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Objectives

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Labour Relations Specificities (V): Internal flexibility in the current state of Portuguese labour law

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Abstract

In this day and age, Labour Law – traditionally a field of rigid law – has to be made flexible and become a new Labour Law in order to create the right conditions for greater competitiveness and productivity.
This OPBPL Electronic Paper characterises internal flexibility in the Portuguese labour market and the legal papers and collective convention.
In addition, we analyse the question of article 4 and characterise the different kinds of flexibility and the changes in the LC.

1 | Internal flexibility

Flexibility is companies' capacity to adjust to market demand. It encompasses forms of external flexibility, which reflects on the companies' ability to hire and fire, and internal flexibility, which implies the reorganisation of the existing labour force (working hours, methods, training, mobility). It is a more long term approach to the management of change and the development of skills and abilities that brings advantages in terms of productivity and the capacity to adapt.

Matters related to working hours, functional mobility and geographical mobility were considered under the topic of internal flexibility. The Commission which drew up the White Paper on Labor Relations made a thorough identification of the norms which should prevail under all circumstances as imperative or minimums; those that can be negotiated in collective bargaining as well as those where individual negotiation is possible were also identified. Accordingly, it was defended that with regard working hours, the law should comply fully with the applicable community directives, including the duty of transposition arising from these directives; it should be limited to setting forth some general principles, completed by a set of subsidiary requirements.

The abovementioned directives are very detailed and thus limit the extent to which legislators and collective persons at the national level have room to manoeuvre. Nevertheless, this does exist and it is collective bargaining that must shape the general lines to fit the circumstances of each activity sector or company.

More specifically, the general principles established under the law should contemplate the following:

- the system for working hours and rest periods (article 10 of Law 99/2003, special arrangements for working hours – modulation, special adaptability arrangements article 165, concentrated timetables, reduction of maximum limits on the normal working hours)

- part time work (removal of the percentage set out in number 1 of former article 180, clarification of point 3)

- overtime (limits, preference, time bank)

- holidays (increase, introduction of a new point in response to absurd and disproportionate results).

- functional and geographic mobility (deadline, expiry, amount of compensation)

- salary flexibility (pay rises, subsidy, revoking of number 3 of former article 255 of the LC).

2 | Alterations and Innovations in the LC – the LC's Contributions to greater flexibility

These can be summarised as follows:

- flexible time (system of flexible timetables, individual flexibility, group flexibility, time bank, concentrated timetables, overtime, record of working hours, sporadic work).

- functional and geographic mobility (mobility clauses)

- salary flexibility (pay rises, pay cuts, holiday subsidy, holiday pay).

We consider the instruments for the collective regulation of work to be instituted in the law by means of collective regulations, by individual agreement between the parties or they may even be imposed upon the worker when found to be true requirements.

In accordance with article 3, number 1 of the LC, the rule is: "the legal requirements regulating the work contract may be waived by instruments for the collective regulation of work, except when these result in the contrary". It requires that the legislator has not prohibited the intervention of the IRCT´s, either in absolute terms (imperative requirements with fixed content), or relative terms (imperative-permissive requirements); the subsidiary requirements are the normal context of application.

Also in accordance with article 3, number 1 and number 3 of LC "the legal requirements regulating the work contract may be waived by the IRCT that, without contradicting those requirements favouring the worker with regard various matters such

as rights of personality, equality and non discrimination, protection in parenthood, child labor, etc. The LC system provides minimum requirements in these matters for the protection of workers.

With regard articles 3 and 4 of the LC, the rule is: “the requirements of this Code may only be waived by the work contract when this establishes more favourable conditions for the worker and if this does not result in the contrary” As for the requirements in the first case – more favourable conditions, this is for the worker to decide in the scope of private autonomy. In the case of the latter requirement – if this does not result in the contrary, it is the duty of the legislator to define this as it is the protection of values of public policy that is at stake.

Finally and in accordance with article 476 of the LC, the rule is: “the provisions of the IRCT may only be waived by the work contract when more favourable conditions are established for the worker”. In relation to the said requirement – more favourable conditions – this shall be decided by the worker in the scope of private autonomy.

In conclusion, and with regard the dynamics of the employment relationship, new and hitherto unknown mechanisms have emerged making manpower more flexible e.g. time bank, new form of organising working hours, dependent on IRCT, where the work done in addition to the normal working hours is calculated in a kind of *bank account.* The normal period of work can be increased by up to 4 hours a day, 60 hours a week or 200 hours a year. The annual limit may be waived by IRCT to avoid the reduction in the number of workers in the company; this annual limit may only be waived for a 12 month period. The IRCT that provides for the time bank should regulate the compensation for the additional work rendered; this may consist of an equivalent reduction in working hours, payment in money or in both forms. The advantages are flexibility in the timetable and the provision of various forms of compensation for work, including allowing for the right to additional holiday), and the law extended the object of the working contract, clarifying that it does not restrict the tasks covered in the category of the worker but also encompasses similar or functionally linked activities (article 118, number 2).

The LC extinguished the principle of the more favourable treatment to the worker in the relations between the law and collective bargaining; as a result, generally speaking the legal requirements are now a collective mechanism and they may be waived by collective bargaining whether this benefits or prejudices the workers. .

3 | Articulation between the Law and the collective regulation of Labour – the role of the more favourable principle

It is known that throughout the legislative process that culminated in the approval of the Labour Code, one of the points that triggered the most heated and persistent discussion was the writing of article 4 which dealt with the relation between the law and instruments for the collective regulation of work. The intricacies of this debate are to some extent reflected in the "Principle of the more favourable treatment".

Article 13, number 1 of the Labour Contract law states the following: "The sources of superior rights always prevail over lesser sources, except when they, without opposition to these, establish more favourable treatment for the worker".

This statement leaves little doubt as it is based on a conception of normality about the legal systems established by the labour laws – this normality would correspond to the functional standard that governed the formation and development of the labour law, a right to minimum conditions from the workers' standpoint. It thus admitted the minimum mandatory character of most of the provisions of labour law so as to conform to its nature and reasoning. All those found to be fixed mandatory requirements would be applied as such, preventing by opposition any variation that would be favourable to the worker.

The preliminary draft of the Labour Code, presented in July 2002, addressed this point in its article 4 on the paragraph – Principle of more favourable treatment, where we read – "It is understood that the requirements of the Code establish a minimum content of protection for the worker, whenever these result in the contrary".

Essentially, the perspective of this statement is similar to that of the previous law in that, due to the exceedingly dubious nature of a requirement, it established in legally stricter terms the guidelines by which it should be considered the mandatory minimum, thus only allowing for the solutions that were more favourable to workers.

The final version of its point number 1 reads as follows: “The requirements of this Code may, without prejudice to the provisions of the preceding number, be waived by means of the collective labor regulations, except when these result in the contrary

In essence, this rule establishes a new conception of what should be considered normal or natural in the content of labour law.

The questions raised by article 4, notably by point 1 of this article, reflected the political and social sensitivity the subject had acquired after the publication of the Code. The following proposal was then made for this point; “The requirements of this Code may be waived by an instrument of collective labour bargaining when they explicitly permit this and within the foreseen limits.

This wording would remove many or all of the doubts raised on the possibility and the meaning of the collective bargaining on matters governed by law. The result would be a precise frame for collective bargaining, defining the space in which the implementation and adaptation of working conditions would be handed over to negotiating partners. Meanwhile, the evolution of labor law was expressed by considerable complexification of its content, which goes beyond the configuration of a system of minimum working conditions. On the other hand, technical rules emerged aimed at the organisation of work, regulations placed at the service of active employment policies, emergency mechanisms intended to make companies viable and safeguard jobs. The argument of equal bargaining powers is a valid one because the employers’ associations are up against similar weaknesses to those of trade union associations, even though the bargaining position of employers is favourable in the labor market in light of the economic situation. When taken in isolation, the wording of article 4, number 1, implies a modification of the role and the reasoning of labour law, in view of a trend towards the development of this branch of law. Nothing was detected on the real impact of this innovative requirement, and the following text was therefore adopted: The regulatory legal requirements of labour contracts may be waived by means of collective labour regulations, except when these result in the contrary”.

Thus, and with regard the “principle of the more favourable treatment for the worker” in the relation between the law and the results of collective bargaining, it was subscribed by the Government and Partners that the aspects of the labor regulation in which this principle could not be waived should be defined in detail. A balance has therefore been established – the principle of the more favourable treatment for the

worker remains, and the areas in which this may not be ignored have been clarified. On these basic questions of working relations, collective bargaining cannot stipulate conditions inferior to the minimum defined by law, notably with regard 14 essential matters (e.g. protection of minors, protection of parenthood, health and safety at work, etc.).

This solution will permit a high level of flexibility in collective bargaining, will do away with unnecessary ideological disagreements and create conditions for more stable labour legislation and greater dynamism in collective bargaining.

4 | Further reading

SITES: http://opbpl.cies.iscte-iul.pt

BOOKS:

Livro Branco das Relações Laborais

Temas de Direito do Trabalho – Edições: Coimbra Editora, Coimbra Neto, Júlio. Cidadania, política e sindicalismo no contexto histórico do nascimento das Relações Públicas (http://www.bocc.ubi.pt/pag/pinho-julio-cidadania-politica-sindicalismo-relacoes-publicas.pdf)

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