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New Forms of Employment in Spain after the 2012 Reform: The “Working Time” Factor as a Tool to make “Distance Work” more Flexible

Lourdes Mella Méndez *

Abstract. This paper analyses some aspects of the legal regime of new forms of employment in Spain after the 2012 Reform, especially in relation to distance work. One key factor in ensuring flexibility and the reconciliation of professional and family life is working time. The organization of working time is key to adapting work to the legitimate demands of the parties to the contract and meeting expectations of productivity and work-life balance. In this sense, this research is devoted to examining the impact of this “time factor” in distance work in Spain. This analysis is not easy as the Spanish legislator keeps silent on this point and the Article 13 of the Workers’ Statute does not clarify this aspect or the way working hours should be organized. Besides, collective agreements contribute little in terms of working time, so many questions remain unresolved.

Keywords: *Distance work, working time, employer control.*

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1. Introduction

Spain's urgent measures to reform the labor market were implemented by means of Law 3/2012 of 6 July in order to promote labor market flexibility – by encouraging the use of anti-crisis measures targeting employers – and to safeguard existing jobs. Some further measures were taken to modernize Spanish Law and to devise new ways of working featuring new information and communications technology (ICT). In this regard, Article 13 of the Workers' Statute (WS) was amended to legally recognize a new scheme promoting remote working. Thus, the previous title of that provision (the “work-at-home employment contract”) has now been changed to “distance work”, that is work “predominantly performed at the worker's home or at a place freely chosen by them, as an alternative to the employer's premises” (par. 1).

As indicated in the Preamble of Law 3/2012, lawmakers wanted to include this new working scheme into the WS, because it is considered “a particular form of work organization that fits perfectly into the productive and economic model pursued”, therefore favoring flexibility in terms of work organization while increasing employment opportunities. From this point of view, it is clarified that “the organization of traditional homeworking is amended to include distance work based on the intensive use of new technologies” (paragraph three).

While regulating this new way of working, the legislator also stresses two important aspects regarding the form and content of the law. Regarding the form, it is required that the agreement on telework is formalized in writing, either at the start or during the employment relationship. This formal requirement seeks to increase legal certainty, by ensuring that the clauses specifying the provision of remote work are laid down in writing (Art. 13.2 WS). The following three paragraphs of the article concern legal contents. To begin with, a general statement is provided according to which remote workers have “the same rights as those working on-site, except for aspects inherent to work performance at the employer's premises”. As an example of such non-discriminatory treatment, some individual rights are reaffirmed: 1) equality of pay, thus remote workers will be paid as much as workers in the same grade; 2) access to vocational training, mobility and career advancement; and 3) protection against occupational risks. In addition, 4) the exercise of collective rights (collective representation, collective bargaining, and collective disputes) is also recognized. According to the initial definition, it can be argued that the new form of telework in Spain is configured as a new way of working that includes two subcategories. The first includes traditional homework,

involving manual and ordinary tasks carried out offline with the employer, who checks one's work at the end of the assignment. While Article 13 of WS does not refer to this type of telework, this working scheme should be conceived as being regulated by this provision all the same. The second subcategory includes the new type of telework, performed through new information and communications technologies and therefore it gives the opportunity to connect with employment online while engaging in the task assigned. Importantly, the Spanish legislator did not make any reference to new technological working tools. This is questionable, for there are many interesting aspects concerning these instruments that raise questions and should be regulated, among others the employer's obligation to provide workers with these tools, possible links with the employer's power of control and the teleworker's privacy. The fact that the legislator makes no mention of the benefits associated with distance work is equally striking, though the preamble to Law 3/2012 states that this type of work provides higher levels of flexibility of working time and "distance work improves the relationship between "the employee's working, personal and family life". One key factor in ensuring flexibility and the reconciliation of professional and family life is *working time*. The sound organization of working time is key to adapting work to the legitimate demands of the parties to the contract and to meet the expectations of productivity and work-life balance. In this sense, this research is devoted to examining the impact of the "time factor" in distance work in Spain. This analysis is not easy, as the Spanish legislator keeps silent on this point and the provisions in place – Article 13 WS - neither clarifies this aspect, nor the way working hours should be organized.

2. Working Time as Feature of both On-site and Remote Work: The Key Factor for a Successful and Combined Working Model

When working time is studied in relation to telework, the first aspect to note is that it bears relevance in the legal configuration of this working scheme, because teleworkers do not work remotely full-time. In other words, as provided in WS, teleworking can be only performed part-time. Although WS does not make special mention of this aspect, its partial nature is arrived at when considering its legal definition, which indicates that "work is carried out *predominantly*" at the site selected by the worker, and "as an *alternative* to performing work" at the traditional place of work (Art. 13.1). This way, the employee's working time consists of work

carried out at the employer's premises, alternating this to that performed through telework, in the manner agreed by the parties. Working hours as referred to in the provision must be understood as performed weekly or annually, as it is not possible to alternate between shifts in office and at home on a daily basis. Significantly, this is expressly prohibited by some rules laid down by the Autonomous Communities¹ concerning public-sector jobs, due to the fact that public-sector workers might face organizational problems. However, some exceptions exist allowing workers to switch from telework to traditional work on a daily basis, thus 20% of working time is performed at a distance (one example is work performed at the Repsol Company)².

This general alternative scheme is justified by individual reasons and might be aimed at avoiding some possible negative effects. It is evident that in case the employee works exclusively at home, there are risks that they lose touch with company goals, therefore feeling disengaged. In order to prevent such risks, the European Framework Agreement on Telework of 16 July 2002 (EFAT) already required the employer to adopt measures to avoid the "isolation" of the worker from his/her colleagues at the company, such as invitations to participate in face-to-face meetings and access to business information (clause 9, third paragraph). However, the Agreement did not clearly refer to part-time telework, whereby some working hours should be performed at the employer's premises.

However, in Spanish collective bargaining, most individual and collective agreements on telework negotiated since 2002 have provided for this way

¹ Art. 15.3, Order of December 20, 2013, by the Vice-President and Ministry of Presidency, Public Administration and Justice and the Ministry of Finance, regulating the accreditation, the working day and work schedule, flexitime and teleworking for public employees of General Administration and the public sector of the Community of Galicia (DOG of December 31, 2013). It is established the prohibition of splitting "the daily work so that one can work remotely and at the employer's premises"; Art. 8.2 Decree 92/2012, of May 29, Euskadi (BOPV of June 7, 2012); Art. 4.2 Decree 127/2012, of 6 July, Extremadura; Art. 9.1 Decree 36/2013, 28 June, Balearic Islands (BOIB of 29 June) and Art. 3.1 Decree 57/2013, of 12 August, Castilla-La Mancha (DOCM 16 August).

² White Paper Teleworking in Repsol, p. 66

http://www.repsol.com/imagenes/es_es/libro_blanco_tcm7-627218.pdf. Similarly, Art. 43 of the agreement "Alcatel Lucent Spain" (EGD Resolution of 28, January 2015, BOE of 10 February) and Art. 36 of the collective agreement "Thales Spain GRP" (Resolution EGD of 23 November 2015; BOE of 9 December). These agreements say that remote work may be performed daily through "on a full or a part-time basis".

of working on a part-time basis³. As an example, the White Paper on Teleworking drafted by Repsol states that “the company has declined to include a full-time telework mode, thereby preventing employees from becoming disconnected from the company and guaranteeing a sense of belonging and teamwork”, establishing that they “must be in the office at least 16 hours a week”⁴.

Although WS seems to point to a combined model of teleworking, it should be recognized that, in considering collective bargaining, there are some collective agreements that expressly set forth “distance-work” contracts to perform work “at home or at any other place available to the employee on a predominant *or a full* basis⁵. Thus, it is possible to distinguish between “part-time” and “full-time” telework, defining the latter as “work which is fully performed at the worker’s home, without him/her having a fixed workstation at the employer’s premises”⁶. If we admit the compatibility of this form of full-time distance work with current legislation, it appears that this might be used to face situations of economic crisis, which might involve the plant closure. Of course, the risk of isolation would persist and it is important to find solutions to this problem.

Of course, if working from home on a part-time basis is allowed, the share of work that can be performed at home should be determined. In this sense, Art. 13 of WS states that work carried out outside the plant should be “predominant” if compared to that performed at the employer’s premises.

³ As laid down in Art. 49 I of the collective agreement “Alcatel-Lucent Transformation Engineering & Consulting Services Spain” (Resolution EGD of 12 February 2014, BOE of 24 February).

⁴ Already cited.

⁵ Art. 11.3 VI of the collective agreement “Carlson Wagonlit Spain” (EDG Resolution of 20 June 2013, BOE of 10 July). Also, see Art. 9.7 of the collective agreement “Europcar IB” (EDG Resolution of 13 May 2013; BOE of 30 May).

⁶ Art. 73 XII of the collective agreement “HIBU Connect” (EDG Resolution of 28 May 2013; BOE of 12 June) Art. 50 VII of the collective agreement “BP Oil Spain” (EDG Resolution of August 4, 2014, BOE of 22 August), makes use of the same wording of the sixth convention prior to the labor reform, which defined telecommuting as: “that form of employment that is characterized by the fact that the employee performs all their daily tasks from their own house”. Similarly, article 50 VIII of the collective agreement “Telefónica On the Spot Services” (EDG Resolution of 11 February 2014, BOE of 21 February) refers to teleworking as a way to provide services whereby “the employee performs his duties, partly or entirely, outside the company”, although referring to telecommuting in the WS and expressly mentioning the new Art. 13.

Since “preponderant” means “predominant in influence, number or importance”⁷, it is clear that the only legal requirement allowing for the alternation between telework and traditional work is that the former should last longer. This is also in line with the idea expressed by the EFAT that telework must “regularly” take place outside business premises.

Therefore, although a share of work should be performed at the company to avoid isolation, more than 50% of weekly, monthly, and yearly working time should be done outside the company. On this point, the collective agreement concluded at BBVA provides that “the provision of work through telework implies that the employee should work remotely, that is from home, for up to 90% of his working hours” (sixth paragraph)⁸. As seen, the agreement allows workers to perform much of their work at home, along with a minimum share of work to be performed at the company to ensure interaction with other employees.

Similarly, regional regulations often clarify the preponderance of remote work through the “three plus two” formula, whereby telework should be performed three days a week and traditional work two days a week⁹. However, a different distribution of working days may be agreed upon due to production needs. Should that be the case, mention should be made of the new circumstances justifying the amendments to the traditional distribution of working hours (the “three plus two” formula)¹⁰. Other regional provisions might reduce, without providing any reason, the share of work carried out remotely below 50% of total working time. Thus, the Decree put in place in Castile-La Mancha, which has been already referred to, reduces the working time to be performed through telework to 40% of monthly working hours¹¹, failing to comply with the minimum percentage imposed by Article 13 of WS and leading one to speak of telework performed on an occasional basis¹². In our view, the

⁷ From Oxford Dictionary, <https://en.oxforddictionaries.com/definition/preponderant>.

⁸ <http://www.ccoo-servicios.es/bbva/teletrabajobbva/>

⁹ Cf., for example, Art. 15.3 of the Galician Order of December 20, 2013; Art. 8.2 of Decree 92/2012, of May 29, the Basque Country; Art. 4.2 of Decree 127/2012 of 6 July, Extremadura and Art. 9.1 of Decree 36/2013, of 28 June, the Balearic Islands, cited.

¹⁰ Art. 8.2 of Decree 92/2012, of May 29, Euskadi, cit.

¹¹ Art. 3.2.

¹² In the case of the White Paper on Teleworking issued by Repsol, cited above, p. 66, four types of telework part-time are envisaged: one of them, which has been already mentioned, allocates 20% of daily working time to distance work, while others devote one or two days a week or two afternoons and Fridays. However, it should be noted that these working schemes were created before the labour reform of 2012, as pointed out on

fact that work performed remotely has to be preponderant determines that telework carried out on an occasional basis falls outside the scope of WS, therefore not representing an innovation in the traditional ways of working.

3. Distance Work: Minimum Rights Regarding Rights Regarding Ordinary Working Time and Overtime

As already noted, the worker who works at a distance only for a part of their working time have the same rights as their peers doing the same job on the employer's premises. This includes minimum rights regarding working time – particularly the application of the 40-hour threshold per week – and the recognition of overtime and minimum daily, weekly and annual rests. Therefore, although the cited Article 13 of the WS does not expressly say so, the general rules laid down in Articles 34-38 of the WS are applied in relation to working time. No exceptions are possible, as this type of distance work is regulated by Labour Law and workers are subject to the employer's power of direction and control. More clearly, maximum working time and minimum rest periods always apply, regardless of the workplace, the way work is performed, and the employee's right to combine work and rest periods.

Accordingly, when the company asks the teleworker to work longer than eight hours, overtime applies, along with relevant legislation¹³. Overtime cannot exceed 80 hours per year; workers working beyond normal hours will be entitled to paid time off – which should be taken in the following four months – or to higher rates of remuneration. Paid rest periods taken

page 66 of the White Paper. The agreement recently signed is already adapted to the wording of the Art. 13 WS, increasing the percentage of distance work. Thus, article 43.6.2 XII of the collective agreement "Repsol Química" (EDG Resolution of 30 April 2015, BOE of 21 May) incorporates a new option by which distance time is preponderant with respect to on-site working time: 3 days a week. Teleworking has a limited use, as it is performed through a pilot plan up to "a maximum of eight hours a week", to be distributed on a full day or two half days, as agreed between the employee and the Director (IV collective agreement "Numil Nutrition" (EGD Resolution of 16 August 2012, BOE of 31 August). See also Article 34 V of the collective agreement of the company "Nutricia" (EGD Resolution of the Department of Employment, Tourism and Culture of the Community of Madrid of 7 November 2014; BOCM of February 7, 2015).

¹³ Cfr. García Quiñones, J. C., *The organization of working time and rest and conciliation in telework*, in AAVV volume (L. Mella): "Telework and distance work" (Pamplona, 2015).

within the subsequent four months fall within the 80-hour limit, while those taken after four months do not.

When the employee works longer hours, problems arise in relation to the employer's control on workers' performing overtime. This issue might be dealt with by considering the communication system in place between the teleworker and the employer. If communication is interactive, technological devices will certainly allow such control. In case employees work offline, employer control is still possible, especially if rules on traditional homework are applied. The employer is required to make available to the worker a register where normal and overtime hours are noted down¹⁴. As will be seen, some collective agreements expressly provide this opportunity. Moreover, Art. 13.2 of WS refers to Art. 8.4 of the same text, which indicates that working time is dealt with in the contract (or in the specific agreement on telework). Accordingly, a copy of it must be delivered to workers' representatives within ten days of the date on which its signing and then sent to the employment office.

It is interesting to refer to one of the few and most recent rulings on the matter, delivered by the High Court of Justice of Castile-Leon (Valladolid) of 3th February 2016¹⁵. In this case, a worker was engaged in telework on a part-time basis to perform commercial tasks, although the company did not establish a work schedule or working hours in advance. The Labour and Social Security Inspectorate sanctioned the company after discovering that the workers in question worked 10 to 12 hours daily. The sanction referred to the violation of fundamental rights concerning working time. The company argued that the absence of a time schedule was due to the fact that teleworkers were given the opportunity to organize their working time when working remotely. The employer also claimed that teleworkers did not perform overtime work. However, employees filed a lawsuit to claim remuneration for work performed beyond normal hours. Thanks to documentation submitted by the Labour Inspectorate, the Spanish Court of First Instance brought evidence that teleworkers were engaged in overtime shifts and ruled that the company would pay 3,978 euros, plus a 10% interest for late payment. This decision was also confirmed by Spain's High Court of Justice. Significantly, the employer did not challenge the ruling but questioned the application of overtime to part-

¹⁴ According to the ruling of the Spanish Supreme Court of 17 May 1988 (Ar. 4238), work which is not subject to working time arrangements or labour rules and that is remunerated all the same depending on the outcome, cannot be considered as homework.

¹⁵ Ruling Number 2229/2015.

time telework. Rather curiously, he argued that the concept of overtime is difficult to assess when involving workers operating remotely, for “the right to privacy applies to their dwelling” (Article 18 of the Spanish Constitution, SC). Since “the employer cannot exercise control over them, working overtime is at their own discretion”. In other words, working beyond normal hours cannot impact on the company economically, so the employee cannot claim remuneration for overtime. Rightly, the Court of last instance rejected this argument, pointing out that the employer has an obligation to monitor employees’ working time regardless of the place where work is performed.

3.1. The Employer’s Obligation to Monitor Employees’ Working Time and all its Possible Consequences

According to the ruling referred to above, the time the worker provides his/her services to the employer is always regarded as working time, so the hours spent working remotely are “regarded as working time in the same way as those worked in the employer’s premises”. Though obvious, it bears repeating that through telework the employee works remotely on a part-time basis, to avoid commuting and saving time and money while reconciling work and family life. The place where one works is not relevant, as the work performed is so that working time should be arranged. When an employment contract exists that includes workers’ tasks in line with labor law, the rules governing normal and overtime hours, as well as minimum rest periods, always apply.

In considering this premise, the inference from the ruling previously analyzed is that “control of one’s working time falls within employers’ responsibility”. They should thus “note down the worker’s daily working hours in a register, using them to calculate remuneration and delivering a copy to the worker” (Art. 35.5 WS). Logically, the employer is the head of the business and is given managerial powers and the right to sanction workers, whereas necessary. He can and must organize business activities, give workers orders and instructions about tasks and specific conditions, including working time. Undoubtedly, this information is key to ensuring the productivity of workers and that of the company, and to determine the remuneration system (e.g., per working hours or per task). From the worker’s point of view, the definition of working time is also important because, while performing work, he is subject to the employer’s managerial powers. However, regardless of the place of work, it is up to the employer to monitor the teleworker in working hours. In this sense, it is the employer who should take steps to comply with the limits imposed

by legislation on working time. Specifically, while normal hours are set by collective agreements or the employment contract and should not exceed forty hours per week considering the annual average (Article 34.1 of the WS), overtime work is subject to different legal regimes. Remuneration is due for normal working hours, as is overtime, which should not exceed the 80-hour annual limit.

The employer's obligation to note down all workers' working hours – including those worked remotely – as well as the requirement to send them daily summaries of the number of hours worked – should always be met and not only in the event of overtime shifts. On this aspect, it might be important to refer to a recent ruling handed down by the Spanish High Court of Justice on 4 December 2015¹⁶, according to which the monitoring of daily working time was seen as a “necessary requirement” to assess the actual hours worked by workers and to determine whether they worked beyond normal hours¹⁷. Duly documented working time arrangements were regarded as the only means to assess the existence of overtime. Without these documents, neither the employer nor the Labour and Social Security Inspectorate (no one, except the worker) could be able to assess the number of hours actually worked. Should this be the case, it would be for the worker to prove the existence of overtime.

Another argument that can be made from the analysis of the previous ruling is concerned with the purpose of monitoring workers' working time on the part of the employer. As the Court remembers: “compliance with the limits imposed on working hours and rest periods is part of the right of workers to protect their safety and health (Directive 2003/88/EC), which falls under the responsibility of the employer as a consequence of his general obligation to prevent risks and devise prevention measures”. Accordingly – and regardless of the employee's place of work – the employer is always responsible for workers' safety and health, and he must comply with all the obligations imposed by rules on occupational risks, particularly those regarding the assessment of possible risks and the adoption of appropriate measures. Evidently, one of the parameters to be considered is working time. The employer's monitoring of this aspect is not only important to ensure the worker's compliance with minimum standards, thus promoting productivity, but also to ensure that workers are given adequate rest periods, as required by law.

¹⁶ Ruling number 301/2015.

¹⁷ The register does not have to report overtime hours, since a workday can be extended without these hours to be calculated, being part of the working day. This is the only way to determine whether the limits of the daily working time are exceeded.

As is known, the limitation of working time is another aspect indirectly referred to by Directive 89/391/EEC of 12 June 1989 on the implementation of measures to promote workers' safety and health in the work, and directly, by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, on the minimum safety and health requirements for the organization of working time. Under Spanish Law, Article 40.2 of the Constitution requires public authorities to ensure workers' necessary rest periods, by limiting working hours. Therefore, the provisions on minimum statutory rest periods, as foreseen in the WS, have a constitutional basis and are intended to protect the health of workers. These minimum standards improve the regulation of the Working Time Directive and thus the minimum daily rest periods it provides (eleven consecutive hours per twenty-four, to which one more hour should be added between the end of a working day and the beginning of the next; Art. 34.3 of the WS). This also determines that the minimum weekly rest period laid down by the Directive (35 hours: 24 of uninterrupted rest for every period of seven working days and plus the 11 of daily rest) is also increased by one hour. As for the annual rest period, it consists of thirty calendar days (Art. 38.1 of the WS) and some legal mechanisms exist ensuring that the workers enjoy this right.

In any case, the EU legislator requires that the employee's rest is "adequate", i.e., characterized by regular and continued rest periods (Art. 2.9 Directive), so that this break is restful for the worker's health. Obviously, excessively long working days can affect job performance, increase the odds of accidents and seriously affect workers' physical and mental health. On this point, psycho-social diseases are more and more relevant, as is work addiction (workaholism) or, in the case of teleworking, addiction to new information and communications technologies. Such technological addiction – called techno-addiction – is seen as a psychological disorder resulting in the uncontrollable need to use new technologies for long periods. Logically, the excessive use of such devices can cause stress, fatigue, anxiety and other significant changes to workers' health. Accordingly, it is important to stress that the employer should control and limit working time, especially over time, in order to prevent such risks.

Certain collective agreements concluded in Germany and France are significant as they establish measures to protect the worker against the prolonged use of technological tools while at work. In France, the sectoral agreement concluded on 1 April 2014 between SYNTEC and CINOV

employers and CFDT and CFE-CGC unions, sets obligations for both parties to limit working time¹⁸. For the first time, the worker has recognized the right and the duty to disconnect from the Internet (Art. 4.8). This right is accompanied by a duty to cooperate with the employer, in order to avoid working outside normal working hours. As for the employer, he also has the duty to refrain from making contact with the employee outside normal working hours or when the end of the working day approaches. He also has to take measures – which also include disciplinary ones – to make sure workers are disconnected from the Internet and stop working when not required. One technical measure to be taken to prevent working beyond normal hours consists in disconnecting or switching off devices from company servers. The recent labor reform in French incorporated these rights into the Labour Code (Art. L. 2242-8, 2.7). Accordingly, ways “to ensure that the worker can disconnect from IT tools to allow him to enjoy rest periods and leave” will be negotiated in collective bargaining on an annual basis. These aspects should be agreed at the company level, as they refer to workers’ quality of life and working conditions. The goal is to encourage collective bargaining to deal with aspects related to ICT and negotiate measures to protect workers’ health and reduce the risk of working longer hours.

3.2. Home Privacy Does Not Relief the Employer from the Duty to Monitor the Teleworker’s Working Time

For the purposes of Article 18.2 of the SC, one’s residence (*domicilio* in Spanish) is concerned with the area in which the individual lives without being necessarily subject to customs and social conventions and where they can enjoy a sense of freedom. Therefore, besides safeguarding “one’s physical space”, protection is also provided to “his/her private sphere characterizing this space”¹⁹. Therefore, this is a different and broader definition than the one provided by the legislator in other branches of law. For example, the Civil Code conceives the notion of residence in a more neutral way – as one’s habitual residence (Art. 40); and the place where legal representation is established or where core functions are carried out for legal purposes (Art. 41). Curiously, in the ruling referred to above the worker’s fundamental rights to privacy and inviolability of the home are referred to by the employer to justify non-compliance with his own duties.

¹⁸ On this point, see my paper “New technologies and new challenges for conciliation and health of workers”, *Trabajo y Derecho*, 2016, n.º. 16, pp. 45 et seq.

¹⁹ Ruling from Constitutional Court n.º 137/1985, of 17 December (RTC 137, 1985).

This is also in line with the position of the High Court, which argued that “the right to privacy and inviolability of the home concerns the worker, that is, the home dweller and not the employer, so the latter cannot refer to this right against them”²⁰. In other words, these rights can only be exercised by the owner to protect his privacy from the employer’s control and to justify his failure to put forward monitoring activities as regards working time, while the reverse is not possible. By accepting the employer’s previous arguments, this might affect workers’ interests, paradoxically using one of their fundamental rights to deprive them of those on working time.

Further, as work is performed partly remotely and partly at the employer’s premises, this fundamental right to privacy is logically altered to allow the employer to exert their managerial powers, particularly in relation to working time and the prevention of work-related accidents.

As far as occupational risks are concerned, the obligation to specify one’s place of work in the employment contract was already envisaged for traditional homework in order to put forward “the necessary measures to protect the health and safety” of workers (Art. 13.2 of the WS prior to the 2012 reform). Concerning telework, the EFAT expressly provides that – in order to ensure the proper application of safety and health rules – the employer, workers’ representatives and relevant authorities (especially labor inspectors) “have access to the telework location”, within the limitations set by the law and the collective agreement. For example, if the worker works from home, access to the teleworker’s dwelling can take place after the latter has been informed and has consented to it (clause eight).

Accordingly, this procedure is in line with the Spanish Constitution, for accessing one’s home always requires the owner’s previous consent, or an authorization from the tribunal pursuant to Article 18.2 of the SC, save for cases in which someone is caught in *flagrante delicto*.

In any case, the EFAT seems to establish the right of the employer to access the teleworker’s home, so prior notification is needed not so much to obtain the worker’s consent, as to inform or to reach agreement on the way access should take place (e.g., the day, the time, the areas that will be inspected or who will carry out the checks). Therefore, the content of the notification must be as complete as possible and include any other relevant detail (e.g., the possible duration of the inspection). The notification shall be in writing and sent through any means admitted by

²⁰ Ruling of High Court of Justice of Castile-Leon (Valladolid) of 3 February 2016, cit.

law (e.g., by post, fax or email). The notice period will be specified in the collective agreement, the telework agreement or an individual employment contract and, whereas not expressly referred to, such notice period will be set at 15 days or 30 days, which is sufficient to discuss aspects concerning inspections and reach agreement between the parties. The need for the parties to negotiate is evident and this requirement should be understood as different from the one concerning notification mentioned earlier since they are conceived as two distinct aspects in the section of the EFAT on house inspections.

If the parties fail to reach consensus because the worker explicitly opposes the inspection or keeps delaying it by raising groundless objections, the employer must remind the worker of his duty to cooperate to prevent work-related accidents and, if necessary, take appropriate measures against him, which include asking the employee to move to business premises and therefore terminating the telework agreement. As a milder alternative, the authorization to perform telework can establish that the place of work is different from one's home and can be freely accessed from the employer, in order to prevent issues concerning the employee's privacy. In the public sector, some regional regulations governing telework specify that when inspection authorities are denied access to workers' home, the principal, and the relevant General Secretariat need to be informed²¹. This is done to relieve authorities of any responsibilities if the employee faces health problems.

The checks of inspectors from the Labour and Social Security Department to the private house elected as a place of work are also subject to the general requirement of workers' prior notification and agreement on the inspection date. Apart from the EFAT, permission is also required by the Inspectorate of Labour and Social Security (ILSS)²². In this sense, Article 5.1 provides that "If the facility inspected coincides with the dwelling of the individual concerned", inspectors should obtain their express consent or, failing that, legal authorization. Logically, authorization should be sought for the most serious cases, where there are reasons to believe that occupational risks exist for workers' health and

²¹ Cf. Annex (the C13 procedure on the evaluation of telework), Plan preventing occupational hazards by the Junta de Extremadura (in <http://ssprl.gobex.es/ssprl/web/guest/plan-de-prevencion-de-la-board-de-Extremadura>), prepared to comply with Art. 15 of Decree 127/2012, of July 6, Extremadura (DOE 13 July).

²² Law 42/1997, of 14 November regulating the establishment of the Inspectorate of Labour and Social Security.

safety and that of other people living with them. Once in, inspectors will remain in the house for the time needed to carry out checks. As for working time, if the worker works offline – as is the case with traditional homework – the employer can fulfill his monitoring duties by setting clear rules on maximum working time and rest periods and then mechanisms to ensure workers' compliance with them without invading their privacy. In any case, it must be recognized that even taking responsibilities for meeting those standards, it is more difficult to verify whether workers fulfill them. For this reason, a piecework payment system is usually implemented. In the event of non-compliance with these standards, the employer should take direct control or cooperate with the Labour Inspectorate if failing to fulfill such standards entails workers' health risks. Conversely, if work is performed online, monitoring can take place by "checking the worker's connection with the company intranet and their participation in the network"²³. Thus, this control is easy and "at first and under normal conditions, does not imply the invasion of protected space under the concept of private home"²⁴.

Back to the central theme of the comments made by the High Court of Justice of Castile-Leon, the following is an important point:

- One: the employer is obliged to supervise the daily work of the teleworker or the homeworker. To do that, he has to set clear guidelines on working time and rest periods, respectful of legal and conventional regulations, therefore considering the worker and the tools for evaluating the work carried out. These tools vary depending on the communication system between the contracting parties, which also determines the degree of collaboration by the worker.

- Two: the employer is obliged to pay overtime following the setting up of a working time monitoring system allowing to assess if an employee has worked beyond normal working hours. However, this obligation also applies when, even without establishing a control system, the worker manages to prove he worked longer hours than agreed upon. Naturally, if the employer does not fulfill his main obligations, and does not set instruments to monitor distance work, the exemption referred to above concerning the obligation to remunerate overtime work does not apply. Otherwise, as pointed out by the ruling, that would be tantamount to

²³ High Court of Justice of Castile-León (Valladolid), 3 February 2016, cit.

²⁴ Ibid.

“creating a space for circumventing the law in distance work and homework”. Moreover, the employer would be released from his obligation to pay overtime, even when aware that it took place, leading them to oppose his right to monitor the employee’s working hours. Undoubtedly, such a position would encourage malpractice and violation of the rules protecting workers.

- Three, if the employer meets his obligations as regards working time control, the responsibility for compliance with guidelines and mechanisms established for that purpose falls on the worker. Therefore, if the latter fails to comply with the employer’s control instruments on a voluntary basis, his behavior can determine an exemption of the employer’s obligation to pay overtime work. As shown, he who does not fulfill his obligations must face the consequences arising from such a violation, as is the case with the worker who loses the right to claim the payment of overtime from the employer. Yet this does not rule out the possibility that he may be subject to disciplinary action for failing to comply with instructions from the employer.

4. Working Time in Spanish Collective Agreements

Given the importance of working time in any contract of employment, especially in those concerning remote work, and the legislator’s disregard for this aspect, collective bargaining must be analyzed in order to determine whether the parties regulate this matter. Some aspects are therefore pointed out:

1. *Scarce regulation in collective bargaining.* The first aspect is that few collective agreements deal with distance work or telework and, of them, only some address working time. In general, regulation is limited and insufficient to address all the problems, so neither the legislator nor the social partners are able to provide specific provisions. In addition, the wording of the rules is literally “copied and pasted” from other collective agreements, usually from the same sector. So it will be up to the parties to the contract to set down specific terms. Therefore, some agreements state for instance that some aspects of working time in telework will be treated in the same way as those concerning full-time positions or other existing working

arrangements if performed part-time²⁵. It is usually enough to indicate the number of weekly days and hours telework will be performed unless otherwise indicated by productive reasons²⁶. More detailed working hours can be specified when we know in advance that teleworkers cannot arrange their working time flexibility²⁷.

2. *Combined model of distance work and office-based work, prioritizing the latter and the employer's interests.* As already noted, most collective agreements established that work should be performed partly at home and partly at the office. Sometimes it is expressly stated that this way of organizing work tries to meet the interests of both parties, and an attempt is made at organizing working time to mutually benefit the employer and the employee²⁸. However, priority is subsequently given to the interest of the former, since it is established that “telework cannot hamper adequate work organization” and cannot be used to avoid dealing with replacements, changes to production and unforeseen circumstances²⁹. Accordingly, telework shall be organized so that it does not affect work performance at the employer's premises and allow one “to deal with changes in response to organizational needs, in compliance with working and office hours”³⁰. In other words, we start from the principle that work should be performed as if the employee were in the office, so the latter “may be required at any time to return to the usual workstation” if the company asks so, within the limits of daily working hours³¹. The employer's requests made to the worker to work at the company can be used at the time of assessing the conversion of teleworking agreements, which can take place upon the request of one of the parties to the employment contract.

²⁵ Art. 74 XII Collective Agreement “HIBU Connect”, cit. Also Art. 33 collective agreement “Numil Nutrition”, already cited.

²⁶ Annex V (conditions of implementation of teleworking, n° 5) the collective agreement “companies linked to Telefonica Spain, Telefonica Móviles Spain and Telefónica Solutions Information Technology and Communications” (EDG Resolution of 28 December 2015, BOE of 21 January).

²⁷ Ibid.

²⁸ Art. 36 of the Collective agreement “Thales Spain GRP”, already cited.

²⁹ Clause sixth, B) of the Collective agreement on conditions for the provision of services in the BBVA bank, already cited.

³⁰ Ibid. Also Art. 74 XII of the collective agreement “HIBU Connect”, cited.

³¹ Art. 36 of the Collective agreement “Thales Spain GRP” and Art. 43 of the collective agreement “Alcatel Lucent Spain”, already cited.

3. *Preference for uniform working time in the company, regardless of where work is performed.* The primacy of the employer's interests and the fact that at times workers have to go back to the main working centre to perform some duties have as a consequence that workers, while allowed to work remotely, have to comply with the same working times as their peers operating at the company, to be able to cooperate with them if needed. Sometimes, this is expressly indicated, along with the fact that their working time will be determined "according to that of those working at the same productive unit³² or to that established in the collective agreement³³". In any case, the time needed to travel from home and to the office is not regarded as working hours³⁴. This requirement affects the core element of teleworking, that is flexibility and freedom to perform work according to worker's needs. One can always deal with working tasks during regular working time, but then there is a risk of overworking and not enjoying rest periods.

In some cases, time flexibility in distance work is accepted in relation to the general time schedule applying at the company, although some requirements are needed. Specifically, teleworking outside normal working hours: 1) must be requested by the employee; 2) must be justified by objective productive needs or work-related reasons and must not have negative effects on other colleagues and work for the organization³⁵; 3) working time cannot be longer than normal daily working hours – including overtime – and provide daily and weekly rest periods; 4) must not give rise to different forms of remuneration than that granted to workers operating at the company³⁶; and 5) must be agreed with the company first (i.e. the employee's supervisor)³⁷. The specific changes must be documented in writing along with the original contract (if not provided from the very beginning). As shown, there is limited or "exceptional" flexibility, which must be agreed with the company. Additionally, telework

³² Art. 74 XII Collective Agreement "HIBU Connect", cited. Also Annex V (working conditions of teleworkers, n.º. 1) of the collective agreement "companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions", cit.

³³ Art. 38.2.3 collective agreement "Orange Espagne" (EGD Resolution of August 5, 2014, BOE of 21 August).

³⁴ Annex IX. 9.5 collective agreement "Nokia Solutions and Networks Spain" (EDG Resolution of 14 April 2015, BOE of 25 April).

³⁵ Ibid. Also Art. 61.3 collective agreement "ONO Group" (DGE Resolution of 11 June 2013, BOE of 1 July).

³⁶ Ibid.

³⁷ Art. 36 Collective agreement "Thales Spain GRP", already cited.

is also possible through shift working whereas one worker working on shifts does so remotely without the need of amending the contract³⁸.

4. *Occasionally, working time is related to remuneration.* This takes place when remuneration depends on the teleworker's working time, which is set according to the time schedule applying in his/her productive unit. In this case, the time schedule is used to limit one's remuneration, for it is not possible to use telework "as a way to generate higher remuneration"³⁹. Evidently, this provision runs counter to the ones stating that reimbursements are granted to workers to cover the expenses resulting from working remotely. No mention is made of overtime, except for some vague reference indicating that if a teleworker works beyond normal hours, the relevant collective agreement will apply⁴⁰. Given the importance of this point, it is surprising that this is not discussed in negotiations in a more detailed fashion.

5. *Few references to the right to minimum breaks.* There are few explicit references to breaks, and when they exist, they only reassert the right to statutory breaks, without going into detail. On some occasions, the right of the teleworker to annual leave is expressly foreseen, according to the provisions of collective agreements in force in the company where the teleworker operates⁴¹. As already stated, the link between workers' rest and health requires the recognition of these breaks for all of them, regardless of their status. Therefore, what was said for annual leave must be applied to minimum daily and weekly rests, days off and time off. While some differences are possible (e.g. breastfeeding leave), they must be acknowledged, as must the legal recognition of equal rights between teleworkers and office-based workers. Also, because of its peculiar nature, the absence of clauses concerning the time spent available for work needs

³⁸ Annex V (working conditions of teleworkers, n°. 1) the collective agreement "companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions" and Art. 61.3 collective agreement "ONO Group", cited.

³⁹ Annex V (working conditions of teleworkers, n°. 1) of the collective agreement "companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions" and Art. 61.3 of the collective agreement "ONO Group", both cited.

⁴⁰ Annex IX. 9.5 of the collective agreement "Nokia Solutions and Networks Spain", cited.

⁴¹ Art. 75 XII of the Collective Agreement "HIBU Connect", cited.

attention. This should be set clearly and remunerated, as it limits the freedom of workers and even their right to rest.

6. *Few References to the Relationship between Working Time and Work-life Balance.* As is well known, reducing and making working time more flexible are key elements to promote work-life balance. Therefore, it is surprising that little reference is made to the latter and the use of working time (point 3) to ensure reconciliation of work and family lives. Maybe it happens because in such agreements telework is seen as a measure put in place by employers to save costs or deal with economic crises as an alternative to the closure of the business. However, teleworking can also be a work-life balance measure and, as some agreements state, “the teleworker is responsible for effectively managing the time devoted to work and leisure”⁴². This wording sounds more like a warning to the worker than as an affirmation of his/her rights. Some companies, however, make clear that work-life balance is a teleworker’s right and put forward measures to improve their work environment and save them the trouble of commuting⁴³.

7. *Working time monitoring systems in telework.* Collective agreements do not clarify if teleworkers’ organization of working time and its monitoring by the employer depend on how the parties interact (online, offline, or one-way online communication). So workers who comply with the traditional time schedule tend to interact with their fellow at the company, thus monitoring is possible by means of technologies. In some cases, the agreement provides that “the worker must work and be *online* in the hours his presence is mandatory, according to the work schedule”⁴⁴. Collective agreements frequently contain clauses relating to workers’ monitoring system to verify the performance of daily activities. Some of them require that an electronic device signaling the worker’s online presence should be installed on their computer through the company’s intranet⁴⁵. In other words, the teleworker may be required to report when they start and end working by operating this “presence mechanism” helping the employer to monitor compliance with working time and overtime arrangements. In

⁴² Annex IX. 9.5 of the collective agreement “Nokia Solutions and Networks Spain”, cited.

⁴³ Art. 73 of the collective agreement “Repsol Butano” (EDG Resolution of 21 May 2012; BOE 8 June).

⁴⁴ Art. 38.2.3 of the collective agreement “Orange Espagne”, cited.

⁴⁵ Art. 75 XII of the Collective Agreement “HIBU Connect”, cited.

any case, control can take place in different forms depending on the worker's tasks. The employer must inform and report to them, to representative bodies and at times to other entities (for example, the commission monitoring and interpreting the agreement).

Logically, it is always necessary to respect the dignity of workers and those systems must be proportionate to the aim pursued.

As shown, collective agreements contribute little in terms of working time, so many questions remain unresolved. If distance work use increases in the future (as seems likely to happen), so is conflict between the parties, thus the social partners will be compelled to regulate the different aspects of this way of working in detail, including those concerning working time. Otherwise, this task will be left to the courts.

ADAPT International Network



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