THE RIGHT TO PRIVACY AS A WORKER'S PERSONALITY RIGHT

A reserva de intimidade da vida privada enquanto direito de personalidade do trabalhador

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Trabalho enviado em 24 de fevereiro de 2023 e aceito em 08 de abril de 2023

ABSTRACT

It is crucial to strengthen the protection of the worker's personality rights, particularly, their right to privacy. Thus, we aim to analyze the protection recognized to the right to privacy, framing it within the scope of constitutionally guaranteed fundamental rights and personality rights recognized in labor law, dividing its study into three phases, namely, the pre-contractual phase, the execution phase of the contract and, finally, the phase of termination of the contract.
Regarding the method of study adopted, a bibliographic review was carried out on the subject under debate, providing a legal approach, as well as jurisprudence, to specific cases decided in the Portuguese higher courts.
The results obtained relate to the urgent need to protect the personality rights of workers who are increasingly the target of aggression by the employer. In fact, the introduction of new technologies in the world of work has increased the steering power of the employer, giving him a greater possibility of controlling the work performed by the worker and, consequently, increasing the possibility of attacks to the worker's privacy.
It is concluded that the worker's right to privacy must be understood as a limit to the employer's power of direction.

Key-words - the right to privacy, worker, personal rights, employment contract; new technologies.

RESUMO

É crucial reforçar a proteção dos direitos de personalidade dos trabalhadores, em especial, o direito à reserva da intimidade da vida privada. Assim, é nosso objetivo analisar a proteção reconhecida a este direito, enquadrando-o no âmbito dos direitos fundamentais constitucionalmente garantidos e dos direitos de personalidade reconhecidos na lei laboral, dividindo o seu estudo em três fases, designadamente, a fase pré-contratual, a fase da execução do contrato de trabalho e a fase da cessação do contrato de trabalho.
Relativamente ao método de estudo adotado, fez-se uma revisão bibliográfica sobre o tema em debate, proporcionando-se uma aproximação legal, bem como jurisprudencial, a casos em concreto, decididos nos tribunais superiores portugueses.
Os resultados obtidos prendem-se com a necessidade premente de proteger os direitos de personalidade dos trabalhadores, que são cada vez mais alvo de agressões por parte da Entidade Empregadora. De facto, a introdução de novas tecnologias no mundo laboral potenciou o poder de direção do empregador, dando-lhe uma maior possibilidade de controlo da prestação laboral do trabalhador e, em consequência, aumentando a probabilidade de agressões da privacidade deste.
Conclui-se, pois, que a reserva da intimidade da vida privada do trabalhador deve ser entendida como um limite ao poder de direção do empregador.

Palavras-chave - reserva da intimidade da vida privada; trabalhador; direitos de personalidade; contrato de trabalho; novas tecnologias.

Introduction

The idea of privacy and the reserve of intimacy of private life was originally recognized by SAMUEL W ARREN and LOUIS BRANDEIS, through a study by those, called "The right to privacy" (WARREN, BRANDEIS, dated on December 15, 1890. However, despite "the discovery or conceptual emancipation of the right to reserve of privacy of private life" or, at least, the "first essay on the subject", was due to W ARREN and BRANDEIS, the authors point to Judge Thomas Cooley, and his iconic phrase "right to be let alone", as the first approach to the concept of privacy.

With the article "The right to privacy", WARREN and BRANDEIS intended to deal with the number of photographs and newspapers that invaded the sacred precincts of domestic and private life, defending in his study the obligation of courts to consider solutions give answer to the unauthorized circulation of portraits of private people (WARREN, BRANDEIS, 1890).

Nowadays, the protection of privacy is not just about "controlling" the activity of the press, because the proliferation of technological and IT means requires increased attention to be given to privacy, in particular, to the reserve of intimacy of worker's private life.

The reserve of intimacy of private life, besides other recognized personality rights to the worker, was included for the first time in Portuguese labor legislation by the Labor Code (CT) of 2003. However, in truth, the reservation of the privacy of the worker's private life already was previously recognized, both in the Constitution of the Portuguese Republic (CRP) and in the Portuguese Civil Code (CC). In fact, the set of rights already provided for in these legal diplomas were transposed to the 2003 CT. In addition to this constitutional and civil protection, the right to privacy also enjoys criminal protection in articles 190th to 198th of the CP.

Hence, despite being "lately" included in labor legislation, personality rights of the worker were not irrelevant in our legal order, as they already resulted from the principle of dignity of the human person, as well as the constitutional norms set out in art. 24th and ss. from the CRP, standards that enshrine the fundamental rights of the person, and also the provisions of the CC, relating to the general protection of personality and personality rights, present in arts. 70th and ss. The personality rights in the CT enshrines a set of rights under merely illustrative, and whenever justified, the use of CRP and CC standards in order to complement these standards in labor legislation.

The emergence of new technologies has made Labor Law recognize the importance that must be given to worker protection, considering the greater control that, currently, is possible to exercise over your work performance, which increasingly enhances - sometimes negative repercussions - on the worker's private sphere.

Thus, it is currently possible for employers to increasingly interfere in private life of the worker, due to the use by employers of technological means that "control" the worker and his work activity, namely through the GPS location of motor vehicles or mobile devices, or through sensors placed on the chair that record the time during which the worker remains seated at his workstation.

1. The concept of private life

It is in this framework of interference that increasingly arises the need for reenforced protection to reserve of intimacy of the worker's private life, currently recognized by the worker in art. 16th of the CT.

Within the scope of the intimacy of private life, we can distinguish two phases or situations, namely, access and disclosure of aspects relating to the intimate and personal spheres of the parties concerning to your familiar, affective and sexual life, as well as your health condition and political and religious convictions. This means that, in addition to interference on the worker's private sphere, the dissemination of such elements is also prohibited.

This way, GUILHERME DRAY says that "even in cases in which there is consent by the worker concerning the employer's acknowledgment of certain aspects of the employee's private life, the employer continues to have the duty to not reveal it to third parties, or vice versa" (DRAY, 2016).

The art. 16th of the CT does not define private life. Therefore, we have to resort to literature and jurisprudence to do so, which will allow us to identify which situations demarcate themselves from the understanding of public life.

It's considered facts about the worker's private life, his personal identification, his health condition, his marital, sexual and emotional behaviors, as well as the facts that occur in your home and also your patrimony.

Within reserve of intimacy of private life, some Portuguese literature accepts and defends the “three spheres theory”, influenced by German law, which distinguishes different spheres that comprehend the private life of each person, depending on the nature of the facts to be considered within the scope of each of them and depending on the degree of protection that each one involves (ASSIS, 2005). The introducer of this theory in Portugal was Orlando de Carvalho, who autonomously, in his teaching, within of the reserve of private life, three protection zones, corresponding to three spheres of that same reserve: personal, private and secret (REDINHA, GUIMARÃES, 2003).

According to this theory, three spheres are in sight: the intimate or secret sphere, the private and the public or social sphere.

In the intimate sphere, are included situations that are completely reserved for oneself, inaccessible to third parties, which cover your family life, your health status, your political and religious beliefs and sexual behavior, whose protection is, as a rule, absolute, being unknown from others.

In the private sphere, are included facts whose knowledge a person is interested in reserving for themselves or in making them known only by a restricted number of people, whether these facts are related to daily routines, his domicile or his professional activity, even if there are aspects that integrate his private life that occur in public. In this sphere, there is only one relative protection, in which the intimacy of private life is overcome, when other superior interests oblige it.

In turn, the social or public sphere presupposes life situations that are widely known in public and which, as such, can be freely disseminated and, therefore, there is no reservation.

Following the understanding of MENEZES L EITÃO, (LEITÃO, 2016) applying the theory of the three spheres to labor relations, it is said that there is absolute protection of the intimate sphere, protection that is extensible to the private sphere, except when there is a superior right or interest that needs to be safeguarded.

2. The reserve of intimacy of worker's private life in the pre-contractual or contract formation

The question that arises here is whether employment candidates are also covered by the reservation of intimacy of private life, present in art. 16th of the CT. The CT guarantees the protection of personality rights, in particular the reserve of intimacy of private life, from preliminary of the formation of an employment contract, regarding to employment candidates, (see arts. 17th and 19th of the CT).

When applying for an employment, some information duties are required from the employment candidate. In fact, art. 106 of the CT states that "the worker must inform the employer on relevant aspects to the work activity". However, this information duty has a negative limit that extends to matters related to the candidate's private life, therefore only relevant aspects to the work activity must be provided to the employer in the period leading up to the suspension of the contract. Thus, applying here the theory of three spheres, the employment candidate is only obliged to provide information related to his/her public sphere, not having to inform the employer of aspects related to his intimate and private sphere, although there are exceptions. In the understanding of MENEZES LEITÃO, in the case of the worker know any circumstances that may prevent the employment contract obedience, he must reveal such circumstances to the employer (LEITÃO, 2016).

The phase pre-contractual is undoubtedly one in which the worker, here as a candidate for employment, is more vulnerable to invasions of his privacy by the employer. Since the beginning, due to the fear of not being admitted to the employment that one's applying for, it's possible that facts about the private life be revealed, limiting, voluntarily, his right to reserve the privacy of his private life, even if there is a limitation that is revocable at any time, under the terms of art. 81.º, nº 2 of the CC.

It is in this sense, and with the intention of protecting the employment candidate, that art. 17th of the CT stipulates some matters about which the employment candidate does not have to inform the employer, namely, those related to his private life, his health or his pregnancy condition.

However, the employment candidate cannot be required to inform the employer about not decisive circumstances for the legal-labor relationship that is intended to be initiated, kind of informations that may even difficult access to the opportunity. It's considered, following the

lessons of MENEZES LEITÃO, that there is an employment candidate's right to silence about aspects of his life that are not directly relevant to acquiring the job (LEITÃO, 2016).

However, this general prohibition, that there is no duty to inform the employer about aspects of his private life, state of health or pregnancy, must be relaxed depending on the own activity that the employment candidate will carry out, assuming, only in that case, that it is revealed information about his intimate, private and family life. Therefore, considering item a) of paragraph 1 of art. 17th, it is understood that the employment candidate does not have the duty to inform the employer of aspects relating to his private life, because they are within the scope of the private sphere of the employment candidate. However, this right waives when such information is "strictly necessary and relevant, to assess the respective aptitude with regard to the execution of the contract of work", and the employer must justify this requirement in writing. We are here behind an indeterminate concept, which raises the question of what should be understood as information strictly necessary and relevant? For JOSÉ JOÃO ABRANTES (ABRANTES, 2014), it will be, for example, knowing whether or not a candidate for a driver's employment tends to break the rules traffic or knowing if the employment candidate is pregnant, if the employment is as a technician of radiology. Other example is a candidate for a job of kindergarten teacher in which the employer questions him about his criminal record, this information, despite being included in the private life of the candidate and, as a general rule, restricted to the employer, it is lawful if he has anytime been convicted of the crime of pedophilia.

Another particularly urging situation relating to the art. 17th of the CT and to the duty to information of workers as employment candidates, exception to the regime set out in art. 16th of the CT, and which deserves reference, is that relating to trend companies, in which, assuming it's pursued political, club or religious interests, it is legitimated not wanting to admit as a worker someone who does not meet your ideals, either because he belongs to another political party or to a different religious association (GOMES, 2007). In the understanding of JOSÉ JOÃO ABRANTES, in these trend organizations, there are certain tasks, in which the labor provision is identified with the realization of ideals in which a company is inspired, which leads also to limitations on the worker's private life and on ideological freedoms. Should the worker "accept" these limitations in his private sphere? In this regard, JOSÉ JOÃO ABRANTES (ABRANTES, 2014) points out a situation that occurred in Germany, in which the management of a children's school belonging to an evangelical religious community fired an educator for

baptizing her son in the Catholic Church. Therefore, it is accepted, in these cases, that the employment candidate provides information related to his private life, if such information does not exceed the circumstantial proportionality.

Regarding item b) of number first of art. 17th of the CT, it's forbidden, within the scope of the intimate sphere of an employment candidate, that the employer requires information concerning health or pregnancy status. However, this information will be imperative when "particular requirements inherent to the nature of the professional activity justify it", and, in addition to what is established in item a), the reasons shall be given to the candidate in writing. Also in this aspect, it's required a link between the informations provided regarding the state of health or pregnancy and the concrete performance of the professional activity.

In this case, establishes number 2 of art. 17 that such information, relating to health or condition of pregnancy, must be provided to a doctor who can only inform the employer if the candidate is able or not to develop his activity. In this regard, the decision of the Constitutional Court, Ac. Nº. 306/2003, from June 25th, when referring to unconstitutionality of the employer's direct access to information relating to the worker or candidate's health and pregnancy status, once it is understood that there is a violation of the principle of prohibition of excess in restrictions on the fundamental right to reserve the privacy of private life, resulting from arts. 26th, nº 1, and 18, nº. 2 of the CRP.

However, there is a possibility that the employer may violate these prohibitions and question the employment candidate regarding matters relating to his private life. In these situations, the worker can remain silent, "he has right to silence" (AMADO, 2019). But will we not be here in front of an opening to the right to lying by the employment candidate when faced with illegitimate questions?

In fact, the possibility of the candidate respond falsely and lie to questions asked by the employer, not restricted to silence, must be considered. According to JOÃO LEAL AMADO, "it is judged, therefore, that in this type of cases, the only mean capable of preserving the possibility of access to employment and preventing discriminatory practices consists in the worker not remaining silent, but rather giving the employer the answer he wants to hear (and thus, occasionally, lying) (AMADO, 2019).

This way, it's accepted, following the understanding of MENEZES LEITÃO, that false statements made by an employment candidate about matters and subjects to which they are not be obliged to respond should not be considered unlawful, because they're not relevant to measure his capacity for the position for which he is applying.

For JOSÉ JOÃO ABRANTES, instead of speaking of a true right to lie, it is more appropriate to speak of a "right to keep one's intimacy private", or a "right not to reveal one's state of health", situations that are a fundamental part of the intimacy reserve of private life (ABRANTES, 2014).

In fact, to the employment candidate is only required to respond truthfully and objectively to the questions that the employer asks, as long as they are related to ones' capacity and competence to perform the functions assigned to the position for which one is are applying.

The numbers 3 and 4 of art. 17th of the CT implement the right to the protection of personal data of employment candidates and workers, aiming to ensure that they have control over the personal data provided to the employer, being able to become aware of the content of this data and the purposes for which they are intended. PAULA QUINTAS (QUINTAS, 2013) refers to this purpose the existence of a right to informational self-determination and a right to be forgotten.

The utilization of files and computer access used by the employer for treating personal data of the employment candidate and worker should be analyzed based on the current legislation regarding the protection of personal data, namely, Law nº. 58/2019, of August 8th, which ensures the implementation, in the national legal order, of Regulation (EU) 2016/679 of the Parliament and of the Council of April 27th, 2016, on the protection of natural people in relation to the treatment of personal data and to the free circulation of such data.

Art. 19th, nº. 1 of the CT establishes that, as a general rule, the employer cannot demand from the employee, as an employment candidate and for the purposes of admission to a position, carrying out tests and medical examinations, of any nature, to confirm the physical or mental condition of the individual. Nevertheless, that regulation also states that there are certain situations in which it is possible carrying out tests and medical examinations for employment candidates or workers, in particular, when such tests or physical examinations "have as their purpose the protection and safety of the worker or of third parties" or, "when particular requirements inherent to the activity justify it". The requirement must be substantiated in writing by the employer and provided to the candidate for employment or worker.

What is at stake here, once again, is the protection of the worker's intimate sphere, as employment candidate, similar to what happens with art. 17th of the CT. When referring to "the inherent particular requirements to the activity", it's presupposed a certain connection between tests and medical examinations effectively necessary and the objective characteristics of the activity to be carried out.

It is also required, based on nº 3 of art. 19th of the CT, that, after valid reasons for carrying out these tests and medical examinations, the doctor who carries them out must only inform the employer whether or not that employment candidate is capable of carrying out the proposed activity, with total confidentiality in relation to the employer, in fact, in line with what happens concerning the protection regime of data relating to health and pregnancy conditions, present in art. 17th, nº. 2 of the CT, analyzed above. Imagine a position whose main activity is handling with toxic products. In this case, it is justified that the employer asks the candidate to present medical examinations that prove that the person does not suffer from any respiratory problems.

Furthermore, nº 2 of art. 19th of the CT determines that the employer cannot demand the employment candidate present or submit himself to tests or pregnancy examinations, once is a "precept absolutely imperative, which does not admit be compromised, in name of ethical personalism and human dignity" (DRAY, 2016).

3. The intimacy's reserve of the worker's private life during the contract execution phase

During the execution of the contract, the employer has the power to "control the correct execution of work" (GOMES, 2007) carried out by the worker, which corresponds to the power of direction of the employer, as determined by the art. 97th of the CT. In fact, since the employee is legally subordinate to the employer, who holds the directive power in the labor relationship, it is understood that he, when define how the work should be carried out, giving orders and instructions, must, also, control whether the work is being carried out in accordance with such directions or not.

Hence, as RUI ASSIS (ASSIS, 2005) states, "when someone submits to the direction and authority of others, is in a position in which interference into one's own sphere is something almost inherent and, because of that, there is like a necessary and inevitable collision between subordinate work and the private sphere of those who work". In this sense, the reserve of

intimacy of worker's private life must be understood as a limit to the directive power of the employer under a contract of work.

Furthermore, currently, and considering if the introduction of more and more technologies that enable a countless number of openings for greater control on the part of the employer, favoring the emergence of new forms of monitoring the worker's work performance, it must be given increased and redoubled attention to the personality rights and, in particular, the one that may be most affected, which is undoubtedly the right to reserve of intimacy of worker's private life. This way, the CNPD (CNPD, 2013) notes that new technologies can, simultaneously, be used to enhance greater control of workers in matter of productivity, in checking the level of efficiency and measuring their competence and even serving as an instrument for measuring compliance with the employer's orders and instructions.

Regarding new forms of surveillance of the worker's performance, it must be pointed out the special vulnerability to which worker privacy was subject in the following of the pandemic, arising from the new coronavirus SARS CoV 2. In fact, due to confinements and mandatory isolations, teleworking, when possible, became the rule, which generated several questions related to the control, both of working times and of the labor activity provided from the worker's own home (CNPD, 2020). Even if the work was carried out in the worker's home and, as a general rule, without work instruments provided by the employer, in the telework regime, the employer maintains its powers of direction and control over the execution of the work. However, also in case of teleworking, it's prohibited the use of remote surveillance means for the purpose of controlling the worker's performance, as establishes art. 20th, nº. 1 of the CT. Concerning the control of working time, the CNPD understands that recording time can be made by using specific technological solutions, as long as they respect the worker's privacy and do not collect more information than is necessary to pursue that purpose (CNPD, 2020).

An essential point should be to safeguard the worker's family and affective life, being forbidden, because of that, any interference in its private life by the employer, although there are exceptions. Thus, the employer cannot dictate whether or not the employee can marry or prevent the employee from having or adopt children, being prohibited, concerning the worker's affective and sexual life, prevent him maintaining a relationship with another employee of the company, outside the workplace, so that sexual freedom of workers be conditioned by their employer's dictates. Besides, a pregnant worker cannot be discriminated for this reason, nor, in

the same way, can be that one who decides to voluntarily interrupt a pregnancy, even that such attitude be contrary to the employer's beliefs and ideals.

Also regarding the health condition of the worker, the employer must not interfere, as he cannot discriminate the worker when suffer from any health problems that do not affect his work performance, such as, for example, HIV status or any physical disability. However, regarding seropositivity, it worths to mention the judicial decision of the STJ, dated from 24/09/2008, lawsuit nº 07S3793, in which successive judicial instances considered that the fact that a cooker was HIV positive was a reason to interrupt his employment contract, as it would have make him unable to exercise his functions. In the understanding of JOSÉ JOÃO ABRANTES (ABRANTES, 2014), however, there was no basis to support that the contract had been compromised due to supervening impossibility, given the lack of minimum proof of a serious and effective risk of transmission of the virus by the cooker in the exercise of his duties because of them (AMADO, 2013/QUINTAS, 2013).

In principle, the employer shall not exercise the powers attributed to him whenever his orders conflict with the worker's personality rights, even if there are at stake relevant interests of the company concerning to its normal functioning and that respect the correct development of labor activities.

As already shown above, when an employment relationship is get started, it must be took into account that there is no worker in one hand and citizen in the other. Instead, there is, simultaneously, the subordinate worker who is also a citizen. Thus, the worker, as a citizen, is subject endowed with certain constitutionally guaranteed personality rights.

However, the worker's personality rights face some limitations, as the right to reserve of the intimacy of the worker's private life is not an absolute right. Such limitations arise from the interests of the company, as well as from coexistence with the fundamental rights of other workers and of the employer itself.

In fact, the employer also has certain rights guaranteed, such as, for example, the right to private property, freedom of economic initiative and freedom of enterprise, rights also constitutionally guaranteed in articles 62nd, 80th, al. *c)* and 86th of the CRP, respectively.

There is no doubt that sometimes the worker’s personality rights may suffer limitations, especially when they conflict with other rights. And are these other rights, namely the employer's rights, that, sometimes, constitute legitimate fundaments and justify the adoption of appropriate measures to limit the worker's right to privacy. However, this limitation must be

reasonable and only exists as long as is necessary for the maintenance of the employment relationship. Therefore, the interests that are at stake in the concrete situation must be balanced. This is the procedure adopted by the Constitutional Court when, in the appeal 368/2002 (lawsuit nº 577/97, dated from September 25th, 2022, Judge Artur Maurício), states that "the right to intimacy in private life may be limited as a result of harmonization with other fundamental rights or other constitutionally protected interests, respecting the principle of proportionality…". In this regard, also the Ac. of TC nº. 319/95 (June 20th, 1995, Judge Messias Bento) follows the same understanding.

As a general rule, if there is any conflict of rights, what must prevail will be the respect for the dignity of the human person, as well as the general principle of good faith.

The arts. 17th and 19th of the CT analyzed in the phase pre-contractual of the labor contract, in relation to employment candidates, are also applied to those workers with a legal bond with the company. Therefore, the aforementioned is also applicable to the worker, concerning to such matters, so we suggest the readers for further considerations. However, within the scope of the execution of the employment contract, some notes must be emphasized regarding to the extent of arts. 17th and 19th of the CT in relation to workers.

The art. 17th of the CT determines, in nº 1, that the employer cannot demand the worker that provide information relating to his private life, health or pregnancy condition. In this field, it's particularly important the use of new information technologies that offer platforms that collect and treat personal data. So, this circumstance justifies giving particular emphasis to the subordination of the worker, since, as noted by RUI ASSIS, "access, by the employer, to the worker's personal data may be, in many cases, justifiable in light of the healthy exercise of his power, but it can also, in other occasions, correspond to abusive and unacceptable behavior". It must be pursued a "balance between the worker's right relating to his private sphere and the employer's right to direct work through determinations and procedures that, at least potentially, conflict with this sphere" (ASSIS, 2005).

As already shown above, the protection of workers' personal data has limits. Thus, shouldn't be mandatory let the employer know about anything related to the worker's private life, like health or pregnancy condition. However, there are situations in which, if "strictly necessary or relevant" to evaluate the worker's capacity to execute the labor contract and "when particular requirements inherent to the nature of the professional activity justify it", the protection of these data may be lifted, thanks to what establishes the art. 17th of the CT.

It's worth to mention the case of a pregnant worker that, occupying a position as a secretary at a company, had to provide information regarding her pregnancy condition, being this "necessary and relevant" information to evaluate his aptitude, once as, being pregnant, could not find itself subject to the same tense situations, nor move with the same speed and ease than other workers.

However, there is no particular relation between the "inherent demands to the professional activity" as secretary and the fact that the worker is pregnant. That is, there aren't, in a first moment, "particular requirements inherent to the nature of the professional activity" of a secretary that justify the obligation to inform about one's pregnancy condition.

However, it will be different when information about health or pregnancy condition is required if "particular requirements inherent to the nature of the activity" justify it. For example, the case of an airplane pilot in which the requirement for information about his cardiac condition will be justified by the nature of the professional activity (PARTYS, 2004).

For DAVID FESTAS, in the case of informations related to health or state of pregnancy of an employee determine the possibility of executing the employment contract, there is a worker's duty to provide such information (FESTAS, 2004).

Regarding what establishes the art. 19th of the CT, the general principle is that the employer cannot, here for the purposes of remaining in the job, be obliged to subject himself to tests and medical examinations. Nevertheless, there are exceptions, like those situations mentioned in safety and health at work legislation, namely, what establishes the Statute nº. 102/2009, of 10 September, which implements the legal regime for promoting safety and health at work.

Regarding the problem of tests and medical examinations, we face a collision of rights. On one hand, the employer's right to prove whether the worker meets the physical and mental conditions to continue performing his functions and the right of the worker and third parties to his safety and protection and, on the other hand, the worker's rights to his dignity, his physical and moral integrity and non-discrimination and, essentially, the reserve of intimacy of his private life.

However, this principle suffers limitations when the current cumulative requirements are gathered in art. 19.º, nº. 1 of the CT, namely, when such tests or physical examinations "have as their purpose the protection and safety of the worker or third parties" or, "when particular requirements inherent to the activity justify it." Think about the example, stated by

GUILHERME DRAY, in which, when it comes to the exercise of nursing functions in the intensive care unit of a hospital service, it's justified the employer demand from the worker tests proving that he/she does not suffers from any infectious disease, with the main goal function of protecting others. Certain professions, such as passenger transport or safety or handling of toxic products, in which the physical and psychological conditions of the worker can put themselves at risk, as well as co-workers or third parties, it is justified that there is a certain amount of control on the part of the employer, which may subject its workers to tests and regular medical examinations, such as alcohol, drug addiction or even personality tests.

Furthermore, it may be essential for the functioning of the company some extra control of facts of the worker's private life, as happens, for example, in the case of workers under athlete's employment contract, based on Law nº. 54/2017 of 14 July, once this worker assumes the obligation to maintain his physical condition appropriate to the nature of his work, subject to mandatory tests and medical examinations. In fact, the art. 13th, al. *d)*, Law Nº. 54/2017 of July 14 considers a duty of sports practitioners his submission to examinations and clinical treatments necessary for practicing sports. Naturally, such situation restricts his private life, both inside and outside his working hours and place.

What can never be discussed, as its regime is imperative, is the requirement for carrying out pregnancy tests for workers, according to what establishes art. 19th, nº. 2 of the CT.

Currently, it's discussed the admissibility of mandatory subjection of workers to alcohol or narcotic substances tests, considering the fact that the use of such substances can modify the productivity of workers, putting their safety at risk as well as third-parties security. It could even, who knows, be a way to prevent the abuse of such substances (GOMES, 2007).

We understand that the obligation to carry out tests and clinical examinations should not be generalized to any workers, being only mandatory for those workers who carry out activities that justify it, as stipulated in art. 19.º, nº. 1 of the CT, and as long as there is a balance with other rights or interests in conflict, based on the principle of proportionality, in its various aspects, namely, the need, adequacy and proportionality in the strict sense.

The Constitutional Court (Ac. Nº. 156/88, Lawsuit nº. 339/87 of June 29, 1988, Judge Mário de Brito) had already stated that there is no violation of the rights and guarantees of a worker (in this specific case, a worker from CP - Comboios de Portugal), when he is subject to regular alcohol tests, in accordance with the internal regulations of the company, with the Court

also understanding that the rights, freedoms and guarantees of that worker must give way when "other rights equally recognized and protected by the
Constitution, such as the right to life and security of people" that are transported annually by CP.

It should also be noted that there are other situations that put in danger the reserve of intimacy of worker's private life, being in these cases greater chance of violations, namely, the case of domestic service work regulated in Statute nº. 253/92 of October 24th, the teleworking stipulated in arts. 233.º and ss. of CT and, the work of models or mannequins (FESTAS, 2004).

Still within the scope of the worker's private life, as RUI ASSIS notes, the employer's instructions within the scope of his power of direction in relation to the clothing worn by the worker, or other aspects of personal presentation, should always be framed taking into account as a starting point of the idea that such domains belong to the private sphere of the worker, and should, as a rule, be outside the employer's scope of intervention. However, considering the activity to be carried out and the concrete functions that the worker performs, can be justified a restriction, within a reasonable range, of the worker's private sphere, when, for example, it is at stake a position as a hostess or flight attendant in an airline or even a hotel employee, situations in which, most of the time, the use of uniforms is required, which restricts, in a certain extent, the worker (ASSIS, 2005).

The art. 18th of the CT regulates the regime for the use of worker biometric data. Worker's biometric data are those that identify him, whether through physical or behavioral characteristics, such as fingerprints, voice, retinal control, blood, saliva or signature.

Considering that, currently, the use of biometric data is increasingly common to control and record workers' working time, the legislator decided to regulate especially this matter. According to what establishes the precept under analysis, the employer only may treat the worker's biometric data after notification to the CNPD, requiring, in addition, that such data are necessary, adequate and proportional to the objectives to be achieved, due to art. 18, nº. 2 of the CRP and art. 335th of the CC. Within the scope of art. 28th, nº. 6 of Law nº. 58/2019 of August 8th, "the treatment of workers' biometric data is only considered legitimate for attendance control and to control access to the employer's facilities".

The art. 20th of the CT stipulates about remote electronic surveillance means, establishing, as a general principle, that the employer is prohibited from using technological equipment of remote surveillance in the workplace with the main purpose of controlling the

worker's professional performance. However, it should be noted that the exceptional situation of call centers, where telephone calls made by workers are recorded (QUINTAS, 2013). Therefore, it is prohibited to the employer using video cameras, audiovisual equipment, hidden microphones or telephone listening and recording mechanisms, whether public or hidden, with the purpose of controlling the worker's work performance.

As mentioned by GUILHERME DRAY (DRAY, 2016), such possibility would be contrary to most workers' basic personality rights and the idea of citizenship at work. In fact, the use of electronic surveillance means, with the main purpose of controlling the work, consists of a true restriction to the reserve of intimacy od worker's private life.

Points out MENEZES LEITÃO, according to M. REGINA REDINHA (LEITÃO, 2016/REDINHA, 2002), that the ILO - International Labor Organization has already considered that the introduction of these electronic surveillance means constitutes a true violation of human dignity and basic rights, inducing in workers the idea that they cannot be trusted, encouraging a destructive mentality in the employment relationship, in addition to being used for discriminatory purposes.

However, it's admitted as lawful the use of such equipment when the purpose is the protection and security of people and property or, when particular requirements inherent to the nature of the activity justify it, imposing, however, that the employer informs the worker about the existence and purpose of the surveillance means used. Thus, limitations on the reserve of intimacy of worker's private life may occur when are at stake requirements inherent to the nature of the professional activity, particularly, when there is access to established communications between an airline pilot and air traffic controllers during a trip or when it comes to protect people and property, particularly, when it is lawful to install video cameras in public sales establishments, bank branches or gas stations, airports or supermarkets. Although in these situations the use of video surveillance is lawful, it must always be preserved, as much as possible, the reserve of intimacy of worker's private life, being, even in these cases, forbidden to place surveillance systems in bathrooms or changing rooms. In this regard, Law Nº. 95/2021, dated from December 29 regulates the use and access to video surveillance systems, which allows the use of such means when intended to protect people and property, as stipulated in art. 3rd, nº. 1, al. *d)*. Law Nº. 61/2004 of the CNPD, from April 19, 2004, specifically establishes the principles on the treatment of data via video surveillance.

According to art. 21st, nº. 1 of the CT, the use of remote surveillance means at the workplace requires prior authorization from the CNPD. However, after Law nº. 58/2019 of August 8, which transposed Regulation (EU) 2016/679 of the Parliament and the Council into the national legal system, that authorization from the CNPD, for placing video surveillance systems, was waived and therefore is not currently mandatory. Continuing, however, such authorization to be necessary if audio recording is occasionally made.

However, all other conditions imposed by the CT for remote surveillance, namely, the fact of the placement of video surveillance systems only being valid when those are considered necessary, appropriate and proportional to the objectives to be achieved, in the terms of nº 2 of art. 21st of the CT.

By the way, Law nº. 61/2004 of the CNPD (CNPD, 2004) indicates us that, in a way to confirm whether such requirements are being obeyed, we must know whether the measure adopted is suitable for achieving the proposed objective (principle of suitability); if it is necessary, there should therefore be no other measure capable of ensuring the objective with an equal degree of effectiveness (principle of necessity); and if the the measure adopted is balanced so that superior benefits can be achieved to the general interest in the case of conflict (proportionality judgment in the strict sense).

Thus, “surveillance will only be acceptable if, and when, there are true reasons for security of facilities, goods, raw materials, control of the production process or protection of sensitive activities of the company or the public that frequents its location” (REDINHA, 2002), not allowed, under no circumstances, the employer use surveillance means for the sole purpose of, with this use, control the worker's work performance.

The art. 22 of the CT is also a projection of the right to reserve of intimacy of worker’s private life by stipulating that he “enjoys the right to reserve and confidentiality regarding the content of messages of a personal nature and access to information of a non-personal nature who sends, receives or consults, in particular, via email”. Despite the legislator expressly have referred only to electronic mail, it is understood that are here included any means of communication, such as postal or telephone communication, for example. It should be noted that art. 22 of the CT corresponds to what establishes art. 34th, nº. 1 of the CRP, when referring to the inviolability of the domicile and the secrecy of correspondence and other means of private communication.

As a general rule, the employer cannot access, alone, the content of messages of a personal or non-professional nature that the worker sends, receives or consults at their workplace. In in any case, the display of worker's personal messages, which is only justified in very sporadic cases, must be done in the presence of the worker and must be limited to viewing only the address of the recipient or sender of the message, the subject, date and time of sending; besides, the control of the employee's email must occur randomly and non-persecutory (DRAY, 2016/CNPD, 2013). What is at stake here is the protection of workers with regard to the use email, internet access and telephone communications.

The nº. 2 of the precept under analysis, excepts situations in which the employer himself establishes rules for using the means of communication in the company (mainly defined in the internal regulations of the company) (CNPD, 2013), namely email. In the understanding of the CNPD, is outside the scope of this art. 22nd, nº. 2 of the CT, "any message or communication carried out by the employee through email accounts, social networks or any other accounts to which the employee has subscribed in a personal title, even if he accesses them through the computer of the company" (CNPD, 2013). It is not disputed that workers have a legitimate expectation of privacy in your workplace, however, in the case of adequate information by the employer to the worker, it can be generated a reduction in that expectation. Nevertheless, it is not enough a prior information from the employer about the use of means of communication to allow the use of all means of control (MOREIRA, 2004).

It is essential that there is a balance between rights and interests, especially between the right of worker to be guaranteed some privacy at work and the employer's right to control the operation of your company, preventing employees conducts that could compromise his interests.

However, the fact that a surveillance activity on the employee's electronic communications be considered convenient to defend the interests of the employer does not justify, itself, an interference into the worker's privacy, meaning that the employer does not have "unrestricted access".

In the understanding of M. REGINA REDINHA, the employer does not have unrestricted access to the employee's electronic mail, even if it is recognized that ownership of the company's IT resources belongs to the employer and that electronic mail is just a working tool available to the worker for the exclusive purpose of being assigned to the performance of his/her labor service (REDINHA, 2002 / GUIMARÃES, REDINHA, 2003).

RUI ASSIS admits that there is space for some type of using of electronic means for personal purposes as long as it is reasonable and in moderation, namely, specific communications with family members, use that should be considered protected by the worker's private sphere, and is therefore unlawful indiscriminate control carried out without the worker's consent (ASSIS, 2005 / PEREIRA, 2002 / GOMES, 2007 / MOREIRA, 2007).

In this regard, the STJ Decision, of July 5, 2007 (related to Lawsuit nº 07S043, Judge Mário Pereira) analyzed a dispute involving a dismissal contestation based in an exchange of e-mails between colleagues who, jokingly, referred to their hierarchical superiors, and understood that the employer's lack of regulation of the use of mail allowed the worker to use it for personal messages and, therefore, are part of his private life's reserve, even if processed through technological equipment of the company. Thus, in the understanding of the STJ, when such regulation fails, the employee is free to use the electronic mail tools provided by the employer.

The TRL decision, of March 7, 2012 (referring to Lawsuit nº 24163/09.0T2SNT.L1-4, Judge José Eduardo Sapateiro) also understands that " due to the lack of any prior regulation for the personal and professional use of the Internet by employees of the Defendant, it's verified the undue and illicit access and knowledge by the company to the content of conversations that are strictly personal to the appellee …The fact that the aforementioned electronic conversations/messages are stored on the Defendant's central server, which belongs to it, does not take away from them, on the one hand, their personal and confidential nature".

Thus, the principle of proportionality is also applied here, and any form of monitoring worker communications must be necessary for a particular purpose and be transparent, and the employer must be clear and open about its monitoring activities.

4. The reserve of intimacy of worker's private life at the stage of termination of the contract

Could facts from the worker's private life be relevant to the termination of the labor bond? In a first moment, behaviors in the worker's private sphere are not relevant for the purposes of dismissal for just cause, because irrelevant, to the employer, conducts that are related to the private lives of their workers which, in general, take place in extra-labor occasions. This way, the employer cannot investigate or reveal facts within the worker's private

sphere, unless there is in fact a direct connection with the functions he carries out (ABRANTES, 2014).

However, there are exceptions, that is, although the right to reserve of intimacy of private life is not absolute (ABRANTES, 2014), there will be facts of the worker's private life, occurring outside the place and time of work, which will be able to lead to your dismissal with just cause in the terms of art. 351st of the CT.

Jurisprudence itself has recognized that worker conducts, even if extra-labor, occurring in the context of his private life, may have serious repercussions on compliance of his work duties and affect the employer's confidence in maintaining the labor bond, which leads to admit such conducts as a cause for dismissal with just cause.

Therefore, the rule should be that worker conducts that occur in his private life, that do not put at risk the obedience to his employment contract, nor the good image and prestige of the company, must be irrelevant to the employer. In this regard, in the Ac. of the STJ of 9/06/1999 (Lawsuit nº. 99S02, Judge Sousa Lamas), it was understood that is only verified "the fair cause of dismissal when the employee's behavior reflects on the normal development of the employment relationship".

In the same line, states GUILHERME DRAY that "… more than carry out his activity with zeal and diligence, the worker must contribute globally to the productivity of the company, refraining from engaging in behaviors that are likely to affect the good name of the employer or the respective production unit, inside and outside the workplace" (DRAY, 2001).

However, it may happen that there are aspects of the worker's private life that reflect negatively in the obedience of their work duties and, in this case, relevant will be these consequences and, not exactly, the extra-labor conduct practiced by the worker (ABRANTES, 2014). It is understood, thus, that in certain, very exceptional circumstances, the possibility for the employer to restrict the worker's private life can be given, demanding that he abstains to practice certain conducts, with the purpose of maintaining the good name of the company, due to the position or the activity carried out. In the same line, the case of athletes, as referred to above, or the management workers.

A dismissal for a fact attributed to the employee, in order to be lawful, must be substantiated in just cause, under the terms of art. 351st of the CT. This way, "the just cause paradigm focuses, thus, on a worker's behavior, occurred at the place and work time, which

configures a disciplinary infraction so serious that it makes it immediately and practically impossible the labor bond subsist" (DRAY, 2001).

However, considering worker's extra professional behaviors, there is dismissal with just cause if there is a judgment of censure of such a serious nature that it justifies the compression of the right to reserve of intimacy of private life, in light of art. 335th of the CC (DRAY, 2001).

Therefore, in case of worker's extra labor conduct, so that we are faced with a dismissal with just cause, three situations are relevant, namely: 1. conduct of worker's private life that affect the good image and prestige of the employer, 2. conducts that may affect the relationship of trust between the parties and, finally, 3. conducts of the employee's extra-professional life that affect the good working environment and his work performance and, due to his illegality and culpability, make it impossible to continue the labor relationship.

In order to study these situations, a brief jurisprudential analysis will be carried out, referring to specific cases.

5.1 Conducts in the worker's private life that affects the good name and prestige of the employer

As already mentioned above, the intimacy of worker's private life may be compromised when other people's rights arise or when a superior interest requires it. Thus, despite the general principle be the irrelevance of acts in the worker's private life, concerning the configuration of a just cause situation for dismissal, jurisprudence has admitted, correctly, that when there is relation between these conducts in the worker's private life and the impact on the employer's rights seriously, we may be faced with situations that results toward dismissal.

As a general rule, situations of alcoholism and drug addiction do not constitute just cause for dismissal. However, from the moment that the consumption of narcotics and the ingestion of alcoholic beverages has a direct impact on work performance, affecting the good name and prestige of the employer, the duty of loyalty and the duties of care and diligence required of the employee when carrying out your work activity, will be gathered motives for dismissal with just cause.

The decision of the STJ of May 11, 1994 (Lawsuit nº. 003887, Judge Chichorro Rodrigues) considered as just cause for dismissal the behavior of a plane pilot who got drunk during the night and in a branch connection, appearing the next day to work to transport people still under the influence of alcohol. The Superior Court argues that the contributes to the

dismissal for just cause the "repercussion and publicity achieved by the behavior of that commander during those hours, particularly in a hotel where guests, as a rule, use the plane, and for whom, consequently, his conduct had negative consequences on transport air" and, naturally, in the image of the employer.

In the same line, the appeal of STJ, December 7, 1994 (Lawsuit nº. 004102, Judge Dias Simão) considered as just cause for dismissal the behavior of a flight attendant who, instead of respecting a resting period to rest, decided to have fun, causing inconveniences in the hotel where he was staying, where was known his profession, having seriously harmed the interests of his employer.

5.2 Conducts in the worker's private life that affects the relation of trust between the parts

Some conduct in the worker's private life, even if they do not affect the good image and name of the employer, may still constitute just cause for dismissal when irreversibly make the relationship of trust between worker and employer unfeasible.

Imagine the situation of a teacher being convicted of the crime of pedophilia, even if the crime had not been against a school student, or a bank employee being convicted of theft. These situations, even if practiced outside the working place and time, may constitute just cause for dismissal considering that such acts affect the relation of trust that must exist between employer and worker, which prevents the maintenance of the employment relation.

Also, the Ac. of the STJ of October 31, 1986 (Lawsuit nº. 001409, Judge Miguel Caeiro) considered "lawful the dismissal with just cause of a worker, an expert from an Insurance Company, who is involved in an international network of drug dealers and is punished with a major prison sentence - with strongly negative impact on the aforementioned relation of trust - proving that the employer took care in recruiting its staff according to moral integrity and would not admit anyone who found themselves in that situation".

It's considered that the employer must prove the casual link between the extra-labor behaviors of his workers and the irreversible breach of trust that makes it impossible to maintain that labor relationship.

5.3 Conduct in the worker's private life that affects the work environment

Behaviors in the employee's private life that occur outside the place and time of work may constitute just cause for dismissal, since reflect in the place of work, affecting the environment and making it impossible to maintain the labor relation.

It should be mentioned, for example, the situation discussed in Ac. of the TRP of 01/22/1990 (Lawsuit n°. 0123601, Judge Neto Parra) in which a worker, outside the working place and time, attacks voluntarily and physically, on several occasions, one of his supervisors, motivated by the fact that he has called the attention of another worker. Such aggression, because directly linked to the labor work, even if it occurs outside the workplace and time, is likely to constitute just cause of dismissal. It is essential that there is reflection in the work environment and that there is a directly connection with the employment relationship.

Despite the growing number of decisions by our Courts that give disciplinary relevance to a conduct in the worker's private life, the rule continues to be its irrelevance, when it is not reflected negatively on the company or the work performance of employees.

It worths to mention, for example, the decision regarding the illegality of dismissal based on "physical offenses committed by one worker on another, in a place far from the workplace, before or after work time and without any impact on the company they both worked for" pronounced by Ac. of the STJ of 11/14/1986 (Lawsuit nº 001415, Judge Correia de Paiva).

In the same line, the Ac. of the STJ of 06/9/1999 (Lawsuit nº 99S023, Judge Sousa Lamas) it was decided that a dismissal was unlawful due to the fact of having been based on a disobedience to an order from the employer that prohibited the use of drugs, stating that could conditionate the "worker's private life and interfere in it, limiting his individual freedom and not concerning directly to the execution and work discipline".

More recently, and due to the emergence of new communication technologies, it comes to mention the disciplinary relevance that has been given to comments made by workers on social networks, namely on Facebook and, as such, protected, in principle, by the right to reserve of intimacy of private life. The essential question is to define whether publications made on social networks should be considered as part of the worker's private sphere or, if, on the contrary, they will already be within the public sphere and, therefore, not protected by the right to reserve of intimacy of private life. In the understanding of the CNPD, "on social networks, profiles are spaces used to express the individuality of each person, belonging to the restricted circle of reserve of intimacy of private life, containing, as a rule, information of a very personal

and even intimate nature". However, this usually contains information of a very personal and even intimate nature." However, this statement is criticized because the user defines the degree of privacy he wants for his profile/publications, and even if the profile is defined as private, nothing prevents anyone who has access authorized by the user from accessing its content and copying it, transmitting it to third parties.

An unprecedented decision of the TRP, of September 8, 2014 (Lawsuit nº 101/13.5TTMTS.P1, Judge Maria José Costa Pinto), which considered that in the situation of a worker have made publications on Facebook, with a defamatory nature, even if in a closed group and with restricted access to workers and former workers of the company, putting at risk the good name and prestige of his employer, as an institution, was reason enough for his dismissal with just cause.

That Superior Court also considered, "to be of fundamental relevance weighing the factors announced - and others that are relevant in each case to be analyzed -, in order to be able to conclude whether in the situation in question there was a legitimate expectation that the established circle was private and closed". However, "if there is no expectation of privacy, and the worker is aware that publications with possible implications of a professional nature, namely because defamatory to the employer, co-workers or hierarchical superiors, would reach the universe of people who make up the group and go beyond its borders, we believe that it does not have the right to invoke the private nature of the group and the "personal" nature of the publications, not benefiting from the protection of confidentiality stipulated in article 22nd of the Labor Code". In this regard, it should be noted that the situation in which a Dutch Court held that "the fact that all comments and messages published on the social network wall can be republished easily makes the information is visible to other people and, therefore, should be considered semi-public" (ABRANTES, 2014).

CONCLUSIONS

The increasing emergence of new technologies has brought increased attention to the protection of worker, particularly his privacy, considering the greater control that the employer can exercise on labor work, which increasingly leads to repercussions, sometimes negative, in the worker's intimate sphere.

The right to reserve of the privacy of the worker's private life is stipulated in art. 16th of CT. However, being considered as the most fragile right recognized to the worker, it is also that right that the CT develops in further projections, namely, through arts. 17th to 22nd from CT. It is in the pre-contractual phase that the employment candidate is most subject to invasions of his contractual status on the part of the employer, first of all, because, fearing of not being admitted to the job for which he is applying, he can agree to reveal facts about his private life, when not obliged to do so.

Within the execution of the contract, the reserve of intimacy of worker's private life should be understood as a limit on the employer's directive power. Thus, in principle, the employer will not be able to exercise his powers whenever his orders conflict with personality rights of the worker. However, the right to reserve of intimacy of private life is not an absolute right, with the employer's rights also being constitutionally recognized, namely, the right to private initiative or freedom to conduct business. Therefore, can the worker's personality rights be restricted when they conflict with other rights, especially those employer's rights. However, this limitation must be reasonable and only exists to the strict extent where it is necessary to maintain the labor relation.

The rule should be that conducts of worker that occurs in his private life that does not put at risk the obedience of his employment contract or the good image and prestige of the company, should be irrelevant to the employer. However, it may happen that there are aspects of worker's private life that have a negative impact on the obedience of his work duties, and, in this case, what will be relevant will be these negative reflections and, not exactly, the extra labor conduct practiced by the worker. There may therefore be extra-work conducts by the worker that result to dismissal for just cause, especially in three types of work conducts, namely, worker's private life conducts that affects the good image and prestige of the employer, conducts that put at risk the relation of trust between the parties and, finally, conducts in the worker's extra-professional life that affect the good working environment and his labor work, which, due to his illegality and culpability, make it impossible to continue the labor relation.

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