

## Reconciling professional and family life for promoting gender equality in Portugal: some considerations and prospects in the light of the new Directive 2019/1158 on work-life balance for parents and carers

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# RECONCILING PROFESSIONAL AND FAMILY LIFE FOR PROMOTING GENDER EQUALITY IN PORTUGAL: SOME CONSIDERATIONS AND PROSPECTS IN THE LIGHT OF THE NEW DIRECTIVE 2019/1158 ON WORK-LIFE BALANCE FOR PARENTS AND CARERS



## RÉSUMÉ

La directive (UE) 2019/1158 concernant l'équilibre entre vie professionnelle et vie privée des parents et des aidants est l'une des premières initiatives visant à promouvoir le Socle Européen des Droits Sociaux. Elle a le mérite de formaliser clairement le lien entre la conciliation du travail et de la vie familiale et l'égalité entre les hommes et les femmes, s'agissant notamment des opportunités sur le marché du travail et du traitement au travail. Cet article soulignera les aspects plus substantiels de la directive et son impact sur la législation portugaise. Une partie des nouveautés introduites par la directive 2019/1158 ne nécessitent pas d'être transposée au plan national, car le cadre portugais va déjà au-delà des dispositions minimales du droit de l'UE. Néanmoins, certains aspects doivent conduire à la modification de la législation portugaise et contribueront certainement à améliorer la conciliation entre travail et famille.

**MOTS CLÉS:** *Équilibre entre vie professionnelle et vie privée, congé de paternité, congé parental, congé d'aidant, formules souples de travail, égalité des genres.*

## ABSTRACT

Directive (EU) 2019/1158 on work-life balance for parents and carers is one of the first initiatives aimed at promoting the European Pillar of Social Rights and has the merit of unequivocally formalizing the link between reconciliation of work and family life and equality between men and women with regard to labour market opportunities and treatment at work. In this paper, we will highlight some of the most relevant topics of the directive and its impact on the Portuguese framework. As it will be explained, many of the novelties introduced by directive 2019/1158 do not need formal implementation, since the Portuguese framework already goes beyond the minimum provisions of EU law. Nonetheless, there are some aspects that must lead to the amendment of the Portuguese legislation and that will surely contribute to improve reconciliation between work and family.

**KEYWORDS:** *Work-life Balance, Paternity Leave, Parental Leave, Carers' Leave, Flexible Working Arrangements, Gender Equality.*

The role of EU law in defending fundamental social rights in the context of the global economic recession that followed the 2008 financial crisis was clearly disappointing<sup>1</sup>, including the very role of the Court of Justice of the European Union (CJEU), which has shown to be weak and powerless<sup>2</sup>.

Furthermore, there was a complete paralysis of the legislative activity in the field of social policy<sup>3</sup>, even when social partners agreed on the need for European regulation and on its content, as happened with the so-called « Coiffure Directive »<sup>4</sup> - paradigm of this deliberate inertia. Despite its limited content, this framework agreement became « a highly politicized battleground for European social dialogue », with the European Commission taking an unprecedented decision to block the proposed Directive<sup>5</sup>.

As it was foreseeable, in times of crisis, flexicurity<sup>6</sup> left us only with the « flexi » part... It had been mentioned in the Council Conclusions « Towards common principles of flexicurity » (6 December 2007) that the latter « requires a cost-effective allocation of resources and should remain fully compatible with sound and financially sustainable public budgets ». In a time of serious sovereign debt crisis, flexicurity was used to justify the reduction of social protection level without giving anything in return, that is, without « an adequate trade-off between flexibility and security »<sup>7</sup>.

The situation changed with the European Commission led by Jean-Claude Juncker and the development of the so-called European Pillar of Social Rights<sup>8</sup>, which was proclaimed by the European Parliament, the Council and the Commission on 17 November 2017 and sought to give a new impetus to the worn out « European social model ». However, the insistence on the concept of « flexicurity » and the difficulty in creating hard law solutions

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- 1 C. O' Cinneide refers to a substantial disconnection « between rhetoric and practice when it comes to translating the abstract concept of a 'social Europe' into the language of social policy ». See « Austerity and the faded dream of a 'social Europe?' », in AA.VV. (A. Nolan ed.), *Economic and social rights after the global financial crisis*, Cambridge, Cambridge University Press, 2014, p. 187.
  - 2 G. Orlandini, « Los derechos fundamentales de los trabajadores en la jurisprudencia del Tribunal de Justicia de la Unión Europea », *Revista de Derecho Social*, 2015, no. 69, p. 58.
  - 3 See A. Bogg & R. Dukes, « The European social dialogue: from autonomy to here », in AA.VV. (Dir. N. Counntouris & M. Freedland), *Resocialising Europe in a time of crisis*, Cambridge, Cambridge University Press, 2013, p. 483; O' Cinneide, *op. cit.*, p. 187.
  - 4 <https://www.eurofound.europa.eu/observatories/eurwork/articles/commission-rejects-proposed-agreement-in-hairdressing-sector>
  - 5 K. Bandasz, « A framework agreement in the hairdressing sector: the European social dialogue at a crossroads », *Transfer - European Review of Labour and Research*, 2014, Vol. 20(4), pp. 505 seq.
  - 6 See Green Paper « Modernising labour law to meet the challenges of the 21<sup>st</sup> century » - COM (2006) 708 final.
  - 7 See J. L. Amado, « Dinâmica das relações de trabalho nas situações de crise (em torno da flexibilização das regras juslaborais) », *Revista do Ministério Público*, 2009, no. 120, p. 97; S. Laulom & C. Teissier, « Which securities for workers in times of crisis? An introduction », *European Labour Law Journal*, 2014, no. 3, pp. 207 and 210; P. Loi, « Risk: a new paradigm to face market challenges », *European Labour Law Journal*, 2014, no. 3, pp. 390 seq.
  - 8 See COM (2016) 127 Final.

based on this non-binding legal instrument raised legitimate doubts about the success of this project<sup>9</sup>.

Therefore, it was with some surprise that we witnessed the approval of two new directives based on the European Pillar of Social Rights in a faster and easier process than we had forecasted. One was Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June on work-life balance for parents and carers<sup>10</sup>, whose approval was even more surprising if we bear in mind the recent failure of the attempt to revise Council Directive 92/85/EEC of 19 October on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

## **I - THE NEW DIRECTIVE (EU) 2019/1158 ON WORK-LIFE BALANCE FOR PARENTS AND CARERS: A POSITIVE APPROACH TO GENDER EQUALITY**

Directive (EU) 2019/1158 on work-life balance for parents and carers is, therefore, one of the first initiatives aimed at promoting the European Pillar of Social Rights, specifically its principles 2 (Gender equality) and 9 (Work-life balance), as well as part of the development of the EU Strategic Engagement For Gender Equality (2016-2019).

This new Directive builds on the rules laid down in the previous Directive 2010/18/EU, which implemented the revised Framework Agreement on parental leave concluded by European social partners (repealing Directive 96/34/EC)<sup>11</sup>, but goes far beyond these former legal texts<sup>12</sup> whose purpose was mostly narrowed down to the regulation of a strict « parental leave », without underlining the obvious link between gender equality and reconciliation issues.

It is true that Directive 96/34 evolved towards the recognition of the topic of reconciliation between professional and family life as an autonomous issue in relation to the topic of protection of pregnant, puerperal and breastfeeding women. The approach was also quite different from the one adopted by the Maternity Leave Directive (the so-called « exception » approach<sup>13</sup>), « because the role of both parents in the reconciliation of family and working life was recognized, mainly by the granting of the leave on the basis of an individual and

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9 M. Ramos Quintana, « El Pilar Europeo de Derechos Sociales: nos ponemos serios? », *Trabajo y Derecho*, 2016, no. 24, pp. 12 seq.

10 The other one was Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June on transparent and predictable working conditions in the European Union.

11 Council Directive 2010/18/EU of 8 March implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

12 This result was only possible because the absence of an agreement among the social partners to enter negotiations regarding parental leave allowed for a more ambitious proposal.

13 In this approach, « maternity provisions are a justified exception to equal treatment between men and women ». A more detailed analysis of this « exception approach » to the topic of maternity protection *vis a vis* the gender equality principle in employment and occupation can be traced at M. R. Palma Ramalho, « Reconciling family and professional life and the gender equality principle in employment », *European Gender Equality Law Review*, 2009/2, pp. 10 seq.

in principle non-transferable right of each parent »<sup>14</sup>. The subsequent Directive 2010/18 reinforced such approach but was clearly insufficient. On the one hand, it did not provide enough incentives for men to assume an equal share of caring responsibilities, and, on the other hand, it did not explicitly assume that a balanced participation of women and men both in professional and in family life is a material condition to achieve gender equality at work (the « integrated » approach<sup>15</sup>).

Therefore, the new broad designation of Directive 2019/1158 (« work-life balance for parents and carers ») should be commended, as well as the explicit formalization, in article 1, of the link between reconciliation and equality between men and women with regard to labour market opportunities and treatment at work.

Nonetheless, the new Directive does not go so far as to determine that discrimination on the grounds of reconciliation shall be considered sex discrimination, when, in fact, if care responsibilities are not equally shared by both parents, this unbalanced division enhances direct and indirect sex discrimination practices in access to employment and at the workplace<sup>16</sup>. Despite that, this Directive broadens the concept of reconciliation, strengthens the existing conciliation rights, introduces new rights and strongly contributes to an integrated perspective on the issues of gender equality and work-life balance.

## II- THE PORTUGUESE FRAMEWORK ON WORK-LIFE BALANCE: RECENT DEVELOPMENTS

### A - GENERAL REMARKS

Portugal has the highest rate of female employment in southern Europe and relies on a mix of informal and family-basis care and social care services<sup>17</sup>. Yet, care responsibilities within the family are still shared in an unbalanced way between male and female workers and the traditional gender role model is prevalent<sup>18</sup>. Consequently, the high rate of female employment is mostly feasible due to easy access to affordable domestic workers<sup>19</sup> and to

14 M. R. Palma Ramalho, « The implementation of the Parental Leave Directive 2010/18/EU, with reflections on a harmonized approach to the maternity and parental leave », *Research Paper*, Brussels, European Union, 2015, p. 9.

15 *Ibid.*, pp. 29 seq. Previously, this approach had been highlighted by a non-binding EU instrument. In fact, the Resolution of the Council and Employment and Social Policy Ministry meeting within the Council on 29<sup>th</sup> June 2000 regarding the balanced participation of women and men in family and working life (2000/C 218/02) had drawn attention to the need to adopt a global and integrated approach towards the promotion of balanced participation of men and women in family and working life as one of the basic conditions for *de facto* equality.

16 M. A. Ballester Pastor, « La conciliación de responsabilidades: estado de la cuestión a la luz de la propuesta de Directiva de la Comisión Europea de 26 de abril de 2017 », *Lan Harremanak*, 2017-II, no. 38, pp. 73 seq.

17 Eurofound, *Working and caring: reconciliation measures in times of demographic change*, Publications Office of the European Union, Luxembourg, 2015, p. 34.

18 See statistical data made available by Comissão para a Igualdade no Trabalho e no Emprego (CITE) at <http://cite.gov.pt/pt/acite/estatisticas.html>

19 Referring to domestic work as « the “other” of women’s liberation », quoting I. Brasão, see M. Abrantes, « A densidade da sombra. Trabalho doméstico, género e imigração », *Sociologia, Problemas e Práticas*, 2012, no. 70, p. 93.

family (namely, grandparents) support, a situation that became particularly clear during the current pandemic. In most cases, part-time work is involuntary, in the sense that people take it when they have no other option (because full-time jobs are not available) and almost 2/3 of part-time workers are women<sup>20</sup>.

Maternity and paternity are important social values protected by the Portuguese Constitution (article 68) and, accordingly, the Portuguese legislator has been continuously increasing the protection of parental rights in the Portuguese Labour Code (herein, PLC<sup>21</sup>), as well as the associated welfare benefits. A major amendment of the labour regime to protect parenthood took place in 2009, leading to the adoption of gender-neutral language. The idea was to promote the sharing of parental responsibilities through the creation of a common « initial parental leave » (*licença parental inicial*), which can be shared between the mother and the father<sup>22</sup>, thus eliminating the previously titled « maternity leave », a designation that attributes the primal childcare role to women. As a consequence, several types of leave concerning childbirth and care of young children are called « parental leave » (including maternity leave). This modification brings about some frequent confusion in the identification of the different national leaves, since their designation does not correspond to the European one. More recent improvements in the parenthood labour and social protection were implemented by Law 120/2015 of 1 September, and Law 90/2019 of 4 September.

To the PLC amendment (2019) strongly contributed the so-called « *3 em Linha - Programa para a Conciliação da Vida Profissional, Pessoal e Familiar* »<sup>23</sup>, a Programme for Reconciling Professional, Personal and Family Life launched by the Portuguese Government in 2018 with the aim of promoting a better work-life balance as a condition for effective equality between men and women and for full citizenship. This programme is still ongoing, and it might lead to further future modifications, since the total results should be available in 2021.

## B- PATERNITY LEAVE

According to article 43 PLC, there is a compulsory paternity leave<sup>24</sup> of 20 working days, to be taken during the six weeks that follow the childbirth, 5 of which shall be taken immediately after the birth. The compulsory nature of this legal provision can be considered a positive action to promote the role of fathers in the care of young children<sup>25</sup>. No period

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20 See *Livro Verde sobre as Relações Laborais 2016*, Ministério do Trabalho, Solidariedade e Segurança Social, Lisboa, 2016, pp. 177, 253.

21 [http://www.pgdlisboa.pt/leis/lei\\_mostra\\_articulado.php?nid=1047&tabela=leis](http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1047&tabela=leis)

22 In general, both parents are entitled to 120 or 150 consecutive days of « parental leave » after the childbirth, which can be split between them as they wish, with some limits (article 40 PLC), namely a mandatory period of six weeks for the mother after the childbirth (article 41 PLC).

23 <https://www.portugal.gov.pt/pt/gc21/comunicacao/documento?i=3-em-linha-programa-para-a-concilia-cao-da-vida-profissional-pessoal-e-familiar-2018-2019->

24 Applicable to both fathers and equivalent second parents, according to the recently added article 33-A PLC.

25 J. Gomes & C. Carvalho, « Portugal », in *International Encyclopaedia of Laws: Labour Law and Industrial Relations*, R. Blanpain (ed.), Kluwer Law International, 2011, Suppl. 374, p. 25; M. R. Palma, Ramalho, P. Foubert & S. Burri, *The Implementation of the Parental Leave Directive 2010/18 in 33 European Countries*, Gender Equality Network of the EC, European Commission, Brussels, 2015, p. 11.

of work qualification, nor a minimum length of service is needed, and the worker's marital or family status is irrelevant, as long as he is not barred or totally inhibited from exercising paternal rights. It is, therefore, a more favourable provision than the one laid down by article 4 of Directive 2019/1158.

Furthermore, there is an additional non-compulsory leave of 5 working days, and 2 extra days for each additional twin in the case of multiple births.

This paternity leave is deemed as effective working time, except for salary purposes (article 65 PLC). Still, it is paid by social security based on 100% of the average salary of the father (articles 15 and 31 of Decree-Law 91/2009)<sup>26</sup>. Because of being considered effective working time, all rights acquired or in the process of being acquired by the worker on the date on which paternity leave starts stand until the end of the leave, thus complying with article 10 of the new Directive. What is more, article 65(3) PLC clarifies that paternity leave suspends the vacation period, does not obliterate the time spent in any apprenticeship or training and postpones the assessments for career development until the end of the leave. Additionally, the worker benefitting from the paternity leave has the right to return to the same job on terms and conditions which cannot be less favourable to him (article 65(5) PLC). Although there is no specific provision in the PLC mentioning the right to « benefit from any improvement in working conditions to which they would have been entitled had they not taken the leave», as stated in article 10(2) of the new Directive, such interpretation is perfectly allowed by the qualification of paternity leave as effective working time.

### C- PARENTAL LEAVE

The parental leave regulation (article 51 PLC)<sup>27</sup>, which implemented, in the national framework, firstly Directive 96/34 and afterwards Directive 2010/18<sup>28</sup>, will need some amendments in order to comply with the new Directive 2019/1158. However, in some respects, it goes beyond what is demanded by the latter.

To begin with, the Portuguese parental leave points towards the assistance to children up to 6 years of age, including an adopted child who has the very same legal treatment<sup>29</sup>. Thus, the Portuguese legislator chose to stay below the 8 years old's cap allowed by the Directive.

This leave can assume four different modalities: (a) 3 consecutive months; (b) or, in alternative, part-time work during 12 months, with a normal workday equal to half the full workday; (c) or a combination of the two previous options, in which the total duration of

26 This allowance is only granted if the worker has six months of contributions to the social security system (article 25 of Decree-Law 91/2009).

27 The PLC designates this leave as « complementary parental leave » (*licença parental complementar*) in order to differentiate it from the « initial parental leave » (*licença parental inicial*), which in 2009 substituted the traditional maternity leave, as explained above.

28 Regarding Directive 2010/18, Portugal has not proceeded to formally implement it, since it considered that national legislation already complied with EU law.

29 Not only parents and candidates for adoption benefit from this leave. Legal guardians and people who have legal or administrative guardianship, as well as their spouses or common-law partners, also do, as long as they live with the child (article 64 PLC). The PLC complies with the challenge launched by EU law « to grant the right to parental leave to all workers who exercise parental responsibilities in accordance with national legal systems » (recital 21 of Directive 2019/1158).

the leave and the reduction of working time are equal to 3 months' working time; (d) finally, collective agreements can allow, as an alternative, interpolated absences from work with a duration equal to 3 months' working time. No period of work qualification or length of service is needed.

As we can see, Portuguese legislation already provides for flexible uptakes of parental leave (i.e., part-time, piecemeal) as aimed by Directive 2019/1158. However, compliance with EU law is unclear, since the standard parental leave's modality does not reach 4 months, as it was already determined by the previous Directive 2010/18. Some legal literature considers that compliance « results from the fact that there are several modalities of parental leave or childcare leave that can be taken successively and that, when considered together, far exceed the minimum duration of parental leave, as set in the Directive »<sup>30</sup>. This view is, in our opinion, debatable. On the one hand, the Directive (article 5(6)) only refers to « flexible ways » to take the parental leave as a right recognized to employees and not as an obligation to be imposed on the worker. In the Portuguese case, if workers choose the standard modality of parental leave, they will only be allowed to take 3 months off. On the other hand, it is true that afterwards they will have the possibility to take another childcare leave (regulated in articles 52 or 53 PLC)<sup>31</sup>, but its regime is not as favourable to the workers as the one applicable to the first parental leave<sup>32</sup>.

Parental leave is an individual right of the employee and cannot be transferred, not even partially, to the other parent. If there are two parents entitled to this leave regarding the same child, they can choose to take the leave simultaneously, alternatively (up to three alternate periods) or in a consecutive manner. However, if both parents work for the same employer, they can postpone the leave of one of them, if justified by the urgent needs of the company. This is the only circumstance in which an employer can postpone the granting of parental leave for a reasonable period of time and must always provide the reasons for such postponement in writing.

The worker's request for parental leave must specify the chosen modality of leave, the intended beginning and end of the period of leave and give 30 days' notice.

During the parental leave, the employee cannot exercise a professional activity incompatible with its purpose. Absences from work due to parental leave do not determine the loss of any rights and are deemed as effective working time, except for payment (article 65(f) PLC). There is a small social security allowance (corresponding to 25% of the average salary of the worker), but it is limited to a very reduced number of cases: it is only granted in the standard modality of parental leave (up to 3 consecutive months) when taken immediately after the « initial parental leave » (which substituted in 2009 the traditional maternity leave) or the other's parent parental leave (article 16 of Decree-Law 91/2009). Consequently, this is the issue in which the new Directive might have more impact, since the implementation of article 8(3) will force the Portuguese legislator to extend such allowance

30 M. R. Palma Ramalho, P. Foubert & S. Burri, *op. cit.*, p. 10.

31 Once parental leave is taken, parents (or equivalents) can exercise the right to a childcare leave (*licença para assistência a filho*), up to 2 or 3 years when there is a third child or more (article 52 PLC), or to a similar leave to assist children who suffer from disability, chronic or oncologic illness (*licença para assistência a filho com deficiência, doença crónica ou doença oncológica*) up to 4 years, or more in specific situations (article 53 PLC).

32 Since it is not considered as effective working time with all the connected consequences.

to all parental leaves, regardless of the moment parents decide to take them up. In spite of this, the abandonment of the Directive's proposal to establish the payment of 4 months (now reduced to 2 months<sup>33</sup>), the level of the allowance being at least equivalent to the level of sick pay, will considerably reduce its impact on national law. It is true that according to Directive 2019/1158 the level of allowance provided for the minimum non-transferable period of parental leave « shall be set in such a way as to facilitate the take-up of parental leave by both parents » (article 8(3)), taking into account « that the take-up of parental leave often results in a loss of income for the family and that first earners in a family are able to make use of their right to parental leave only if it is sufficiently well remunerated, with a view to allowing for a decent living standard » (recital 31). However, the question that remains is whether 25% of the average salary of the worker<sup>34</sup> fulfils such criteria...

Because of being considered effective working time, all the above-mentioned considerations on the subject of paternity leave and acquired rights (or in the process of being acquired), as well as on the right to return to the same job, are also applicable to parental leave (article 65(5) PLC).

## D - CARERS' LEAVE

The ageing population, the consequent increase in the prevalence of age-related impairments, and the predictable continued rise in care needs justifies the inclusion of a carers' leave in Directive 2019/1158.

This is a provision that can positively impact the Portuguese national legal system, since, for the present moment, it only recognizes the right to take time off from work on the grounds of force majeure for urgent and unexpected family reasons, as it will be mentioned below.

In fact, Portugal has recently approved a new regime applicable to the informal caregiver (*Estatuto do cuidador informal*)<sup>35</sup>, but the employment implications of such role for the « non-primary informal caregiver »<sup>36</sup> were left for the following regulations (article 14 of Law 100/2019). Meanwhile - while proceeding to the identification of the legislative measures necessary to strengthen the labour protection of non-primary informal caregivers and the corresponding approval -, article 13 of *Portaria 2/2020* has considered temporarily applicable « to holders of parenting rights to whom the status of non-primary informal caregiver is recognized » the parenting rights provided for in the PLC. Notwithstanding, this general reference is quite ambiguous and does not seem to add any supplementary protection.

33 Which correspond to the minimum non-transferable period of parental leave guaranteed under this Directive instead of the 4 months of the proposal.

34 In 2018, the average salary in Portugal was EUR 970,4. Source: GEP/MSESS, MTSSS (PORDATA). <https://www.pordata.pt/Portugal/Salário+médio+mensal+dos+trabalhadores+por+conta+de+outrem+remuneração+base+e+ganho-857>

35 Law 100/2019 of 6 September (<https://dre.pt/application/conteudo/124500714>), regulated by *Portaria 2/2020* of 10 January (<https://dre.pt/application/conteudo/127957590>).

36 The « primary informal caregiver » cannot have a paid professional activity (article 5 of *Portaria 2/2020*).

## E - TIME OFF FROM WORK ON GROUNDS OF FORCE MAJEURE

In addition to the right to carers' leave, all workers should retain their right to take time off from work on the grounds of force majeure for urgent and unexpected family reasons, as provided for in Directive 2010/18/EU.

In the Portuguese case, workers are entitled to time off from work on the grounds of force majeure for urgent family reasons in two different groups of situations whose regime varies according to the family bond.

The first group regards the need to take care of children in the event of sickness or accident, and enables absences from work up to a maximum of 30 days per year, if the child is under 12 years old (and, regardless of age, for a disabled or chronically ill child), or to a maximum of 15 days per year when the child is 12 or more years old (article 49 PLC)<sup>37</sup>. These time limits can be exceeded in case of hospitalization of the child and in case of a second (or further) child. Assistance can also be provided by grandparents replacing the parents (article 50(3) PLC). These time-off from work periods are considered as effective working time, except for payment (article 65 PLC). Still, an allowance is provided by social security on the basis of 100% of the average salary of the worker (articles 19 and 35 of Decree-Law 91/2009) or, in case of grandparents, on the basis of 65% of the average salary of the worker (articles 21 and 37 of Decree-Law 91/2009). Because of being considered effective working time, all the above-mentioned considerations on the subject of paternity leave and acquired rights (or in the process of being acquired) apply here as well.

The second group concerns unpaid time-off from work to take care of other family members<sup>38</sup> in the event of sickness or accident and enables absences up to a maximum of 15 days per year (article 252 PLC). However, in these situations, although the absences are deemed justified for other purposes, they are not paid by the employer, nor the worker receives any social security allowance.

In both situations the need to render assistance must be considered indispensable and undelayable, and the time-off is conditioned on the requirement that the worker cannot be replaced in the care for the child/other family member.

## F- FLEXIBLE WORKING ARRANGEMENTS

According to article 3(f) of Directive 2019/1158, « flexible working arrangements » refer to « the possibility for workers to adjust their working patterns, including using remote working arrangements, flexible working schedules, or reduced working hours ».

In Portugal, workers have a legal right to adjust their working time patterns, upon request, for work-life balance purposes, using all the mentioned flexible working arrangements, although not all of them comply with article 9 of the Directive, as it will be explained.

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37 As mentioned above in the context of parental leave, also in this case, not only parents and candidates for adoption benefit from time-off from work, but also legal guardians and people who have legal or administrative guardianship and their spouses or common-law partners, as long as they live with the child (article 64 PLC).

38 Spouses or common-law partners, relatives by bloodline or by marriage in direct ascending line (e.g. parents, parents-in-law), and brothers/sisters.

Firstly, a worker with a child under 12 years of age (or regardless of age if disabled or chronically ill) has the right to change to part-time work (article 55 PLC). This modification of working time is temporary. It might last up to 2 years, or up to 3 years when there is a third child or more, or even up to 4 years if the child is disabled or has a chronic illness. The part-time work is subsidiary to the parental leave, since one of the modalities of the latter, as mentioned above, is part-time work for up to 12 months and its regime is more favourable to the worker. Additionally, the request is only admissible if both parents<sup>39</sup> have a professional activity<sup>40</sup>. In case both parents are employees and, consequently, equally entitled to work in part-time, they can decide that only one of them will benefit from it or, instead, that both are going to work in part-time in a sequential way, but never simultaneously. During the period of part-time work, the employee cannot exercise a professional activity incompatible with its aim. The worker has the right to return to the original working pattern at the end of the part-time period. In case of termination of the condition that gave rise to the leave, the employee can resume work in the first job vacancy that occurs in the company or, if this is not the case, at the end of the period foreseen for the licence.

Secondly, and as an alternative, workers are entitled to a flexible time schedule under the same circumstances that allow them to request part-time work (article 56 PLC). This flexible working arrangement is, however, more requested in practice than part-time work, since the low Portuguese salaries do not allow most families to survive on half a salary. The only differences, when compared to part-time work regulation, regard the elimination of some of the part-time requirements: there is no maximum limit for the flexible time schedule besides the age of the child; the other parent may or may not have a professional activity; and both parents can be allowed to benefit from it simultaneously.

In both cases, no period of work qualification or length of service qualification is needed. The employer can only refuse the worker's request on the grounds of compelling operational reasons or the impossibility of replacing the worker. Moreover, this justification has to be considered valid by the entity in charge of promoting equal opportunities between men and women (Commission for Equality in Labour and Employment<sup>41</sup> - CITE) and if the CITE does not agree, the employer must challenge the decision before the court in order to obtain a ruling recognizing the justification for the refusal of the employee's request (article 57 PLC).

Finally, it is also important to mention the possibility of teleworking from home recognized by article 166(3) PLC. According to this legal provision, a worker with a child under 3 years old has the right to telework if the professional activity performed is compatible with this type of work and the employer can provide the necessary means to make that change possible. However, on the one hand, the child age limit (3 years old) does not comply with the minimum threshold of article 8 of Directive 2019/158 (« children up to a specified age, which shall be at least eight years ») and, on the other hand, the PLC adopts a very narrow concept of telework, which does not include all forms of remote working

39 As mentioned above, in the context of parental leave and time-off from work, also in this case, not only parents and candidates for adoption benefit from this right time-off, but also legal guardians and people who have legal or administrative guardianship and their spouses or common-law partners, as long as they live with the child (article 64 PLC). The same applies to the flexible time schedule, but not to teleworking.

40 Or, alternatively, if the other is barred or totally inhibited from exercising parental rights.

41 Comissão para a Igualdade no Trabalho e no Emprego.

arrangements<sup>42</sup>. Furthermore, as pointed out by some legal literature<sup>43</sup>, it is very easy for the employer to invoke that they cannot provide the necessary means to make that change possible in order to refuse it.

As a final point, the scope of article 8 of Directive 2019/158 is not respected, since the previously described flexible working arrangements do not apply to every carer as defined in article 3(1)(d): « a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State ».

## **G - DISCRIMINATION, PROTECTION FROM DISMISSAL AND AGAINST ADVERSE TREATMENT**

The Constitution of the Portuguese Republic enshrines the right to job security and forbids dismissals without just cause (article 53)<sup>44</sup>. As a consequence, disciplinary dismissal is only allowed if there is a just cause which, according to article 351 PLC, must be a faulty behaviour of the employee that in light of its seriousness and of its consequences makes it immediately and practically impossible to maintain the labour relationship. Moreover, the burden of proof of the existence of « just cause » lies on the employer. In addition, the dismissal for disciplinary reasons requires a written and complex procedure, which demands, namely, a formal and detailed accusation (article 353 PLC) and a final written and grounded decision (article 357(5) PLC)<sup>45</sup>.

Hence, the employer cannot dismiss an employee for having exercised any right conferred by Directive 2019/1158 and, in case of dismissal, the employer will always have to « provide duly substantiated reasons for their dismissal », as demanded by article 12 of the Directive. The burden of proof relies on the employer.

At the same time, a disciplinary sanction is considered abusive when it is due to the fact that the employee exercises, exercised or intends to exercise or evoke rights and guarantees they are entitled to (article 331(1)(d) PLC). The disciplinary sanction (including dismissal) is presumed unfair and abusive whenever it is applied up to 6 months after such facts or up to 12 months after the denunciation or other form of exercising rights related to equality and non-discrimination (article 331(2) PLC).

Finally, article 33-A PLC explicitly prohibits any form of discrimination based on the exercise of maternity and paternity rights, namely discrimination related to attendance

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42 According to the legal definition present in article 165 PLC, telework only includes the work rendered under legal subordination and involving intensive use of information and communication technologies. See M. R. Palma Ramalho, *Tratado de Direito do Trabalho. Parte IV - Contratos e regimes especiais*, Coimbra, 2019, Almedina, p. 174.

43 M. R. Palma Ramalho, « Tempo de trabalho e conciliação entre a vida profissional e a vida familiar - Algumas notas », in *Tempo de trabalho e tempos de não trabalho: o regime nacional de tempo de trabalho à luz do Direito europeu e internacional*, M. R. Palma Ramalho & T. C. Moreira (eds.), Lisboa, AAFDL, 2018, p. 116.

44 Dismissals can, however, be allowed for economic reasons, but the selection criteria of the employees who are to be made redundant cannot be discriminatory and must be justified in the written procedure.

45 Additional protection against dismissal is conferred by article 63 PLC but only to pregnant, puerperal and breast-feeding employees or to a parent on « initial parental leave ».

and productivity bonuses, as well as adverse effects in terms of assessment and career development. The burden of proving that there has been no discrimination due to the exercise of parental rights is on the employer (article 25(6) PLC).

### III- CONCLUDING REMARKS: WHAT NEEDS TO BE CHANGED IN THE PORTUGUESE FRAMEWORK IN ORDER TO IMPLEMENT THE NEW DIRECTIVE?

The previous analysis shows that many of the novelties introduced by Directive 2019/1158 do not need formal implementation, since the Portuguese framework already goes beyond the minimum provisions of EU law.

Nonetheless, there are three main topics that must lead to the amendment of the Portuguese legislation and will surely improve reconciliation between work and family. First, article 8(3) of the Directive will force the Portuguese legislator to extend the allowance to all parental leaves, thus increasing their uptake, since the absence or the low level of the Social Security allowance granted together with the low level of salaries make it very difficult for parents to take advantage of the leave in practice. Second, a new carers' leave will have to emerge. Third, the scope of flexible working arrangements must be enlarged to all carers, just as the scope of specific remote working arrangements will have to be widened.

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