DOI: 10.26807/rfj.v10i10.354

Change of labor occupation of the worker and its impact on the right to *job stability*

Cambio de ocupación laboral del trabajador y su incidencia en el derecho a la estabilidad laboral

Yesenia Alexandra Ramos Granda
Universidad Laica Vicente Rocafuerte de Guayaquil
City: Guayaquil
Country: Ecuador

Karelis Albornoz Parra
Universidad Laica Vicente Rocafuerte de Guayaquil
City: Guayaquil
Country: Ecuador

Original article (analysis)
RFJ, No. 10, 2021, pp. 388 - 423, ISSN 2588-0837

ABSTRACT: The main objective of this article is to analyze the incidence that the change of employment occupation has on the full exercise of the right to stability guaranteed by the Constitution, the International Treaties and the Labour Code, carrying out this analysis by means of a bibliographic and descriptive research, where the historical background of the right to work was determined, as well as the elements that make up the employment relationship, what makes up an employment contract, the principles that support the rights of workers, employment stability and its types, determining the main causes or practices that violate this right, especially the change of occupation. In this study, the incidences that occur with this type of action taken by the employer against the worker are analysed in a critical and doctrinaire manner, taking the change of occupation as an untimely dismissal from work. To achieve the objectives, a quantitative and qualitative

study was carried out, using surveys and interviews with labour lawyers and judges as data collection tools. The results show that 84% of those surveyed consider that the right to stability is violated by means of a change of occupation, contradicting the mandate established in the Magna Carta, which is why it is necessary to reform the Labour Code to protect the rights of workers that are currently being undermined by employers

KEYWORDS: labour, rule of law, personnel management, labour conflict, employment.

RESUMEN: Este artículo tiene como objetivo principal analizar la incidencia que tiene el cambio de ocupación laboral sobre el ejercicio pleno del Derecho a la estabilidad que está garantizada al mismo en la Constitución, los Tratados Internacionales y el Código de Trabajo, llevándose a cabo este análisis por medio de la realización de una investigación bibliográfica y descriptiva, donde se determinaron los antecedentes históricos del Derecho al trabajo, también los elementos que conforman la relación de trabajo, lo que conforma un contrato laboral, los principios que sostienen los derechos de los trabajadores, la estabilidad laboral y sus clases, determinándose las principales causas o prácticas que vulneran este derecho, especialmente el cambio de ocupación. En este estudio es analizado de manera crítica y doctrinaria las incidencias que se producen con este tipo de acciones realizadas por el empleador contra el trabajador, tomándose el cambio de ocupación como un despido laboral realizado de manera intempestiva. Para el logro de los objetivos se desarrolla un estudio cuantitativo y cualitativo, aplicándose como herramientas de recolección de datos las encuestas y las entrevistas, realizados a abogados en materia laboral y jueces del área, expulsando entre sus resultados que el 84% de los encuestados consideran que, si es vulnerado el derecho a la estabilidad por medio del cambio de ocupación, contradiciendo el mandato establecido en la carta magna, por lo que es

necesaria la reforma del Código del trabajo a fin de precautelar los derechos de los trabajadores que son menoscabados por parte de los empleadores en la actualidad.

PALABRAS CLAVE: Trabajo, imperio de la ley, gestión de personal, conflicto laboral, empleo.

JEL CODE: J28,J81.

INTRODUCTION

It is important to note that article 192 of the Labour Code determines that if the employer decides to change the employee's occupation by order of the employer, this will be understood as an untimely dismissal. Through this type of action by employers to change the employee's occupation, dismissals have increased in the country, and this type of policy not only operates in the private sector, but also in public institutions, despite the existence of certain measures that seek to limit this type of action by employers, which so far are not sufficient.

Therefore, this research is developed due to the importance of analysing and studying the problem in depth, such as the incidence of labour stability, a right that must be guaranteed and fully satisfied for all workers in Ecuador, without exception, as this right has constitutional protection, in the various treaties and norms that regulate labour relations.

Social law is the set of rules that govern the life of man in society, within this compendium of rules are the conditions and rights that are granted to people who are immersed in a relationship of dependence, which must comply with the fundamental elements for its determination, these are: provision of service, subordination, remuneration and working hours. This relationship is known as an employment relationship, where both parties are guaranteed their rights according to the Constitution and the Labour Code. The State is obliged

to guarantee the development and protection of the right to work, as established in article 325 of the Constitution (2008): "The State shall guarantee the right to work. All forms of work, whether dependent or autonomous, are recognised, including self-supporting and human care work, and all workers are recognised as productive social actors" (art. 325).

But over time it has been observed that the rights of workers to job stability have been violated by changing their occupation, despite the conclusion of international treaties by entities such as the International Labour Organisation (ILO) and the United Nations (UN), among others, rights such as job stability continue to be violated, which is why it is necessary to continuously study and develop the social principles on which work is based, expressed broadly in the Constitution (2008) in Article 33, which reads:

Work is a social right and duty, and an economic right, a source of personal fulfilment and the basis of the economy. The State shall guarantee working persons full respect for their dignity, a decent living, fair remuneration and wages, and the performance of healthy and freely chosen or accepted work. (art. 33)

Consequently, this study aims to analyse the effects that the right to employment stability suffers when the employer arbitrarily and without consultation changes the occupation of the worker for which he/she was hired; this situation being understood as a deterioration in working conditions, with the effect that the worker is obliged to voluntarily terminate the employment relationship, constituting an untimely dismissal.

In recent years, through the publication of the Organic Law for Labour Justice and Recognition of Work in the Home, in Official Gazette 483, 20-IV-2015, labour stability was recognised for women in a state of pregnancy or associated

with their condition of pregnancy or maternity, sanctioning and qualifying it as an ineffective dismissal; However, it is necessary to indicate that this right is not covered or guaranteed in its entirety, because through "strategies" applied by the employer, the employment stability of workers is violated, one of these is the use of the change of occupation as a figure to break the protection of this right and seek the resignation of the worker, in order to avoid paying compensation for untimely dismissal. According to the National Institute of Statistics and Census (INEC), reported by the newspaper El Universo in 2019, it says:

> Unemployment in Ecuador has reached a high level in the last three years compared to previous years, with the official figure standing at 4.9 per cent. The entity's records show that this rate is the highest since December 2016, when it stood at 5.2%. INEC publishes this indicator every three months. Adequate employment was 38.5%. The reduction of this indicator, at national and urban level, was statistically significant, a year ago it was 39.6%, said the researcher in the report. Underemployment stood at 19.7 per cent; the rate of other non-full employment was 25.9 per cent and unpaid employment was 10.4 per cent. (El Universo, 2019, n. p.)

As evidenced by the above quote, the official unemployment figure is 4.9, revealing its increase compared to 2016. This is a clear evidence of the violation of the right to employment stability. The protective norms that ensure job stability are not sufficient at present; there are still situations where employers place the worker in an environment where he/she feels obliged to resign from his/her job, one of these situations are the changes of job occupation, without consultation and worsening his/her working conditions.

Currently, the Labour Code does not provide sufficient protection against these irregularities that may be suffered by the employer, considering that this situation occurs frequently,

and the worker does not take any action for fear of losing his job; in other words, he does not feel that he is guaranteed the right to job stability and there are not enough legal tools to protect him from this violation.

It is important to highlight that the right to job stability guarantees the worker to remain in the job, to maintain the position and activity for which he/she was hired, as long as he/she is fully capable of working, until he/she becomes disabled, reaches the right to retirement or incurs in serious faults committed by the worker, as determined by law; But when the worker's occupation is changed arbitrarily, Article 192 of the Labour Code foresees that it will be considered an untimely dismissal, leaving the worker with the burden of claiming within 60 days, and while this process is being processed, the worker must carry out the new occupations that have been assigned to him/her, often causing the worker to face situations of harassment, frustration and annoyance in the workplace, most of which results in the worker resigning.

Therefore, within this research, it is proposed to establish new mechanisms that guarantee and establish conditions that can favour the worker, when he/she has been arbitrarily changed of occupation without his/her prior consent and consultation, being taken as an untimely dismissal, so that the right to employment stability can be guaranteed.

1. THEORETICAL UNDERPINNINGS

1.1. Historical background: Ecuador

According to author Quiloango (2014):

> With the appearance of the Labour Legislation, the workers of Ecuador attained liberties that until then they had never had, because when it did not exist, the abuse against their human condition had

> no limits, they lacked the most elementary justice, and their life was consumed in the slowness of an inexhaustible working day. (p. 12)

It was clear that, at the time, these workers had no freedom and no equality, being denied any participation in the progress in which society was developing, with all their own labour power being used to enrich others. Their mistreated dignity was reflected in the impossibility of enjoying the most elementary guarantees as subjects of law or as participants in their own work.

That society arrived from the conquistadors of America, because of its injustices, imposed the Spanish legal system, establishing institutions that chained without time limits; labour obligations that fell as a heavy inheritance; as an evil stain on those who would come after them, from generation to generation (Costa, 2016, p. 15).

The working class during this period was the victim of many abuses by the bosses and employers they had at the time, despite the legal changes that were taking place in society.

By the year 1830, the time of the Republic arrived without any change in the field of labor, and once this new form of government was proclaimed, the guilds and servitude continued to be in force. Only in Art. 62 of the Constitution that governed the new Republic at that time, contains the first steps that sought to curb the abuse without measure of the workforce, providing that no one is obliged to provide personal services that are not prescribed by law, are the first achievements of the working class, but nevertheless with many limitations (Quiloango, 2014, p. 33).

1.2. Elements of the Employment Relationship

2.2.1. Employer

This figure originates directly from a person who is the owner of a certain operational capital, who arranges other activities, assignments, and functions that each dependent worker must perform in the execution of his or her labor role and to whom he or she must pay remuneration in accordance with the law, convention or custom (Salazar, 2012, p. 34). According to this definition, the employer appears as a subject with absolute power to determine in the worker the labor activity to be performed in the development of the agreed contract.

2.2.2. Worker

Within the employment relationship, one of the most vulnerable parties is the worker, a person who dedicates his or her physical or intellectual effort to the development of some type of activity that for legal purposes must be remunerated.

Barzallo (2012) explains that:

> Similarly, the worker is any individual who makes a physical or mental effort for remuneration to satisfy economic needs. That is to say, the employee is the worker whose priority in providing his service is the intellectual part and the worker is the worker whose priority in providing the service is the physical part. (p. 18)

If the person who is obliged to provide a service is called a worker, whose obligation must be framed in the law as legal, because it may be the case that someone acquires an obligation that is not legal, it may also be the case that an obligation may be legal but not moral, and there are many examples of this.

In all cases, the concept of worker is broad, and its scope goes beyond the legal and even reaches the sociological and even the psychological field, because it is describing a task, of which every human being naturally has that force of production and puts on sale to society in order to be able to subsist as a productive entity that makes up the national treasury.

2.2.3. Employment contract

The author Cevallos (2015) states that a contract is defined as: "The agreement that two parties undertake to fulfil, where one party will provide its services in a lawful manner and under subordination and the other party must pay a fair remuneration in accordance with the law" (p. 18).

Therefore, it can be indicated that the establishment and signing of a contract between the parties of an employment relationship, having benefits for both parties, allows the worker to know the terms of the contract, related to the working hours, the amount of his salary, working hours, causes of termination, etc.; and it will also serve as a means of proof regarding the employer's obligations at the time of a trial.

The traditional concept of employment contract specifies it as that which commits the worker to provide work or service to the employer and under his direction or dependence in exchange for remuneration or reward. The commitment may be for a fixed term if the work or service is certain in time, or indefinite, in general. In turn, it creates reciprocal obligations, consensual and can be perfected with the consent of the parties; onerous commutative, since the parties obtain equivalent reciprocal benefits (Zegarra, 2015).

2.2.3.1. Personal provision of the service

This is directly linked to the fact that what is contracted is the labour force of a natural person, and that it is the conditions

of that person that serve as the motive for the contract. Likewise, it allows establishing that it must be that person who has been hired and not another, the one who performs the work or activity that is the object of the contract, an aspect that, as will be analysed later, generally implies a substantial difference with other types of civil or commercial relationships of a civil or commercial nature of provision of services (Molero, 2014, p. 55).

It is important to highlight that this element will have implications from the point of view of the termination of the contract, since, if the worker ceases to provide services due to death, this will be conceived as a means of termination of the employment relationship.

2.2.3.2. Subordination

According to the author Urquizo (2015), it is defined as:

> The power of the employer to require the employee to comply with orders, regulations, and instructions, which, understood as a true subordination of a legal nature, is a distinctive and defining element of the employment contract. (p. 54)

Subordination is perhaps one of the most important elements of the employment contract, because once it is understood, it represents the obligation of the worker to follow the orders and instructions of the employer. According to doctrine and jurisprudence, this element has been defined as a permanent legal power of the employer to direct the labour activity of the worker, through the issuance of orders and instructions and the imposition of regulations, in relation to the way in which the worker must perform the functions and comply with the obligations that are proper to him, with a view to the fulfilment of the objectives of the company, which are generally economic (Nieto, 2013, p. 44).

2.2.3.3. Remuneration

Author Frieds (2017) notes that:

> Remuneration for the service rendered is an essential element of the individual employment contract, it is so indispensable that without it there would not strictly speaking be an employment relationship, but a gratuitous provision of work, as prescribed by the Labour Code, Art. 3 in its last paragraph stating: "in general all work must be remunerated. (n. p.)

Remuneration represents a right of the worker and an unavoidable obligation of the employer to provide an economic consideration for the activity that the employee carries out. The remuneration or salary may be in cash, but the values and rates that the law imposes on the employer must be respected.

According to Altamiranos (2012): "The remuneration called Salary can be paid in daily, weekly, fortnightly and at most monthly periods" (p. 34). It can also be indicated that the amount of the remuneration can be freely fixed by the parties in the same contract, in the absence of express stipulation, it will be determined by the Law, and in the absence of this, the employer must pay the remuneration that it is customary to pay for the work performed by the worker in the place where it has been executed, Art. 8 and 38 of the Labour Code.

2.3. Job stability in Ecuador

The doctrine has established two main types of employment stability:

Absolute Stability occurs when the worker, after passing a probationary period, cannot be dismissed by the employer, unless he/she incurs in a cause of serious misconduct and proven before the competent judicial authority. If such misconduct is not proven, the worker can be reinstated in the same job (Marín, 2016, p. 23).

This type of stability gives the worker the right to be reinstated in his or her job or position, if he or she has been dismissed untimely by his or her employer, because the employer took such action without the permission of the authority of the Ministry of Labour. It is also closely related to the trade union privilege or that position of immobility at work, which is enjoyed by certain workers who cannot be dismissed, as is the case of pregnant women.

According to Ochoa (2018), Ecuadorian legislation distinguishes several types of absolute stability, which are:

a. When the worker obtains a scholarship for studies abroad.

b. When the worker must perform military service.

c. When it comes to protecting pregnant women.

Consequently, the protection provided to pregnant women is subject to a time limit, twelve weeks, during which the employer may not terminate the employment contract with the pregnant woman.

Relative stability occurs when the employer is entitled to terminate the employment relationship without just cause, only with the payment of a special indemnity or by giving the employee a specific period of notice. Relative stability also occurs when, when the dismissal of the worker is challenged and judicially resolved in favour of the worker, the judge cannot order reinstatement but only the payment of a special indemnity (Marín, 2016, p. 23).

This type of stability is generated in favour of the worker only to receive compensation when he/she is dismissed for cause attributable to the employer or is retired, which means that this stability does not ensure the permanence in the place

or position that he/she had in the job. This regime is the one that has generally been established in labor relations, guaranteeing the payment of the worker when he/she is dismissed.

The stability of the worker has other norms of protection to prevent it from being affected, and when the employer proceeds unilaterally against it, he/she is sanctioned with the payment of economic indemnities. Untimely dismissal is the disrespect of the guarantee of the individual employment contract, which is sanctioned with compensation.

In Ecuadorian legislation, this type of relative stability is accepted, due to the fact that the employment contract for an indefinite period of time is the one that does not contemplate a fixed date for its termination, but it is also worth saying that it is not a contract for life, an indefinite period of time that is advantageous because for the termination, unless the express will of the parties intervenes, there is a need to prove legal causes contemplated in articles 172 and 173 of the current Labour Code, It is necessary to prove legal causes contemplated in articles 172 and 173 of the Labour Code in force, trying to curb the arbitrariness of the employers, which is still insufficient, highlighting that workers rarely resort to the causes established in article 173, due to the need they have for employment to support their families and themselves.

Stability classes also include stability by origin, which are classified as follows:

> a. *Legal Minimum:* defined by Viteri and Quiloango (2014), stating that: "it is the stability enshrined and protected by law, a circumstance that makes it operate as of right. It is said to be minimum because the parties cannot agree below or contradict what is stated in the norm" (p. 11).
>
> b. *Conventional legal:* According to the doctrinaire Bogliano (1957) this type of stability is comprised when:

> The State seeks stability without establishing it, so it allows the parties to agree on it either in the employment contract or through collective bargaining agreements in which the law allows the mediation of clauses that benefit the workers, but in no way can it be less than the legal minimum, even with the consent of the worker. (n. p.)

Therefore, this stability is achieved by means of collective agreements, but it has the problem of not being considered as fixed, as it has to be renewed when the agreement expires, which inevitably causes a struggle between employers and workers when it is time to ask for the agreement to be ratified, and if the agreement is not ratified, the workers are left unprotected, as in some way it serves as stability for the worker and for all those who are in charge of him/her.

2.4. Job stability and its types according to doctrine

The author Zegarra (2015) quotes the doctrine of Ferrero (n. d.), who defines employment stability as: "The contractual relationship in terms of its duration is considered to be indefinite, unless this term results from the particularity of the relationship" (p. 1). Employment stability is considered a fundamental principle and an important source for the acquisition of certain rights recognized in our social environment. Within the Ecuadorian legislation, relative stability is determined in Art. 14 of the Labour Code, which recognizes the principle of job stability under the title of minimum stability and exceptions.

In addition, it is important to note that, this article determines that it protects the stability of the worker for one year who signed a fixed-term or indefinite contract.

Taking into consideration that job stability seeks to benefit both parties in the employment relationship and society in general, it is important to explain that, with the execution of this principle, it is creating in the worker the satisfaction of

being secure in their jobs, which has the effect that the worker provides a service free of worries and unnecessary anxieties of losing their jobs in cases where there is no just cause.

It should be noted that the rights and principles relating to labor law, which are widely determined in international conventions and treaties, have been admitted as one of the main sources of consultation, as stated in the Constitution of the Republic of Ecuador, published in the Official Register 449 of 20 October 2008.

So, basically, the meaning and purpose of the right to stability is to ensure the protection of the worker in general. Consequently, this stability regime seeks to limit and restrict to some extent the unconditional freedom and autonomy of the employer to take actions or decisions that are detrimental to the welfare of the workers, thus avoiding the occurrence of arbitrary dismissals that cause problems and insecurities to the worker, whose only source of income and livelihood is his or her job.

The author Núñez (2016) points out that:

> The academic concept of the principle of Job Stability comes from the meaning of the three words:
>
> a) Principle: an abstract guiding norm or mandate for optimization of an inalienable, unrenounceable, indivisible, and interdependent nature; b) Stability: having the quality of stability, corresponding to the meaning of: That it is maintained without danger of changing, falling or disappearing; and c) Labor: referring to work. (n. p.)

From this we can deduce that the principle of job stability refers to the right of a person to remain in his or her job, producing a livelihood for himself or herself, his or her family

and contributing to society, without the danger of being dismissed from his or her job without legal justification.

In doctrine, the principle of stability can be found in the following contributions:

According to Cabanellas (1979), the principle of job stability: "It consists of the right that a worker has to keep his job indefinitely, if he does not incur in previously determined faults, or if very special circumstances do not occur" (p. 87).

Another labor scholar puts it this way: "It is the basis of the economic life of the worker and his family, whose purpose lies in living today and tomorrow, it is the certainty of the present and the future" (Milanta, 1972, p. 11).

The principle of employment stability, therefore, ensures and protects the permanence of the employment relationship with an important transcendence related to the present, but also to the future, which is equivalent to saying that it has a direct impact on the life project of individuals it is of vital importance.

2.5. Labor practices that undermine employment stability in Ecuador

2.5.1. Untimely dismissal

Untimely dismissal is known as the termination of the employment relationship, which is carried out unilaterally by the employer, understood as the notice given by the employer to the worker of the termination of his work, where the employer also lets the worker know that it is his will to terminate the employment relationship. The decision taken by the employer is carried out without the consent of the worker, in an unjustified manner and without prior notice, which causes the worker to be unemployed and, failing this, obliges the employer to pay the worker compensation for untimely dismissal, in accordance

with the provisions of article 188 of the Labour Code. In cases of untimely dismissal, the employer must pay the worker, in addition to the proportions of the thirteenth salary, fourteenth salary and holidays, a mandatory dismissal bonus, in accordance with the provisions of article 185 of the Labour Code (Mingo, 2018, p. 36).

2.5.2. Harassment at work

The author Torres (2019) defines it as:

> Any repeated and potentially injurious behaviour that violates the dignity of the person, committed in the workplace or at any time against one of the parties to the employment relationship or between workers, and which results in the person concerned being undermined, mistreated, humiliated, or whose employment situation is threatened or undermined. (p. 22)

Therefore, harassment in the workplace is understood as when discriminatory acts are carried out, generally motivated by reasons of age, sex, gender identity, cultural identity, marital status, religion, ideology, judicial past, among other conditions, which lead to the suffering worker being under pressure and taking the decision to voluntarily resign from the job, it should be noted that this resignation, despite being voluntary, is guided by the pressure and harassment to which the worker is subjected in the work area.

By Torres (2019) it is understood that:

Mobbing or mobbing is a phenomenon that has existed historically, however, in recent times it has come to the forefront of discussion. This type of harassment has become such an escalating problem that it has begun to be referred to as a psychological crime. (p. 6)

It is important to point out that harassment suffered by a female or male employee in the workplace is a form of gender-based violence that is mostly suffered by women, where their quality of life is seriously affected, thus violating the exercise of their rights.

2.5.3. Occupational change of job and its effect on job stability in Ecuador

The jurist Leiva (2014), in his work Diccionario Jurídico defines Dismissal as: "To deprive of occupations, employment, activity or work" (s. p.).

Accordingly, jurist Mayorga (2019) defines it as follows:

> When the employer terminates the employment contract and dismisses the worker, without having legal cause to do so, or when there is legal cause and the employer does not observe the procedure established in the Labour Code for dismissing the worker, we say that the termination is illegal, and the dismissal is untimely. Likewise, there is untimely dismissal if the termination of the fixed-term employment contract has been carried out abruptly, i.e. without the respective dismissal, unless the dismissal has been omitted because it has been approved. (p. 24)

Art. 192 of the Labor Code establishes the change of employment occupation without authorization of the worker by the employer as untimely dismissal, provided that the worker claims it within the following 60 days, and for these cases the approval of the Labor Inspector is not necessary, the claim for severance pay, and this has been established in several rulings by the National Court of Justice.

This article prohibits the employer from infringing on the rights of the worker, which cannot be waived, representing a

balance with respect to the legal relationship, by establishing that the employer cannot order arbitrary changes of occupation or require the employee to carry out work for which he/she is not hired or prepared.

This legal protection that the worker has, and which cannot be ignored by the employer, who may not improve the worker's current position, may not reform it or try to make changes that affect the acquired rights. The change of the worker's occupation, to be valid, requires the worker's consent; otherwise, it is considered a case of unjustified untimely dismissal, with the consequent responsibilities of the employer to compensate for the violation of the contract through the payment of compensation provided for in the labor law (Pilataxi, 2014, p. 26).

That is to say that the current legal provision does not fully guarantee the worker the right to reinstatement and job stability, but only recognizes the worker's right to claim compensation for untimely dismissal, which is why many workers do not complain about the change of occupation, because they prefer to keep their job and accept the arbitrary provisions imposed on them by the employer; This situation should be better regulated by our Labor Code, in order to protect the worker from these arbitrariness and to guarantee his right to stable and permanent work, to work in a safe place, to receive a fair remuneration, to carry out the activities for which he was contracted, to work in the same place where he is employed, to work in the same job, to work in the same place where he is employed, to work in the same place where he is employed, and to work in the same place where he is employed.

Comparative doctrine and legislation have called dismissal the unilateral decision of the employer to terminate the employment relationship, whether there is a justifiable cause. Thus, dismissal can be defined as the unilateral manifestation

of the employer's will, of which the worker is aware, and which evidences the unequivocal intention to terminate the employment relationship. Dismissal is then consolidated as an act (Altamiranos, 2012, p. 21).

For its part, the National Court of Justice, Labor Chamber, in No.840-10, Report of Dr. Johnny Ayluardo Salcedo, states that:

> Untimely dismissal, as a way of concluding the contractual relationship, consists of any direct or indirect procedure used by the employer with the purpose of unilaterally terminating the employment relationship; and, in the case of a change of occupation, it is known as indirect dismissal. The work is not agreed between the worker and the employer, it is produced by the needs of the company and for the convenience of the employer, the agreed labor benefits undergo changes and modifications. Therefore, changes in working conditions, when they do not go against the worker, are considered normal. (Judgment No.840-10, 2012, s. p.)

3. METHODOLOGY ASPECTS

3.1. Study and type of research

Due to the doctrinal and theoretical-legal influence, a study has been implemented According to Hernández Sampieri, Fernández Collado and Baptista (2017), a descriptive study is defined as follows:

> Descriptive studies seek to specify properties or any other phenomenon that is subject to analysis. They measure, evaluate, or collect data on various aspects, dimensions or components of the phenomenon to be investigated; from a scientific point of view, to describe is to collect data. (p. 60)

This article details the situations suffered by many workers who are changed of occupation, which is taken as an untimely dismissal, affecting the full enjoyment of job stability.

According to Fidias (2012), documentary research is defined as:

> A study process based on the search, analysis, retrieval, and interpretation of data obtained from primary and secondary sources on the phenomenon under investigation. In this research, the examination and analysis of norms, jurisprudence and doctrine related to the worker's change of occupation and employment stability was carried out. (s. p.)

In addition, field research is applied, as it is applied by extracting information and data that are directly related to reality, carried out using data collection techniques, by means of surveys or interviews, in order to obtain conclusions and solutions to a given situation or problem (Chernobyl, 2018).

3.2. Research approach

The quantitative method is implemented, as its main objective is to give a numerical assessment of the development of the elements proposed in the field research.

According to Rodriguez (2010):

> The quantitative method focuses mainly on the facts or causes of the phenomenon under study, with little interest in the subjective states of the individual. In the development of this study, inventories, questionnaires, demographic analyses are applied, where the results are summarised in percentages, with statistical tables and graphs. (s. p.)

This approach was applied in this study when surveying free practicing lawyers in Guayaquil.

In addition, a qualitative study is implemented, which Maya (2014) points out that: "This involves the use and collection of a wide variety of materials, such as interviews, life stories, personal experiences, observations, images, historical texts and competent observers" (p. 14). The qualitative method aims to collect judgement on some objective fact, the result of which contributes to the research work.

3.3. Population and sample

3.3.1. Population

The population to whom the data collection instruments indicated in this study will be applied are the free practice lawyers in the labour area of the city of Guayaquil, registered in the Forum of Lawyers in Guayas, with several 16,152 registered up to the time of this research.

3.3.2. Sample

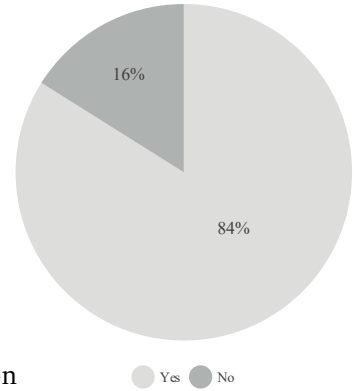
The following formula was used to calculate the sample size:

$$n = \frac{N \quad Z_{\propto}^{2} \quad p \quad q}{e^{2}(N-1)+Z_{\propto}^{2} \quad p \quad q}$$

4. RESULTADOS

4.1 Do you consider that the change of occupation has an impact on the worker's right to stability?

Table 1: Results Question No. 1

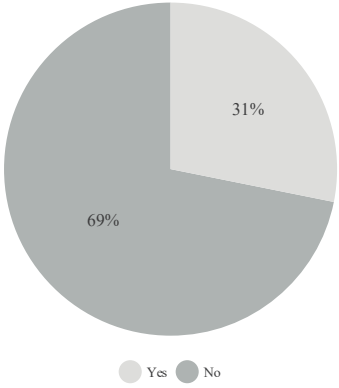


Own elaboration

Of the 100% of the labour lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered as an untimely dismissal that the employer is carrying out to the detriment of the employee.

4.2 Do you think that the control measures and sanctions to prevent untimely dismissal due to change of occupation currently existing in the Labour Code ensure respect for employment stability?

Table 2: Results Question No. 2

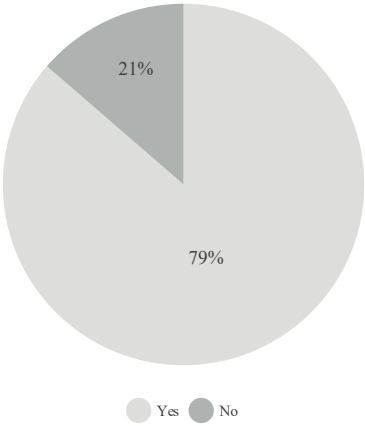


Own elaboration

Of the 100% of the labor lawyers surveyed, 69% stated that the current control measures established in the Labor Code in force are not sufficient to stop cases of abuse by employers, who make changes of occupation without reaching an agreement with the worker and that it is practically an untimely dismissal, while 31% said yes to the approach taken.

4.3 Do you consider that a change of occupation experienced by an employee should be regulated as harassment at work by the employer or manager?

Table 3: Results Question No. 3

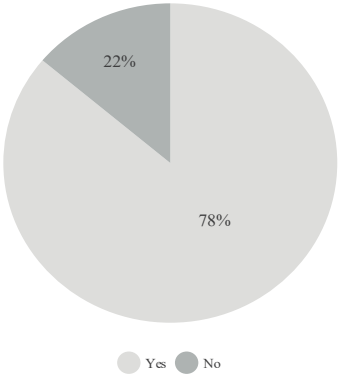


Own elaboration

Of the 100% of the labor lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered an untimely dismissal that the employer is carrying out to the detriment of the employee, while 21% indicated that this was not the case.

4.4. Do you think that the change of occupation has a negative impact on the worker?

Table 4: Results Question No. 4

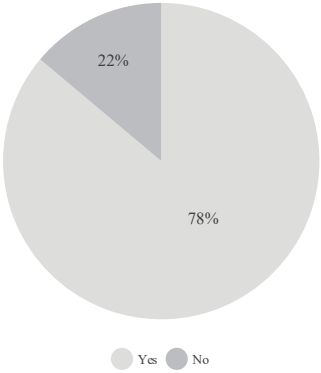


Own elaboration

The labour lawyers surveyed stated that 78% said that it does have a negative impact on the worker who is changed of occupation, generating drastic changes in their economy, while 22% said that there are no such psychological effects on the person.

4.5. Do you consider that the Labour Code should be reformed to establish new legal protection mechanisms for arbitrary change of occupation in order to guarantee job stability?

Table 5: Results Question No. 5

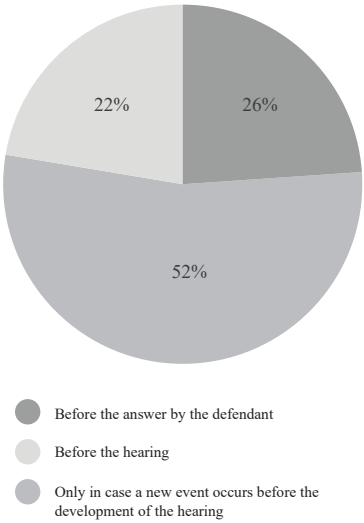


Own elaboration

Of the 100% of the labor lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered as an untimely dismissal that the employer is carrying out to the detriment of the employee.

4.6. . At what procedural moment do you consider that it is most useful to reform the claim within the processes established in the COGEP?

Table 6: Results Question No. 6

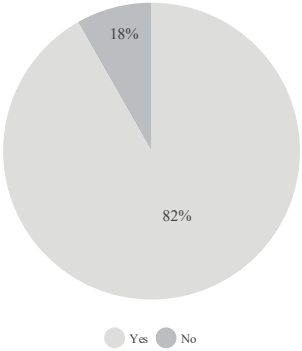


Own elaboration

Of the 100% of the respondents, 52% stated that the amendment of the claim is advisable before the hearing, while 26% considered that the amendment should be carried out before the defendant's defence, followed by 22% only in the case of events that occur before the hearing.

4.7. Is it useful for the plaintiff to amend the claim in the summary procedure?

Table 7: Results Question No. 7

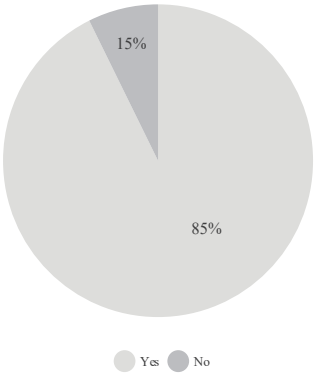


Own elaboration

The graph shows that 82% of the respondents indicated that the reformation of the claim is an act of great benefit for the parties in the process, because through it they can add some relevant facts before the hearing takes place, while 18% consider that it does not represent much benefit to carry out this act in the summary procedure.

4.8. Is the refusal to amend the claim in the summary procedure under the COGEP an inconvenience for the plaintiff?

Table 8: Results Question No. 8

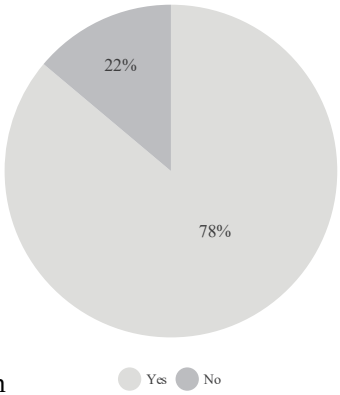


Own elaboration

The graph shows that 85% of those surveyed indicated that the refusal to amend the complaint in the summary procedure represents an inconvenience for the plaintiff in the event that he/she has to add some element or fact of conviction in the complaint that will serve to clarify or prove the facts that he/she alleges and that due to the prohibition to amend, he/she cannot add these new facts or has to withdraw the complaint; on the other hand, 15% indicated that it does not represent any inconvenience at all.

4.9. Do you consider that the COGEP should be reformed in order to allow in the summary procedure to amend the claim and defences in the defence?

Table 9: Results Question No. 9



Own elaboration

Of the 100% of respondents, 78% stated that they considered it necessary and appropriate to reform the COGEP to eliminate the refusal to amend or reform the complaint in the summary procedure so as not to violate the rights of the parties in the development of this process, which is expeditious, while 22% did not consider this reform to be necessary.

5. ANALYSIS OF RESULTS

Of the total number of respondents, 84% consider that the change of occupation does have a negative impact on the worker's right to stability, as it is nothing more than an untimely dismissal, which many employers use this strategy in order to avoid paying the worker the corresponding compensation, thus generating work and psychological pressure on the worker with the change of occupation, which leads him/her to resign, thus violating the rights of workers, directly related to the full enjoyment of job stability, as mentioned above.

The survey also asked the population whether they considered it necessary to reform the Labor Code to solve this problem. 78% of respondents agreed that it is necessary and important to make these changes to the labour law, with the aim of establishing and strengthening measures to ensure that workers' rights, especially the right to job stability, are protected and guaranteed in an effective manner.

CONCLUSIONS

Based on the bibliographical research carried out in the theoretical framework of this study, it is evident that the employment relationship must be based on the principles and guarantees established in the Constitution and other related regulations. The doctrinal and legal foundations of labor stability were also analyzed, but it was found that despite the development of these, controversies still arise in their environment, generally leaving the worker in eminent neglect, with their rights being violated, and it was determined that one of them is labor stability, after being changed occupation by unilateral mandate by the employer.

With the development of the theoretical framework, the second objective of identifying the doctrinal foundations was fulfilled, determining the importance and classification of

employment stability in the doctrine and the legal framework. The conventions signed by the ILO were extensively reviewed, proving the legal protection provided to the worker's employment stability, which is one of the essential rights in the employment relationship.

Constitutional Court sentences and rulings were also reviewed, in reference to the change of occupation, considering that in those cases where a change of occupation is generated, which was not agreed with the worker, it is known as indirect dismissal. Interviews with judges also indicate that it is necessary to expressly conceptualize what a change of occupation is and that it should be regulated as a cause for termination of employment.

In the development and application of the surveys and interviews, the need for the law to be reformed to guarantee the right to employment stability became evident. 84% of those surveyed stated that the change of occupation does have a direct impact on the full enjoyment of employment stability, which is guaranteed to workers in the Constitution.

Similarly, it was determined that the current control measures and sanctions to avoid the violation of labor stability are not sufficient to prevent and prevent employers who disrespect these guarantees, 69% of them stated that the guarantees currently established in the Law are not sufficient.

Finally, it was found that the change of occupation should be considered as an act of labor harassment that is carried out by the employer against the worker and should therefore be regulated in the norm.

REFERENCES

Altamiranos, D. (2012). *Comentarios Doctrinales y Procedimientos-Derecho Laboral.* Quito-Ecuador: Fondo de Cultura Ecuatoriana.

Asamblea Constituyente . (2008). *Constitución de la República de Ecuador.* Quito: Gaceta Oficial.

Barzallo, S. M. (2012). *Práctica Laboral, Análisis del Derecho Laboral Ecuatoriano.* Cuenca- Ecuador: Editorial Corporación de Estudios y Publicaciones.

Bogliano, J. (1957). *La estabilidad Laboral.* Buenos Aires.

Cabanellas, G. (1979). *Diccionario Enciclopédico de Derecho Usual*, tomo III, 13ra ed. Buenos Aires: Heliastra S. R. L.

Cevallos, M. (2015). Derecho laboral. *CMP abogados,* (3), pp. 1-23.

Chernobil, L. (2018). *Investigación de Campo*. Recuperado de: https://definicion.mx/investigacion-campo/

Corte Nacional, Sala de lo Laboral. (2012). Juicio No.840-10, Corte Nacional, Sala de lo Laboral 12 de mayo de 2012.

Costa, A. (2016). *La protección del Derecho al Trabajo digno.* [Trabajo de Disertación]. Universitat de Barcelona. Recuperado de: https://www.tdx.cat/bitstream/handle/10803/400085/CCAL_TESIS.pdf?sequence=1&isAllowed=y

El Universo. (19 de Octubre de 2019). Tasa de desempleo en Ecuador sube a 4,9%. *El Universo*. Recuperado de: https://www.eluniverso.com/noticias/2019/10/18/nota/7563827/tasa-desempleo-pais-sube-49

Frieds, G. L. (2017). *¿Fue legítimo el imponer a las empresas de casinos la carga de indemnizar a sus trabajadores al terminar la relación laboral como resultado de la*

consulta popular del 2011? [Trabajo de Disertación]. Universidad Católica de Santiago de Guayaquil. Recuperado de: http://repositorio.ucsg.edu.ec/bitstream/3317/8136/1/T-UCSG-PRE-JUR-DER-111.pdf

Hernández Sampieri, R., Fernández Collado, C. y Baptista, M. (2017). *Metodolodia de la Investigacion,* 6ta edición. México: McGraw Hill Education.

Leiva, L. (2014). *Derecho Laboral, II*. Quito.

Marín, B. (2016). La estabilidad laboral: Aspectos y procedimientos. *Cuestiones Jurídica*s, (6), pp. 3-30.

Maya, E. (2014). *Mestodo y tercnica de investigacion*. Mexico DF: Universidad Nacional Autónoma de Mexico.

Mayorga, R. (2019). *Aplicabilidad y vigencia del principio de legalidad en el régimen jurídico administrativo dentro del marco del Estado constitucional de derechos y de justicia.* [Tesis de Maestría]. Universidad Andina Simón Bolívar, Quito, Ecuador. Recuperado de: https://repositorio.uasb.edu.ec/bitstream/10644/6856/1/T2936-MDA-Mayorga-Aplicabilidad.pdf

Milanta, J. A. (1972). *De la estabilidad del empleo en general.* Buenos Aires.

Mingo, M. (2018). *Despido Intempestivo*. Quito: Derecho Ecuador.

Molero, M. (2014). *Manual de Derecho del Trabajo.* Madrid: Civita.

Nieto, S. (2013). *La subordinación en los diferentes contratos laborales.* [Trabajo de Disertación]. Universidad de Manizales.

Núñez, R. (2016). *El principio de estabilidad laboral en la Constitución del 2008.* Recuperado de: http://

repositorio.uasb.edu.ec/bitstream/10644/5126/1/T2045-MDE-Nu%c3%b1ez-El%20principio.pdf

Ochoa, R. (2018). *Aplicación del nuevo Código del Trabajo.* Cuenca-Ecuador.

Pilataxi, M. (2014). *El despido intempestivo por cambio de ocupación en el trabajo conlleva consecuencias en la estabilidad laboral del trabajador, reforma al art*. 192 del Código de Trabajo. [Trabajo de Disertación]. Universidad Nacional de Loja, Ecuador.

Rodriguez, M. (2010). M*etodo de investigacio;diseños de proyecto y desarrollo de tesis en ciencias administrativa.* Sinaloa: Universidad Autónoma de Sinaloa.

Salazar, M. (2012). *Compendio de Derecho Laboral.* Editorial Jurídica del Ecuador.

Torres, E. (2019). El acoso laboral en Ecuador. *Derecho Ecuador.* Recuperado de: https://www.derechoecuador.com/acoso-laboral

Urquizo, G. (2015). Análisis de la sentencia emitida por la Corte Nacional de Justicia. *Revista de Derecho,* (24), pp. 121-127.

Viteri, J. y Quiloango, Y. (2014). *La Estabilidad Laboral en Ecuador, situación actual del trabajor en base a la Constitución y el Código de Trabajo Vigente.* [Trabajo de Disertación]. Universidad Central del Ecuador, Quito. Recuperado de: http://www.dspace.uce.edu.ec/bitstream/25000/3074/1/T-UCE-0013-Ab-61.pdf

Zegarra, F. (1986). La estabilidad Laboral. *V Congreso Latinoamericano de Derecho Romano.* Derecho Internacional, (40), pp. 309-328.

Received: 25/09/2020

Accepted: 04/11/2021

Yesenia Alexandra Ramos Granda: Abogada por la Universidad Laica Vicente Rocafuerte de Guayaquil

Email: yeseniaarg4@gmail.com

City: Guayaquil

Country: Ecuador

ORCID: https://orcid.org/0000-0002-9653-4562

Karelis Albornoz Parra: Docente de la Universidad Laica Vicente Rocafuerte de Guayaquil

Email: kalbornoz@ulvr.edu.ec

City: Guayaquil

Country: Ecuador

ORCID: https://orcid.org/0000-0002-9653-4562