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**Smart Working.
Dialogues between Portugal and Italy**

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ABSTRACT

The digitisation process is changing the way we work. Besides this, we are looking at a slow but profound change in the conception of work, particularly regarding the interests of employees. Considering the implementation of Smart Working in Italy thorough Lavoro Agile regulation, we are going to analyse the Portuguese legal framework, in order to understand if a new regulation is needed or if we can implement Smart Working in Portugal using the interpretative way.

Keywords: Smart Working; Lavoro agile; Digitisation

Smart Working. Dialogues between Portugal and Italy

SUMMARY: 1. Introduction. – 2. Smart Working: concept. – 3. *Lavoro Agile*, the Italian version of Smart Working. – 4. Smart Working and employment contract. – 4.1 Legal subordination vs independent work. – 4.2 Power of management and responsibility for results. – 5. The contract of employment content. – 5.1 Teleworking. – 5.2 Workplace. – 5.3 Working time. – 5.3 Remuneration. – 6. Conclusion.

1. Introduction*

The profusion of Information and Communication Technologies (1) (ICTs), which leads to the liquefaction of social roles, also allows the emergence of new models of work (2). Those models do not imply physical presence in the workplace, which is promoted by digitisation (3), and they constitute a real departure from the recent trend of labour law, marked by flexicurity policies, which in turn were responsible for weakening the position of the employee. This is the case of Smart Working, a new Management paradigm that advocates for the granting of greater autonomy and flexibility to the employee, in choosing the time, place and way of work, as a counterpart of greater accountability for results. Its central element is the appreciation of the person and the promotion work-life balance.

We propose to gauge the legal and labour compatibility of the Smart Working, seeking to see if there are reasons that justify its framing in Portugal. In this analysis of compatibility, we will list the main problems that trigger the labour law constituted and which existing mechanisms allow its application.

* Whenever the legal norm does not mention the regulation, it is presumed that it refers to the Portuguese labour code.

(1) T. COELHO MOREIRA, *A privacidade dos trabalhadores e o controlo electrónico da utilização da Internet*, *QL*, 2010, n. 35-36, pp. 25-35, on how ICTs and the Internet shape and influence business and personal life.

(2) C. TOUMIEUX, *Directive 91/533/EEC and the Development of New Forms of Employment*, in *New Forms of Employment in Europe*, ed. R. Blanpain - Frank Hendrickx, Wolters Kluwer, 2016, pp. 72 ss.

(3) Referring to a digital revolution, supported by internet, cloud computing and new ways of working, T. COELHO MOREIRA, *Algumas questões sobre Trabalho 4.0*, *PDT, CEJ*, Edições Almedina, 2016, II, p. 246.

2. Smart Working: concept

Smart Working (4) is a new management philosophy based on restoring the person the flexibility and autonomy in choosing the workplace, time and instruments to use, in return for higher responsibility for results (5). Flexibility, autonomy and collaboration are assumed as slogans, focusing attention on the person of the employee, who is given greater autonomy in the management of his work (6).

From a management perspective, Smart Working implies the combination of three variables: workplace, technology and behaviour.

As for the former, it is believed that space should be designed in such a way as to provide spaces that optimise the work performance (e.g. open spaces, areas designed to promote teamwork) and that enhance concentration (isolated, calm areas), as well as areas of leisure and rest.

Secondly, the use of technologies should be designed considering the needs and activity of the company and its employees. Since each organization has its characteristics, we cannot suggest a universally applicable model. However, we can give some examples like the creation of internal file-sharing networks, the digitisation of documents (to be accessible anywhere in the world at any time) and the creation of virtual teams (7).

Finally, referring to people and their behaviour, the concern for the well-being of the employee and working conditions stands out. There will have to be a redefinition of how managers, employers and employees communicate with each other. Effective people management (8) can increase productivity. We can also observe a progressive abandonment of vertical work towards horizontal work are underway, affecting the traditional existence of hierarchy

(4) Also known as Agile Working. Cf. The Agile Organisation.*

(5) Smart Working Observatory of Politecnico di Milano.* For a better framing of the theme it is indicated the reading of another study of the Author, J. MOREIRA DIAS, *Smart Working*, in *Los Actuales Cambios Sociales y Laborales*, I, Lourdes Mella Méndez (Dir.), Peter Lang.

(6) M. BIAGI, *Quality of Work, Industrial Relations and Employee Involvement in Europe: Thinking the Unthinkable?*, in *Quality of Work and Employee Involvement in Europe*, M. BIAGI, Kluwer Law International, 2002, pp. 3 ss.

(7) J. PISSARRA, *Equipas Virtuais ou Virtualização do Trabalho em Equipa*, in *Psicossociologia do Trabalho e das Organizações – Princípios e Práticas*, coord. SÓNIA P. GONÇALVES, Pactor, 2014, pp. 391 ss. In this chapter, the author presents several advantages in the use of virtual teams, for example the possibility of companies being able to operate in markets with diverse cultural contexts.

(8) For more developments, K. DAVIS – J.W. NEWSTROM, *Human Behavior at Work – Organizational Behavior*, McGraw-Hill International Editions, 1989, p. 7.

and subordination in a company (9). Moreover, the idea that more hours of work are equivalent to higher productivity is increasingly undermined (10) by the realisation that with the right organisation it is possible to get better results in equal or shorter periods of time (11).

This idea takes us to the concept of good practices (12), referring to a set of actions and planning that a company must carry out, taking into account its specific characteristics, and which combines multiple factors, namely compensation and remunerations systems, motivational elements or recruitment and selection procedures (13).

3. *Lavoro Agile*, the Italian version of Smart Working

With the approval of Law no. 81, dated May 22, 2017, the Italian legislator pioneered and introduced in its legislation the Italian version of the Smart Working, with the goal of adopting measures that favour subordinate work's flexible articulation in time and place.

The art. 18 co. 1, under the heading *lavoro agile* (14), introduces a new system of labour flexibility, which aims to increase productivity and enable better conciliation of private and professional life. It consists of the provision of subordinate work, resulting from an agreement between the parties, with a form of organisation in phases, cycles and objectives and without the imposition of limits related to time and workplace. Thus, the work is performed in part at and outside the employer's premises, with no physical

(9) CIPD, *Smart... op. cit.* p.11, where it refers the tendency in the adoption of an organization of the vertical work for a horizontal organization. The example of the company WL Gore is given, that it adopted an organization without hierarchy, professional categories or chains of command (cf. p. 25).

(10) A. BORGESÉ, *from Great Place to Work Italia*, states that the application of the SW in a company should not be a logistical or technological problem, but rather because of the ability to trust. He adds that it is necessary to avoid believing that performance and productivity at work are associated with the time spent in the workplace. G. MASI, *Let's Trust the Agile Working*.*

(11) R. TAYLOR, *Un Temps Pour Travailler, Un Temps Pour Vivre*, in *Le Temps de Travail en Europe*, Syros, Paris, 1995, pp. 111-117.

(12) European Agency for Safety and Health at Work, *Healthy Workplaces Good Practice Awards 2014-2015 – Managing stress and psychosocial risks at work*, Publications Office of the European Union, 2015.

(13) Smart Working practices consist on organizational systems development that facilitate the relationship with the client, benefiting both the business and individuals, A.M. MCEWAN, *Smart Working: Creating the Next Wave*, Routledge, New York, 2016, p. 20.

(14) We recommend consulting ADAPT organization's webpage to get access to more content. *

presence, limited only to the normal daily and weekly working hours (considering the maximum limits imposed by law or through collective bargaining). It is also possible to use the technological tools available to provide the work, not meaning that they must necessarily be used. Paragraph 2 stipulates that responsibility for the instruments of work lie with the employer.

Subsequently, art. 19 provides for a written form for the conclusion of *Lavoro agile* agreement, and it must include the way work is carried out outside the establishment, the form of exercise of the power of management and the instruments used, as well as technical and organisational measures to promote employee disconnection through electronic devices. It is ensured that the employee who carries out his activity under this modality does not receive less favorable treatment in relation to other employees (article 20, paragraph 1); gets access to continuing vocational training (article 20, paragraph 2); and also benefits from the appliance of existing tax incentives attributed to the recognition of increased productivity and efficiency at work.

The art. 21 concerns the powers of control and disciplinary action, which provides that the mode of control and disciplinary sanctions be governed by the agreement of *lavoro agile*. To achieve this, actions which may trigger disciplinary sanctions outside the company's headquarters must be considered. As such, this provides a plus on existing disciplinary measures, increasing the range of behaviours that can integrate disciplinary procedures.

About safety and health at work, art. 22 establishes a principle of cooperation between the parties to prevent risks related to the provision of work outside the premises of the employer.

However, this legislative consecration is not exempt from criticism, claiming to have fallen short of expectations, namely by remaining attached to the concept of subordination (15) and unable to withstand the impact of the fourth industrial revolution. In a convergent sense, Emanuele Massagli (16), affirms that it is an insufficient regulation, clinging to the conflict between subordination and autonomy, and impregnated with the already outdated idea of teleworking (17). In Italy teleworking is not regulated in the private sector, at least legally. The existing regime is the result of collective bargaining, and it

(15) M. SACCAGGI, “*Primo commento al “lavoro agile”: finalità e ipotesi regolatorie*”, Bollettino ADAPT, 02/11/2015.*

(16) E. MASSAGLI, *Il lavoro è agile. La legge meno*, bollettino ADAPT, 02/11/2015.*

(17) In Italy, telecommuting is not regulated for the private sector, only guidelines exist in some sectoral collective agreements. About the subject, L. SERRANI, *Problemi e Prospettive del Telelavoro – Tra Teoria e Prassi*, tesi di dottorato, Scuola di Dottorato in “Formazione della persona e mercato del lavoro”, XXVI ciclo, pp. 19 ss.*

is a very demanding legal regime, so it is difficult for companies to bear the burdens inherent in such a practice. Thus, *lavoro agile*, which has been applied informally, at the company level, is an alternative route for the implementation of telework, more accessible and with lower costs, although it is affirmed that it is a different paradigm of teleworking. The difference here is the possibility of being the employee to define the contours of this provision.

Emanuele Dagnino (18), about the temporal element of the provision, argues that there should be no predetermination of the timetable, with the limits resulting only from the maximum limits established by law and IRCT. The current configuration, reflected in some collective bargaining agreements on flexible work, puts work out of the workplace in temporal correlation with the work performed at the employer's premises. The assumption is that productivity and performance should be primarily offered through distance work, and it is necessary to change mindsets and break with the vision of physical presence in the workplace.

4. Smart Working and employment contract

Up to this point, we have presented the Smart Working as a new business management paradigm. It is now essential to select the points of contact with some of the essential matters of the employment contract. They are the concession to the employee of greater autonomy (19) and flexibility in the management of the time, place and way of work; on the other hand, higher accountability for results.

The relations of the future find support in two axes: Mobility (the existence of several workplaces or collaborative working groups through social networks, for example) and Flexibility. As stated by Liberal Fernandes (20), the flexibility of work related to the organization of the company relates to flexibility in contractual forms, flexibility of working time, flexibility of remuneration (eg in terms of individual and collective productive variation) and flexibility in work organization (teamwork, simplification of hierarchical

(18) E. DAGNINO, *Lavoro agile: una questione definitoria*, bollettino ADAPT, 02/11/2015.

(19) The autonomy is understood as the margin of decision granted to the worker in the definition of the form as it gives its main activity and the secondary tasks. F.J. GELLERT - R. SCHALK, *Youth Employment: Students' Preferences for Mobiflex Work*, in *Productivity, Investment in Human Capital and the Challenge of Youth Employment*, Cambridge Scholars Publishing, Newcastle, 2011, pp. 158 ss.

(20) L. FERNANDES, *Algumas ...*, *op. cit.* pp. 205-206.

relations, geographical mobility and flexibility of the tie of subordination, which includes work at home or teleworking).

From the company's point of view, it should be noted that the adoption of this type of policy necessarily involves risks for the employer: for example, the supervision of the contractual obligations and the duties of the employee and the prevention of occupational risks, regarding health and safety in the job.

Having said this, in this chapter we will first examine the problems raised by the Smart Working in substantive labour law, and then we will survey the existing instruments and adapt to this new form of work.

4.1. Legal subordination vs independent work

As Júlio Gomes (21) points out, «Labour law remains essentially the right of subordinated labour, and it is still "open", as some stress, to self-employment, so that subordinate labour is the cornerstone of construction, "the touchstone" of labour law». In this expression is understood the significant problem that we face, in this case, when introducing new forms of work that attenuate subordination. In the past, subordinate work was easily identifiable, but with the introduction of new and more flexible forms of work, it can be provided either on an autonomous basis or as subordinate work. Within this concept, Romano Martinez (22) differentiates economic subordination from legal subordination, noting that the first criterion has no relevance to employment contract qualification.

However, the contract of employment (articles 11 of the Labour Code and 1152 of the Civil Code) is that by which a natural person undertakes, by way of remuneration, to provide his activity to another or other persons within the organisation and under the authority thereof. For its part, "the Service Agreement is one in which one of the parties undertakes to provide to the other a certain result of its intellectual or manual work, with or without remuneration" (article 1154 of the Civil Code). As stated in the case-law (23), it «is deprived of any legal reference to statements which may be of any significance or value, or which can be renewed or projected in the social,

(21) *Op. cit.* p. 103. Cf. R. MARTINEZ, *Direito do Trabalho*, Almedina, Coimbra, 8ª Edição, 2017, pp. 315 ss. e M. FERNANDES, *Direito do Trabalho*, 17ª Edição, Almedina, Coimbra, 2014, pp. 121 ss.

(22) R. MARTINEZ, *Relações Empregador Empregado*, in *Direito da Sociedade da Informação* – Volume I, Coimbra Editora, 1999, p. 187.

(23) Ac. do STJ de 10/08/2015, processo n.º 292/13.5TLabour CodeLD.C1.S1.

economic and legal areas in which the terms "organization", "authority", "direction" or "subordination", understood as defining bonds of a relation, such as labour, which presupposes the integration and dependence of a part - which is obliged to provide the result of its work - to the other party». It should not be understood, however, that those who provide the activity are outside the instructions given by the person who benefits from the benefit (24), which often contributes to the widening of the doubts in the classification between labour contract or contract for service.

When it is necessary to define the formal contractual relationship underlying a given legal relationship (25), the typological method and the evidence-based method, with an apparent prevalence of the latter, are used because they are more effective (26). The evidence-based method allows us to gauge the existence of subordination or autonomy through specific indications (internal and external) (27), among which we highlight the organization of work, trying to verify who is responsible for this task; the result of the work, trying to perceive if the contract has in view the result or the activity itself (28); the workplace (29); working hours; the ownership of work tools (30); and the form of payment of retribution (31).

About the qualification of the employment contract, we issued a note for its concept and for updating the operational criteria of the presumption of work (Article 12). As regards the first, we believe that the insertion of the

(24) B. LOBO XAVIER, *op. cit.* p. 350.

(25) Veja-se, A. MENDES BAPTISTA, *Qualificação contratual e presunção de laboralidade, Estudos sobre o Código do Trabalho*, 2ª Edição, Coimbra Editora, Coimbra, 2006, pp. 63-81.

(26) M. LEITÃO, *op. cit.* pp. 128 ss. Sobre o tema, R. MARTINEZ, *Trabalho subordinado e trabalho autónomo*, in *Estudos do Instituto de Direito do Trabalho*, I, Almedina, Coimbra, p. 287; M. FERNANDES, *Direito ...*, *op. cit.* pp. 130 ss. Veja-se ainda o Ac. do STJ, de 27/11/2007, proc. n.º 07S2911.

(27) M. LEITÃO, *op. cit.* p. 131-133.

(28) R. MARTINEZ, *Direito...*, *op. cit.* p. 319 e ff. With particular relevance, *vide* G. TELES, *Contratos Cíveis (Projecto completo de um título do futuro Código Civil Português e respectiva exposição de motivos*, BMJ, 1959, n.º 83, p. 165.

(29) Work at a distance and the existence of virtual companies put this clue in question, as indicated by J. GOMES, *op. cit.* p. 132.

(30) Ac. STJ, de 02/12/2014, proc. n.º 3813/05.3TTLSB.L3.S1. The provision of a portable computer by the employer, as well as the recommendation and the availability of software that allows to make expert reports and send the resulting reports, does not constitute an indication of legal subordination, since it is only intended to facilitate the result.

(31) No SW a retribuição deverá estar, por norma, concebida em função dos resultados, através de modalidades de retribuição variável. M. FERNANDES, *Direito...*, *op. cit.* p. 127, abordando o pagamento à peça ou por tarefa, que sugere que o objeto do contrato está vocacionado para os resultados, dá conta de que este é uma fórmula de pagamento que também se encontra no trabalho subordinado.

expression “within the organization” emphasizes the integration into a business organization of the subordinate employee, by adhering to the understanding of Rosário Palma Ramalho(32), when she states that this component should be considered as an essential element of the contract, and not as a mere hint of subordination. About the second, the improvement of this mechanism is noted, above all by the indications and criteria of choice taken, as well as by the consequences that result from apparently independent work, regarding paragraphs 2, 3 and 4, art. 12.

The Smart Working calls into question all the signs listed here, especially if the employee has full autonomy. As a rule, this comes from the nature of the activity and the necessary training, as well as the position and purpose that a profession occupies. From labour law, the employment contract does not prejudice the recognition of the technical autonomy of the employee, as is provided, for example, on the art. 116 of the labour code. However, what the Smart Working aims to implement is a *de facto* autonomy (33), which already happens in similar situations. Monteiro Fernandes (34), on the definition of art. 11 and the existence or not of acts of the beneficiary of the work, states that it does not apply to work carried out under a 'de facto autonomous regime', situations in which «it is in the interest of the beneficiary of the work not to direct, order, not to impose a certain mode of execution of the activity, giving, finally, prevalence to the criterion of the organizing element of subordination».

In the case of the Smart Working, the problem is that the use of this form of work can lead to the so-called escape for self-employment (35) since this type of function can be exercised autonomously or with an attenuated subordination.

(32) R. PALMA RAMALHO, *Delimitação do Contrato de Trabalho e presunção de laboralidade no novo código do trabalho – breves notas*, in *Direito do Trabalho + Crise = Crise do Direito do Trabalho? - Actas do Congresso de Direito do Trabalho*, Escola de Direito do Porto da Universidade Católica Portuguesa, Coimbra, 2011, pp. 293 ss.

(33) M. FERNANDES, *O triste fado dos maestros titulares ou o problema da subordinação invisível*, RDES, p. 121 ss.; J. GOMES, *op. cit.* p. 124 «Em suma, o que releva é que o operário altamente especializado pode, na prática, apenas receber directivas muito genéricas, mas o seu empregador (ou superior hierárquico competente) pode ainda dar-lhe instruções concretas se assim o desejar.».

(34) *O triste fado...*, *op. cit.* p. 123.

(35) R. MARTINEZ, *Direito...*, *op. cit.* p. 317, where it states that recourse to self-employment may be the result of fraudulent motives, to prevent mandatory rules of labour law, or it may result from the will of the parties, when this arises from the manner of providing the activity.

4.2. Power of management and responsibility for results

Recalling the teachings of Júlio Gomes, the power of management of the employer expresses «in the faculty of determining the provision of work done by the employee» (36). The benefit is not utterly indeterminate in the employment contract, but it lacks preciseness, depending on the circumstances of each activity. It unfolds in the faculty of directing the benefit, which influences the mode, time and place of the benefit. On the other side is the power of control (37), instrumental about the power of direction.

As Annamaria Donini (38) elucidates, smart organizations have contradictory contours: on the one hand it is necessary to have the courage to trust the employee, delegating the responsibility in him and accepting a partial decrease of the control of direction of the activity (39); on the other hand, the use of the new technologies entails a high exposure to the technological control and monitoring, which puts in the availability of the employer a vast amount of information.

There are specific activities (40) under the employment contract which presuppose a more significant contribution (in some instances, a real responsibility) to achieving a result. Alain Supiot (41) establishes a relation between the recognition of the personal element of the work contract, the professional qualification of the employee and its influence on their accountability, and subordination. This is exemplary in the case of the employee-managers when there is a secondment, but also in other situations of individual employment contracts. It may be said that from this relationship

(36) *Op.cit.* p. 123. Cf. R. PALMA RAMALHO, *Tratado de Direito do Trabalho*, Parte II – *Situações laborais individuais*, Almedina, Coimbra, 6ª Edição, 2016, pp. 728 ss.

(37) In the case of workers who work through digital platforms, the question arises in a different way: the power of direction is shared with the user: he proceeds to the immediate control of the performance (assisted by such platform, eg. in the case of Uber, the user can check the route that is followed), followed by a procedure in which the customer evaluates the service.

(38) A. DONINI, *Nuova flessibilità spazio-temporale e tecnologie: l'idea del lavoro agile*, in *Web e Lavoro – Profili Evolutivi e di Tutela*, a cura di P. Tullini, Giappichelli, 2017, p. 81.

(39) M. FERNANDES, *Direito... op. cit.* p. 123, «There is, therefore, a progressive devaluation of managerial behaviors in the characterization of subordinate work».

(40) R. MARTINEZ, *Direito... op. cit.* p. 319, gives the example of the "uncertain fixed-term contract to" (...) the execution, direction and supervision of civil construction works (...)", referring to paragraph 3 of art. 140.

(41) A. SUPIOT, *Crítica del Derecho del Trabajo*, Ministerio de Trabajo y Asuntos Sociales, Subdirección General de Publicaciones, 1996, pp. 121 ss.

of trust (42) will result in a broad set of "rights-duties" (43) and accessory duties of conduct (44), typical of long-term obligatory relationships, such as the contract of employment (45).

The general principle of good faith must also be taken into account, with particular emphasis on the duty to promote the improvement of company productivity (art. 128); the duty of custody (g) no. 1 art. 128 and 168); the duty of non-competition and the duty of secrecy (art. 128); and the duty to participate in vocational training actions (d) no. 1 art. 128).

Thus, if on the one hand the employee is granted greater autonomy in the choice of his place and time of work, the employer benefits from more efficient forms of control of the benefit (46), and this should be complemented by the reinforcement of the duties to which the employee is subject.

5. The contract of employment content

At this point, we will mention some of the existing mechanisms in our planning that allow us to concretise (47) the Smart Working. It would extract the object of this work an analysis held by each one of these legal institutes. We will limit ourselves to referring them, with few considerations because it seems to us that their connection with the Smart Working results from the considerations made up to this point.

(42) On trust as an organizational culture and its economic value, V. PELLIGRA, *Fiducia e produttività: sulla natura relazionale dell'agire economico*, *Sindacalismo – Rivista di studi sulla rappresentanza del lavoro nella società globale*, Rubbettino Editore, 2009, pp. 55 ss.

(43) A. VARELA, *Das Obrigações em Geral, Parte I*, 10ª Edição, Almedina, Coimbra, p. 61.

(44) On primary and secondary duties and conduct duties, A. VARELA, *op. cit.*, pp. 121 a 129.

(45) A. SUPLOT, *Crítica... op. cit.* p. 128, « The other side of the autonomy that is granted to the professional is the commitment without fainting that is demanded of him, it is a loyalty that goes beyond the strict contractual obligations. »

(46) *Vide* T. COELHO MOREIRA, *Controlo do correio electrónico dos trabalhadores: comentário ao acórdão do Tribunal da Relação do Porto, de 8 de Fevereiro de 2010*, *QL*, 2009, n.º 34, 2009, pp. 219–224, on the use of e-mail messages of a personal nature, sent and received by the company's computer, and their relevance as evidence in a disciplinary offense.

(47) About changes to the employment contract, R. MARTINEZ, *Direito... op. cit.* p. 751.

5.1 Teleworking

Currently, Teleworking (articles 165 to 171 of the CT), an atypical form of work, is presented as the «work performance performed with legal subordination, usually outside the company and through the use of information technologies and communication». It can be provided at home, in a telecentre or mobile telework. In fact, the expression 'usually outside the company' does not necessarily imply that the work is carried out at home or in teleworking centres. As for the second, it refers to online telework (one-way line or two-way line, the latter allows real-time electronic control by the employer) or offline.

Under paragraph 1 of art. 166, the employee of the company can be teleworked (see article 167) or another contractor for that purpose. In any of these cases, the contract must follow the formalities imposed in paragraph 5 of the same article. In this area, the written form is required, and the agreement must contain the express reference to the teleworking regime and the position or functions to be performed. Otherwise, it will not be considered subject to the teleworking regime.

Regarding the use of NICTs, Rosário Palma Ramalho (48) warns against the danger of too broad an interpretation of the IT element, stating that this element should be understood «as an essential element to the performance of the activity and not as a simple working tool». This understanding is increasingly undermined as the evolution and integration of ICT (49) in all jobs, and all sectors of activity make it difficult to know when the use of new technologies is essential to the performance of the activity. In this way, and to ensure that more employees benefit from this regime, a current and dynamic interpretation, albeit casuistic, must be adopted.

Teleworking is one of the possibilities within the Smart Working (50), although the figures are easily confused. There are some points of contact, such as the conciliation of private and professional life, employee autonomy, the existence of mutual benefits between the employer (e.g. cost reduction) and employees (autonomy) and use of ICT. However, we understand that the Smart Working, although it refers to it, is more comprehensive than teleworking, possessing other valences. It should be noted that teleworking

(48) *Tratado...II, op. cit.* p. 342.

(49) R. REDINHA, *O teletrabalho*, in *II Congresso Nacional de Direito do Trabalho – Memórias*, Almedina, Coimbra, 1999, p. 3.

(50) G. REBELO, *Teletrabalho... op. cit.* p. 5, « the opportunity to create a contract that seeks autonomy and responsibility on the part of its workers ».

among us has received a modest reception: the Green Paper on Industrial Relations – 2016 (51), gives an account of the weight that it has in the Portuguese context: in 2010 there were 2464 contracts of employment and are currently 805.

There is also a significant similarity between the *lavoro agile* regime and teleworking. It differs, above all, in the degree of autonomy granted to the employee and in the possibility that the employee has, by agreement, to negotiate the terms in which the executive power will be exercised. At the level of the protection of privacy and the right to rest, Italian regulation goes further, by predicting the embryonic right to disconnect (52). Prevention regarding safety and health at work is also benefited by the encouragement of collaboration between these two parties.

5.2 Workplace

As Bernardo Lobo Xavier (53) points out, the workplace (54) integrates 'contractual matter' and is also a matter of the right to information (art. 106). Under paragraph 1 of art. 193 the parties must predetermine workplace. It is, moreover, one of the essential elements of the contract, which constitutes the obligation to provide work. On the one hand, the employee confirms all his life according to the place where he will provide his activity, which ends up having a relevant impact on the level of the organization of his private life; on the other hand, the establishment of the workplace is a relevant and strategic interest of the company, subject to a series of variables, among which are the accesses, rental income, tax incentives, among others.

According to Menezes Leitão (55), «the parties are in principle free to establish to a greater or lesser extent the place of work (an indication of the street, locality or county)», and may also stipulate alternative locations. However, it states that there should be no undue indetermination of the workplace. In this sense, Joana Nunes Vicente asks what the limits to contractual freedom (56) should be, and affirms that the predetermination of

(51) *Cf.* pp. 177-178.

(52) C. MATHIEU - M.M. PÉRETIE – A. PICAULT, *Le droit à la déconnexion: une chimère?*, RDT, n. 10, Dalloz, 2016, pp. 592-598.

(53) *Op. cit.* pp. 513-514.

(54) R. PALMA RAMALHO, *Tratado...II*, *op. cit.* p. 495-498.

(55) *Op. cit.* p. 280.

(56) J. NUNES VICENTE, *Cláusulas de definição do local de trabalho*, *QL*, 2013, n.º 42, p. 219.

the geographical parameter in the contract should be as precise as possible (57).

Rosário Palma Ramalho (58), referring to the concept of a place of work, lists some hypotheses which make it more difficult to determine, namely «Work contracts in which, because of their structural specificity, the activity is carried out at the premises of an entity other than the employer, albeit in a stable way». In these cases, the employer's premises «may have an additional relief», but should not be confused with the workplace.

The Labour Code grants a broad power to shape the workplace (article 193), and the parties may, with some restrictions, change it (59). The employer has the power to unilaterally change the workplace (Articles 129 co. 1, lett. f and art. 194), although it is limited by the criterion of serious injury to the employee.

Thus, once the initial considerations are taken into account, if the employee is given the option of freely choosing the workplace, the concerns inherent in the predetermination of the workplace disappear. As for the employer, it is only in the typical job that the employee is required to work at the defined location. In the activities in which the result is interested, from the moment we accept the new paradigm of work, the result must be deferred to the activity, conceiving the workplace in another way.

It seems to us, therefore, that the placing of a clause whose content allows the employee to choose his place of work freely does not call into question any value of the public order. The importance of the workplace has to be relativised when in situations where the domain of the employer loses importance, namely by the will of the parties, and also as a consequence of the use of ICT.

5.3 Working time

The Smart Working promotes the autonomy of the employee in the choice of his work schedule, which will have to be coupled with the interests of the management of the employer. Also, it is up to the employer to prepare the schedule, under art. 212, in compliance with the maximum limits allowed by law and the rest time to be granted to the employee. The employer may, in

(57) *Idem*, *op. cit.* pp. 228 e *ff.*

(58) R. PALMA RAMALHO, *Tratado...II*, *op. cit.* p. 499.

(59) R. MARTINEZ, *Direito...*, *op. cit.* pp. 762-771.

principle, unilaterally change schedule (article 217 *a contrario*) (60), except for those situations where the timetable has been individually agreed (article 217, paragraph 4). In this case, the amendment needs the employee's agreement, and it is still discussed whether the employee must give his consent in the case mentioned above (61).

While it is not our aim to provide an exhaustive description of the mechanisms for working time flexibility (62), we are particularly interested in exemptions from working hours (Articles 218 to 219) because they have a closer connection with the Smart Working. It allows three modalities: non-compliance with the maximum limits of the NTP; possibility of increasing the NTP by day or week; and, third, compliance with an established NTP between the parties. However, we raise some reservations about the subjective scope of application, when there is no IRCT that regulates or does not promote a broadening of its scope.

The law assumes that the figure is harmful and must be limited, which is evident not only because the lawmaker does not authorise the application of this figure to any employee, but also because it provides for exclusive remuneration. However, according to paragraphs (a) and (c) of paragraph 1 of art. 218, the IHT may hold, for the exercise, positions of administration or direction, or of functions of trust, supervision or support to the holders of that office; or telework and other cases of regular exercise of activity outside the establishment, without immediate control of the superior.

So, can the employee who operates within the Smart Working can benefit from this scheme? We believe unless we have a better opinion, which the wording of the rules in force does not preclude the application of the IHT, although we should not ignore any extension of the subjective spectrum of this figure by the legislator.

(60) C. CARVALHO, *Da dimensão...*, *op. cit.* p. 279. On the modulation of working time, R. MARTINEZ, *Direito...*, *op. cit.* p. 752-756.

(61) *Idem*, p. 280.

(62) Among others, the labour code regulates the adaptability of working hours, hour's bank, part time, concentrated work or continuous journey.

5.4 Remuneration

The provision of results-oriented work is, as a rule, accompanied by a system of compensations (63). Apart from imperative questions of remuneration, for labour law, the principle of private autonomy allows a wide margin of manoeuvre in its choice (64). The periodicity and guarantee of remuneration play an essential role in financial stability, while also allowing for the stability necessary to reconcile personal and professional life.

Among the retributive benefits (65), and regarding art. 261, the remuneration can be certain (calculated according to the working time, to which may be added any subsidies), variable or mixed (66). However, variable remuneration and mixed retribution (combining the elements of both forms) are more important in this context, since they are more appropriate to a management system by objectives and results (67). It should not be forgotten that, under the terms of arts. 273 ff., the employee shall always be entitled to the minimum monthly guaranteed remuneration.

In the scope of non-remuneration benefits, the provisions of art. 260 provides for wage supplements, productivity bonuses and gratuities (68). Besides this, employee benefits are also relevant, such as life insurance, health insurance, support for children's education, cultural and leisure programs.

6. Conclusion

The philosophy behind Smart Working is another break point with the current labour paradigm, especially the way the employee is viewed. Juan Bengoechea (69) affirms that if century XIX was dominated by the machine and in the century XX by the technician, the century XXI belongs to the human resources.

(63) R. PALMA RAMALHO, *Tratado...II*, *op. cit.* p. 658, about the duty to contribute to the improvement of worker productivity. We add that this duty is also fulfilled through the incentives offered.

(64) R. MARTINEZ, *Direito...*, *op. cit.* pp. 772-774.

(65) R. PALMA RAMALHO, *Tratado...II*, *op. cit.* pp. 691 e ff. Cf. M. LEITÃO, *op. cit.* pp. 345 e ff.

(66) R. MARTINEZ, *Direito...*, *op. cit.* p. 606-607.

(67) G.J. BORJAS, *Labor Economics*, McGraw-Hill Education, New York, 2016, pp. 458 ss.

(68) Cf. R. MARTINEZ, *Direito...*, *op. cit.* p. 609.

(69) J. BENGOCHEA, *Derecho del Trabajo, ¿Víctima o Culpable?*, *Nueva Revista Española de Derecho del Trabajo*, 2017, n. 196, p. 32

The paradigm of the employee of the future is based on the concept of talent and its competences, in contrast to the ideas of function and job position. In fact, qualifying flexibility, along with the right policies, can produce the second result: on the one hand, it strengthens and qualifies the employee; on the other hand, companies can adapt to the future, especially in crisis contexts.

However, we do not want to see an overly optimistic view of the concept of flexibility, not only because of caution but also because of what history is showing. Thus, we advocate that flexibility should be tending towards the service of the employee, promoting citizenship (70) and the humanisation of work, through greater collaboration between the parties. Also, as regards the way in which the implementation of NICT should be pursued, the interests of the employees should be taken into account to facilitate the conciliation of private and professional life.

As we have seen, the Smart Working elements of the labour law concern the granting of *de facto* autonomy to the employee and greater accountability for results. This set is typical of independent work, and this situation can dictate a new exodus and opportunism in the use of autonomous work.

Given the above, what is the best way to regulate Smart Working? Moreover, can it correspond to a model of employment contract?

The Italian scheme of *lavoro agile* results from reality that is somewhat different from the Portuguese, as we have already mentioned, overlapping in some respects with the telework scheme. Moreover, the regulation has been criticised for remaining attached to the elements of legal subordination, referring in this point to the criticisms that had already been pointed out.

About the creation of a special scheme, we believe that this will not be the best solution, given that the problem is in the very concept of work, as well as in the methods that allow qualification as an employment contract. Although this discussion is debatable, given the specificities of this form of work, the truth is that there already exists in our legal system, not only the will but also the mechanisms necessary to implement the Smart Working. As stated by Pedro Pais de Vasconcelos (71), «prudence requires that you do not

(70) On the concept of citizenship at work, see U. MÜCKENBERGER, *Citizen at Work. A Guiding Principle for Social and Trade Union Policy, Transfer – European Review of Labour and Research*, 2016, Vol. 22, n. 1, pp. 29-30.

(71) P. PAIS DE VASCONCELOS, *Contratos Atípicos*, 2ª Edição, Almedina, Coimbra, 2009, p. 23.

innovate where you can achieve the desired result with the use of tried and true formulas», because the freedom of attachment allows the replacement and removal of standard clauses (72).

However, the main reason has to do with the nature of the relations that are established between the parties. As Júlio Gomes (73) points out, the working conditions of the new employees become increasingly individualised, which leads to the resurgence of the importance of the individual labour contract, negotiated by both parties, directly or through collective bargaining. In the case of the Smart Working, the difficulty is in translating the proper guidelines for business management into the legal-labour field. Given the multiplicity and reality of each company, conditioned by its activity and size, all changes cannot be brought back to a small regulatory framework. So much so that the use of imperative norms can significantly condition individual autonomy (74) and atypical employees.

In this context, Michele Tiraboschi (75) refers to the importance of incentive norms as standards for economic operators and inducing them to adopt behaviour which is in the general interest of the economy and employees. Moreover, mandatory rules are often seen as a limitation, whereas incentive rules constitute an opportunity, a chance to gain access to a benefit. In this way, acting through the path of behaviour, it becomes feasible to change mentalities and promote the application of new forms of work. About the Smart Working, this will involve a greater conciliation between professional and private life, increased efficiency and productivity, the application of ICT and the granting of greater autonomy to employees and consequent accountability for results. Because, more than breaking with the traditional view of legal subordination, we must guarantee professional and material equality between typical employees and atypical employees, which can only be achieved by changing the concept of work (76).

Looking to the future and to the opportunities generated by the Smart Working, namely its advantages, we believe that its implementation can

(72) J. MORAIS CARVALHO apud R. PINTO DUARTE, *op. cit.* p. 26, on the boundaries that define typical and atypical contracts.

(73) *Op. cit.* p. 110.

(74) J. MORAIS CARVALHO, *op. cit.* pp. 167 e *ff.* See also H. EWALD HÖRSTER, *A Parte Geral do Código Civil Português – Teoria Geral do Direito Civil*, Almedina, Coimbra, 2003, pp. 51 *ss.*

(75) M. TIRABOSCHI, *Teoria e Pratica dei Contratti di Lavoro*, ADAPT, ADAPT University Press, 2016, pp. 24-26.

(76) A. SUPIOT, *Crítica...*, p. 291. Cf. J. GOMES, *op. cit.* pp. 115 e *ff.*, on the redefinition of labour law.

revitalise labour law, promoting among others, the role of negotiation in its individual and collective dimensions. In our view, and considering that we have opted for a broad Smart Working concept, we are before a new model of work, which aims to take advantage of new forms of work while focusing on the value of the person-employee. On the other hand, labour law may have a privileged position in the reaction to the impact of digitisation, primarily since the first concerns of the legislator, both national and European, will be reflected in the economic regulation of the phenomenon (77).

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