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CONCILIATION OF WORK AND FAMILY LIFE IN PORTUGUESE LAW[1]/[2]*

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* Article approved for publication after submission to double blind peer review.

[1] Principal abbreviations used:

ACT – *Autoridade para as Condições do Trabalho* (Authority for Working Conditions);

CPR – Constitution of the Portuguese Republic

CC – Civil Code

CITE – *Comissão para a Igualdade no Trabalho e no Emprego* (Commission for Equality in Labour and Employment)

LC – Labour Code;

SWR – Statute of Workers' Rights (Spain) *(Estatuto de los Trabajadores)*

EU – European Union

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on European Union

EU – European Union

[2] Any article cited without indicating the source refers to the Labour Code (LC), approved by Law 7/2009, of 12 February, last revised by Law 93/2019, of 4 September.

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Abstract:

This study is centred on the conciliation of work with family life in Portuguese Law. Several instruments of domestic and international law serve to achieve such conciliation.

The study includes an analysis of the international and European legal framework, looking in particular at the ILO Conventions and European Union directives.

In Portuguese internal law, the conciliation of work with family life is addressed in both the Constitution and the Labour Code. We consider in particular the various forms of leave provided for, as well as other situations of absence and time off established for family care, in addition to protection in the event of dismissal.

The article also analyses in detail the rules on work and employment, particularly with regard to adaptability, time banks, compressed working hours, overtime, night work and the scheduling of holiday leave.

The conciliation of work with family life can also entail different forms of working, including the use of part-time work and flexitime, home working or teleworking, which are also addressed in this study.

Our study of Portuguese law is complemented by a comparative analysis with the legal rules in force in Spain and France.

1. Introduction

1.1. Preliminary considerations

The conciliation of work and family life is a question with which the public authorities have concerned themselves[5]. If we consider that, as a rule, earnings from work are essential for meeting the most basic human needs[6], rules need to be set to protect the family, to

[5] For an analysis of this matter, see, inter alia, Organização para a Cooperação e Desenvolvimento Económico, *Políticas de Conciliação da Actividade Profissional e da Vida Familiar*, Nova Zelândia, Portugal and Suiça, volume 3, Direcção-Geral de Estudos, Estatísticas e Planeamento, Lisbon, 2004.

[6] For a general appraisal of pay issues, among many others, LEAL AMADO, *A Protecção do Salário*, offprint from volume XXXIX of the supplement to Boletim da Faculdade de Direito da Universidade de Coimbra, Coimbra, 1993, *passim*, and also, from the same author, *Contrato de Trabalho – Noções Básicas*, 3rd edition,

save it from being sidelined by the necessity and the attraction of earning money.

Work has to be compatible with the worker's family life. Whilst it is true that work brings personal fulfilment, it is no less true that this fulfilment will only be complete if he or she is able to enjoy the benefits of the institution of the family. Working activities must therefore be subject to rules.

Having made these introductory considerations, we shall now define our subject matter, what we seek to establish and the path we shall take.

Our subject matter will be the private employment relationship, on the one hand, and the Portuguese legal system, on the other; this perspective will be complemented by an overview of the rules in place in Spain and France.

Almedina, Coimbra, 2019, pp. 287 et seq.; MENEZES CORDEIRO, *Direito do Trabalho*, II – Direito Individual, Almedina, Coimbra, 2019, pp. 689 et seq.; MONTEIRO FERNANDES, *Direito do Trabalho*, 20th edition, Almedina, Coimbra, 2020, pp. 371 et seq.; JÚLIO GOMES, *Direito do Trabalho - Relações Individuais de Trabalho*, volume I, Coimbra Editora, 2007, pp. 759 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, 6th edition, Almedina, Coimbra, 2019, pp. 347 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, 9th edition, Almedina, Coimbra, 2019, pp. 592 et seq.; ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, 12th edition, Almedina, Coimbra, 2020, pp. 630 et seq.; PALMA RAMALHO, *Direito do Trabalho, Parte II – Situações Laborais Individuais*, Almedina, Coimbra, 7th edition, 2019, pp. 523 et seq.; LOBO XAVIER, "Introdução ao Estudo da Retribuição no Direito do Trabalho Português", *Revista de Direito e de Estudos Sociais*, year XXVIII (I of 2nd series), 1986, no. 1, pp. 65 et seq., and also, "Reflexões sobre o Chamado Princípio da Irredutibilidade da Retribuição", *Revista de Direito e de Estudos Sociais*, 2020, nos. 1-4, pp. 7 et seq.; LOBO XAVIER, with contributions from FURTADO MARTINS, A. NUNES DE CARVALHO and JOANA VASCONCELOS, *Manual de Direito do Trabalho*, 4th edition, Rei dos Livros, Lisbon, 2020, pp. 550 et seq..

Our aims are easy to identify: to provide an informative and descriptive text that sets out (briefly) the legal perspective on the conciliation of work and family life, with a particular focus on parenthood.

1.2. International and European legal framework

From a social point of view, the concern with conciliating work and family life is fundamental to guaranteeing equality and non-discrimination between workers[7], whilst at the same time ensuring an environment in which family life may flourish. This justifies the significant scale of the legal instruments - domestic, international and European - especially designed for this purpose.

Internationally, we may point to ILO Convention no. 156, on equal opportunities and treatment for men and women workers: workers with family responsibilities[8]-[9]. This convention, applicable to all branches of economic activity and all categories of workers (Article 2), requires member States to adopt measures that enable "persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being

[7] On this question of non-discrimination, see MENEZES CORDEIRO, *Direito do Trabalho*, II, op. cit., pp. 260 et seq.; JÚLIO GOMES, *Direito do Trabalho - Relações Individuais de Trabalho*, volume I, op. cit., 385 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 177 et seq.

[8] Approved by Decree 66/84, of 11 October, published in *Diário da República*, Series 1, no. 236, of 11 October 1984.

[9] Whilst setting out to secure protection, the convention may still be criticised for the formulation of Article 1, which states that it applies "to men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity", in view of the perspective it adopts on family, as a factor limiting employment activity.

subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities" (Article 3). Among other provisions intended to ensure equality and non-discrimination, it is also added that family responsibilities may not constitute a valid reason for termination of employment (Article 8).

Attention may also be drawn to the more recent Convention no. 183, of 2000, concerning the revision of the Maternity Protection Convention (Revised), 1952[10]. Measures are to be adopted to protect pregnant and breastfeeding women, and members are required to establish measures to prevent them from carrying out tasks harmful to their own health or that of their child, or which pose a significant risk to the mother's health or that of her child (Article 3). It also establishes entitlement to maternity leave of no less than 14 weeks' duration (Article 4.1), leave in the event of illness or complications (Article 5), in both cases with the right to cash benefits (Article 6), and the mother's right to return to her job, or an equivalent position with the same pay, after taking maternity leave (Article 8.2). Termination of the employment of a woman during her pregnancy, maternity leave or during a period following her return to work to be prescribed by national laws is expressly prohibited, except on unrelated grounds, in which case the burden of proof rests on the employer (Article 8.1).

[10] Approved by Resolution of the Assembly of the Republic 108/2012, and by Decree of the President of the Republic 137/2012, of 8 August, published in *Diário da República*, Series 1, no. 153, of 8 August 2012.

In the European Union, a concern for protecting social rights is visible in several legal provisions, starting with Article 3 of the TEU, which lays down that the Union shall combat social exclusion and discrimination and shall promote justice and social protection, equality between men and women, solidarity between generations and protection of the rights of the child. Likewise relevant is Article 153.1 i) of the TFEU, establishing that the European Union shall support and complement the action of Member States, among others, in the field of equality between men and women with regard to labour market opportunities and treatment at work.

Article 33 of the Charter of Fundamental Rights of the European Union provides for the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child, with a view to conciliating professional and family life.

A number of European directives specifically address family responsibilities[11]. We may point to the Directive on pregnant workers and workers who have recently given birth or are breastfeeding (Directive 92/85/EEC, of 19 October, consolidated in 2019), the Directive on parental leave (Council Directive 96/34/EC, of 3 June) and the directive on part-time work (Council Directive 97/81/CE, of 15 December).

Directive 92/85/EEC, of 19 October, consolidated in 2019, seeks to improve the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding, establishing the

[11] JEAN-PHILIPPE TRICOIT, *Droit Social International et Européen*, Gualino, Lextenso, Paris, 2020, p. 71.

obligation to assess the risks of each activity to pregnancy or breastfeeding (Article 4), which may require the employer to move the worker to another job or even grant her leave (Article 5). There are also restrictions on night work, as well as provisions on the compulsory nature of maternity leave, time off for ante-natal examinations and the prohibition of dismissal (Article 7 to 10).

Council Directive 96/34/EC, of 3 June, was in turn revoked by Council Directive 2010/18/EU, of 8 March 2010, implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC. In this agreement, we should note the entitlement granted to men and women workers to parental leave on the birth or adoption of a child, for a minimum period of four months (Clause 2). Concern is also shown for the return to work, guaranteeing that workers may go back to the same job, or an equivalent position, and providing for adjustments to working hours (Clauses 5 and 6).

One year later, Council Directive 97/81/EC, of 15 December 1997, concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, set out essentially to eliminate all and any discrimination and also to promote the use of part-time working arrangements.

In 2006, The European Parliament and the Council adopted Directive 2006/54/EC, of 5 July, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which for the first time includes definitions of direct and indirect discrimination and of harassment, the latter being regarded as a manifestation of

discrimination. This directive is also important for the rules on the burden of proof contained in Article 19, which requires Member States to take the steps needed to ensure that, when someone considers they have suffered discrimination, they can establish facts from which it may be presumed that there has been direct or indirect discrimination, it being incumbent on the respondent to prove that there has been no breach of the principle of equal treatment[12].

More recently, reference should be made to Directive (EU) 2019/1158, of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU[13]. The directive adopts a substantially social perspective, as follows from Recital 19, which points to the aim of "encourag[ing] a more equal sharing of caring responsibilities between women and men, and to allow for the early creation of a bond between fathers and children". The minimum period of parental leave which cannot be transferred from one parent to another is here extended from one to two months, in order to encourage fathers to avail themselves of this leave, whilst guaranteeing in all cases a minimum of four months' parental leave. In addition, workers may ask to take parental leave on a full time or part-time basis, with alternating periods, thereby offering increasing flexibility in how this right is enjoyed. There are also measures encouraging the use of

[12] See also, with further considerations on the European Union framework, PALMA RAMALHO, *Direito Social da União Europeia*, Almedina, Coimbra, 2009, pp. 79 et seq., and also, from the same author, PALMA RAMALHO, *Direito do Trabalho, Parte IV – Contratos e Regimes Especiais,* Almedina, Coimbra, 2019, pp. 726 et seq.; ROMANO MARTINEZ, "Igualdade de Tratamento no Direito Laboral – A Aplicação da Directiva 76/207/CEE em Portugal", *Direito e Justiça*, volume XI, part 2, 1997, pp. 83 et seq..

[13] The deadline for transposition of this directive is 2 August 2022.

flexible working arrangements, if possible through the use of teleworking, flexible working hours or a reduction in working hours to allow for the provision of care; this is intended to apply both to working parents and to carers[14].

Alongside the directives, the European Union has also undertaken a number of initiatives, such as the Resolution (of the Council and of the Ministers for Employment and Social Policy, of 29 June 2000) on the balanced participation of women and men in family and working life, or - providing an inventory of different instruments - Resolution (of the European Parliament on conciliating professional, family and private lives, of 2003), revealing its concerns in this area[15].

Reference should also be made to the European Parliament Resolution of 12 May 2016, on implementation of Directive 2010/18/EU, on parental leave, stressing the need to take all possible steps to allow this directive to be implemented correctly and in a uniform manner, in both the public and private sector (item 5). This also includes an incentive for Member States to ensure that family rights, including parental leave, are equally accessible for both parents (item 11). Attention is drawn to the difficulties resulting from a return to work, both for the parent and for the child,

[14] Despite the scale of the measures, provision is made for Member States, within the margin for manoeuvre allowed to them, to adjust the rules in relation to smaller undertakings, in particular micro-enterprises, as reflected in Recital 48, whilst also admitting the provision of "incentives, guidance and advice to SMEs to assist them in complying with their obligations pursuant to this Directive".

[15] For an analysis of work-life balance from an essentially Community perspective, PALMA RAMALHO, "Conciliação Equilibrada entre a Vida Profissional e Familiar – Uma Condição para a Igualdade entre Mulheres e Homens na União Europeia", and "Protection de la Maternité et Articulation de la Vie Familiale et de la Vie Professionelle par les Hommes et par les Femmes", *Estudos de Direito do Trabalho*, volume I, Almedina, Coimbra, 2003, respectively, pp. 269 et seq. and 279 et seq..

which is why it is important to promote a smooth and gradual resumption of work and a better balance between professional and family life; examples of such arrangements include teleworking, home working and smart working (item 14). Parents are to be encouraged to take parental leave, and the rules on remuneration for parental leave are fundamental in this respect[16].

1.3. Internal legal framework

Portuguese constitutional law also contains a number of provisions designed to defend families and to conciliate work with family life, values which are also protected in ordinary law.

In the Constitution, we may point to the following rules[17]:

1) Everyone has the right to form a family and to marry under conditions of full equality (Article 36.1);

2) Regardless of age, sex, race, citizenship, place of origin, religion and political and ideological convictions, every worker has the right that work be organised under conditions of social dignity and in such a way as to provide personal fulfilment and to make it possible to conciliate work and family life (Article 59.1 b));

[16] Mention should also be made of the creation of the European Institute for Gender Equality (https://eige.europa.eu/pt/in-brief); Strategic engagement for gender equality, 2016-2019, adopted by the European Commission, and the Gender Action Plan for 2016-2020, of the European Commission.

[17] For further consideration concerning the articles cited, see the annotations to the provisions in GOMES CANOTILHO and VITAL MOREIRA, *Constituição da República Portuguesa Anotada, CRP - Constituição da República Portuguesa Anotada (artigos 1.º a 107.º)*, volume I, 4th edition, Coimbra Editora, 2007; JORGE MIRANDA and RUI MEDEIROS, *Constituição Portuguesa Anotada*, part I (Articles 1 to 79), 2nd edition, Coimbra Editora, 2010.

3) The state is charged with ensuring the working, remuneratory and rest-related conditions to which workers are entitled, particularly by protecting the work done by women during pregnancy and following childbirth (Article 59.2 c));

4) As a fundamental element in society, the family has the right to protection by society and the state and to the effective implementation of all the conditions needed to enable family members to achieve personal fulfilment (Article 67.1);

5) In order to protect the family, the state is particularly charged with promoting the conciliation of work and family life, by concerting the various sectoral policies (Article 67.2 h)[18]);

6) In performing their irreplaceable role in relation to their children, particularly as regards the children's education, fathers and mothers have the right to protection by society and the state, together with the guarantee of their own professional fulfilment and participation in civic life (Article 68.1);

7) Motherhood and fatherhood constitute eminent social values (Article 68.2);

8) Women have the right to special protection during pregnancy and following childbirth, and workingwomen also have the right to an adequate period of time off from work without loss of remuneration or any privileges (Article 68.3);

9) The law shall regulate the attribution to mothers and fathers of rights to an adequate period of time off from work, in accordance with the interests of the child and the needs of the household (Article 68.4).

[18] Added by Constitutional Law 1/2004, of 24 July.

It follows from the provisions cited that the family (in its 'traditional' form) is afforded recognition as an institution, and the legislator is required to intervene to ensure that professional activities are effectively conciliated with family life, all this, of course, in harmony with other values enshrined in the Constitution, including free enterprise (Article 61.1).

As we shall see in detail below, there are also several provisions of ordinary law that seek to protect the family and conciliate professional activities with family life; these are most immediately visible in the rules on working hours. It may be recalled that shorter working hours were one of the earliest demands of the labour movement (the May Day holiday commemorates precisely the campaign for an eight-hour working day, and the first ILO convention was none other than the Hours of Work (Industry) Convention, of 1919), and this remains one of the most frequent causes of employment disputes[19].

For example, another significant question here is the organisation of working hours, which has a direct impact on the fundamental rights or interests of workers, in particular on the time they have for themselves (see, for instance, Article 59.1 b) and d) CPR).

As regards working conditions, the Labour Code establishes a general principle, following from the constitutional provisions, that

[19] Changes in working hours are to be explained not only by the demands of the workforce, but also by other important factors, such as technological progress and changes in organisations.

these conditions must favour conciliation of professional life with the worker's family and personal life (Article 127.3). Looking specifically at the first part of this paragraph, we may see that it creates an obligation for the employer who, in exercising his power of management, is required to allow the worker to enjoy such conciliation, i.e. as regards how, when and where the work is to be performed, the employer must act so as to ensure that professional activity is compatible with the worker's family and personal life[20].

Of course, notwithstanding the actual nature of constitutional provisions, this is essentially a rule pointing to a broadly defined obligation of outcome, and no penalty is expressly established for non-compliance.

The specific features of Portugal's business fabric prevent the country from importing rules or business models. The effectiveness of legal rules and the conciliation of work with family life cannot be truly understood unless we bear in mind the employment setting in which they are applied. When drawing up and applying legal rules, it is important to consider the real employment situation in Portugal, as reflected by concrete data[21]. Some of the most relevant facts here are these:

[20] Cfr. ROMANO MARTINEZ, MADEIRA DE BRITO and GUILHERME DRAY, in ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, op. cit., pp. 325 et seq..

[21] Attention is also drawn to HELOÍSA PERISTA, *Os Usos do Tempo e o Valores do Trabalho, uma Questão de Género*, collection of studies, no. 15, Ministry of Labour and Solidarity, 1999.

1) Approximately 97.7% of enterprises have no more than 49 employees[22] and approximately 64.5% of enterprises have 4 or less employees[23]-[24];

2) Enterprises with up to 49 employees account for 56.4% of the workforce;

3) Enterprises with 100 or more employees – 0.9% of enterprises – represent 33.7% of all those in work[25];

4) Enterprises with a workforce of 500 or more – 0.1% of all enterprises – account for 16.7% of total employment[26];

5) In 2018, out of a total workforce of 4,154,185 persons, 3,230,077 were employed by SMEs, whilst only 924,108 worked in large companies[27];

6) Non-permanent employment arrangements represent one of the most significant changes in the world of work. Employees on non-permanent contracts account for 19.5% of total employees (approximately 18.7% among men and 21.1% among women)[28]; in 2020, out of 4,010.6 thousand individuals, 3,298.1 thousand had a permanent contract and 595.7 had a fixed term contract[29];

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[22] According to figures from PORDATA, in 2018 there were 1,295,299 enterprises, or which 1,294,037 were SMEs and 1,262 were large enterprises. Data available at: https://www.pordata.pt.

[23] ANTÓNIO DORNELAS *et al.*, *Livro Verde sobre as Relações Laborais*, Ministry of Labour and Social Solidarity, Lisbon, 2006, p. 44.

[24] According to PORDATA, in 2018, micro, small and medium sized enterprises accounted for 99.9% of the business fabric. Data available at: https://www.pordata.pt.

[25] ANTÓNIO DORNELAS *et al., Livro Verde sobre as Relações Laborais*, op. cit., p. 44.

[26] ANTÓNIO DORNELAS *et al., Livro Verde sobre as Relações Laborais*, op. cit., p. 44. Based on data from 2003.

[27] Figures from PORDATA, available at: https://www.pordata.pt.

[28] ANTÓNIO DORNELAS *et al., Livro Verde sobre as Relações Laborais*, op. cit., p. 49.

[29] Source: https://www.pordata.pt.

7) We should also note that, according to the latest versions of the Green Paper on Labour Relations, in 2016, the proportion of employees on non-permanent contracts (aged 15-64) stood at 22%[30], up from 9% in 1992[31].

These data show that smaller companies dominate Portugal's business fabric, and that the level of qualifications is somewhat poor.

These facts cannot but have an impact on the issues under consideration, and of course offer a further obstacle to conciliating working and family life.

It is not enough to produce rules that foster a balance between working and family lives, because their drafting cannot be confused with actual compliance. In seeking to ensure that work is effectively conciliated with family life, it is therefore essential for the public authorities to exercise active oversight[32], accompanied by the watchfulness of everyone involved in the employment sector. In other words, we cannot expect the State to be all-seeing, and a very important contribution is needed from the private sector, especially from labour organisations.

Responsibility here rests today with the Authority for Working Conditions (ACT)[33], which has powers to "promote, oversee and inspect compliance with the legal, regulatory and contractual

[30] Available here: https://www.portugal.gov.pt.

[31] ANTÓNIO DORNELAS *et al.*, *Livro Verde sobre as Relações Laborais*, op. cit., p. 49.

[32] The Authority for Working Conditions (ACT) is responsible for oversight of employment rules (Article 2 of Regulatory Decree 47/2012, of 31 July. For further considerations, of interest to this issue, WOLFGANG VON RICHTHOFEN, *Inspecção do Trabalho – Um Guia da Profissão*, Coimbra Editora, Coimbra, 2006.

[33] The Organic Law of the Authority for Working Conditions was approved by Regulatory Decree 47/2012, of 31 July.

provisions concerning labour relations and working conditions" (Article 2.2 a) of Regulatory Decree 47/2012, of 31 July). However, on specific issues of equality and non-discrimination between men and women in the world of work, this mission is entrusted to the Commission for Equality in Labour and Employment (CITE)[34]. Created in 1979, merely as an advisory body, this organisation underwent significant changes in 2000, when it was entrusted with new powers in relation to dismissals and the organisation of hours of work, largely as a result of the influence of European law and the transposition of directives. It should be mentioned that CITE's composition is tripartite, comprising members of government, members of trade union confederations and members of employees' confederations[35].

2. Specific instances of (direct and indirect) conciliation of work and family life.

2.1. Leave, absence and time off for family care and protection in the event of dismissal.

Labour legislation upholds the conciliation of work with family life. The Labour Code reasserts the constitutional declaration that motherhood and fatherhood are 'eminent social values' and that

[34] Regulated by the Organic Law, approved by Decree-Law 76/2012, of 26 March, as amended by Law 60/2018, of 21 August.

[35] On this topic, cfr. LOBO XAVIER and A. NUNES DE CARVALHO, "Reflexões sobre a Intervenção da CITE no âmbito da Cessação do Contrato de Trabalho", *Revista de Direito e de Estudos Sociais*, year LIV (XXVII of series 2), 2013, no. 4, pp. 7 et seq.; and, likewise of interest, of the same authors, "Organização Flexível do Tempo de Trabalho (Competências da CITE)", *Revista de Direito e de Estudos Sociais*, year LV (XXVIII of series 2), 2014, nos. 1- 4, pp. 33 et seq..

mothers and fathers are entitled to the protection of society and the State in their irreplaceable role of raising their children, in particular as regards their education (Article 33, paras. 1 and 2), and then goes on to enshrine and regulate a series of rights in which these values are reflected[36].

[36] For an analysis of the rules governing parenthood, see, among others, CATARINA OLIVEIRA CARVALHO, "A Protecção da Maternidade e da Paternidade no Código do Trabalho", *Revista de Direito e de Estudos Sociais*, 2004, nos. 1-2-3, pp. 41 et seq.; GUILHERME DRAY, annotation of the articles cited, MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 196 et seq.; ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, op. cit.; JÚLIO GOMES, *Direito do Trabalho - Relações Individuais de Trabalho*, volume I, op. cit., pp. 443 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 369 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., p. 400; MENEZES CORDEIRO, *Direito do Trabalho*, II, op. cit., pp. 445-446; PALMA RAMALHO, Direito do Trabalho, Parte II – Situações Laborais Individuais, op. cit., pp. 746 et seq., and also, from the same author, PALMA RAMALHO, *Direito do Trabalho, Parte IV – Contratos e Regimes Especiais*, op. cit., pp. 726 et seq.; LOBO XAVIER, with contributions from FURTADO MARTINS, A. NUNES DE CARVALHO and JOANA VASCONCELOS, *Manual de Direito do Trabalho*, op. cit., pp. 881 et seq.. And from an essentially sociological perspective, HELOÍSA PERISTA and MARGARIDA CHAGAS LOPES, *A Licença de Paternidade – Um Direito novo para a Promoção da Igualdade*, collection of studies, no. 14, Ministry of Labour and Solidarity, Lisbon, 1999.

These rights, and in some cases powers/duties, include notably various forms of leave[37]/[38]/[39]/[40]:

[37] The legal rules in force in Spain also contain rules that confer similar protection for parenthood. As these matters are governed by European directives, it is no surprise to find common ground as to the areas regulated; indeed, this is one of the aims of the intervention by Community authorities, whilst the technical legal framework and the consequent names given to concepts may vary. In the case of Spain, it should be noted that collective bargaining is an important and active source of regulation in employment, often relegating the law to a merely secondary role.

In Spain, we may observe (in brief) the following rules on suspension of contracts:

1) On the birth of a child, with an uninterrupted duration sixteen weeks, of which six weeks are mandatory after childbirth (Articles 45.1 d) and 48.4 SWR);

2) A further two weeks are added to this period of sixteen weeks for each child in the event of a multiple birth (Article 48.6 SWR);

3) On grounds of risk, during pregnancy or breastfeeding of a child aged under nine months (Article 45.1 e) SWR);

4) The father may enjoy the period granted to the mother (or the remaining time, if suspension has started), in the event of her death (Article 48.4 SWR);

5) If both mother and father work, the mother may opt for the father to take an uninterrupted part of the leave (simultaneously or successively), in weekly periods, whilst still being obliged to take six weeks' leave after childbirth (Article 48.4 SWR);

6) Upon adoption or guardianship with a view to adoption or fostering, whenever of a duration of no less than one year, of children aged less than six years, or minors aged more than six years with a disability or who, because of their personal circumstances and experiences, or because they have come from abroad, have special difficulties in social and family integration, with a duration of sixteen weeks for each adoptive parent, guardian or foster parent, six of which mandatorily after the judicial ruling of adoption or administrative decision of guardianship with a view to adoption or fostering; the remaining ten weeks may be taken on a continuous or non-continuous basis, during the twelve months following those acts (Article 48.5, SWR). For further details concerning the legal rules in Spain, at different times, see , among others, MONTOYA MELGAR, *Derecho del Trabajo*, 41st edition, Tecnos, Madrid, 2020, pp. 451 et seq. and pp. 473-474, the latter concerning "interruptions due to circumstances affecting the worker" ; MONEREO PÉREZ, MOLINA NAVARRETE, MORENO VIDA and VILA TIERNO, *Manual De Derecho del Trabajo,* 18th edition, Comares, Granada, 2020, pp. 397 et seq.; ALONSO OLEA and MARÍA EMILIA CASAS BAAMONDE, *Derecho del trabajo*, 26th edition, Editorial Civitas, 2009, pp. 554-555 and pp. 561-563. On the principle of non-discrimination, MARTÍNEZ GIRÓN, ARUFE VARELA and CARRIL VÁZQUEZ, *Derecho del Trabajo*, 2nd edition, Netbiblo, 2006, pp. 253 et seq.. Readers may also consult *Estatuto de los Trabajadores*, Edición Conmemorativa del 25 Aniversario com Texto Inicial Y Texto Vigente, Ministério de Trabajo y Asuntos Sociales, Madrid, 2005, which also contains previous versions of these rules. The *Estatuto de los Trabajadores* (Statute of Workers' Rights) has undergone successive

amendments, including that in Law 39/1999, of 5 November, regulating the conciliation of the family and employment lives of persons in work. BALLESTER PASTOR, *La Ley 39/1999 de Conciliación de la Vida Familiar y Laboral: Una Corrección de Errores com Diez Años de Retraso,* Tirant lo Blanch, Valencia, 2000.

[38] In France, the principle of non-discrimination on grounds of pregnancy also applies. Maternity or adoption leave has a duration of sixteen weeks, which may be taken as from six weeks prior to the foreseeable date of the birth, continuing for ten weeks thereafter (Articles L1225-17 and L1225-37 of the *Code du Travail*). The period taken prior to the birth may be reduced to a minimum of three weeks, on the worker's request, supported by a doctor's certificate. The duration of leave is increased in the event of multiple births, or adoption of multiple children, as well as in the event of complications in the mother's health, a further two weeks being added prior to the birth and/or a further four weeks thereafter. The entitlement to leave is deemed optional, except for the mandatory period of eight weeks, divided between two weeks before, and the remainder after, the birth Leave is considered as time effectively worked. Women workers are also entitled during pregnancy to a change of category, when this is needed to protect their health, as supported by a doctor's certificate; if a change of category is not possible, the employment contract is suspended. As in Portugal, women workers are entitled to one hour a day for breastfeeding or feeding, for one year after the birth. There is specific protection against dismissal, except in the event of a serious offence, and this takes effect as from when the woman worker informs her employer of her pregnancy, supported by a doctor's certificate, and continues up to the tenth week after the end of her maternity leave (Article L1225-4 of the *Code du Travail*). This protection also applies to the father, for a period of ten weeks after the birth, and also to adoptive mothers and fathers, when they take adoption leave. Dismissal is reversed provided that the worker presents proof of his or her status within fifteen days, in the form of a doctor's certificate or evidence of the arrival of an adoptive child. For a general overview of the French legal rules, cf. FRANÇOIS DUQUESNE, *Droit du Travail 2020*, 15th edition, Gualino, Lextenso, Paris, 2020, pp. 120-121; DOMINIQUE GRANDGUILLOT, *Le Droit Social. Droit du Travail. Droit de la Protection Sociale*, 22th edition, Gualino, Lextenso, Paris, 2020-2021, pp. 185 et seq.; JACQUELINE BOUTON, FRANÇOIS DUQUESNE and SABRINA MRAOUAHI, *Cours de Droit du Travail*, Gualino, Lextenso, Paris, 2020-2021, pp. 261 et seq..; DOMINIQUE GRANDGUILLOT, *L'Essentiel du Droit du Travail*, 20th edition, Lextenso, Paris, 2020, p. 126; FRANCK PETIT, *L'Essentiel du Droit du Travail*. Les Relations Individuelles, 3rd edition, Lextenso, Paris, 2020, p. 97.

[39] In Italian law, cfr. MAZZOTTA ORONZO, *Diritto del lavoro*, 7th edition, Giuffrè, 2019, pp. 169 et seq.; FRANCO CARINCI, PAOLO TOSI, TIZIANO TREU and LUCA TAMAJO, *Diritto del Lavoro*, 10th edition, Utet Giuridica, 2019, pp. 394 et seq.; TURSI ARMANDO, VARESI PIER ANTONIO, *Istituzioni di diritto del lavoro. Rapporti di lavoro e relazioni sindacali nel settore privato*, 8th edition, Wolters Kluwer, 2019, pp. 471 et seq.; PROIA GIAMPIERO, *Manuale di diritto del lavoro*, 3rd edition, Wolters Kluwer / Cedam, 2020, pp. 246 et seq.; ROCCELLA MASSIMO / TREU TIZIANO, *Diritto del lavoro dell'Unione Europea*, 7th edition, Wolters Kluwer / Cedam, 2016, pp. 291 et seq..

[40] On the rules in English-language systems, see JOHN BOWERS QC, *A Practical Approach to Employment Law*, 9th Edition, Oxford University Press, Oxford, 2017,

1) Initial parental leave, of one hundred and twenty days or one hundred and fifty consecutive days[41], which may be shared between the mother and father workers, the exclusive leave for mothers and fathers being mandatory (Articles 40.1, 41.2 and 43.1 LC); it should be noted that, with the changes introduced by Law 120/2015, of 1 September, shared parental leave can now be taken simultaneously, on the parents' initiative, between days 120 and 150, in other words, this is only possible if they have opted for the 150 days' leave[42];

2) In the event of multiple births, thirty days is added to the duration of leave for each child (Article 40.4 LC);

3) Paternity leave, of twenty working days, the taking of which is compulsory (Article 43.1 LC);

4) By the father or mother, in the event of physical or mental incapacity or death of the other parent who is taking the leave (Article 42LC); this appears also to admit application of this rule, through broad interpretation, to situations where the mother is not party to an employment contract, e.g. when self-employed, in which case the initial parental leave (after the mother has taken her compulsory leave) may be taken by the father;

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pp. 182 et seq.; DAVID LEWIS / MALCOLM SARGEANT, *Employment Law. The Essentials*, 15th edition, Kogan Page Limited, London, 2020, pp. 155 to 182; HUGH COLLINS, K. D. EWINGE and AILEEN MCCOLGAN, *Labour Law*, 2nd edition, Cambridge University Press, Cambridge, 2019, pp. 397 ert seq..

[41] At the worker's discretion, with effects on the level of pay, which varies between 100% and 80%, in accordance with Article 30 of Decree-Law 91/2009, of 9 April.

[42] For a different view, cfr. GUILHERME DRAY, annotation to Article 40, ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, op. cit., pp. 165 and 166, who considers that sharing and taking leave simultaneously means that parents have only had time at home with the child on a parental leave basis during 135 days.

5) Upon the adoption of a child aged less than 15 years, then the adoptive parent may take leave identical to the initial parental leave provided for in Article 40 (Article 44.1 LC);

6) Complementary parental leave, for care of a child or adoptive child aged six years or under, comprising: (i) additional parental leave of up to three months; (ii) or part-time work for a period of twelve months, with normal working hours equal to half the full-time hours; (iii) or non-consecutive periods of parental leave and part-time work, where the total duration of absence and reduction in working hours is equal to the normal working hours over three months; (iv) or interspersed absences from work with a duration equal to the normal working hours over three months, when so provided in agreements reached through collective bargaining (Article 51 LC);

7) Special leave (when the above entitlements are exhausted), for care of a child or adopted child, up to a limit of two years (Article 52 LC);

8) Leave of up to six months (which may be extended to up to six years), for care of a child, or the child of a spouse residing with that spouse, with a disability or chronic illness or cancer, during the first twelve years of life, or subsequently when confirmed by a doctor's certificate (Article 53 LC);

9) When employees return to work after leave to care for a child or a disabled or chronically ill person, employers are required to provide training and refresher training, in order to enable the worker to be fully reintegrated into their professional activity (Article 61);

10) Also not without significance is the obligation, established in Article 127.4, requiring the employer to display full information in the company on the legislation on parents' rights or, if the internal regulations referred to in Article 99 are drawn up, to enshrine in them all this legislation, even though this is a provision without legal consequence.

Article 63 LC also establishes special rules of protection in the event of dismissal, applicable to pregnant workers and workers who have recently given birth or are breastfeeding, and also to men workers who are taking parental leave, establishing that in this case any termination requires a prior opinion from CITE, the lack of which renders the dismissal unlawful under sub-paragraph *d)* of Article 381 LC[43]. In any case, when the worker meets one of these requirements, Article 63.2 presumes that the dismissal was without fair grounds[44], the burden of proof in relation to the circumstances forming such grounds resting with the employer[45].

[43] However, as pointed out by MENEZES CORDEIRO, *Direito do Trabalho*, II, op. cit., p. 1012, as the question here is an irregularity, this can be remedied by obtaining the opinion not originally produced.

[44] This is what happened in the case decided by Decision of the Lisbon Appeal Court of 13.09.2017 (Paula Sá Fernandes), www.dgsi.pt: "The fact that the worker received the notice of the decision to dismiss him on the first day after the end of his parental leave is of no relevance here, and it cannot be deemed that the opinion from CITE would not be necessary, because at the time of the decision to dismiss and in the time leading up to this, the claimant was taking his initial parental leave".

[45] Defending the utility of the presumption of no fair grounds, albeit in the context of a worker who is a trade union officer, GONÇALVES DA SILVA, annotation to Article 410, in ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, op. cit..

CITE does not exercise judicial powers, and so its opinion sets out to assess whether the dismissal is in accordance with equality and non-discrimination law, rather than actually to judge whether fair grounds exist[46]. However, if its opinion is negative, the employer may only proceed with dismissal after obtaining a court decision recognising the existence of due grounds, in proceedings brought within 30 days of notification of the opinion (Article 63.3).

It should also be noted that, if the dismissal is declared unlawful, the employer is obliged to reinstate the worker, unless the worker opts not to be reinstated, in which case he or she is entitled to compensation equivalent to 30 to 60 days' basic pay and seniority payments for each year worked (Articles 63.8 and 392.3).

As regards time off work, we may point to that allowed for ante-natal doctor's appointments (for pregnant women), including preparation for childbirth, as often and for as long as necessary.

[46] Nonetheless, CITE's opinions sometimes contain considerations concerning the existence of fair grounds, as in Opinion no. 1/CITE/2017. This dealt with a woman shop worker, who was accused by her employer of taking money from the till, with testimony to this effect from other workers. The worker contested the facts of which she was accused, contending that several people had had access to the till where the money was kept, as well as to the shop itself. According to CITE: "In accordance with the Community rule, Portuguese law enshrines, in Article 63.2 of the Labour Code, that dismissal due to grounds attributable to a pregnant worker or worker who has recently given birth or is breastfeeding or a male worker taking parental leave "is presumed to be without fair grounds", and so the burden of proving that the worker was dismissed on fair grounds rests with the employer. (…) Accordingly, considering the facts stated in the notice of offence, the employer alleges but is unable to demonstrate that the behaviour of the respondent worker is culpable or serious to such an extent that, as a result of its consequences, it renders subsistence of the employment relationship immediately and practically impossible, in view of the company's management context, the degree of injury to the employer's interests, the characters of the relations between the parties or between the workers and her colleagues and the other circumstances that are relevant to the case, with the result that the requirement for fair grounds for dismissal are not met, under the terms of Article 351 of the Labour Code".

Fathers are entitled to time off on three occasions to accompany the expectant mother to ante-natal doctor's appointments (Article 46 LC)[47]-[48].

[47] In Spain, the legal rules allow for absence (*permisos*):

1) In the event of marriage, for fifteen days (Article 37.3 a) SWR);

2) Of two days, in the event of the death, accident, serious illness, hospitalisation or surgical procedure without hospitalisation but requiring rest at home, of relatives or in laws to the second degree, which may be extended to four days if travel is necessary (Article 37.3 c) SWR); when, for this reason, the worker needs to travel for this purpose, the time off allowed will be four days;

3) Pregnant workers are entitled to the time needed to undergo ante-natal and technical examinations in preparation for childbirth, and, in the event of adoption or guardianship with a view to adoption or fostering, to attend prior information and preparatory sessions and to undergo the psychological and social assessments preceding the declaration of suitability, when, in both cases, these have to take place during working hours (Article 28 of the Law on Prevention of Occupational Risks – no. 31/1995, of 8 November - Article 37.3 f) SWR);

4) A mother - or father - who has a child aged less than nine months, and also, in the event or adoption or guardianship with a view to adoption or fostering, when the adopted or foster child is aged nine months or less, is entitled to one hour a day, which may be divided into periods of half and hour, or to request reduction of their working hours by the same amount, in order to care for the infant (Article 37, paras. 4 and 6 SWR). It should be noted that, when both parents, adoptive parents, carers or foster parents exercise this right with the same duration and on the same basis, the period may be extended until the infant reaches twelve months, with a proportional reduction in pay as from nine months. The duration will be increased pro rata in the event of multiple births, adoption or guardianship with a view to adoption or fostering; when such provision is made in collective bargaining instruments, or through agreement with the employer, the employee may opt to combine successive half-hour periods and take them as full days off;

5) The worker is entitled to absent himself from work during one hour in the event of premature birth of a child or in the event of the birth of a child who needs to remain in hospital care after birth; he may also reduce his working day by up to two hours, with a proportional cut in pay (Article 37.5 SWR);

6) A person with legal guardianship of a child aged under twelve years or a disabled person not in paid work is entitled to a reduction in daily working hours, with a proportional reduction in pay, between a minimum of one eighth and a maximum of half the duration of those hours; this entitlement also applies to those responsible for the direct care of a relative or in-law up to the second degree who, for reasons of age, accident or illness, cannot care for himself and is not in paid work (Article 37.6 SWR);

7) A father or mother, an adoptive parent, a carer with a view to adoption or permanent foster parent is entitled to a reduction in working hours, with a proportional reduction in pay, of at least half the duration of those hours, in order to provide care, during hospitalisation and ongoing treatment of a child aged under

One of the changes introduced by Law 90/2019, of 4 September, was the addition of Article 46-A, conferring the right to time off work on three occasions for medical appointments in relation to each treatment cycle in medically assisted reproduction.

Time off is also allowed for breastfeeding (mother) and feeding (mother or father, as decided jointly, up to the child's first birthday), as established in Article 47 LC.

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eighteen in his or her care who has cancer or other serious illness that entails long-term hospitalisation and requires direct, continuous and permanent care.

These situations allow workers to remain in their jobs and also, in several situations, to keep the same level of pay, either because their remuneration continues to be paid (for example, *permisos*, Article 37.3 SWR), or else through welfare benefits (e.g. maternity benefit). For an analysis of welfare protection, see Articles 133 et seq. of the General Social Security Law (approved by Royal Legislative Decree 1/1994, of 20 June) and Royal Decree 1251/2001, of 16 November.

[48] In France, the following main rules apply:

1) Workers are allowed time off to get married (or enter a civil partnership), under Article L3142-1 of the *Code du Travail*;

2) Time off is also allowed for the birth of a child or the arrival of an adopted child or a prospective adoptee, although these days are not added to those permitted under maternity leave;

3) Pregnant workers are entitled to time off to undergo mandatory medical examinations, as well as for medically assisted reproduction procedures (Article L1225-16 of *Code du Travail*); the spouse is entitled to time off on three occasions to accompany her at the doctor's appointments or medical procedures; no pay is docked in respect of these absences, which are counted as time effectively worked;

4) For one year after birth, mothers are entitled to an hour a day for feeding (Article L1225-30 of the *Code du Travail*);

5) In the event of a child aged six years or under suffering an illness or accident, the worker is entitled to a maximum of three days' leave per year, which may be increased to five days in the case of a child aged one year or under, or if the worker is responsible for three or more children under six years of age (Article L1225-61 of the *Code du Travail*);

6) In the event of a child suffering a particularly serious illness, disability or accident, the worker is entitled to leave of up to 310 working days, or may instead opt to work part time or to take that leave divided into separate periods (Article L1225-62 of the *Code du Travail*).

With regard to absences[49], we may note the following:

1) Care for minors, up to a limit of thirty days a year, when such care is urgent and indispensable, in the event of illness or accident, or for stepchildren, aged under twelve years (Article 49 LC);

2) Care for grandchildren, up to thirty consecutive days, following birth, when born to adolescent children aged less than sixteen and living in the same household (Article 50 LC);

3) Care for a person with a disability or chronic illness, if the child, or child of a spouse living with that child, has a disability or chronic illness (Article 49 LC);

4) Marriage, during fifteen consecutive days (Article 249.2 a) LC);

5) Absences upon the death of a spouse, relatives or in-laws (Articles 249.2 b) and 251 LC);

6) Absences resulting from the need to provide urgent and indispensable care to members of the household (Articles 249.2 e) and 252 LC);

The leave, absences and time off referred to above do not, as a rule, entail forfeit of any rights (such as length of service), except as regards pay, and are regarded as time effectively served (Article 65.1). Appointments for medically assisted reproduction or ante-natal check-ups, breastfeeding and feeding do not entail the forfeit

[49] There are two laws that confer protection for absences (holidays and public holidays) of persons living as life partners (*economia comum*) and those living as unmarried partners (*união de facto*), on the same terms as for married couples. These are Law 6/2001, of 11 May (Article 4.1 b)) and Law 7/2001, of 11 May (Article 3 c)).

of any rights and are regarded as time effectively worked (Article 65.2)[50], meaning that no pay is lost as a result.

2.2. Part-time work and flexible working hours

It should also be noted that the mother or father (also applicable in cases of guardianship, judicial or administrative custodianship (*confiança*) and adoption) are entitled to special working conditions, in particular a reduction in normal working hours (five hours a week to care for a child aged one year or under), if the minor is disabled or chronically ill (Article 54 LC).

In addition, since 2009, a worker with a child aged less that 12 years or, irrespective of age, who has a disability or chronic illness, living with him or her in the same household, has been entitled to work part time or on a flexitime basis[51] (Articles 55 and 56 LC). Part-time work and flexitime are both instruments that help conciliate professional and family life, and the law allows either of the parents, or both (in successive periods), the possibility of working on one or other basis for up to two years (general rules), up to three years if

[50] Regarding social protection in these situations, see Decree-Law 154/88, of 29 April, amended by Decree-Law 333/95, of 23 December, Decree-Law 347/98, of 9 November, Decree-Law 77/2000, of 9 May, and Decree-Law 77/2005, of 13 April.

[51] This is the only reference in the Portuguese Labour Code to flexible working hours, arrangements defined in Article 56.3 as follows: a) they must contain one or two periods of compulsory presence at work, with a duration equal to half the normal working day, b) they must set periods for the start and end of the normal working day, each with a duration of no less than one third of the normal daily working hours, which duration may be reduced as needed in order for working hours to fit within the opening hours of the establishment, and c) they must establish a rest break of no more than two hours.

they have three or more children, or four years in the case of a disabled or chronically ill child (Article 55.4 LC).

When the legal requirements are met, the employer may only refuse a request on the grounds of the overriding demands of the functioning of the enterprise, or of it being impossible to substitute the worker, if he or she is indispensable (Article 57.2 LC). In this case, the employer is required to submit the respective file to CITE (Article 57.5), which will issue its recommendation within 30 days. If no recommendation is issued, it is understood that CITE accepts the employer's refusal (Article 57.6); if instead the recommendation goes against the employer, it may only refuse the worker's request if it secures a judicial ruling in its favour (Article 57.7). This means that a decision on what constitutes "overriding demands of the functioning of the enterprise" rests with CITE or, in the final instance, with the courts, insofar as CITE must be involved if the employer seeks to turn down the request, and the courts must be asked to rule whenever CITE deems that the worker's request should be accepted.

Part-time work[52] - which is subject to written agreement, as well as other formalities (Article 153.1) - consists of setting normal working hours that are shorter than those applying for full-time work

[52] Framework Agreement on part-time work, concluded on 6 June 1997, between inter-branch organisations of general scope (UNICE - Union of Industrial and Employers' Confederations of Europe, CEEP - European Centre of Employers and Enterprises providing Public Services, and ETUC - European Trade Union Confederation), application of which was determined by Council Directive 97/81/EC, of 15 December.

in a comparable situation (Article 150.1)[53]. Employees working part time may work all or only some days of the week, the month or year (Article 150.3), and the worker may not suffer discrimination as regards his or her working conditions (Article 154.2).

The code specifies that (in the case of a worker with a child aged under twelve years or, irrespective of age, with a disability or chronic illness), unless otherwise agreed, the normal working hours will correspond to half those worked on a full-time basis in a comparable situation, and will be worked daily, in the morning or afternoon, or three days a week, as requested, in writing, by the worker (Article 55.3).

The fact of leaving more time free - insofar as the hours worked are shorter than on a normal basis - helps, as we have seen, to conciliate family life with work, something that the authors of the code clearly had in mind when they established that collective employment agreements (Article 2) must establish preferences, among others, in favour of workers with family responsibilities in access to part-time working (Article 152.1)[54].

[53] Concerning part-time work, LEAL AMADO, *Contrato de Trabalho – Noções Básicas*, op. cit., pp. 111 et seq.; MENEZES CORDEIRO, *Direito do Trabalho*. II, op. cit., pp. 649 et seq.; MONTEIRO FERNANDES, *Direito do Trabalho*, op. cit., pp. 229 et seq.; JÚLIO GOMES, *Direito do Trabalho - Relações Individuais de Trabalho*, volume I, op. cit., pp. 676 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 505 et seq.; ROMANO MARTINEZ, Direito do Trabalho, op. cit., pp. 565 et seq.; PALMA RAMALHO, *Direito do Trabalho, Parte IV – Contratos e Regimes Especiais*, cit., pp. 207 et seq.; LOBO XAVIER, with contributions from FURTADO MARTINS, A. NUNES DE CARVALHO and JOANA VASCONCELOS, *Manual de Direito do Trabalho*, op. cit., pp. 544 et seq..

[54] Breach of this provision constitutes a serious administrative offence (Article 660).

Flexible working hours are defined in the code as arrangements whereby the employee may choose, within certain limits, the starting and ending times of his or her working hours (Article 56.2 LC). It should be noted that workers may work for up to six hours consecutively and up to ten hours a day, and must complete the normal weekly working hours, on average, in each four-week period (Article 56.4 LC).

It should not however be overlooked that, in contrast with other European Union states, part-time work is rare in Portugal[55]-[56]. In 2020, for instance, part-time workers accounted for only 9.8% of the workforce, and 11.7% of women in work[57].

[55] In Spain, specific regulations apply to part-time work. Spanish law establishes that a part-time employment contract exists when it has been agreed that the employee will work a lesser number of daily, weekly, monthly or annual hours than a full-time employee (Articles 12.1 and 34.1 SWR).

Part-time employment contracts must be concluded in writing (Article 12.4 a) SWR) and may be temporary (fixed term) or permanent (Article 12.2 SWR). As a rule, part-time workers may not work overtime (Article 12.4 c) SWR).

Other important rules are that part-time workers enjoy the same rights as full-time staff (Article 12.4 d) SWR) and that collective agreements for sectors or with a more limited scope may establish measures to facilitate effective access by part-time workers to ongoing vocational training, whenever family or educational reasons are involved (Article 12.4 f) SWR). On this matter, LUJÁN ALCARAZ, "Las Medidas de Impulso a la Contratación Indefinida", AAVV, *La Reforma Laboral de 2006, Análisis del Real Decreto-Ley 5/2006, de 9 de Junio*, ed. Sempere Navarro, Aranzadi, Navarra, 2006, pp. 65 et seq..

[56] In France, after taking maternity or adoption leave, a worker with at least one year's length of service at the date of birth or adoption (or custodianship with a view to adoption) is entitled to parental leave for education, during which the employment contract is suspended, or to a reduction of working hours, to a minimum of six hours a day, for the period of one year. This leave can be extended twice, and half the duration of the applicable period is counted for the purposes of the worker's length-of-service rights (Articles L1225-47 and L1225-54 of the *Code du Travail*).

[57] Data available at www.pordata.pt.

In addition, the reason most frequently given in Portugal for seeking part-time work is the fact that the worker has failed to find full-time work, whilst in the EU it is "caring for children and other dependants"[58].

2.3. Forms of work

Labour legislation enshrines an adaptable approach to working hours, in other words, normal working hours are fixed as averages, setting absolute daily and weekly limits (Articles 204 et seq.)[59]; provision is also made for time banks and compressed working hours (Article 208 to 209 LC)[60]; an exception is established for pregnant workers or workers who have recently given birth or are breastfeeding, who are entitled to be excused from working on this basis (Article 58.1), and this may be extended for situations where either of the parents are feeding the child, if the adaptability, hours bank or compressed working hours systems affects them (Article 58.2).

[58] ANTÓNIO DORNELAS *et al., Livro Verde sobre as Relações Laborais*, op. cit., pp. 48-49.

[59] Directive 2003/88/EC, of the European Parliament and of the Council of 4 November 2003.

[60] Concerning adaptability, cf. LEAL AMADO, *Contrato de Trabalho – Noções Básicas*, op. cit., pp. 247 *et seq.*; MONTEIRO FERNANDES, *Direito do Trabalho*, op. cit., pp. 509 et seq.; JÚLIO GOMES, *Direito do Trabalho - Relações Individuais de Trabalho*, volume I, op. cit., pp. 667 et seq.; MENEZES CORDEIRO, *Direito do Trabalho. II*, op. cit., pp. 528-529; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 554 et seq; PALMA RAMALHO, *Direito do Trabalho, Parte II – Situações Laborais Individuais,* op. cit., pp. 410 et seq..

Overtime work is any work outside working hours (Article 226.1) and is compulsory (Article 227.3)[61]. This obligation does not apply to pregnant workers, those with children aged under twelve months or women workers for as long as they are breastfeeding (Article 59.2).

In the absence of a collective labour agreement, the Labour Code considers night work to be that taking place between ten p.m. on one day and seven a.m. on the next (Article 223.2)[62].

Mindful of the need to conciliate work and family life, the legislator has established specific rules, under which women workers are excused from working between eight p.m. and seven a.m. in the following situations:

a) During a period of one hundred and twelve days before and after childbirth, of which at least half must be before the presumable date of childbirth;

[61] Concerning overtime work, cf. LEAL AMADO, *Contrato de Trabalho – Noções Básicas*, op. cit., pp. 256 et seq.; MENEZES CORDEIRO, *Direito do Trabalho*. II, op. cit., pp. 555 et seq.; MONTEIRO FERNANDES, *Direito do Trabalho*, op. cit., pp. 523 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 317 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 569 et seq.; PALMA RAMALHO, *Direito do Trabalho, Parte II – Situações Laborais Individuais*, op. cit., pp. 449 et seq.; LOBO XAVIER, with contributions from FURTADO MARTINS, A. NUNES DE CARVALHO and JOANA VASCONCELOS, *Manual de Direito do Trabalho*, op. cit., pp. 537 et seq..

[62] Concerning night work, cf. MENEZES CORDEIRO, *Direito do Trabalho*. II, op. cit., pp. 548 et seq.; MONTEIRO FERNANDES, *Direito do Trabalho*, op. cit., pp. 531 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 313 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 568-569; PALMA RAMALHO, *Direito do Trabalho, Parte II – Situações Laborais Individuais*, op. cit., pp. 445 et seq.; LOBO XAVIER, with contributions from FURTADO MARTINS, A. NUNES DE CARVALHO and JOANA VASCONCELOS, *Manual de Direito do Trabalho*, op. cit., pp. 535 et seq..

b) During the rest of her pregnancy, if she presents a doctor's certificate declaring this to be necessary for the health of the worker or her unborn child;

b) For as long as she is breastfeeding, if she presents a doctor's certificate declaring this to be necessary for the health of the worker or her child.

Of course, workers are not released from their obligation to work, but must, whenever possible, be given compatible daytime working hours (Article 60.3); if this is not possible, the worker is excused from working (Article 60.3). The worker may be excused not only on her own initiative, but also on that of the occupational health physician, when he considers that night work poses a risk to the pregnant worker or worker who has recently given birth or is breastfeeding (Article 60.6)[63]. This assessment may be made under Article 62 of the Labour Code.

We may also observe that the legislator has provided special protection as regards the scheduling of holiday leave. Unless seriously prejudicial to the employer, persons who live together as unmarried partners or life partners and work in the same company or establishment must be able to take their holidays at the same time (Article 241.7).

[63] Provisions concerning the intervention of an occupational health physician are contained in Articles 103 et seq. of Law 102/2009, of 10 September, as most recently revised by Law 79/2019, of 2 September.

2.4. Home working

Home working is another instrument that can be used to help conciliate work with family life[64]. When people can live and work in the same place, they avoid the inconvenience of travel and the impact on their free time is consequently diluted. In addition, the workers have more freedom in organising the time given over to their work, which can also allow them to devote more care and time to their family life.

It is important to bear in mind that home working may consist of employment in the proper sense (where there will be an employment contract) or else of self-employed work, which may or may not entail economic dependence. If it does, we will then have a contract deemed equivalent to an employment contract (constructive employment) (Article 10)[65].

Home working - without an employment contract, but in a situation of economic dependence - is specifically regulated in labour law. Elaborating on the provisions of Article 10 of the Labour Code, we may observe in Law 101/2009, of 8 September, a series of rules governing this form of work[66].

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[64] On the subject of home working, cf. MONTEIRO FERNANDES, *Direito do Trabalho*, op. cit., pp. 176 et seq.; MENEZES LEITÃO, *Direito do Trabalho*, op. cit., pp. 554 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 367 et seq..

[65] On this concept and the respective rules, see ROMANO MARTINEZ, *Direito do Trabalho*, op. cit. pp. 367 et seq., pointing out, on p. 371, after distinguishing between situations in which legal subordination exists and others where it does not, that "in any teleworking scenario, legal subordination, even when it exists, is necessarily attenuated". Cf. also MENEZES CORDEIRO, *Direito do Trabalho*, II, op. cit., pp. 665 et seq..

[66] In Italian law, cfr. PALLINI MASSIMO, *Il Lavoro Economicamente Dipendente*, Cedam, Padova, 2013, pp. 183 et seq..

The subject matter expressly regulated in Law 101/2009 relates to contracts concerning work performed, without legal subordination, in the home or establishment of the "worker", or more accurately, the service provider, and also contracts in which this party purchases the raw materials and supplies the finished product to the vendor at a given price, whenever, in either case, the worker should be deemed to be economically dependent on the beneficiary of the work (Article 1.1, of Law 101/2009).

The main features of the home working rules are these[67]:

1) Safeguards for the worker's privacy, the beneficiary only being able to make visits, scheduled no less than twenty-four hours in

[67] Spanish law also provides regulations on home or remote working. The current wording of Article 13 of the SWR (amended by final provision 3.1 of Royal Decree-law 28/2020, of 22 September) determines that workers - i.e. subject to legal subordination - may work remotely, referring to the provisions of Royal Decree-law 28/2020, of 22 September. This legislation has been introduced in the midst of the COVID-19 pandemic, with the intention of regulating this form of work, making it the preferred form of work, so as to reduce the impact of measures restricting the working of the economy.

Article 2 draws a distinction between remote working and teleworking, the former being a way of organising work or carrying on labour activities in the home of the worker or a place of his choice, during all or part of his working day, on a regular basis. In contrast, teleworking is defined as work done remotely, but exclusively or predominantly using IT, telematic and telecommunications equipment and systems.

The legislation affirms the equality of and non-discrimination against workers working remotely or teleworking (Article 3 of Royal Decree-law 28/2020, of 22 September).

Remote work is subject to written agreement between the parties (Articles 5 and 6 of Royal Decree-law 28/2020, of 22 September). In addition, the law enshrines the right of persons working remotely, and especially teleworkers, to switch off, outside their working hours (Article 18 of Royal Decree-law 28/2020, of 22 September). The provider of the work is entitled to pay at least equal to that of a worker of the equivalent occupational category in the economic sector in question (Article 4.2 of Royal Decree-law 28/2020, of 22 September). He is also entitled to the fringe benefits established for workers who only work on site.

advance, to check the work and compliance with rules on health and safety at work, between 9.00 a.m. and 7.00 p.m., accompanied by the worker or other person designated by the same (Article 4, paras. 2 and 3 of Law 101/2009);

2) Remuneration is to be set on the basis of the average time for execution of the goods or service and the pay established in a collective labour agreement applicable to the same work provided on an employment basis in the establishment or, failing that, the minimum monthly wage, as well as the worker's expenses entailed in carrying out the work, in particular those relating to electricity, water, communications and acquisition and maintenance of equipment (Article 7.1 of Law 101/2009);

3) The worker is entitled to an annual allowance of one twelfth of the sum of his remuneration earned in each calendar year (Article 8 of Law 101/2009);

4) The contract may end upon unilateral termination, expiry or termination for due cause (Article 10 of Law 101/2009);

5) The social security rules are the same as for employees (Article 15 of Law 101/2009).

2.5. Teleworking

Teleworking is now an established reality, thanks to the increasing use information and communication technologies, especially in European countries. It has accordingly been regulated

within some legal systems (such as in Italy) [68-69]. This has become all the more evident since March 2020, as a result of the COVID-19 pandemic, which has meant that teleworking has been established as the rule, in both the public and private sectors, contributing decisively to widespread use of this form of work, and consequently to the development and application of the rules requiring it[70].

The advantages of teleworking have long been demonstrated; we may point in particular to the worker's enhanced ability to organise his time, and consequently his family life, the elimination of travel costs and avoidance of travel time to and from work, the reduction in office space, the positive environmental impact, etc.[71].

[68] In Italian law, see PROIETTI MARCO, *Diritto del lavoro tra riforme e società digitale*, Giuffrè, 2020, pp. 73 et seq., and, in the same work, specifically concerning the changes resulting from the COVID-19 pandemic, pp. 324 et seq..

[69] In France, teleworking is defined in Article L1222-9 of the *Code du Travail*, in terms similar to those established in Portuguese law. However, in the absence of agreement, the employer is only obliged to agree to teleworking when the request is made by a disabled worker or one who qualifies as a carer, as established in special legislation.

[70] As a result of the growing recourse to teleworking the following draft laws are currently under discussion in the Portuguese Parliament (www.parlamento.pt): (i) Draft Law 765/XIV/2, establishing rules for teleworking; (ii) Draft Law 791/XIV/2, strengthening the rights of teleworkers; (iii) Draft Law 806/XIV/2, amending the Labour Code in order to establish fairer rules for teleworking; (iv) Draft Law 811/XIV/2, which regulates telework in the public and private sectors, creates rules on flexible working and strengthens the rights of remote workers, making amendments to the Labour Code, the General Law on Public Sector Work and Law 98/2009, of 4 September; (v) Draft Law 812/XIV/2, altering the employment law rules on teleworking (19th amendment to the Labour Code and 1st amendment to Law 98/2009, of 4 September, regulating compensation for accidents at work and occupational diseases).

[71] Of course, teleworking also entails risks, cfr. MENEZES CORDEIRO, *Direito do Trabalho*, II, op. cit., pp. 665 et seq.; ROMANO MARTINEZ, *Direito do Trabalho*, op. cit., pp. 696-697; GUILHERME DRAY in ROMANO MARTINEZ, LUÍS MIGUEL MONTEIRO, JOANA VASCONCELOS, MADEIRA DE BRITO, GUILHERME DRAY and GONÇALVES DA SILVA, *Código do Trabalho Anotado*, op. cit., pp. 424 and 425.

It is therefore easy to understand that the Portuguese legislature should have regulated teleworking (Articles 165 et seq.). Portuguese law defines teleworking as the provision of labour subject to legal subordination, habitually off the employer's premises, using information and communication technologies (Article 165).

The employment contract must be written, and a number of formalities are required (Article 166.5).

The law sets an initial time limit of three years for the agreement between the employee and employer, in the case of an existing employee who moves to teleworking (Article 167.1). This agreement may be terminated by decision of either party during the first thirty days of implementation (Article 167.2).

Teleworkers of course enjoy the same rights and are subject to the same duties as other employees not teleworking, as regards training and professional advancement, and also working conditions (Article 169).

Attention is also drawn to the safeguards for the privacy of teleworkers and their families. Employers are required to respect rest periods, and also to provide teleworkers with good working conditions, both physically and in working ethos (Article 170.1).

When teleworking is done from home, the employer may only visit the place of work (to oversee working activities and the respective equipment) between 9.00 a.m. and 7.00 p.m., accompanied by the employee or a person designated by the same (Article 170.2).

Teleworkers are subject to the same daily and weekly upper limits as non-teleworkers (Article 203), and may also be exempted from working hours (Article 218).

Since the entry into force of Law 120/2015, of 1 September, workers with children aged three years or less are entitled to work on a teleworking basis, when this is compatible with their job and the employer has the resources and equipment needed (Article 166.3). However, provided teleworking is compatible with the person's job, the employer is not permitted to refuse, as expressly established in para. 4 of this article.

The rule in this Article 166.3 is something of a surprise, when compared with the possibility of working on a flexitime or part-time basis, as provided for in Articles 56 and 57. In effect, in these cases, the worker's request is conditional on the employer's authorisation, which it may only refuse on the grounds of the overriding demands of the functioning of the enterprise, albeit with the mandatory intervention of CITE as the arbiter of the validity of those grounds. In contrast, in the case of telework, the employer cannot stand in the way of the worker's request, provided teleworking is compatible with the specific duties performed and provided the company has the resources needed. The flexibility of the rules established in Article 166 - to be applauded - accordingly stands in contrast to the difficulties of a potentially long and bureaucratic process for a situation which, from the company's point of view, will not be so damaging, as it concerns merely a change to the rules on working hours or the duration of those hours.

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