Global Workplace Law & Policy

The right to disconnect – or as Portugal calls it – the duty of absence of contact

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The right to disconnect has been one of the most talked about labour topics in recent years at European level. Recently, the topic took the spotlight in Portugal.

1. The Portuguese new bill

Law 83/2021, of 6 December 2021, which entered into force at 1 January 2022, amended the Teleworking Framework set forth in the Portuguese Labour Code (PLC) and imposed a duty on employers to refrain from contacting employees outside regular working hours.

One of the initial questions that arises is whether we can consider that, when talking about a duty of abstention of contact by the employer and a worker's right to disconnect, we are talking about the same thing? The answer must be negative, even though its practical consequences are similar.

The absence of clarity in the new article 199-A of the PLC creates practical issues there are not easy to solve, thereby making its effective implementation difficult. As regards the worker, the legislator chose not to refer to a right to disconnect, but rather to his/her right to a rest period,

which is understood here as the period in which the worker is not contractually obliged to remain available for the provision of work (which excludes situations of overtime work or on-call work, for example).

In Portugal, there were several bills before this amendment. However, they were all rejected on the grounds that Portuguese labour law already guarantees this protection to workers through the rules in force on the right to rest, hence the references to the worker's right to a rest period are not a coincidence.

Regarding the legislative process and contextualising the emergence of this duty to abstain at a national level in Portugal and its correlation with the right to disconnect, it is relevant to mention the European Union concerns; namely the need to regulate the right to disconnect which may be the subject of a directive suggested by a Resolution of the European Parliament to the European Commission which has made the necessary follow up.

There is currently no European legal framework directly defining and regulating a right to disconnect, even though the Working Time Directive (Directive 2003/88/EC) refers to several rights that indirectly relate to similar concepts, in particular the minimum daily and weekly rest periods that are required to safeguard workers' health and safety. Also, the desire to set up a right to disconnect is related to attaining a better work–life balance, *i.e.* an objective that has been at the core of recent European initiatives (*e.g.* Principles 9 ("Work–life balance") and 10 ("Healthy, safe and well-adapted work environment and data protection") of the European Pillar of Social Rights), although they do not refer specifically to the right to disconnect.

In the COVID-19 pandemic crisis context, namely when most workers where on remote work and the frontiers of work time and rest time were faint, the European Parliament, on 21 January 2021, passed a resolution in favour of the right to disconnect, calling on the European Commission to prepare a directive that enables those who work digitally to disconnect outside their working hours and that also should establish minimum requirements for remote working and clarify working conditions, hours and rest periods. This initiative concluded that pursuant to the TFEU, the social partners have a three-year period within which the FAD may be implemented before any legislative proposal could be laid down also, which was not, however, welcomed by the European Social Partners who plead for the rejection of this initiative (see Joint ETUC/ETUFs Letter to the Members of the European Parliament), for several reasons, in particular that «*This amendment creates a dangerous precedent that will undermine the ETUC and the European social partners' capacity to negotiate and conclude a European autonomous agreement in the future, if the existence and implementation of that autonomous agreement means no legislative action can be taken by the Commission for a period of three years.*». In sum, European Social Partners argued that, on one hand, it would be better to rely on the European framework agreement on digitalisation that the European social partners concluded in 2020 than to pass one-size-fits-all legislation and, on the other hand, that this agreement does not cover the right to disconnect and called on the Commission to consult the European social partners, pursuant to Article 154 of the Treaty on the Functioning of the European Union. Currently, the decision lies with the European Commission who has the right of initiative and that already ensured appropriate follow-up.

On the national level, and without prejudice to the existence of legal protection of the right to the worker's rest period, the Portuguese legislator considered, even so, relevant, to regulate a duty of the employer which corresponds, in practice, to the better-known right to disconnect.

The establishment of this new duty of the employer is deliberate, insofar as the Portuguese legislator intended, contrary to the legal solutions adopted in other European countries such as France, Spain and Italy, to place the burden on the employer to ensure compliance with the worker's right to rest, refraining from making contacts which could disturb that right and reinforcing the idea that it is not only a right of the worker not to be disturbed during his rest period but also, and above all, a duty of the employer to refrain from such acts and to prevent such disturbance of the worker's rest.

This configuration also guarantees additional protection to the worker, insofar as it prevents him, as a matter of principle, from having to claim and enforce his right, placing him in a position of greater vulnerability in the face of possible retaliations (direct or indirect) by the employer. The law ends up removing the employer's responsibility, in part, to adopt measures that guarantee the effectiveness of his post-labour rest. In addition, the law establishes that the breach of this duty by the employer constitutes a serious administrative offence.

2. Practical problems

a. Does the duty to abstain from contact only cover teleworkers?

Although the enshrinement of this duty of the employer appears in the context of the amendment to the legal regime of telework, it is not to be confused with or limited to its scope of application, which is why it is a new and autonomous subject to that of the amendment to the telework regime.

Therefore, the duty to abstain from contact covers subordinate workers, as well as non-subordinate workers, but in economic dependence under the legal terms, regardless of the type of work provision adopted (i.e. whether they work face-to-face or remotely).

b. Who is the "employer" for the purposes of the duty to refrain from contact?

The Portuguese law does not give a direct answer as it does not expressly define the concept of employer. However, an employer should be the natural or legal person who, under the terms of the law, holds the labour powers of direction and discipline, either directly or delegated.

Therefore, in practical terms, the employer may be both the director or manager of the company and the employee's hierarchical superior and direct superior (e.g. a director or head of department), and it is up to each of these persons to refrain from contacting the employee outside working hours.

Thus, the burden of not contacting the employee no longer applies, from the outset, to contacts between co-workers, as they do not fulfil the concept of employer, even though, at European Union level, in the proposal for a directive on the right to disconnect, this duty to refrain from contact is also extended to contacts between colleagues.

c. What should be considered as "contact"?

The law does not define what is to be understood by contact in this context. And so, we are faced with an undefined concept that will have to be analysed on a case-by-case basis. In a general and more cautious manner, contact should be understood as any form of attempt to communicate with the worker during their rest period (e.g. telephone calls, Microsoft Teams meetings and even e-mails or SMS).

However, in an optimum risk management approach, it seems justifiable that some contacts are riskier than others (for example, a phone call to the worker's mobile phone indicates a desire for a more assertive contact than the sending of an e-mail when the worker is in cc, especially if we are within the context of a multinational company where contacts do not obey the constraints inherent to the various time zones in question).

However, as the legislator has not defined the concept of contact for the purposes of compliance with this duty, it is up to the employer to adopt internal mechanisms to safeguard the absence of a legal concept, namely through internal policies.

d. How does the duty to abstain from contact relate to the need to work overtime or flexible ways of organising working time (for example, exemption from working hours)?

There is a problem of articulation, conciliation and compatibilization of a new duty of the employer to abstain from contacting the worker, except in situations of force majeure, with situations of a contractual or regulatory nature existing or to be established (e.g. exemption from working hours, overtime work, work on call, among others), in which workers have the obligation to remain available to be contacted outside the workplace and outside working hours (when these exist) for situations in which this is deemed necessary by the employer.

In fact, this duty to refrain from contact by the employer was designed to cover the reality of the worker with a fixed work schedule, with well-defined working hours and rest periods, and not for the realities of flexible working hours, such as the exemption from working hours schemes where the rest period is more difficult to define insofar as there are no working hours and, therefore, an eventual contact by the employer also presents fewer risks.

e. What are considered situations of "force majeure"?

Once again, we are facing an undetermined concept. Some Portuguese authors[1] have already commented on the issue and adopted the jurisprudential concept of force majeure equivalent to that which is usually considered under the overtime work regime (i.e., the idea of inevitability and exceptionality, often linked to natural phenomena, which, due to being uncontrollable and not even predictable by the agent's will, are not liable for their consequences, such as fires or floods). Nevertheless, and without prejudice to the criticisms to the legislator's option, which proves to be reductive to the practical reality of companies, it should be noted that the proposal for a Directive on the right to disconnect extends the situations that may constitute derogations to the worker's right, including not only situations of force majeure, but also other emergencies, leaving some margin to the employer to define the criteria that may justify such derogations.

To this extent, if the proposal for a directive is approved and this option of the European legislator is consecrated, the Portuguese option will necessarily have to accompany this more flexible understanding of the situations of derogation applicable in these cases.

f. What are the consequences for a worker who refuses contact from the employer during their rest period?

The law guarantees protection to the worker against any less favourable treatment given to him, namely as regards working conditions and career progression, due to the fact that he exercises his right to a rest period. As a result, the rule will be that any refusal by the worker to accept a contact, outside working hours, is a legitimate refusal and, therefore, cannot be sanctioned. The problem

lies in the refusal of contact by the worker in situations in which the employer can prove the need for contact (e.g. force majeure), although this analysis must always be made on a case-by-case basis.

3. Closing remarks

The understanding and practical application of this new duty of the Portuguese employer is bound to cause more doubts than certainties. Even so, it seems that the best way to ensure compliance with this duty of the employer and to minimise its practical risks is, in our opinion and as also suggested by the European Commission, to implement internal policies within the companies and organisations, which materialise the operationalisation measures of said duty, adapted to the labour and business reality of each company.

Finally, it should not be forgotten that this initiative of the Portuguese legislator may be short-lived, should the Directive on the right to disconnect become a reality, which will require a necessary revision by the Portuguese legislator.

[1] António Monteiro Fernandes, "O "dever de abstenção de contacto" na Lei 83/2021", *in Direito Criativo Blog*, 9th December, 2021; and João Leal Amado "Teletrabalho: o "novo normal" dos tempos pós-pandémicos e a sua nova lei", in Observatório Almedina, 29th December 2021.

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