

**THE CONSTITUTIONALITY OF THE RULES GOVERNING INTERMITTENT  
WORK: ADI 6154, ADI 5826, AND ADI 5829**

**A CONSTITUCIONALIDADE DAS REGRAS ATINENTES AO TRABALHO  
INTERMITENTE: ADI 6154, ADI 5826 e ADI 5829**

**LA CONSTITUCIONALIDAD DE LAS REGLAS RELATIVAS AL TRABAJO  
INTERMITENTE: ADI 6154, ADI 5826 Y ADI 5829**



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**ABSTRACT**

Law No. 13.467/2017 (Labor Reform) introduced the intermittent employment contract in Brazil, a modality characterized by non-continuous service provision and lack of a minimum work schedule. This article examines the constitutional controversy surrounding this contract before the Brazilian Supreme Federal Court (ADIs 6154, 5826, and 5829), focusing on the legal and hermeneutical grounds of the Justices' opinions. Based on a theoretical-dogmatic methodology and documentary-bibliographic research, the ruling that upheld the constitutionality of the norm is analyzed as a paradigmatic shift that favors a liberal-economic model over traditional social protection. The study highlights the potential risks of structural labor precarization and the transfer of economic risks to workers, despite the formal preservation of rights. It concludes that the Supreme Court's decision poses significant challenges to ensuring social protection and balancing labor flexibilization with the core values of Brazilian social constitutionalism.

**Keywords:** Intermittent Work. Constitutionality. Labor Reform. Supreme Federal Court. Fundamental Rights. Labor Flexibilization. Social Constitutionalism.

**RESUMO**

A Lei nº 13.467/2017 (Reforma Trabalhista) instituiu o contrato de trabalho intermitente, modalidade marcada pela prestação descontínua de serviços e ausência de jornada mínima. O artigo analisa a controvérsia constitucional dessa figura perante o Supremo Tribunal Federal (ADIs 6154, 5826 e 5829), investigando os fundamentos jurídicos e hermenêuticos dos votos ministeriais. Com base em pesquisa teórico-dogmática, de cunho bibliográfico e documental, a decisão que declarou a constitucionalidade da norma é examinada como marco hermenêutico que evidencia a primazia do paradigma liberal-econômico sobre o

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tradicional modelo protetivo. Apontam-se os riscos de precarização estrutural das relações de trabalho e a transferência de riscos ao trabalhador, mesmo com a manutenção formal de direitos. Conclui-se que a decisão do STF suscita relevantes desafios à efetividade da proteção social e à conciliação entre flexibilização das relações laborais e os fundamentos do constitucionalismo social brasileiro.

**Palavras-chave:** Trabalho Intermitente. Constitucionalidade. Reforma Trabalhista. Supremo Tribunal Federal. Direitos Fundamentais. Flexibilização Trabalhista. Constitucionalismo Social.

## RESUMEN

La Ley n.º 13.467/2017 (Reforma Laboral) instituyó el contrato de trabajo intermitente, modalidad caracterizada por la prestación discontinua de servicios y la ausencia de jornada mínima. El artículo analiza la controversia constitucional de esta figura ante el Supremo Tribunal Federal (ADI 6154, ADI 5826 y ADI 5829), investigando los fundamentos jurídicos y hermenéuticos de los votos de los ministros. Con base en una investigación teórico-dogmática, de carácter bibliográfico y documental, la decisión que declaró la constitucionalidad de la norma es examinada como un hito hermenéutico que pone de manifiesto la primacía del paradigma liberal-económico sobre el tradicional modelo protectorio. Se señalan los riesgos de precarización estructural de las relaciones laborales y la transferencia de riesgos al trabajador, aun con el mantenimiento formal de derechos. Se concluye que la decisión del STF suscita importantes desafíos para la efectividad de la protección social y para la conciliación entre la flexibilización de las relaciones laborales y los fundamentos del constitucionalismo social brasileño.

**Palabras clave:** Trabajo Intermitente. Constitucionalidad. Reforma Laboral. Supremo Tribunal Federal. Derechos Fundamentales. Flexibilización Laboral. Constitucionalismo Social.

## 1 INTRODUCTION

Law No. 13,467/2017, which instituted the Labor Reform in Brazil, promoted significant changes in the Consolidation of Labor Laws, highlighting, among them, the creation of the intermittent employment contract (Articles 443, §3 and 452-A of the CLT). This contractual modality, which allows the provision of services with subordination on a non-continuous basis, with alternation between periods of activity and inactivity and without guarantee of minimum working hours or fixed monthly remuneration, emerged as one of the most controversial points of the reform. While defenders presented it as an essential tool for making the labor market more flexible and formalizing informal relations, critics directly associated it with precariousness, income instability, and potential violation of fundamental rights.

In view of the relevance and dissent, the constitutionality of the rules related to intermittent work was submitted to the analysis of the Federal Supreme Court (STF) through Direct Unconstitutionality Actions (ADIs) 6154, 5826 and 5829. The joint judgment of these actions by the Supreme Court, concluded in December 2024, resulted in the declaration of dismissal of the requests made and the affirmation, by majority, of the constitutionality of the contested provisions. This decision then consolidated the judicial understanding of the modality. He also explained the tension that exists in the highest Court of the country between different views on the interpretation of the constitutional principles that govern labor relations and the economic order.

The main object of research in this article is to study how the Federal Supreme Court in ADIs 6154, 5826 and 5829 dealt with the constitutionality of the intermittent employment contract, evaluating how the divergence between the justices occurred.

The central hypothesis that guides this study argues that the decision of the STF, by declaring the constitutionality of the modality by majority, built a paradigmatic inflection in the constitutional interpretation of fundamental labor rights in Brazil. It is argued that this decision, which recognized the compatibility of the rule, reflects a weighing of principles that privileges free enterprise and economic efficiency to the detriment of an alleged material effectiveness of social rights and the classical protective principle.

The research is justified, among other factors, in the potential of the theme to generate a deep social impact regarding the protection of the vulnerability of the intermittent worker, appearing to be a debate of a concrete, practical nature and placed as an agenda not only for the understanding of the decision, but, above all, to create a scenario for monitoring how the market and reality will behave from now on: The coming years will be in charge of saying the correctness (or not) of the elected political-legislative option.

As a general objective, the present study seeks to analyze in a detailed and critical way the foundations of what was decided by the STF within the horizon of Brazilian social constitutionalism linked to labor rights in the context of flexibilization.

As specific objectives, it is proposed: (a) to describe the normative structure of the intermittent employment contract; (b) analyze the arguments of the parties and the votes of the Ministers of the STF in the ADIs; (c) to identify the hermeneutical tension between the constitutional principles in conflict; (d) to evaluate the dogmatic and socio-legal implications of the decision; and (e) point out regulatory challenges and future perspectives for the modality.

The research is justified by the notorious legal, social and economic relevance of the theme, its direct impact on the lives of workers and on business dynamics, and by the importance of the decision as a precedent that is aligned with a framework of normative foundations that can be added to a new panorama of redefinition of the constitutional limits of flexibilization in the country. A critical analysis is essential to understand how the legal system seeks to reconcile the adaptability of the market with the protection of human dignity.

The methodology used is qualitative, of a theoretical-dogmatic nature and an analytical-critical approach, using a documentary-bibliographic procedure based on the legislation, judgments and votes of the ADIs and specialized doctrine.

The structure of the article comprises a sequence of topics that begin with the conceptual and normative analysis of the intermittent contract, after the study of the ADIs and the ministerial votes, followed by the discussion of the hermeneutic tension and its implications, and a referral to the study of the socioeconomic impacts and regulatory challenges, and the future proposals/perspectives, culminating in the conclusions that synthesize the contribution to the understanding of the evolution of Labor Law Brazilian post-Labor Reform and STF decisions.

## **2 OF INTERMITTENT WORK**

The intermittent employment contract modality was incorporated into the Consolidation of Labor Laws (CLT) and is one of the fruits resulting from the Labor Reform, sanctioned by Law No. 13,467 of 2017. It is important to note that, roughly speaking, it was a reform (like this new type of contract), taxed as having allowed undue flexibility. To a certain extent, it may have unfairly readjusted employee rights, under the pretext of enabling a more adaptable contractual model between the parties (Leite, 2023)<sup>4</sup>.

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<sup>4</sup> In fact, it is a contractual format already used in several countries, although in Brazil, the intermittent contract is still relatively unknown and used – which could be justified by a pure and simple lack of knowledge or even by some perception of legal uncertainty that such contracting would generate. Since the time of the legislative

The very name "intermittent" signals that the fundamental characteristic of this modality is exactly the alternation between periods of activity and inactivity.

That is, the work will be provided in a discontinuous manner. The employee is summoned by the employer at specific times or when there is a specific need. Thus, during the intervals of inactivity, the worker does not receive a salary and is not at the disposal of the employer - and this gives him the freedom to perform other activities or provide services to other companies.

The intermittent worker is not to be confused with the *freelancer*. The latter has substantial autonomy in the execution of activities, while in the intermittent employment contract, **subordination** persists as a present and indisputable element – and the employee must follow the guidelines established by the employer. In addition, another striking feature is the **unpredictability** of the call: the employee is aware that he does not have a fixed date for the performance of his duties, which, from another point of view, means that the employer does not hire a workforce on an exclusive basis (Romar, 2018).

The legal bases of the intermittent contract in the CLT are articles 443, *caput* and third paragraph, and article 452-A. Ordinance No. 671 of 2021 regulates the provisions. Thus, the normative feasibility for the employee to provide services in a non-continuous manner is defined, which may be for days, hours or weeks, with interspersed periods of inactivity.

However, formality emerges as an indispensable pillar for the validity of the intermittent employment contract, and must always occur in **writing**, with annotations in the Work and Social Security Card (CTPS) and clear contractual clauses that prevent distortions<sup>5</sup>.

## 2.1 REMUNERATION, PURPOSE AND CALL PROCESS

The remuneration of the intermittent worker must be proportional to the time actually worked. If the organization adopts the minimum wage as a basis, the intermittent worker will

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discussions, it was argued that the intermittent contract would have the purpose of regularizing the well-known "bico", ensuring, as a consequence, more rights to workers on the one hand. Still, on the other hand, from the employer's perspective, offering him ways to optimize labor costs compared to fixed-term or indefinite hiring (Delgado, 2021).

<sup>5</sup> The intermittent employment contract provided for in article 452-A of the CLT must be entered into in writing, even if provided for in a collective bargaining agreement or collective bargaining agreement, and will contain

- the identification, signature and domicile or registered office of the parties;
- the value of the hour or day of work, which shall not be lower than the hourly or daily value of the minimum wage, nor lower than that due to other employees of the establishment who perform the same function, ensuring that night work is remunerated higher than that of day work; e
- the place and deadline for payment of remuneration.

The intermittent employee, by prior agreement with the employer, may enjoy his vacation in up to 03 (three) periods.

The hourly or daily remuneration of the intermittent worker may be higher than that paid to other workers of the company hired for an indefinite period, given the special characteristics of the intermittent employment contract. The confirmation of the summons continues to be as determined by article 452-A, § 1 and § 2, that is, through any effective means of communication.

be entitled to the corresponding hourly or daily rate. If the other employees perceive remuneration higher than the legal minimum, the intermittent worker must also have the proportionality of this remuneration guaranteed.

What is certain is that, in order to avoid discrimination in relation to the fixed contract, the payment of the intermittent worker is equivalent to his, that is, that the same hour of the permanent worker determines the value of the intermittent worker's hour. In addition, the contract must unequivocally establish that the intermittent worker is entitled to all **legal bonuses**, which includes, for example: night bonus (higher than daytime pay), unhealthy pay, hazard pay, etc.

The CLT allows the hiring of intermittent work to extend to **any activity**, except **aeronauts**.

The mechanics of the call, with its intricacies of acceptance or refusal, is configured as one of the most particular and critical elements of the intermittent contract. The call can be made by any means of communication that is effective, such as phone calls, text messages (including the use of applications such as WhatsApp)

However, it must be carried out at least three calendar days in advance of the date scheduled for the start of the provision of services. Failure to comply with this deadline (for example, calling today to work tomorrow) may mischaracterize the intermittent contract, resulting in its conversion to an employment contract for an indefinite period.

The employee has one working day to communicate his acceptance or refusal to the call. Unlike the popular phrase "he who is silent consents", in the context of the intermittent contract, the worker's silence is interpreted as refusal. If the worker does not manifest himself, there will be no obligation to provide the services in that period, and this inaction will not be configured as insubordination or serious misconduct.

The refusal does not require justification. The employee has the prerogative to decide whether or not to accept the summons, without this implying the termination of the contractual

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The parties may agree through the intermittent employment contract:

- The places where services are provided;
- The shifts for which the employee will be called to provide services; e
- The forms and instruments of summoning and responding to the provision of services.

In the intermittent employment contract, the period of inactivity will not be considered time at the employer's disposal and will not be remunerated, in which case the intermittent employment contract will be mischaracterized if there is remuneration for time available during the period of inactivity.

Severance pay and prior notice must be calculated based on the average of the amounts received by the employee during the course of the intermittent employment contract.

Therefore, the calculation of the amounts of severance pay and prior notice is different from the calculation of an employment contract under the continuous regime.

In the intermittent employment contract, the employer must pay its own and the employee's social security contributions, and deposit the FGTS based on the amounts paid in the monthly period, and will provide the employee with proof of compliance with these obligations (Ordinance No. 671 of 2021) (BRASIL, 2021).

relationship. This particularity reinforces the non-exclusivity of labor, since the employee can work for other employers during their periods of inactivity.

If the offer to attend work is accepted, the party who fails to comply, without just cause, will pay the other party, within thirty days, a fine of 50% (fifty percent) of the remuneration that would be due, with compensation allowed within the same period<sup>6</sup> (CLT, 2025).

“ ... It should also be noted that MP No. 808/2017, despite having suffered the oft-mentioned loss of validity, brought to light a set of solutions (from article 452-B to article 452-H of the CLT) with the objective of further regulating the controversial and criticized intermittent employment contract. Article 452-B provided for optional clauses that may or may not be included in the intermittent employment contract, among which the one that provides — if the parties so wish — for a reciprocal compensation format in the event of cancellation of services previously scheduled under the terms of paragraphs 1 and 2 of article 452-A ...” (Martinez, 2019)

The payment regime in the intermittent contract has distinctive nuances, designed to ensure the payment of labor funds immediately after the effective provision of services.

## 2.2 FUNDS

The intermittent employee will receive the following amounts soon after the end of the provision of services (either at the end of a week, 20 days, or the period that lasted the call):

- 1) the remuneration is calculated according to the hourly wage practiced for the company's fixed worker.
- 2) proportional vacation: plus one constitutional third, with immediate payment.
- 3) 13th proportional salary: measured based on the days actually worked.
- 4) paid weekly rest (DSR).
- 5) additional: including night, unhealthy, dangerous bonuses, among others, if applicable to the activity performed.

In addition, other amounts provided for in Collective Bargaining Agreements or Collective Bargaining Agreements may be incorporated and must be itemized in the payment receipt.

You are also entitled to: FGTS, INSS/Social Security Payment based on the monthly payment made to the worker, unemployment insurance (provided that it meets the other criteria established in the specific legislation).

The employer must always provide proof to the employee regarding the payment of these contributions - detailed payment receipt.

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<sup>6</sup> If the employee accepts the summons, but later refuses to provide the service on the agreed day, he must pay a fine equivalent to 50% of the amount of remuneration that would be due to him, to be paid within 30 days. In turn, if the employer summons the worker and the worker appears, but the employer, for any reason (such as "no longer needs" or "forgot"), dismisses the need for the service, the employer must pay the same fine of 50% of the amount of remuneration that would be due to the employee, due to non-compliance with what was agreed.

With regard to vacations, the intermittent contract adopts, in essence, the same terms applicable to the fixed worker, but with notable particularities<sup>7</sup>.

### 3 ANALYSIS OF THE DECISIONS OF THE FEDERAL SUPREME COURT

#### 3.1 ADI 6154

ADI 6154 was proposed by the National Confederation of Industrial Workers (CNTI), questioning the constitutionality of articles 443, *caput* and §3; 452-A, §§1 to 9; and 611-A, VIII, of the CLT. The central issue under discussion was to verify whether the rules that regulate intermittent work are compatible with the principles and rights provided for in the Federal Constitution of 1988, especially with regard to the protection of workers and the guarantee of decent working conditions.

The rapporteur of the action was Justice Edson Fachin (rapporteur of this and of the joined actions ADI 5,829 and ADI 6,154), who voted for the merits, being defeated by the majority of the Court – but having reasoned that there was incompatibility between intermittent work and the essential core of fundamental labor rights. According to his argument, the contractual modality violates the dignity of the human person (art. 1, III, CF88) and the social value of work (art. 1, IV, CF88) by institutionalizing the precariousness of labor relations.

He noted that the intermittent contract breaks with the principle of contractual synagma, allowing an employment relationship without a minimum obligation to convene or remunerate. This characteristic, according to Fachin, transforms the worker into a "mere instrument of economic activity", violating his dignity and autonomy. The Minister was in tune with the theory of the prohibition of insufficient protection (*untermassverbot*), originating in the German constitutional doctrine and adopted by the jurisprudence of the STF in other contexts. According to this postulate, the State cannot establish a level of protection of fundamental rights below the minimum necessary to preserve the effectiveness and meaning of these rights<sup>8</sup>.

<sup>7</sup> " ... And the vacation system? Was there any regulation made by law, in particular, in favor of intermittent employees? Yes. Every 12 months, the intermittent employee acquires the right to enjoy, in the following 12 months, one month of vacation, a period during which he may not be called to provide services by the same employer, nor will he receive anything, given the anticipation of the perception of the proportional vacation fragments with an increase of one third, as provided for in paragraph 6, II, of the provisions of article 452-A of the CLT. Despite the loss of validity of paragraph 10 of the aforementioned article 452-A of the CLT, its reference was maintained in the legal universe. To dispel doubts about analogous application, the aforementioned provision provided — and still seems required — that the employee hired for intermittent work, by prior agreement with the employer, may enjoy his vacation in up to three periods, under the terms of paragraphs 1 and 2 of article 134 of the CLT ..." (Martinez, 2019).

<sup>8</sup> Main Arguments of the Rapporteur: Violation of Constitutional Principles: The plaintiff points out violation of the principles of human dignity, the social value of work, the prohibition of social regression and legal certainty. They allege that intermittent work was designed to make the means of hiring workers more precarious.

Justice Nunes Marques, who drafted the ruling, pointed out the full constitutionality of intermittent work, arguing that the contractual modality represents a legitimate instrument for making labor relations more flexible. His vote was based on three main axes:

- a) Constitutional compatibility: he argued that the Constitution does not prohibit different contractual modalities, as long as essential rights are guaranteed. Intermittent work, according to his argument, preserves the fundamental rights of the worker, ensuring proportional vacations, 13th proportional salary, FGTS and social security protection.
- b) Social and economic function: he highlighted that intermittent work contributes to the formalization of labor relations that would otherwise remain informal. The modality would respond to real economic needs, especially in sectors characterized by seasonal or fluctuating demand.
- c) Private Autonomy: emphasized the importance of private autonomy as a constitutional principle, arguing that contractual freedom is a corollary of free economic enterprise. The intermittent worker, according to this perspective, can refuse summons and maintain multiple bonds, expanding his work options<sup>9</sup>.

Justice Cristiano Zanin adopted an intermediate position, recognizing the constitutionality of intermittent work, but establishing interpretative limits. According to his vote, the contract should be automatically terminated if the worker is not summoned for a

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Transformation of the Worker into an object: The intermittent contract places the worker in a condition of mere object, as a tool, equipment, machinery, at the disposal of the business economic activity, whenever, where and as the employer sees fit. Uncertainty and Unpredictability of Remuneration: The zero-hour contract modality does not guarantee service provision or remuneration. The worker continues without the real conditions to enjoy the fundamental social rights that depend on the provision of services and resulting remuneration, without which there are no essential conditions for a dignified life. Insufficient Protection: The provisions are insufficient to guarantee minimum respect for constitutionally protected rights. There is no setting of minimum working hours and minimum incomes, even if estimated. The Minister invoked a postulate of protection or prohibition of insufficient protection. Suspension of Fundamental Social Rights: The rights guaranteed in arts. 6 and 7 of the Federal Constitution are suspended for the entire period in which the worker, despite being formally hired, is not providing services to the entrepreneur (STF, ADI 6154).

<sup>9</sup> Main Arguments of Justice Nunes Marques: Non-Suppression of Labor Rights: The intermittent contract ensures the payment of traditionally provided amounts, such as paid weekly rest, vacation and thirteenth salary proportional, and social security payments. In addition, the value of the hour of work cannot be lower than the hourly value of the minimum wage or that salary due to the other employees of the establishment who perform the same function. Increase in Social Protection: The modality increases social protection in relation to informal workers, who perform services without any type of contract. It constitutes a middle term between informality and the common employment relationship, offering minimum guarantees. Flexibility and Inclusion in the Labor Market: The new model aims to provide flexibility, regularize and bring workers back to the market, with guaranteed constitutional social rights. It cites case law of the TST stating that *"In this sense, the Fourth Panel of the Superior Labor Court (TST), when examining, on August 9, 2019, AIRR 1045406.2018.5.03.0097, considered to regulate the hiring of an employee under the intermittent regime modality, once all the dictates of the law were met. On the occasion, he stated: "The introduction of rules for intermittent work in our legal system was due to the need to grant basic rights to a multitude of workers who were in informality (almost 50% of the country's workforce), living on odd jobs, without a formal contract and without guarantee of fundamental labor rights. This is one of the new contractual modalities existing in the world, making the form of hiring and remuneration more flexible, in order to combat unemployment. It does not generate precariousness, but legal certainty for workers and employers, with clear rules, which stimulate the creation of new jobs". (STF, ADI 6154).*

period of more than 12 months, avoiding situations of perpetual availability without labor compensation. It also recognized the possibility of civil liability of the employer for non-compliance with objective good faith in cases of unjustified absence of summons or discriminatory use of the institute<sup>10</sup>.

### 3.2 ADI 5826

ADI 5826, now proposed by FENEPOSPETRO, followed substantially the same fundamentals and results as ADI 6154<sup>11</sup>. In the initial complaint, he alleged the violation of the principles of human dignity, the social value of work, the prohibition of social regression and legal certainty.

Justice Edson Fachin, as Rapporteur, voted for partial knowledge of the actions and, in the known part, for the merits of the requests, declaring the unconstitutionality of the following provisions of the CLT, as amended by Law No. 13,467/2017: Article 443, *caput*, final part, and paragraph 3; Article 452-A, paragraphs 1 to paragraph 9; and Article 611-A, VIII, final part. It pointed out that the provisions inserted by Provisional Measure No. 808/2017 would not be analyzed, since the MP was not converted into law and had its validity ended on 04/23/2018.

Justice Nunes Marques, the winning vote, rapporteur for the judgment, voted for partial knowledge of the actions and, on the merits, for the dismissal of the requests, declaring the constitutionality of the contested legal provisions. His vote was the prevailing one, making him the Draftsman of the Judgment. Justice Alexandre de Moraes emphasized the importance of legal certainty provided by the legal regulation of intermittent work. According

<sup>10</sup> Zanin voted for the partial upholding of the direct actions, to give an interpretation in accordance with the Federal Constitution to article 443, paragraph 3, of the CLT. His judgment thesis is that the intermittent contract is constitutional, but the intermittent employment contract will be considered terminated by operation of law if one year has elapsed without any summons of the employee by the employer. It also provides for civil liability of the employer for lack of justification. Arguments: Agreement with General Constitutionality: It aligns with the position of constitutionality of the intermittent contract, but highlights the concerns with uncertainty. Frustration of Expectation and Dignity: The absence of an indefinite call frustrates the worker's expectation of receiving remuneration that meets his vital needs (Article 7, IV, FC), violating the dignity of the human person. Offense to the Principle of Alterity: Understands that the possibility of not calling without the employer's responsibility transfers the risks of economic activity to the worker, in violation of article 2 of the CLT and the principle of alterity. It cites jurisprudence of the Superior Labor Court (TST) that considers an unlawful act the employer who does not summon the intermittent worker. Need for Maximum Period of Inactivity: Proposes a period of one year for the automatic termination of the contract due to inactivity, based on other labor rights (13th salary, vacation) that are consolidated annually. It mentions that Provisional Measure 808/2017 (which has lost its validity) already provided for this deadline, demonstrating the intention of legal certainty (STF, ADI 6154).

<sup>11</sup> The lawsuit was dismissed by a majority, with votes defeated, albeit in part, by Justices Fachin, Rosa Weber, Luiz Fux, Cristiano Zanin and Cármen Lúcia. Likewise, the constitutionality of provisions of the Consolidation of Labor Laws (CLT) that deal with the intermittent employment contract was also questioned, specifically the amendments to Provisional Measure No. 808/2017 in arts. Article 443, *caput* and § 3, Article 452-A and Article 611-A, VIII (STF, ADI 5826).

to his argument, the legal formalization of the modality offers greater protection than informal labor relations ("bicos"), guaranteeing basic rights and enabling state control.

Justice Rosa Weber produced a dissenting opinion of particular legal density, arguing that intermittent work compromises the *minimum contractual sign* necessary to characterize a genuine employment relationship. According to Weber, the modality structurally favors the employer, creating a contractual imbalance incompatible with the principle of worker protection. Although she requested to see the records, Justice Rosa Weber cast a dissenting vote, following Justice Edson Fachin with reservations, for the merits of the action (unconstitutionality).<sup>12</sup>

Justice Zanin voted for the partial upholding of the direct actions, to give an interpretation in accordance with the Federal Constitution to article 443, paragraph 3, of the CLT. His thesis, as in the previous ADI, is that the intermittent contract is constitutional, but the intermittent employment contract will be considered terminated by operation of law if a year has elapsed without any call of the employee by the employer, with possible civil liability of the employer for lack of justification<sup>13</sup>.

### 3.3 ADI 5829

ADI 5829, filed by FENATELL, was also dismissed, consolidating the jurisprudential understanding of the constitutionality of intermittent work. The judgment reaffirmed the grounds of the previous decisions, demonstrating the stabilization of the majority position of the Court.

<sup>12</sup> In the final minutes extract, it is listed as partially overdue. It declared the active illegitimacy of the federations (5,826 and 5,829) and the loss of purpose of MP 808/2017, focusing on ADI 6,154. Main Arguments: Precariousness and Deterioration of Rights: The labor reform aimed to make the social rights of workers more flexible in favor of the economic interests of the private sector, promoting the deterioration of the legal regime for the protection of social rights. Offense to Decent Work and Human Dignity: The modality transfers the economic risk from the company to the employee, fosters the generation of underemployment and occupational uncertainties. Unemployment is replaced by precariousness. It argues that the uncertainty regarding the object of the employment contract leads to the insecurity and infeasibility of the working citizen to receive remuneration essential to his maintenance and to the construction of a life project. Distortion of Labor Law: The intermittent contract breaks with the basic principle of continuity of the employment contract, to which the certainty of the provision of services and the scheduling of the workday, essential for the dignity of the worker, are linked. Negative Impact on Collective Bargaining

Work is Not a Commodity: Reaffirms the ILO principle, criticizing the instrumental view of work. Dilution of the 13th and Vacations: The fragmented payment of these funds corrupts its purpose (STF, ADI 58260)

<sup>13</sup> In summary, the Minister reported that there would be a constitutionality with reservations: he agrees with the general constitutionality, but shares the concerns about the uncertainty of the provision of service. It also argues the frustration of expectation and the principle of alterity: it argues that the possibility of not calling indefinitely frustrates the worker's legitimate expectation of receiving a salary for his vital needs (Art. 7, IV, FC). This also transfers the risks of the enterprise to the employee, violating the principle of alterity (Article 2 of the CLT). It cites a decision of the TST that considers the employer who never summons the intermittent worker to be unlawful. Need for a maximum period of inactivity: proposes the establishment of a maximum period of one year of inactivity for the automatic termination of the contract, based on other annual labor rights and the provision of Article 452-D of MP 808/2017 (which lost its validity, but demonstrated the intention of protection) (STF, ADI 5826).

Despite the divergences and robust arguments presented by Justices Edson Fachin, Rosa Weber and Luiz Fux, the majority of the Federal Supreme Court (STF) decided for the constitutionality of the contested legal provisions that regulate the intermittent employment contract.

Therefore, the prevailing thesis was that the intermittent employment contract, as outlined by Law No. 13,467/2017, is compatible with the Federal Constitution, being seen as an instrument to make labor relations more flexible and combat informality, offering a level of protection to workers who previously did not have a formal relationship.

#### **4 REFLECTIVE NOTES: DID THE SUPREME COURT GET IT RIGHT?**

The intermittent employment contract marks a significant change in the labor dynamics of Brazil. The promise is that it represents a balance between the flexibility of hiring and the safeguarding of minimum rights for workers.

However, its correct application will require accurate vigilance to the formal details and deadlines established by employers and employees, in order to avoid the mischaracterization of the relationship or the application of penalties.

Trade union movements and workers' organizations have maintained mobilization for the revision of the legislation, while business entities defend its maintenance and eventual expansion. This political tension will continue to influence the normative development of the matter

The decisions of the STF in the ADIs under analysis express a fundamental tension between two interpretative paradigms of the 1988 Constitution: the protective-social paradigm and the liberal-economic paradigm. This tension is not merely academic, but reflects concrete disputes about the Brazilian socioeconomic development model.

It is demonstrated that the decision of the STF, by dismissing the lawsuits by majority vote and declaring the constitutionality of intermittent work, represents a paradigmatic milestone in the Brazilian labor constitutional interpretation. A significant hermeneutic inflection is revealed that privileges the liberal-economic paradigm over the traditional social-protective one.

This latent articulation between constitutional principles points to substantial concerns regarding the effectiveness of minimum social protection and the risk of structural precariousness of labor relations, despite the formal maintenance of rights and the potential for formalization for some.

Notwithstanding being formally legalized, the intermittent modality, as interpreted by the majority of the STF, promotes a significant transfer of economic risks to the worker and

can compromise the material effectiveness of fundamental rights, reflecting the prevalence of private autonomy and economic efficiency to the detriment of the protection of the underprivileged in the current context of Brazilian social constitutionalism.

In this sense, such concerns are tangential to the authoritative part of the doctrine, which makes severe criticisms in the opposite direction, estimating that, in fact, this new intermittent employment contract is a clear trend in the understanding of the entrepreneurs who fostered (and sponsored) the so-called Labor Reform who, through it, intend to transfer the risks of their economic activity to the employee and, with this, increase their profits (LEITE, 2023).

See:

In addition, the new article 425-A of the CLT (and articles 29 to 39 of MTP Ordinance 671/2021, which "regulate" intermittent work) is, in our opinion, manifestly unconstitutional, because the worker will only receive remuneration when summoned by the company, which uses his service and then discards it as if it were a commodity, thus violating the principles of the dignity of the human person of the working citizen, of the social value of their work, the search for full employment, the correction of social inequalities and the social function of the company (CF, articles 1, III and IV, 170, caput, III, VII and VIII), and it is also certain that this "intermittent worker" may receive nothing for a month or months or receive remuneration below the minimum wage, which violates the provisions of article 7, IV, of the FC. (LEITE, 2023).

In summary, *"... This contractual modality is certainly one of the clearest manifestations of the overexploitation of human labor, as it equates the worker to a disposable machine ..."*. It puts in check the Brazilian constitutional project of building citizenship, improving the social conditions of workers, and a freer, fairer, and more solidary society (LEITE, 2023).

In the same sense, it is recommended to read Statements 40, 73, 74, 84, 85, 86, 87, 88, 89, 90 and 91 approved in the Conference on Material and Procedural Labor Law. Statement 73 has the following diction:

**INTERMITTENT EMPLOYMENT CONTRACT: UNCONSTITUTIONALITY:** The intermittent work regime provided for in article 443, paragraph 3, and article 452-A of the CLT is unconstitutional, for violation of article 7, I and VII of the Constitution of the Republic and for violating the fundamental right of the worker to the limits of working hours, to the thirteenth salary and to paid vacations<sup>14</sup>.

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<sup>14</sup> Still the statements. Statement 74. Intermittent employment contract: minimum wage The legal protection of the minimum wage, enshrined in article 7, VII, of the Constitution of the Republic, reaches workers in an intermittent work regime, provided for in arts. 443, § 3, and 452-A of the CLT, which are also guaranteed the right to the minimum monthly wage, regardless of the number of days in which they are called to work, respecting the professional minimum wage, the normative wage, the conventional wage or the regional floor. Statement 84. Intermittent employment contract: workload: as the intermittent employment contract must be entered into

This points out that the STF's decision is not unanimously followed. The setbacks urge a critical understanding of this transformation in the understandings of Brazilian labor law and the persistent challenges to reconcile the flexibilization of labor relations with the preservation of human dignity and social protection in the contemporary context.

## 5 FINAL CRITICAL CONTRIBUTIONS

The intermittent employment contract marks a significant change in Brazil's labor dynamics under the mantle of seeking a balance between the flexibility of hiring and the safeguarding of minimum rights for workers. Its correct application, however, requires accurate vigilance to the formal details and established deadlines, on the part of employers and employees, in order to avoid the mischaracterization of the bond or the application of penalties.

The decisions of the STF in the ADIs under analysis express the relationship of fundamental contradiction between two interpretative guidelines of the 1988 Constitution: the protective-social paradigm and the liberal-economic paradigm. The divergences between the

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in writing, the contractual instrument must contain the periods of service provision or the estimate of services to be performed, in respect of which the employer is obligated. Statement 85. The intermittent employment contract in Brazil does not correspond to the British zero-hours contract. In intermittent employment contracts, it is mandatory to indicate the minimum number of hours of effective provision of services, as an employment contract with an undetermined object or subject to a purely potestative condition is not admitted, according to articles 104, II, 166 II and 122 of the civil code, applicable in the alternative to the matter, pursuant to article 8, sole paragraph, of the CLT. Statement 86: Vacation and intermittent work. Vacation. intermittent work. in view of the existence of a legal antinomy between the provisions of paragraph 6 of article 452-A of the CLT and the provisions of paragraph 9 of the same article 452-A of the CLT, the legal system must be interpreted in a systematic way and the hierarchical criterion must be used to resolve the conflict of rules. Thus, in view of article 7, XVII, of the CF/88, which provides for the right to paid annual vacation, that is, paid at the time of the rest period (as also provided for in article 452-A, paragraph 9, CLT), the payment of proportional vacation after the provision of services (article 452-A, paragraph 6, II, CLT) is not applicable. Thus, in intermittent work, vacation must be paid when it is enjoyed. Statement 87. Intermittent employment contract. minimum wage and professional floor. fine. Unconstitutionality The fine provided for in article 452-A, paragraph 4, of the CLT, imposed on the worker who does not comply with a summons previously answered, is not compatible with the constitutional principles of human dignity, the social value of work, isonomy, the protection of the worker and the social function of the company. Statement 88. Intermittent work and risk to third parties intermittent work may not be carried out in activities that may endanger the life, health and safety of the workers themselves and/or third parties. Statement 89. Intermittent employment contract. permanence of the worker inside or outside the employer's establishment for the convenience of the latter. calculation as length of service intermittent employment contract. Permanence of the worker inside or outside the employer's establishment for the convenience of the latter. Calculation as length of service. in the intermittent employment contract, pursuant to article 452-A, paragraph 5, of the CLT, the periods in which the worker remains inside or outside the employer's establishment to meet interests, conveniences or awaiting instructions from the latter will be computed as hours or fractions actually worked. Statement 90. Intermittent employment contract and permanent demands 1. It is illegal to hire in the form of intermittent work to meet permanent, continuous or regular work demand, within the normal volume of activity of the company. 2. It is illegal to replace a regular or permanent job by hiring in the form of intermittent work. 3. The employer cannot opt for the intermittent employment contract to, under this legal regime, adopt the sliding and variable scale of the working day. 4. In view of the need for intermittent work, the employee hired under the terms of article 443, paragraph 3, of the CLT has a subjective right to the call, and his or the employer's omission is unlawful. Statement 91. Uncertain day and time for labor and risk exclusive to the employer. time at disposal is of effective service in the intermittent employment contract, the period without call by the employer is time at his disposal and must be remunerated as effective service. The burden of variations in demand in the enterprise is exclusive to the employer.

justices themselves, the doctrinal uprising in the opposite direction, and the very initiative of the parties who authored the ADIs to raise a trench to fight the legislative modification show that the problem is not merely academic, but reflects concrete disputes about the Brazilian socioeconomic development model.

It is demonstrated that the decision of the STF as a paradigmatic landmark in the Brazilian labor constitutional interpretation reveals itself as a significant hermeneutic inflection that makes a political-normative option that chose to privilege the liberal-economic paradigm over the traditional social protection.

It is pointed out that these substantial concerns regarding the effectiveness of minimum social protection and the risk of structural precariousness of labor relations (despite the formal maintenance of rights and the potential for formalization for some) end up leading to the criticism of the transfer of economic risks to the worker and may compromise the material effectiveness of fundamental rights.

Under the guise of giving the prevalence of private autonomy and economic efficiency, it is secondary to the protection of the underprivileged in the current context of Brazilian social constitutionalism.

What is certain is that the STF's decision does not solve all the challenges related to the sport. It will be essential to monitor, from now on, its practical effects on the living conditions of workers, the levels of employment and formalization, and the collection of social security.

Statistical studies will be key to assessing whether the modality fulfills the promises of its advocates (formalization, reduction of unemployment, beneficial flexibility) or confirms the fears of its critics (precariousness, reduction of income, weakening of social protection).

This entire panorama must be tempered with other issues such as: time limits of intermittency, criteria for termination due to inactivity and liability for abuse in the call (factors that will need a more precise jurisprudential definition).

This practical experimentation may require new measures in both directions. It is worth saying: the practical experience of intermittent work can generate pressures for legislative reforms, both in the sense of greater flexibility and greater protection. The public debate on the effects of the modality will influence future political decisions about its regulation.

The prioritization of economic efficiency in the face of a theoretical ideal of traditional social protection also signals deference to legislative choices of flexibility, due to the crucial role of the economy in the full development of a nation, which makes the decision of the majority of the STF defensible, rekindling the well-known margin of constitutional interpretation available to the Courts that, sometimes they also decide on political criteria.

It is identified, however, that one of the main weaknesses of the Praetorian majority argument in the STF lies in the insufficient consideration of the practical effects of the modality on the concrete lives of workers. It is necessary to think about whether the formal maintenance of rights is sufficient to ensure that rights do not lose material effectiveness due to the intermittence of the provision of work.

On the other hand, the minority argument, represented by the unsuccessful votes, although more sensitive to social rights, may have underestimated the legitimate needs for flexibility in the modern economy and the possibilities of future and adequate regulation of the modality – which may well be modified to meet a scenario that only the entrails of a new reality can prove necessary and require normative symbioses that accommodate such coming vicissitudes.

It seems that several decisions of the STF in recent years have been pointing, in a very massive and repeated way, a very clear direction of giving constitutional validity to norms that make traditional CLT rights more flexible, - a general framework from which a certain relativization of that historical-constructive primacy in the protection of the worker is extracted, revealing a reinterpretation of these rights, previously magnetized by a certain absoluteness, now in the light of the most recent economic considerations.

The main danger that can be glimpsed in this trajectory is the possible and progressive erosion of social protection, with a special impact on workers in situations of greater vulnerability. It is undeniable that intermittent work can be a functional alternative for professional categories that already have a more consolidated bargaining power. However, for those who depend on a single employment relationship, this modality can indeed bring undesirable precariousness.

Hence the demand for meticulous regulation, a point of balance, capable of preserving the core of fundamental labor rights in the constitutional sphere and, before that, entering the field of legislative policy and practical application by jurisprudence.

The very democratic and social vitality of our legal system will depend, to a large extent, on the way we manage to regulate, in an adequate and genuinely responsible way, tested in the laboratory of daily life, outside a watertight normative paralysis, this and many other forms of labor flexibilization in the legal field, but shaped by a joint and coordinated effort of all public authorities and civil society as a contribution to development economic, without, however, putting in check the pillars of social justice marked by the irreducible demands of human dignity.

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