New prospects on working time. Face to face with António Nunes de Carvalho ([1])

Interview by Diogo Silva

Working time has always been a fundamental matter on labour law, connected to retribution, worker's health and safety and productivity. I interviewed Professor António Nunes de Carvalho on some particular current issues of working time.

1) Working time is a key aspect of the employment relation, being in constant change. Is it possible to identify any major trend on the new developments of working time?

The major issues that labour law is facing today (the determination of the right balance between the defence of workers' rights and flexibility; the compatibility between the protection provided by labour law and internal fragmentation between core workers and peripheral workers and the segmentation of the labour market, as well as the need to protect the economically dependent self-employed workers; the disappearance of the anthropological reference of the subordinate worker and the spreading of interests of the different segments of the workers; the need to overcome traditional paradigm of trade union action; etc.) have a direct and inevitable impact on the problems related to working time issues. Therefore, the solutions that could be found for all these subjects will, naturally, dictate the evolution of the organization and management of working time regulations.
From the perspective of the temporal dimension of the employment relationship, I believe that the most relevant trend is the increasingly fluid and manifold nature of the notion of working time. The increasing difficulty in defining working time makes more complex to understand the nuclear synallagmatic structure of the employment contract (with all the consequences that this may entail). Moreover, the whole protection scheme associated with the notion of working time must be reviewed, not only by adjusting it to the new organizational and productive contexts, but also, in deeper terms, by guaranteeing the correct application, in this new context, of those fundamental principles around which Labour Law was built.

2) In the Portuguese paradigm, there has been a recent legislative reform to support parental leave, which promoted measures on the right to request flexible working time arrangements (with reference to the main changes provided by the Law n.º 120/2015, of September 1st). Do you think that the amendments provided by this reform on banking hours, part-time working, etc., could support work-life balance?

In this topic, as in others, the great problem of Portuguese labour regulations is mainly linked to the high level of ineffectiveness and non-application of standards, combined with a productive

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framework mostly based on micro and small-sized enterprises, and little support in human resources and enforcement resources from the inspective institutional bodies.
Apart from the creation of a distortion effect to the competition between enterprises, this factor drastically reduces the level of effectiveness of legal protection, even in key aspects such as rules limiting working hours, whether normal or extra. The 2012 revision of the Labour Code worsened the situation even further, repealing the obligation to report certain data to the *Autoridade das Condições de Trabalho*. The implications of poorly-implemented rules are worsened by the subsequent introduction of a multitude of flexibility schemes of working time management: in particular, the proliferation of working schedule exemption, adaptability and banking hours' regimes without the involvement of collective bargaining.
Furthermore, legislation contains loopholes, which can hardly be considered as unintentional. For example, article 211.º of the Labour Code, which transposes the fundamental rule contained in article 6.º of Directive 2003/88/EC, is one of the few regulations whose violation is not associated with the application of an administrative sanction: there is kind of "subliminar" message limiting the effectiveness of that (fundamental) rule that explains its absence in judicial rulings.
All this strongly reduces the possibility of balancing work and family life (although this principle is included in point b) of n.º 1 of article 59.º of the Constitution of the Republic).
In this context, the very limited scope of measures introduced by Law n.º 120/2015 do not have significant relevance. Moreover, several of them, by virtue of generic (quasi-programmatic) legal formulations, are unlikely to produce a significant evolution towards a more adequate balance between work, family and personal life.

3) In Italy, article 8 of the Decreto Legislativo n.º 81/2015 expanded the right to request part-time work to those who provide care to other suffering from a progressive chronic degenerative pathology (without prejudice to the already existing right to request part-time work to support a parent, spouse or children with oncologic disease, total and permanent incapability to work, who are in need of continuous assistance). Given the ageing Portuguese population, are you in favour of the possibility to extend the right to request flexible measures to workers who need to take care of their spouse/parents in the Portuguese context?

The adequate framework of time dedicated to taking care of family and dependents should be one of the vectors of evolution of the discipline of working time. Unfortunately, and contrary to what is happening in Italy and other countries, this issue is not sufficiently researched in Portugal.
That said, it will certainly make sense to extend to caregivers, in appropriate terms, protections like access to part-time work or flexible work arrangements. Nevertheless, it is also necessary to ensure that these protection mechanisms are harmonized with business needs, both in their modelling and implementation, which is not always the case. As such, the rules laid down to safeguard parenthood in the context of flexible or part-time work are poorly defined and have been applied in a manner which can jeopardize the normal functioning of enterprises – which, in practical terms, and considering the problems related to labour inspection referred to above, ultimately works to the detriment of these categories of workers.

4) Without prejudice of the position already taken on the role of the CITE [2] on flexible working time schedules (the Author expressed his opinion in an article co-authored with Bernardo da Gama Lobo Xavier, "Organização flexível do tempo de trabalho (competências da CITE)",

[2] The *Comissão para a Igualdade no Trabalho e no Emprego* (CITE) is public entity with a tripartite collegiate body with representatives of the Government, representatives of unions and representatives of employers ' associations. Its primary functions are to promote equality, protection on parenting and reconciliation of work and family life of workers, having authority to issue opinions on working time, for example, in case of denial of permission for part-time or flexible hours for workers with children under 12 years old.

Revista de Direito e Estudos Sociais, 2014, n.º 1-4, pp. 33-80), do you think that trade unions can have an important role in favouring employee-friendly flexible working time arrangements?

At a first glance, the answer must be positive. The intervention of collective bargaining, with the substitution of heteronomous impositions by autonomous negotiation, the increase of legitimacy, the possibility of attending to the idiosyncrasies of sectors, companies and organizational contexts, the consideration of the relevant interests of those to whom the norm apply, all this leads, in theory, to the consideration that the mediation of the collective regulation can produce a more adequate equilibrium in the conciliation of work, personal and family life matter.
On the other hand, it is well known that, as with all flexibility devices, it is all about knowing the interests served by these schemes and, ultimately, those who run them. In this regard, it is very enlightening the rich patrimony of the Italian collective bargaining in respect to the matter of banking hours. Furthermore, collective bargaining could temper these regimes that essentially favours the interest of the employer.
Moreover, these issues have sustained the affirmation of the paradigm of the so-called "flexible guarantism".
However, this generic consideration to the intervention of collective bargaining does not dismiss the reflections about possible obstacles of great relevance.
In Portugal, the preponderance of quantitative negotiation is a given, to the detriment of qualitative negotiation. The negotiating parties are not sufficiently aware or willing to negotiate flexibility. In this respect, it suffices to refer to the "*Adaptabilidade*" regimes: although the law already showed, since 1991, openness to these schemes, making them dependent upon collective agreement, its application was extremely low until 2003, when the then approved Labour Code allowed its establishment by agreement between employer and employee.
On the other hand, it is undeniable that there exist structural obstacles to the intervention of collective bargaining, which derives from the conjugation of the "*Princípio da filiação*" enshrined in the law (according to which conventions apply only to employment relations between workers affiliated to the representative unions and employers who either directly entered the agreement or are affiliated with signatory employers' organisations) with a very low union affiliation rate. It is well known that it was exactly this obstacle that justified the legal enactment of such mechanisms as "*Adaptação grupal*" or group banking hours.
In addition, other structural factors, linked to the dynamics of union representation, may cause discouragement. The doubts on the ability of trade unions to interpret the interests of increasingly segmented employees' universes are well known, both from the intergenerational and labour market views.
Taking this into consideration, I would say: certainly, collective bargaining may have great relevance in these matters, but it is doubtful that there are conditions for a truly efficient intervention, as long as these structural obstacles are not dealt with.

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