

Labour law in Portugal during the pandemic: main measures and developments

Ana Teresa Ribeiro*

1. Preliminary remarks. 2. The Covid-19 Pandemic and Portuguese Labor Law: main measures. 3. The Covid-19 pandemic and the Portuguese Labour Market: main consequences. 4. Telework: the new regime. 5. The employer's duty to refrain from contact. 6. Conclusions.

Abstract

Like in many other countries, the COVID-19 pandemic provoked the implementation of several measures in the Portuguese labour regime in order to adjust this new reality and its aftermath. This Article provides an overview of such actions, namely the suspension of employment contracts, the admissibility of absences from work due to COVID-related reasons, the mandatory telework, the new powers of the Portuguese Labour Authority, and the prohibition of dismissals. The impact of the pandemic on the overall Portuguese labour market is also addressed, as well as the most recent changes prompted by the pandemic experience. Therefore, we will provide a panoramic view of the new regime of telework as well as of the newly proclaimed duty of the employer to abstain from contacting the employees outside of the working period.

Keywords: COVID-19 Pandemic; Portuguese Legal Regime; Crisis; Telework; The right to disconnect.

1. Preliminary remarks.

Challenged by the new reality brought on by the SARS-CoV-2 virus,¹ several countries implemented several measures to deal with its effects and aftermath. Many were aimed at the

* Assistant Professor and Researcher at Porto Faculty of Law, Universidade Católica Portuguesa, member of CEID – Católica Research Centre for the Future of Law, Porto, Portugal, Orcid <https://orcid.org/0000-0001-5107-1982>. This Article is based on our intervention at the International Conference in Commemoration of Professor Marco Biagi, that took place in June 2022, in Modena, Italy. This essay has been submitted to a double-blind peer review.

¹ Which was declared as a pandemic in March 2020, by the director of the World Health Organization - see WHO, *WHO Director-General's opening remarks at the media briefing on COVID-19*, 11 March 2020, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, accessed 22 October 2022.

labour market, intending to cushion the social and economic impact of the virus, and Portugal was not an exception to this trend.

The first part of this Article will, therefore, address the main legal innovations implemented during this period, as well as the effects the pandemic generally had in the Portuguese labour market. While the second part will provide a general overview of the recent alterations to the regime of telework and of the formal introduction of the employers' duty to refrain from contacting employees outside of the working time. Changes that, as will be explained, were clearly provoked by the pandemic experience and the need to overcome the legal shortcomings that were detected during this period.

2. The Covid-19 pandemic and Portuguese Labor Law: main measures.

While at first representing a public health crisis, the COVID-19 pandemic soon (severely) impacted other domains, such as the economy and the labour market, bringing about the harshest crisis since the great depression of 1929 and with deeper consequences than the 2008 financial crisis.²

In Portugal, given the recent economic recovery, the confinements and the general contraction of economic activities were naturally regarded with great concern. Therefore, to cope with this new reality (and its consequences), from March 2020 onwards,³ several measures were introduced in the national legal order. Regarding the labour market, some of the most significant were the temporary suspension of holidays and the ban on the right to strike on essential sectors,⁴ mandatory telework, new cases for justified absences from work and new and easier conditions for the suspension of employment contracts.⁵

In fact, the absences from work of employees infected with COVID-19 or subjected to prophylactic isolation (which was equated to illness for this purpose) were justified, entitling

² Caleiras J., *Pandemia e desigualdades no emprego: que políticas para uma recuperação sustentável?*, in Carmo R. M., Tavares I. and Cândido A. F. (orgs.), *Que futuro para a igualdade? Pensar a sociedade e o pós-pandemia*, Observatório das Desigualdades, Lisbon, March 2022, 27. Similarly, Guy Ryder, former Director-General of the ILO, stated that the pandemic's impact on the world of work is four times bigger than that of the 2008 financial crisis – see Ferreira L.P., *“Impacto da pandemia no mundo do trabalho é quatro vezes maior do que foi em 2008 com a crise financeira”*, in *Diário de Notícias*, 10 May 2021, <https://www.dn.pt/internacional/impacto-da-pandemia-no-mundo-do-trabalho-e-quatro-vezes-maior-do-que-foi-em-2008-com-a-crise-financeira-13701699.html>.

³ All the legislation produced during this period can be accessed, by chronological order, at <https://dre.pt/dre/geral/legislacao-covid-19>, accessed 30 October 2022.

⁴ During the months of March and August of 2020, the number of strike notices was half of those registered in the previous year. This can be explained not only by the suspension of the right to strike – on essential sectors –, but also by the mandatory confinements and the atmosphere of uncertainty felt during this period – see Patrício I., *Pandemia faz cair para menos de metade pré-avisos de greve*, in *Sapo.pt*, 2 November 2020, <https://eco.sapo.pt/2020/11/02/pandemia-faz-cair-para-menos-de-metade-pre-avisos-de-greve/>, accessed 7 November 2021. The amount of notices also fell on the first trimester of 2021 (coinciding with a new mandatory confinement), but has since increased – see Direção Geral do Emprego e das Relações de Trabalho, *Dados de 2022 – Pré-avisos de greve*, 2022, <https://www.dgert.gov.pt/dados-de-2022-relativos-aos-avisos-previos-de-greve>, accessed 30 October 2022.

⁵ For an analysis of the declarations of state of emergency and of calamity, as well as the most important rulings of the Portuguese Constitutional Court during 2020, see Botelho C.S., Ribeiro A.T., *Portugal*, in Albert R., Landau D., Faraguna P. and Drugda S. (eds.), *2019 Global Review of Constitutional Law*, I CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020, 273-277.

them to receive their full remuneration.⁶ Similarly, absences from work, to accompany a child or grandchild infected with COVID-19 or under prophylactic isolation⁷ or children under 12 years of age (or above, in the case of children with special needs or chronic diseases), whose school activities were suspended, were also justified.⁸⁻⁹

In addition, a *simplified* lay-off – for the suspension of employment contracts – was created, through *Decreto-lei n.º 10-G/2020*, 26 March,¹⁰ exempting employers from observing the deadlines and steps imposed in the “regular” lay-off (enshrined in Articles 298.º and ff. of the Portuguese Labour Code, hereinafter “PLC”).¹¹ This regime was particularly important to support employers and prevent a higher number of dismissals, since it not only imposed pay cuts on employees, but it also involved the State’s support (who reimbursed part of the employees’ salaries, while exempting the employer from paying contributions to the social security system).¹²

Furthermore, employers benefiting from this or other support schemes, enshrined in the aforementioned *Decreto-lei n.º 10-G/2020*, were prohibited from dismissing employees, either through collective redundancy or by the extinction of the work position, during the

⁶ Articles 19.º and 20.º of *Decreto-lei n.º 10-A/2020*, 13 May (with the changes introduced by *Decreto-lei n.º 62-A/2020*, 3 September).

⁷ Article 21.º of *Decreto-lei n.º 10-A/2020* (with the changes introduced by *Decreto-lei n.º 62-A/2020*, 3 September).

⁸ Article 22.º of *Decreto-lei n.º 10-A/2020* (with the changes introduced by *Decreto-lei n.º 12-A/2020*, 6 April). In this case, workers were only entitled, in principle, to two thirds of their remuneration. Regarding other situations of justified absences from work, also introduced during the pandemic, to accompany children or grandchildren, see Article 2.º-A of *Decreto-lei 10-K/2020*, 26 March (added by *Decreto-lei n.º 101-A/2020*, 27 November). For further developments on this issue, particularly the timeline and evolution of these measures, see Vieira Borges I., *Faltas e Covid19: isolamento profilático e doença*, in Ramalho M.R.P. and Moreira T.C. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 164 ff.

⁹ It should be noted that these regimes were also extended to independent workers. In the meantime, all these cases were revoked, by *Decreto-lei n.º 66-A/2022*, 30 September, since the infection with COVID-19 is now being treated like any other disease and it does not require any period of isolation.

¹⁰ Martins D. and Caro G., *Layoff à la COVID-19: notas introdutórias*, in *Prontuário de direito do trabalho*, 1, 2020, 155-158. As explained, the designation “simplified” was introduced by the *Resolução do Conselho de Ministros n.º 10-A/2020*, 13 March. However, this diploma, along with others that followed, did not create a differentiated regime regarding the suspension of employment contracts (they merely instituted special benefits, to aid companies). That only happened with *Decreto-lei n.º 10-G/2020*. This regime was later complemented by *Decreto-lei n.º 12-A/2020*, 6 April, which extended it to independent workers. This mechanism was in force until September 2020, but it was brought back in January 2021, due to the increase in COVID-19 cases and the imposition of a new confinement, by *Decreto-lei n.º 6-E/2021*, 15 January. Its implementation was later adjusted to the gradual reopening of the economy and prolonged until 30 September 2021, by *Decreto-lei n.º 23-A/2021*, 4 March. Finally, it was revoked by the aforementioned *Decreto-lei n.º 66-A/2022*.

¹¹ For further information on these procedures, see Moreira T., *Direito ao trabalho em tempos de pandemia*, in Martins M. and Rodrigues E. (eds.), *A Universidade do Minho em tempos de pandemia. Tomo III. Projeções*, Universidade do Minho Editora, 2020, 93 ff.; Martins D. and Caro G., nt. (10), 159 ff. This diploma also enshrined other support measures, such as extraordinary training plans and financial support to the return to normal company activity. For a detailed analysis of such schemes, see Santos C., *As medidas de apoio ao emprego no âmbito da crise económico-social causada pela pandemia da COVID-19*, in *Prontuário de Direito do Trabalho*, 1, 2021, 311-344.

¹² Fernandes A.M., *O regime atual da relação de trabalho pode responder à crise?*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 16-17. As pointed out, it is not surprising that employers asked for this measure’s consecutive renewal. However, more than being a jobs-saving tool, it was mostly a way for employers to delay collective redundancies and to more comfortably wait while the situation unfolded. Underlining this measure’s goal to avoid mass dismissals – see Ramalho M.R.P., *O direito das situações laborais coletivas é imune ao COVID-19?*, in Ramalho M.R.P. and Moreira T. (coord.) *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 28; Amado J., *A pandemia, o despedimento e o empoderamento da ACT*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 89.

application of such measures and in the following 60 days.¹³ The violation of this ban led to the termination and return of the benefits previously provided by the State (still, the dismissal remained legal).¹⁴

The powers of the Portuguese Labour Authority were also reinforced, allowing it to “block” dismissals when there is evidence that they are illegal.¹⁵ In this case, the employment contract can be temporarily resuscitated merely on the labour inspector’s decision, pending the definitive court decision. However, if, following the inspector’s decision, the employee fails to judicially challenge the dismissal in due time, the suspension will be lifted, and the dismissal shall become definitive.¹⁶

This measure, which was a complete novelty in our system – regarding not only the competences of this body, but also the way these situations are handled –, has divided opinions, being criticized by some¹⁷ who believe it to be unconstitutional, and applauded by others, who, while acknowledging the difficulties surrounding its interpretation and application, deem it to be a clearly positive innovation.¹⁸

In the meantime, despite it being common practice in the adoption of new legislation, during 2020 and until mid-2021, there were no new social dialogue agreements between the Government and the social partners.¹⁹ Nevertheless, several meetings took place between them, resulting in the signing of a declaration stating their commitment towards a constructive dialogue, in order to better deal with the pandemic and its consequences.²⁰ Still, this represented a change in the *modus operandi* of the Labour legislator, since, traditionally, new legislation is often preceded by a formal agreement between the Government and the social partners.

¹³ Article 13.º of *Decreto-lei n.º 10-G/2020* (rectified by the *Declaração de retificação n.º 14/2020*, 28 March). See Vasconcelos J., *COVID-19 e proteção dos contratos de trabalho: sentido e limites de mais uma proibição de despedimento*, in *Revista do Ministério Público*, Número Especial COVID-19, 2020, 383-385 and ff. As pointed out, given this diploma’s self-proclaimed (in its preamble) aim to maintain jobs and avoid dismissals based on economic grounds, this ban was inserted to prevent defrauding the mechanisms it enshrined and to ensure the protection of workers. For further developments on the interpretative questions arisen by this regime, see also Santos C., nt. (11), 322 ff.

¹⁴ According to Article 14.º, no. 1, of *Decreto-lei n.º 10-G/2020*. Similarly, see Vasconcelos J., nt. (13), 388.

¹⁵ This change was introduced by Article 24.º of *Decreto n.º 2-B/2020*, 2 April, and was renewed by Article 26.º of *Decreto n.º 2-C/2020*, 17 April, and later on, by Article 8.º-C of *Lei n.º 1-A/2020*, 19 March (added by *Lei n.º 14/2020*, 9 May).

¹⁶ Amado J., nt. (12), 104.

¹⁷ Such as the Portuguese Bar Association:

<https://portal.oa.pt/comunicacao/imprensa/2020/04/06/inspetores-dizem-que-nao-ha-forma-de-garantir-salarios-em-despedimentos-ilegais/>, accessed 7 May 2022. See Ramalho M.R.P., nt. (12), 29. The author also doubts the constitutionality of this novelty, since it encroaches on the principle of separation of powers (given that the decision concerning the (in)admissibility of a dismissal belongs to the courts).

¹⁸ Moreira T., nt. (11), 98; Amado J., nt. (12), 99 ff. In fact, as the latter underlines (pp. 105 and 107), although a bit “unorthodox”, this measure does not prevent employers from dismissing their employees, nor does it change the situations in which such dismissals may occur or the conditions that need to be met.

¹⁹ In July 2021, an agreement, on professional training, was concluded: Conselho Económico e Social – Comissão Permanente de Concertação Social, *Acordo sobre Formação Profissional e Qualificação: um desígnio estratégico para as pessoas, para as empresas e para o país*, 28 July 2021, available at <https://ces.pt/wp-content/uploads/2022/03/acordo-2021.pdf>, accessed 7 May 2022.

²⁰ <https://www.ces.pt/storage/app/uploads/public/5eb/ab6/269/5ebab62690b85856044630.pdf>, accessed 7 November 2021.

In addition, even though the legal framework of the collective labour relations was “apparently” immune to the changes provoked by the pandemic,²¹ in practice, collective bargaining was quite affected, with a decrease in the number of new agreements, which returned to the 2011-crisis levels.²²

Furthermore, and for the first time since this mechanism was introduced (in 2014), several collective agreements (applicable in airways companies) were suspended, on the grounds of economic distress, leading to the implementation of several cuts to the salaries of flight personnel.²³

On one hand, it is laudable that these measures were implemented through negotiations with the employees’ representatives (making it a more democratic process). But, on the other hand, it is worrying to see trade unions being put under pressure²⁴ to negotiate conditions that will, objectively, be less favourable to employees, in contrast with the traditional role of both trade unions and collective bargaining.²⁵ Still, we recognize the delicacy surrounding this situation (which arose from a pandemic that had a particularly hefty impact on the aviation industry), and it is, indeed, important, that collective agreements prove to be flexible instruments, capable of adjusting to evolving scenarios.

²¹ Ramalho M.R.P., nt. (12), 25. The author stresses that the only exceptions to this immunity were the aforementioned suspensions of the right to strike in essential sectors (by *Decreto do Presidente da República n.º 14-A/2020*, 18 March) and of the right of trade unions, works councils, and employers’ association to participate in the labour legislative procedure (the latter was only imposed by Article 4.º, paragraph c) of *Decreto do Presidente da República n.º 17-A/2020*, 2 April, that determined the first extension of the state of emergency. Subsequently, *Decreto do Presidente da República n.º 20-A/2020*, 17 April, which extended, for a second time, the state of emergency, reinstated this right in its Article 4.º, paragraph c), albeit with shorter deadlines and conditions). It should be noted that when, in November 2020, the state of emergency was, again, declared, these rights were not suspended – see *Decreto do Presidente da República n.º 51-U/2020*, 6 November 2020. A scenario that persisted in its various renewals, until 30 April 2021.

²² In 2020, there were merely 169 new collective agreements, while in 2011 (when Portugal requested international financial aid) there were 170 – see Lusa, *Contratação coletiva cai 30% em 2020, recuando para níveis de 2011*, in *RTP Notícias*, 18 July 2021, https://www.rtp.pt/noticias/economia/contratacao-coletiva-cai-30-em-2020-recuando-para-niveis-de-2011_n1328717, accessed 6 November 2021. Still, there was a slight increase in the remuneration levels – see:

<https://www.crlaborais.pt/documents/10182/13326/Relat%C3%B3rio+Anual+Negocia%C3%A7%C3%A3o+Coletiva+em+2020/28ecbe79-0b9d-4910-bb16-1a45a5ba8e98>, accessed 7 November 2021.

²³ Lusa e Público, *Pilotos e tripulantes aprovam acordo de emergência na TAP*, in *Público*, 26 February 2021, <https://www.publico.pt/2021/02/26/economia/noticia/pilotos-aprovam-acordo-emergencia-tap-1952378>, accessed 7 May 2022. Some of those “emergency agreements” can be found at http://bte.gep.msess.gov.pt/completos/2021/bte9_2021.pdf, accessed 7 May 2022.

²⁴ However, it should be noted that since the Government had, in the meantime, declared these companies to be in economic distress, the agreements’ suspension could be achieved without trade union consent, which drew some criticism. On this, see Lusa, *Suspensão dos acordos de empresa na TAP é “golpe baixo” e “traíçoeiro”, acusa Sitava*, in *Negócios*, 23 December 2020, available at:

<https://www.jornaldenegocios.pt/empresas/transportes/aviacao/detalhe/suspensao-dos-acordos-de-empresa-na-tap-e-golpe-baixo-e-traicoeiro-acusa-sitava>, consulted on 7 May 2022.

²⁵ Nevertheless, trade unions decided to subject the agreements to their members approval. See Lusa e Público, nt. (23). And even though this was a wearing process, it did allow their members to have their say regarding their new employment conditions.

Finally, and to ensure social isolation,²⁶ telework was, at times, either imposed or recommended, depending on the evolution of the pandemic situation in the country. That way, in a first moment, telework could be unilaterally imposed either by the employer or the employee, whenever compatible with the functions at stake.²⁷ Afterwards, following the declaration of the state of emergency, through the *Decreto do Presidente da República n.º 14-A/2020*, and with the steady increase of infection cases, mandatory telework was determined, in all compatible activities.²⁸ However, as the situation became more controlled, this rule was reverted, and, again, telework became a right that could be unilaterally imposed either by the employer or the employee (if compatible with the activity at stake),²⁹ and later, it became, once again, only applicable through an agreement of both parties.³⁰

A similar path was later observed, following the second spike of the pandemic at the end of 2020.³¹

3. The Covid-19 pandemic and the Portuguese Labour Market: main consequences.

The impact of the pandemic was duly felt in the Portuguese labour market. In March 2020 the unemployment rate increased in 8,9% by comparison with the numbers displayed in February 2020. The service sector (particularly tourism) was the most affected, accounting for around 73% of these numbers.³²

²⁶ Amado J., *O teletrabalho: do Código à Covid-19*, in *Observatório Almedina – De especialistas para especialistas*, 25 March 2020, <https://observatorio.almedina.net/index.php/2020/03/25/o-teletrabalho-do-codigo-a-covid-19/>; and Moreira T.C., nt. (11), 90-91. It should be noted that, during the pandemic, telework was applied in a general manner, including to functions that do not imply the use of IT (which is part of the Portuguese legal definition of telework). Therefore, there was an amalgamation between telework and work at distance – see Ramalho M.R.P., nt. (12), 32; Redinha M.R., *Teletrabalho 2020 ou o encanto de Janos*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL editora, Lisbon, 2020, 39.

²⁷ Article 10.º of *Decreto-lei n.º 10-A/2020*.

²⁸ Article 6.º of *Decreto n.º 2-A/2020*, of 20 March. This was subsequently reiterated in Art. 8.º of *Decreto n.º 2-B/2020*, 2 April, Art. 8.º of *Decreto n.º 2-C/2020*, 17 April, and Art. 4.º of the *Resolução do Conselho de Ministros n.º 33-A/2020*, 30 April (which also declared the state of calamity).

²⁹ Article 29.º of *Decreto-lei n.º 22/2020*, of 16 May.

³⁰ Article 4.º of *Resolução do Conselho de Ministros n.º 40/2020*, of 29 May.

³¹ Through *Decreto-lei n.º 79-A/2020*, 1 October, in its original version and subsequent alterations. Telework was, once again, declared mandatory between 25 December 2021 and 9 January 2022, *Resolução do Conselho de Ministros n.º 181-A/2021*, 21 December. Telework finally stopped being recommended with the *Resolução do Conselho de Ministros n.º 25-A/2022*, 18 February.

³² Almeida J.R., *Novo desemprego: As fragilidades de uma opção produtiva nacional*, in *Barómetro das crises*, 21, 1. Nevertheless, globally, the unemployment rates have varied less than expected. In fact, while in 2019, the unemployment rate was of 6,6%, in 2020 in only increased to 7,0%, while in 2021, it decreased to 6,7% (data available at [https://www.pordata.pt/Portugal/Taxa+de+desemprego+total+e+por+sexo+\(percentagem\)-550](https://www.pordata.pt/Portugal/Taxa+de+desemprego+total+e+por+sexo+(percentagem)-550), accessed 7 May 2022). However, it should be noted that the employees' underutilization rate went from 1,2% to 13,9%. This last indicator is particularly important because the unemployment rates merely measure the number of people actively searching for employment, not accounting for people who are not actively looking for employment or the underemployment of part-time employees. With the confinements, the number of people in this situation increased (see Mateus C. and Lourenço S.M., *Mercado do trabalho resiste à pandemia*, in *Expresso*, 12 February 2021, <https://expresso.pt/economia/2021-02-12-Mercado-de-trabalho-resiste-a-pandemia>, accessed 6 November 2021).

Since the beginning of the pandemic until the second semester of 2021, there was the destruction of about 172.600 jobs. Of these, 153.300 were fixed-term contracts and 32.400 were other forms of precarious jobs (namely bogus self-employment).³³ From the second semester of 2020 onwards, there was more job creation, but, particularly between the third trimesters of 2020 and 2021, 61% of these new contracts were precarious (fixed-term contracts, bogus self-employment, and so on). These numbers show that precarious workers were the most affected by the job destruction caused by the pandemic and they are also the basis of the job recovery.³⁴

Furthermore, during this period, employees, in general, and women,³⁵ in particular, suffered mentally from the pandemic.³⁶ That means that, albeit undeniably useful, the measures implemented during this period were not enough to prevent this situation.

The extra pressure felt by women, during this period, reflected the household inequalities still present in today's Portuguese society. In fact, until June of 2020, around 81% of requests from workers to provide family support were submitted by women (who are, already, particularly affected by precariousness and unemployment). Inquiries also show that, in Portugal and during the confinements, women displayed higher levels of stress, overwork, and pessimism, as well as greater difficulty in adjusting telework to their family life.³⁷ This means that the pandemic did not give way to new challenges in the domain of parenthood. It merely shone light on the fact that the prevalent Portuguese sociological reality is still anchored in traditional gender views which lead to a highly asymmetric distribution of non-paid work between men and women (while, at the same time, Portugal presents the highest percentage of female work in Southern Europe).³⁸

³³ According to Caleiras J., nt. (2), 33, the jobs of the most precarious workers were not saved by the previously mentioned measures, and they ended up being swept from the labour market.

³⁴ Almeida J.R., *A saída da pandemia: precariedade, baixos salários e estagnação*, in *Barómetro das Crises 2021*, 24, 4-5. This is in line with the traditional segmentation of the Portuguese labour market. For more developments on this issue, see Carvalho C. and Ribeiro A.T., *The impact of the EU economic governance in Portugal*, in *European Labour Law Journal*, 13, 2, 2022, 1-21.

³⁵ Rocha S. and Rico C., *No emprego ou em casa, as mulheres estão a ser mais afetadas pela pandemia*, in *TSF- Rádio Notícias*, 5 March 2021, <https://www.tsf.pt/portugal/sociedade/no-emprego-ou-em-casa-as-mulheres-estao-a-ser-mais-afetadas-pela-pandemia-13421568.html>, accessed 7 November 2021.

³⁶ According to the Ministry of Health, the confinements, the economic insecurity, and the demands of telework that characterized the pandemic period took a toll on employees' mental health, with an increase on the numbers of burnout, depression, anxiety, and stress – see Lusa, *DGS lança guia para promover vigilância da saúde mental dos trabalhadores*, in *Sic Notícias*, 28 September 2021, <https://sicnoticias.pt/especiais/saude-mental/2021-09-28-DGS-lanca-guia-para-promover-vigilancia-da-saude-mental-dos-trabalhadores-c5cd1b7a>; and Secretaria-Geral da Economia, *Guia Técnico “Vigilância da saúde dos trabalhadores expostos a fatores de risco psicossocial no local de trabalho”*, available at <https://www.sgeconomia.gov.pt/destaques/dgs-guia-tecnico-vigilancia-da-saude-dos-trabalhadores-expostos-a-fatores-de-risco-psicossocial-no-local-de-trabalho.aspx>, accessed 6 November 2021.

³⁷ Aboim S., *Covid-19 e desigualdades de género: uma perspetiva interseccional sobre os efeitos da pandemia*, in Carmo R.M., Tavares I. and Cândido A.F. (orgs.), *Um olhar sociológico sobre a crise Covid-19 em livro*, Observatório das Desigualdades, Lisbon, 2020, 132-133.

³⁸ Carvalho C., *Novos desafios da parentalidade*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 209-210.

4. Telework: the new regime.

According to Literature,³⁹ telework possesses several advantages, allowing employers and employees to save resources, a better conciliation between personal and professional lives, greater flexibility on the use of the workforce, the integration of workers with greater difficulty to work out of their home, reducing atmospheric pollution and road accidents, fostering a better distribution of employment opportunities throughout the country, and so on. Despite this, until the pandemic, telework had a residual presence in the Portuguese labour market,⁴⁰ which may be explained by cultural reasons.⁴¹

The pandemic brought about a new reality, forcing an unprecedented use of this mechanism⁴² and highlighting the shortcomings of its legal regime, that had previously gone practically undetected, namely in subjects such as health and safety at work, the remote control exercised by the employer, the parametrization of the teleworker's working time, the teleworkers' risk of isolation, the extra costs associated with telework, the accidents at work, and the teleworkers' participation in the collective relations.⁴³

Recently, *Lei n.º 83/2021*, 6 December, amended the PLC, changing the telework's legal regime and its own definition. Like before, telework requires two elements: the use of IT technologies and its performance outside of the company. However, the new definition⁴⁴ states it shall be performed in a location not determined by the employer. Some Authors have interpreted this as meaning that telework shall take place in a location outside of the

³⁹ Martins J., *A pandemia e a morfologia do trabalho digital: que futuro para o Direito do (tele)Trabalho?*, in *Revista do Ministério Público*, Número Especial COVID-19, 2020, 391-432; Gomes J., *O teletrabalho obrigatório em tempos de COVID-19 e algumas insuficiências do regime jurídico português*, in Ramalho M.R.P., Carvalho C. and Vicente J. (coord.), *Trabalho na Era Digital: Que Direito?*, 2022, 179-205; Amado J., *Teletrabalho: os deveres especiais das partes*, in *Questões laborais*, 60, 2022, 127-146.

⁴⁰ Gabinete de Estratégia e Planeamento do Ministério do Trabalho, Solidariedade e Segurança Social, *Livro verde sobre as relações laborais 2016*, December 2016, 177, available at http://www.gep.mtsss.gov.pt/documents/10182/55245/livro_verde_2016.pdf. The presence of telework in the Portuguese labour market was not only very modest, but it had also been declining in recent years, going from 0,12% of all employment contracts in 2010, to 0,05% in 2014.

⁴¹ Gomes J., nt. (39), 180-182. But also, as pointed out by the Author, by the several disadvantages this form of work also poses, such as the costs required by IT investment, the increase in employees' expenses, the risk of computer hacking and loss of sensitive information, the difficulty felt by employees regarding time management, or the dilution of the frontiers between personal and professional lives. It also presents the danger of employee isolation, which has consequences not only at a personal level, but also at a collective one. Telework also represents environmental costs due to the slow development of computer recycling and the use of polluting components. Furthermore, it may increase territorial inequalities (due to a varying distribution of network services), economic inequalities (since not all workers enjoy the same working conditions at home), and gender inequalities (since there is the risk women may be relegated to this kind of work). Also stressing the negative contribution of telework towards the construction of collective solidarities – see Martins J., nt. (39), 421.

⁴² See Ramalho M.R.P., nt. (12), 33. According to the author, this “experience” shattered the myth of the employees' lack of productivity outside of the workplace, when they are not under the employer's or superior's close supervision, since it was shown that, even under these circumstances, employees can perform equally well.

⁴³ Gomes J., nt. (39), 183; Ramalho M.R.P., nt. (12), 33-34; Gomes M.I., *Disponibilização de equipamentos e sistemas e compensação de despesas adicionais. Um exemplo do intrincado puzzle em que se convertem o regime jurídico do teletrabalho?*, in *Questões laborais*, 60, 2022, 101.

⁴⁴ Article 165.º PLC.

employer's control or free access, excluding from this regime work being done in buildings belonging to the employers, but outside of their main organizational centre regime.⁴⁵

In turn, telework's legal framework is now expressly applicable, whenever compatible, to situations of work at a distance, when there is economic dependency (despite the absence of legal subordination).⁴⁶

The legal regime maintains the emphasis on the need of an agreement between both parties to implement the telework.⁴⁷ When there is already an employment relation between both parties, if the proposal towards telework comes from employer, the employee has complete freedom to refuse it, without having to provide a justification.⁴⁸ However, when the proposal comes from the employee, the employer's refusal, although possible, needs to be in writing and, whenever it is not grounded on the employee's activity, a justification must be given.⁴⁹

In addition, to fight the risk of isolation of the teleworker, the new regime densified the employer's duty to ensure the teleworker's sociability with the rest of the company's employees, requiring for an in-person contact with colleagues and management every two-months (or as often as determined in the telework agreement).⁵⁰

Furthermore, to protect the teleworkers' privacy, any kind of control over their activity is subjected to the principles of proportionality and transparency. It is also forbidden to impose a permanent connection, during the working time, through image or sound. And, finally, the control of the teleworkers' performance shall be done according to previously known procedures.⁵¹

The pandemic experience also showed the need to ensure the limitation of the working time. And, in this line, the new regime now expressly states the employer's duty to refrain from contact outside of working hours.⁵²

And, to fight the extra costs that this kind of work entails, the new regime reinforces the fact that the necessary equipment and systems shall be provided by the employer (who shall

⁴⁵ Redinha M.R., *A noção de teletrabalho na Lei 83/2021, de 6 de dezembro*, in *Questões laborais*, 60, 2022, 29. Situations that, according to the previous wording of the law, would be encompassed in the notion of telework. The Author believes this was an oversight of the Legislator, provoked by the pandemic context. Similarly, Lambelho A., *O trabalho à distância, o teletrabalho e os trabalhadores autónomos economicamente dependentes em Portugal*, in *Questões laborais*, 60, 2022, 38.

⁴⁶ Article 165.º, no. 2, PLC. Regarding the necessary adjustments, see Lambelho A., nt. (45), 44 ff.

⁴⁷ Nevertheless, there are some cases in which employees may impose the change to telework (assuming it is compatible with the performed activity). That is the case of workers subjected to domestic violence or when they have a child younger than three years old (which can, in some cases, extended eight years old) – see Article 166.º-A, nos. 1 to 3, and 4, PLC.

⁴⁸ Article 166.º, no. 6, PLC. And this refusal cannot be the basis of the employee's dismissal or of the application of any kind of sanction.

⁴⁹ Article 167.º, no. 7, PLC. Nevertheless, due to the legal formulation, some Authors believe that the employer enjoys wide margin concerning the reasons that shall be presented to ground the refusal – see Vicente J., *A nova disciplina do acordo para a prestação de teletrabalho – comentário aos artigos 166º e 167º do Código do Trabalho*, in *Questões laborais*, 60, 2022, 57-78 and 60-63.

⁵⁰ Article 169.º-B, no. 1, paragraph c), PLC.

⁵¹ Which shall also be compatible with the teleworkers' privacy. All these demands are present in Article 169.º-A, nos. 4 and 5, PLC. Furthermore, the legal regime also enshrines (as it did before) some precautions regarding the inspection of workplaces, when they coincide with the teleworkers' homes – see Article 170.º PLC.

⁵² Article 169.º-A, no. 1, paragraph b), PLC. A duty that is analyzed below.

also compensate the employees from all the expenses in which they might incur due to acquisition or use of such equipment or systems).⁵³

Regarding the matter of accidents at work, it is now expressly provided that the legal regime concerning the reparation of accidents at work and occupational diseases is also applicable to telework.⁵⁴ And the place of work, for this effect, shall be the one chosen by the employees to habitually perform their activity, while the working time will be that in which they are performing their activity. The agreement establishing the situation of telework shall also determine the aforementioned location (which can be changed through an agreement concluded between both parties).⁵⁵

Some Authors note that the rigidity of the procedure to change of the place of work, even though the agreement might provide a flexible determination of the workplace, makes the regime less compatible with some new forms of work, such as digital nomadism or mobile telework.⁵⁶

This recent change also led to the inclusion of telework among the list of subjects from which collective bargaining may only deviate in *mellius*, i.e., only by creating more favourable regimes.⁵⁷

However, it should be underlined that, so far, telework has been present in very few collective agreements.⁵⁸ And although the pandemic provoked a contraction in the negotiation of new agreements, social partners, so far, do not seem to be focusing on this issue, a trend that should be inverted, to prevent social partners from “losing” these workers.⁵⁹

5. The employer’s duty to refrain from contact.

One of the concerns that followed Labour Law since its beginnings has been the issue of working time and its limitation, in order to protect the physical and psychological well-being of employees, safeguarding the balance between professional and personal lives, and ensuring

⁵³ Article 168.º, nos. 1 and 2, PLC. Regarding the obligation to provide the necessary equipment and systems, Gomes M.I., nt. (43), 105 ff., questions whether equipment such as ergonomic chairs is included. The Author also questions whether this duty and the obligation to support the associated expenses make sense when the employee is only partially teleworking. And if the employee is hired up-front to telework, could these amounts not be implicitly provided in the workers’ remuneration?

⁵⁴ Article 170.º-A, no. 5, PLC.

⁵⁵ Article 166.º, nos. 4, b), and 8, PLC.

⁵⁶ Lambelho A., nt. (45), 38.

⁵⁷ Article 3.º, no. 3, paragraph k), PLC.

⁵⁸ In 2020, this issue was present in seven agreements, while, in 2021, it was alluded in nine agreements – see Ministério do Trabalho, Solidariedade e Segurança Social - Centro de relações laborais, *Relatório anual sobre a evolução da negociação coletiva em 2021*, Lisbon, 30 June 2022, 194, available at <https://www.crlaborais.pt/documents/10182/483314/RNC2021/ecd5d8da-54df-43f3-b0df-21f64f5b0af1>, accessed 30 October 2022.

⁵⁹ Alert issued by Ramalho M.R.P., nt. (12), 34.

the appropriate resting periods.⁶⁰ It is not surprising that these demands are present in the Portuguese Constitution, in Article 59.º, no. 1, paragraph b), and in the PLC.⁶¹

However, the development of IT systems and their growing presence in the world of labour mean that work can now follow employees beyond their working hours, diluting the frontiers between working time and personal and family time. Plus, they enable the employer to “find” the employee anywhere and anytime, bringing about the model of the 24-hour connected and available employee.⁶² This danger is recognized in the Framework agreement on digitalisation, entered into by the European social partners,⁶³ in 2020, which underlines the need to create a counterculture, that rejects the 24-hour employee availability.

This was also a concern of the Portuguese legislator, who recently enshrined the employers’ duty to refrain from contact.⁶⁴

Portuguese literature commended the Legislator’s choice of words, accentuating the fact that this is an employer’s obligation, instead of merely stating the workers’ right to disconnection.⁶⁵ Such right is a virtual version of right to rest and leisure, characteristic of today’s digital world.⁶⁶ And while it should be regulated and guaranteed, the emphasis should be on the employer’s behaviour. In fact, the burden should not rely with the employees, requiring them to exercise this right, but rather with the employer, who should abstain from disturbing the workers’ rest.⁶⁷

This new provision also safeguards the more complicated cases in which the employee has (legitimately) ignored an out-of-hours contact from the employer and, consequently, is subjected to a detrimental treatment from the employer. In this situation, such conduct shall be framed as discrimination.

However, contacts in case of *force majeure* are exempted from this prohibition. An exemption that should be interpreted in a flexible manner, allowing it to encompass not only situations that are traditionally associated with this concept (such as fires, earthquakes, floods, and so on), but also other situations of unavoidable contact, in order to prevent serious harm to the company or to its maintenance.⁶⁸

⁶⁰ Amado J., *Desconexão profissional: direito ou dever?*, in Ramalho M.R.P., Carvalho C. and Vicente J. (coord.), *Trabalho na Era Digital: Que Direito?*, 2022, 470.

⁶¹ MARTINS, J. (*op. cit.*, page 410) believes the right to disconnection already emanated from this provision. In fact, since the employee’s subordination is confined to the working period, the rights to rest and to the balance between professional and personal lives are ground enough to allow the employee to refuse to get phone calls or answer to email from the employer outside of that period.

⁶² Amado J., nt. (60), 474, talks of a *homo connectus*.

⁶³ *European Social Partners Framework Agreement on Digitalisation*, June 2020, available at https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf, accessed 8 May 2022.

⁶⁴ Article 199.º-A of the PLC. This provision was added by *Lei n.º 83/2021*, and it is not circumscribed to telework.

⁶⁵ Amado J., nt. (60), 476-477; Amado J., nt. (26), 134.

⁶⁶ Amado J., nt. (60), 478.

⁶⁷ Incessant contacts from the employer, with calls, emails, messages, constants requests for work can also be framed as harassment – Amado J., nt. (60), 479-480 and 483.

⁶⁸ Amado J., nt. (60), 483; Amado J., nt. (26), 135.

This duty will also not be violated if the employer contacts the employee to request unpredicted overtime work.⁶⁹ But it will be put into question in other situations, even if no immediate answer or reaction is requested from the employee.⁷⁰

Finally, although the employee's rest may be disturbed by contacts from colleagues and third parties, they are not encompassed by this duty. Nevertheless, in this context, the problem assumes a different configuration, due to the inexistence of the supra-infra relation that characterizes the employment relation.⁷¹

6. Conclusions.

The pandemic has accelerated trends that were already manifesting in recent years, regarding new forms of producing and working,⁷² forcing us to deal with issues and phenomena that albeit in the horizon, weren't still present in the majority of companies and labour relations.

The Portuguese legislator was able to endure the initial clash with the pandemic, applying or adapting already existing mechanisms and instruments to soften the economic effects of the pandemic.⁷³

Still, these were trying times for the Portuguese labour market. Despite the small variation of the unemployment rates, the underutilized workers increased, as did the feelings of uncertainty and insecurity. Precarious workers (and women, in particular) were specially affected by the destruction of jobs and even though telework was important to ensure the maintenance of company activity, it accentuated employees' stress and other psychosocial risks, since they were forced to conciliate their work and family demands at home (often without the necessary accommodations, rooms or equipment).

Trade union activity was also affected, with the decrease of new agreements and strikes, and unions were placed in the uncomfortable position of having to negotiate (in the most affected sectors) salary cuts.

During this time, the Legislator had a particularly challenging task, because the events provoked by the pandemic were unfolding in a swift and uncertain manner. There was mostly an emphasis in safeguarding work posts and providing assistance to companies, to try and prevent their shutting down. And while this is laudable, both employers and employees had to deal with the instability brought on by a succession of legal diplomas and a, at times, unclear legislative technique.

⁶⁹ Fernandes F. L., *O dever de o empregador se abster de contactar o trabalhador*, in *Questões laborais*, 60, 2022, 150-151. Conversely, even though expressing doubts, the Author believes that, in order not to be devoid of content, this provision must be interpreted as also forbidding the employer from generally requesting the employer from demanding work outside of the working time. Therefore, the employer shall only be allowed to contact the employee to demand overtime work in situations of *force majeure*.

⁷⁰ Amado J., nt. (26), 137.

⁷¹ Amado J., nt. (26), 134.

⁷² Amado J., nt. (26), 129.

⁷³ Ramalho M.R.P., nt. (12), 29.

All in all, although the State aimed at providing a quick and effective answer to the constraints brought on by the pandemic, the latter's negative effect on the Portuguese labour market is undeniable, as are its consequences.

Bibliography

- Aboim S., *Covid-19 e desigualdades de género: uma perspetiva interseccional sobre os efeitos da pandemia*, in Carmo R.M., Tavares I. and Cândido A.F. (orgs.), *Um olhar sociológico sobre a crise Covid-19 em livro*, Observatório das Desigualdades, Lisbon, 2020, 130-146;
- Almeida J., *À saída da pandemia: precariedade, baixos salários e estagnação*, in *Barómetro das Crises* 2021, 24;
- Almeida J., *Novo desemprego: As fragilidades de uma opção produtiva nacional*, in *Barómetro das crises*, 21;
- Amado J.L., *A pandemia, o despedimento e o empoderamento da AC*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 89-107;
- Amado J.L., *Desconexão profissional: direito ou dever?*, in Ramalho M.R.P., Carvalho C., Vicente J. (coord.), *Trabalho na Era Digital: Que Direito?*, 2022, 469-484;
- Amado J.L., *Teletrabalho: os deveres especiais das partes*, in *Questões laborais*, 60, 2022, 127-146;
- Borges I., *Faltas e Covid19: isolamento profilático e doença*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 157-208;
- Botelho C.S. and Ribeiro A.T., *Portugal*, in Albert R., Landau D., Faraguna P. and Drugda S. (eds.), *2019 Global Review of Constitutional Law*, I CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2020, 273-277;
- Caleiras J., *Pandemia e desigualdades no emprego: que políticas para uma recuperação sustentável?*, in Carmo R., Tavares I. and Cândido A.F. (orgs.), *Pandemia e desigualdades no emprego*, Observatório das Desigualdades, Lisbon, 2022, 27-42;
- Carvalho C. and Ribeiro A.T., *The impact of the EU economic governance in Portugal*, in *European Labour Law Journal*, 13, 2, 2022, 1-21;
- Carvalho C., *Novos desafios da parentalidade*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 209-237;
- Fernandes A.M., *O regime atual da relação de trabalho pode responder à crise?*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 13-23;
- Fernandes F.L., *O dever de o empregador se abster de contactar o trabalhador*, in *Questões laborais*, 60, 2022, 147-152;
- Gomes J., *O teletrabalho obrigatório em tempos de COVID-19 e algumas insuficiências do regime jurídico português*, in Ramalho M.R.P., Carvalho C., Vicente J. (coord.), *Trabalho na Era Digital: Que Direito?*, 2022, 179-205;

-
- Gomes M.I., *Disponibilização de equipamentos e sistemas e compensação de despesas adicionais. Um exemplo do intrincado puzzle em que se converteu o regime jurídico do teletrabalho?*, in *Questões laborais*, 60, 2022, 99-125;
- Martins D.C. and Caro G.A., *Layoff à la COVID-19: notas introdutórias*, in *Prontuário de direito do trabalho*, II, 2020, 153-172;
- Martins J., *A pandemia e a morfologia do trabalho digital: que futuro para o Direito do (tele)Trabalho?*, in *Revista do Ministério Público*, Número Especial COVID-19, 2020, 391-432,
- Moreira T., *Direito ao trabalho em tempos de pandemia*, in Martins M. And Rodrigues E., *A Universidade do Minho em tempos de pandemia. Tomo III. Projeções*, Universidade do Minho Editora, 2020, 87-107;
- Ramalho M.R.P., *O direito das situações laborais colectivas é imune ao COVID-19?*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 25-38;
- Redinha M.R., *A noção de teletrabalho na Lei 83/2021, de 6 de dezembro*, in *Questões laborais*, 60, 2022, 21-30;
- Redinha M.R., *Teletrabalho 2020 ou o encanto de Janos*, in Ramalho M.R.P. and Moreira T. (coord.), *COVID-19 e trabalho: o dia seguinte*, AAFDL, Lisbon, 2020, 39-48;
- Santos C., *As medidas de apoio ao emprego no âmbito da crise económico-social causada pela pandemia da COVID-19*, in *Prontuário de Direito do Trabalho*, I, 2021, 311-344;
- Vasconcelos J., *COVID-19 e proteção dos contratos de trabalho: sentido e limites de mais uma proibição de despedimento*, in *Revista do Ministério Público*, Número Especial COVID-19, 2020, 379-389;
- Vicente J., *A nova disciplina do acordo para a prestação de teletrabalho – comentário aos artigos 166º e 167º do Código do Trabalho*, in *Questões laborais*, 60, 2022, 57-78.

Copyright © 2022 Ana Teresa Ribeiro. This article is released under a Creative Commons Attribution 4.0 International License