

DOMESTIC WORK AND HEALTH ON TRIAL: A STUDY BASED ON THE DECISIONS OF THE BRAZILIAN LABOR JUDICIARY

TRABALHO DOMÉSTICO E SAÚDE EM JULGAMENTO: UM ESTUDO A PARTIR DAS DECISÕES DA JUSTIÇA DO TRABALHO BRASILEIRA

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ABSTRACT: In Brazil, domestic workers had an unfavorable legal treatment in relation to other workers for a long time. This legal inequality was mitigated with Constitutional Amendment (EC) 72/2013 – which extended rights related to workers’ health for the group – and Complementary Law (LC) 150/2015 – focused on, above all, rights related to working hours. This research investigated the recognition of domestic workers’ health rights in the Brazilian Labor Judiciary, by using judicial decisions related to domestic work and health, considering the period between April, 2013 and April, 2022. The investigation used a qualitative approach and an inductive reasoning, with a bibliographic and documental study, based on the analysis of judicial decisions.

KEY-WORDS: Domestic workers. Legal inequality. Workers’ health. Brazilian Labor Judiciary.

RESUMO: No Brasil, as trabalhadoras domésticas⁴ tiveram por muito tempo um tratamento jurídico desfavorável em relação aos demais trabalhadores. Essa desigualdade jurídica foi amenizada com a Emenda Constitucional (EC) 72/2013 – que ampliou os direitos relacionados à saúde do trabalhador para o grupo – e a Lei Complementar (LC) 150/2015 – voltada, sobretudo, para os direitos relacionados à jornada de trabalho. Esta pesquisa investigou o reconhecimento dos direitos à saúde das trabalhadoras domésticas na Justiça do Trabalho brasileira, por meio de decisões judiciais relacionadas ao trabalho doméstico e à saúde, considerando o intervalo entre o mês de abril de 2013 e o mês de abril de 2022. A investigação utilizou uma abordagem qualitativa e um raciocínio indutivo, com um estudo bibliográfico e documental, baseado na análise de decisões judiciais.

PALAVRAS-CHAVE: Trabalhadoras domésticas. Desigualdade jurídica. Saúde do Trabalhador. Justiça do Trabalho brasileira.

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⁴ In Portuguese, we chose to use the expression “trabalhadoras domésticas” in the feminine form to cover all workers who perform domestic work. The choice is justified since the activity is mainly developed by female workers, as presented in the text.

INTRODUCTION

In Brazil, domestic work is performed by 5.7 million of people, which represents 5.95% of the occupied population (DIEESE, 2022). It is mainly executed by black women, highlighting its gendered and racialized composition related to historical factors, such as colonialism and slavery in the country.

Until the entry into force of Constitutional Amendment (CA) 72/2013 and, later, its regulation, domestic workers had very unfavorable legal treatment in relation to other professionals. The CA was responsible for extending some of the social rights recognized in the Federal Constitution (1988) for other urban and rural employees to domestic workers. The Amendment of 2013 recognized the provision of workers' health rights to domestic workers and it was regulated by the Complementary Law (CL) 150/2015, which focused mainly on rights related to working hours. The regulation left a gap on workers' health right related to the reduction of risks.

This gap, the health crisis caused by the COVID-19 pandemic, and the formal recognition of health as a fundamental right at work by the International Labour Organization (ILO, 2022) motivated the present study.

The research investigated the recognition of domestic workers' health rights in the Brazilian Labor Judiciary. For that, we used judicial decisions related to domestic work and health, considering the period between April, 2013 and April, 2022, as explained below in the methodological considerations presented in item 2. Based on the normative gap, the study hypothesizes that possible violations of the right to health may be addressed to the Judiciary by domestic workers to guarantee its enforcement.

1 DOMESTIC WORK AND HEALTH IN BRAZIL

The investigation of the health of domestic workers is intersected by factors related to the characteristics of the provision of services and the physical characteristics of the person performing the work. The present section was divided into two parts in order to describe the factors that intersect with the health of domestic workers.

1.1 Discussions on domestic work and health

The preparation for the ILO Convention and Recommendation of Domestic Workers led to the publication of the Law and Practice Report (2010). The Report of the International Labour Organization synthesized discussions related to promoting occupational safety and health (OSH) for domestic workers. Initially, the Report included a brief overview of the lack of coverage of domestic workers by OSH legislation in the ILO Member States that participated in the publication (International Labour Office, 2010, pp. 61).

Domestic work is associated with “normal activities of a household” that are not restricted to being carried out by people who are part of an employment relationship (International Labour Office, 2010, pp. 61). This association conducts to the misleading perception of domestic work as “safe and non-threatening” (International Labour Office, 2010, pp. 61-62).

María Fernanda Bauleo, Frank van Dijk and Katja Radonl (2017, pp. 75) presented the following provocation “[...] Home 'is a safe place' to come to after work, so how could it be considered, at the same time, a risky place for a worker?”. The authors pointed out that the confusion of spaces – one’s home and another’s workplace – contributes to an attitude of “minimizing” the risks of domestic work (Bauleo; Dijk; Radon, 2017, pp. 74).

The focus of their research is the workplace of domestic workers, based on psychosocial risks and their potential in environments where there is proximity and intimacy with the employer (Bauleo; Dijk; Radon, 2017, pp. 74). The authors concluded that work pace is a risk factor for mental health in a place isolated from other workers (Bauleo; Dijk; Katja Radon, 2017, pp. 81).

Jill Hanley *et al.* (2010, pp. 431) investigated 150 domestic workers in Montreal (Canada) and concluded that “it definitely demonstrates that the job of the domestic worker involves health risks”. The authors identified a discrepancy between the small number of people who reported having already suffered a work-related accident/illness and the high number/detail of types of accidents/diseases that have already been affected (Hanley *et al.*, 2010, pp. 428 - 429).

Eliana Cardoso Sales and Vilma Sousa Santana (2003, pp. 685) investigated the mental health of domestic workers in Salvador (Brazil). The authors found that domestic workers reported depressive and anxiety symptoms more frequently than women with another type of occupation (Sales; Santana, 2003, pp. 688).

Comparison with working women with another type of occupation was carried out in another study, focusing on non-fatal occupational accidents, conducted by Vilma Sousa Santana *et al.* (2003, pp. 67). The results based on a survey in a sample of 1,650 domestic workers in Salvador (Brazil) indicated that most of the accidents occurs in the employers' homes, motivated by falls and that the annual incidence of non-fatal accidents at work is higher in the case of domestic workers than in female workers with another type of occupation (Santana *et al.*, 2003, pp. 71). The authors concluded that domestic work poses a major risk to the health of workers, in a scenario of “invisibility of the occupational morbidity of domestic activities” (Santana *et al.*, 2003, pp. 71; 72).

Catharina Lopes Scodro (2022, pp. 196) investigated the National Occupational Health Policy in Brazil, which formally includes domestic workers, by conducting interviews with different social actors within the state of São Paulo. The results indicate a mismatch between the reports of members of unions and the number of notifications of psychic illness and led to the conclusion that “health promotion permeates strategies and initiatives that institutionalize the recognition of the home as a workplace” (Scodro, 2022, pp. 164; 196).

The literature review indicated that, in general, the health of domestic workers is worse than that of other female workers. Louisa Acciari, Juana del Carmen Britez, and Andrea del Carmen Morales Pérez (2021, pp. 28) emphasized that the COVID-19 pandemic has intensified and created new occupational risks for domestic workers. Thus, studies that propose to investigate the health of domestic workers – especially by considering thhe impacts of COVID-19 – have a significative relevance.

1.2 Profile and regulation of domestic workers' health in Brazil

In 2021, the population engaged in domestic work in Brazil totaled 5.7 million people, of which 92% were women, whose more than half were “heads of families” responsible for supporting their homes and children (DIEESE, 2022).

Data reveal that 65% of female domestic workers are black, which impacts a difference in average wages and formalization rates (DIEESE, 2022). The intersection of gender and race factors reveals that black female workers receive lower amounts, with an average of R\$ 1,319.00 (formalized) and R\$ 743.00 (non-formalized), while non-black female workers receive an average of R\$ 1,372.00 (formalized) and R\$ 920.00 (non-formalized) (DIEESE, 2022).

Formalization occurs in cases where the provision of services occurs in a continuous, subordinated, costly, and personal manner, with a non-profit purpose for the person or family, within the scope of their residence. The legislation innovated by bringing the requirement of more than two days a week to perform the service, for the same employer.

This provision institutionalized the figure of the “daily domestic worker” (in Portuguese, “diarista”), whose remuneration is per day of service performed and, being informal, does not enjoy the rights⁵ foreseen to those included in the employment relationship. Despite being restricted to the formalized portion of workers, the rights represent decades of struggle for the recognition of domestic work properly as a work.

The regulation of domestic work in Brazil reveals a historical trajectory of exclusions (Scodro, 2022, pp. 118), highlighting the case of health and safety rights. Such exclusions are identified in the following instruments: Decree 24,637 of 1934 on occupational accidents; Decree-Law 3,078 of 1941, aimed at regulating employees in domestic service and restricting the employer’s duties to health and safety to “hygienic food and housing conditions when such utilities are due”; Decree-Law 5,452 of 1943 on urban employment relations, popularly known as “Consolidation of Labor Laws ‘CLL’” (in Portuguese, “Consolidação das Leis do Trabalho ‘CLT’”); Decree-Law 7,036 of 1944 that reformed the legislation on work accidents and included domestic services, excepting domestic service employers from keeping a record authenticated by the respective competent authority; Law 605 of 1949 on paid weekly rest and the payment of wages on civil and religious holidays, not including domestic workers; Law 3,807 of 1960 on the general Social Security regime that did not extend the quality of

⁵ The rights provided to domestic workers are: limitation of working hours, extraordinary remuneration, remuneration for night work, paid annual leave with an increase of one-third of the normal salary, the deposit of the “Fundo de Garantia do Tempo de Serviço ‘FGTS’”, and mandatory enrollment in the National Social Security Institute.

compulsory insurance to domestic workers; Law 5,316 of 1967 which excluded domestic workers from work accident insurance in Social Security.

These exclusions indicate a lack of recognition of risks in the residence and, consequently, the house as a workplace (Scodro, 2022, pp. 190). To face these exclusions, the collective movement of domestic workers was structured and strengthened, through the creation of professional associations and the organization of meetings and events.

Law 5,859 was published in 1972, regulated in 1973, and reported as a “definitive milestone in the advancement of social legislation in Brazil and modernization” (Kofes, 2001, pp. 290). Despite advances in the definition and provision of rights for domestic workers (vacations, for example), the mobilization of the category at the “II National Congress of Domestic Workers”, in 1974, concluded that the law was insufficient in terms of legal protection (Bernardino-Costa, 2015, pp. 167-168).

The collective movement of domestic workers had an impact on the Federal Constitution of 1988 (FC/88), which provided for a list of thirty-four rights for urban and rural workers. The demand for rights led to the (partial) inclusion of domestic workers in the list, through the conquest of nine rights and integration into Social Security, as well as the conversion of some professional associations into unions.

The subsequent decades experienced a period of intense mobilization by domestic workers' unions, impacting on the discussions that culminated in the participation for the preparation of ILO C189 – Convention and R201 – Recommendation on Domestic Work⁶; in Constitutional Amendment 72 of 2013, by expanding the constitutional rights; and in Complementary Law 150 of 2015. These events reveal an intertwining – in time and content – that must be read as a repercussion of the demand for domestic workers' rights at different levels (Scodro, 2022, pp. 135), without taking the legal changes in Brazil as a “boomerang effect” and/or “a case of ‘vernacularization’ of global rights frameworks” of C189 (Acciari, 2019, pp. 40).

The expansion of constitutional rights for domestic workers signals a formal attempt to mitigate their unfavorable legal treatment. Such mitigation can be identified by the provision of rights related to health and safety and the recognition of occupational risks in residences,

⁶ Scodro (2022, pp. 192) concluded that the ratification of ILO C189 did not lead to its full internalization by the Brazilian State, which has repercussions on its effects on the Brazilian legal system.

such as “Reduction of risks inherent to work, through health, hygiene and safety standards” (art. 7, XXII, Federal Constitution).

These rights needed to be regulated by infra-constitutional instruments to carry out the formal attempt at mitigation. In Brazil, CL 150/2015 was responsible for regulating the changes brought about by CA 72/2013. However, the Complementary Law was silent on risk reduction provision for domestic workers, including health and safety aspects related only to working hours, vacations, weekly paid rest, and night work.

This scenario of lack of regulation raises questions related to the vulnerability that the group experiences, with emphasis on the COVID-19 pandemic. According to Instituto Pólis (2021), the number of deaths in the city of São Paulo from March 2020 to March 2021 was concentrated in the following groups/sectors: retirees (32.2%); services (24.3%); and housekeepers (15.7%). In the service sector, domestic workers accounted for a high percentage of deaths, especially female and black workers (52.8%) (Instituto Polis, 2021).

These data indicate that the vulnerability of the group was intensified during the COVID-19 pandemic, reiterating its gendered and racialized composition. This percentage of deaths did not impact, however, the continuity of domestic work during the pandemic, leading to its exclusion from the priority group of vaccinated workers. The pandemic has exposed the invisibility of occupational risks that were already present in homes and, therefore, the precariousness of domestic workers’ health.

2 DOMESTIC WORK AND HEALTH ON TRIAL

Since CA 72/2013, Brazilian law started to guarantee domestic workers the reduction of risks inherent to work. However, there is a gap between FC/88 and CL 150/2015, since this provision was not regulated. Considering that this normative gap can lead to the ineffectiveness of the right to health at work, the study hypothesizes that possible violations of the right to health may be addressed to the Judiciary by domestic workers to guarantee its enforcement.

To understand the demands of these workers in relation to occupational health, as well as the positioning of the Judiciary on these claims, we carried out documentary research at the Regional Labor Court of the 2nd Region (TRT2). For that, the data collection was carried out on the TRT2 website and had the following search queries: (i) geographic, by restricting the

study to TRT2 (which encompasses the city of São Paulo), with the highest concentration of the Brazilian workforce and has the highest volume of processes; (ii) temporal, limiting to decisions of processes distributed from Constitutional Amendment 72 of 2013 (published on April 3, 2013) until April 3, 2022 (which allowed the analysis of the pandemic); and (iii) procedural⁷, through the collection of decisions of electronic lawsuits of the 1st instance, since the disputes involving domestic workers are less common in the superior instances. The search for decisions was based on the combination of the terms “domestic work and health”.

In the electronic database, 257 decisions were found, of which: 211 decisions effectively referred to domestic work; 44 decisions (although they mentioned the term domestic work) did not actually deal with domestic work and were not analyzed; and 2 decisions handed down in proceedings under the secrecy of justice, precluding their analysis. The description and analysis below are based on the 211 decisions that effectively referred to domestic work.

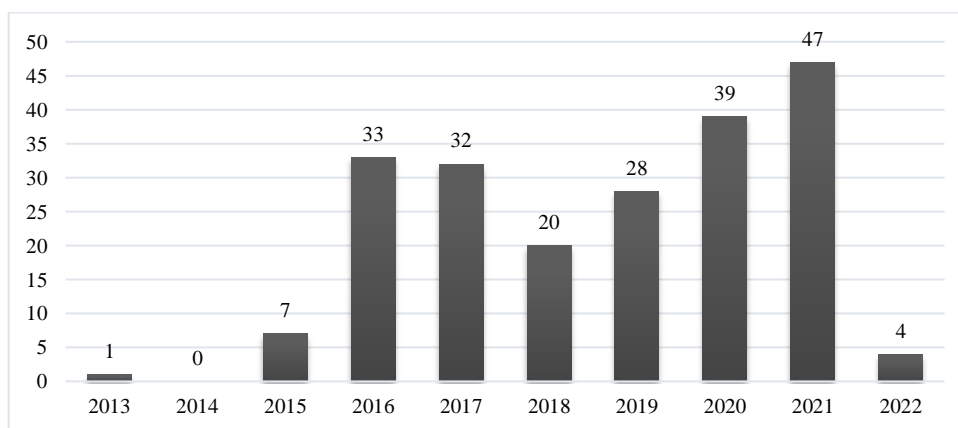
2.1 Portrait of decisions

Research on electronic processes resulted in findings from 2013, the year of publication of Constitutional Amendment 72. This does not mean that there were no processes before, as it is possible that they were physical processes. However, data collection allowed us to verify that until 2015 – the year of publication of LC 150 – there were few results.

The graph below systematizes the year in which lawsuits were filed by domestic workers and shows that, after 2015, there was a significant increase in the number of lawsuits filed. There were peaks in the years 2020 and 2021, which can be explained by the advent of COVID-19 (although we did not find many processes related to COVID-19 in the analyses, which may be due to the processes being recent and potentially not having yet been judged).

Graph 1 – Year of the lawsuit

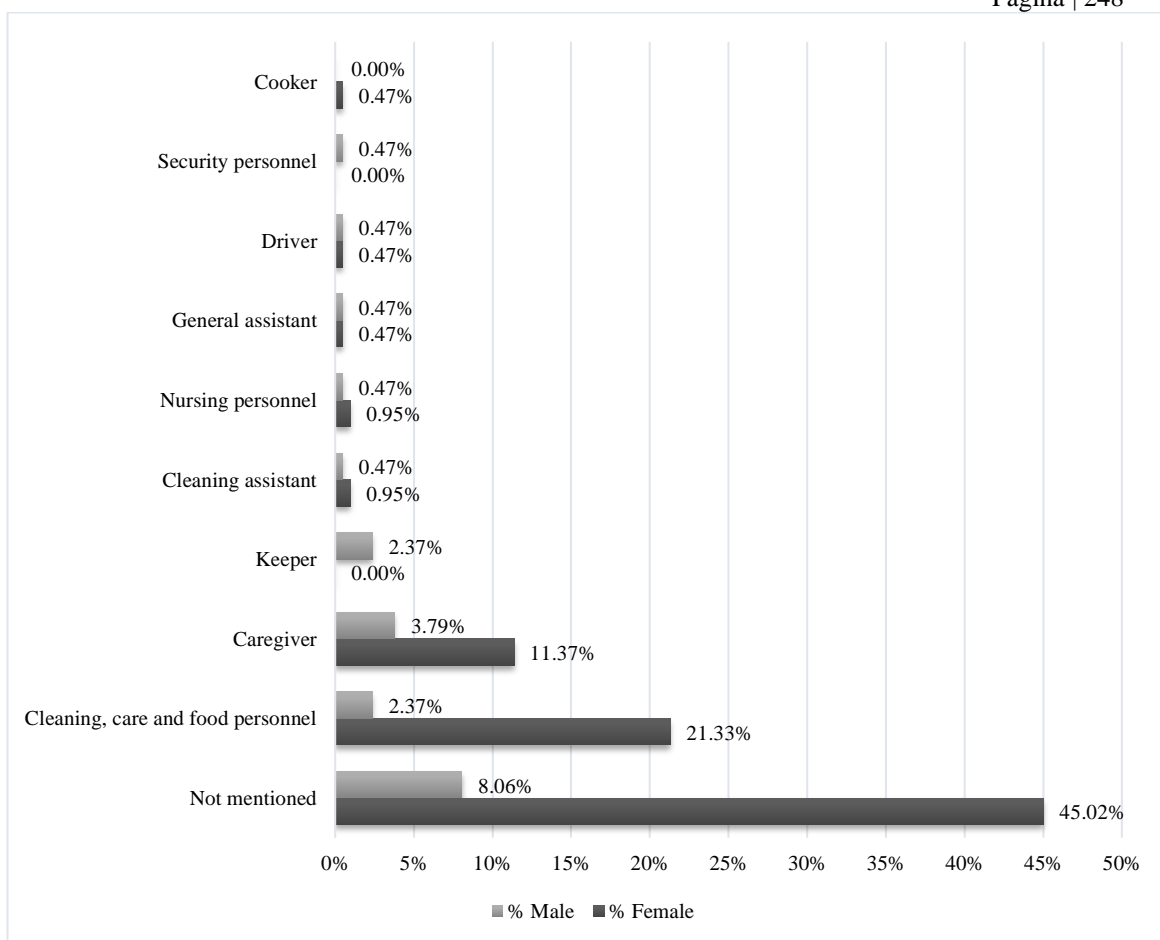
⁷ Regarding the procedural search query, we analyzed the final decisions (and not the entire process). The choice to analyze the decisions is justified for two reasons: the first is related to a limitation of the Court's database, which only allows searching by key-terms in decisions and not in the entire process; the second is linked to access to decisions, since in some cases reading the entire process would depend on a password (registered for specific access to the process) and, therefore, we selected decisions with public access.



Source: Own elaboration.

The analysis of the claimers' profiles about gender reflected the predominance of the female gender, as indicated by the literature. The activities developed by these workers are diversified, allowing a broader understanding of domestic work as a care work.

Graph 2 – Activity vs. Gender of the claimers

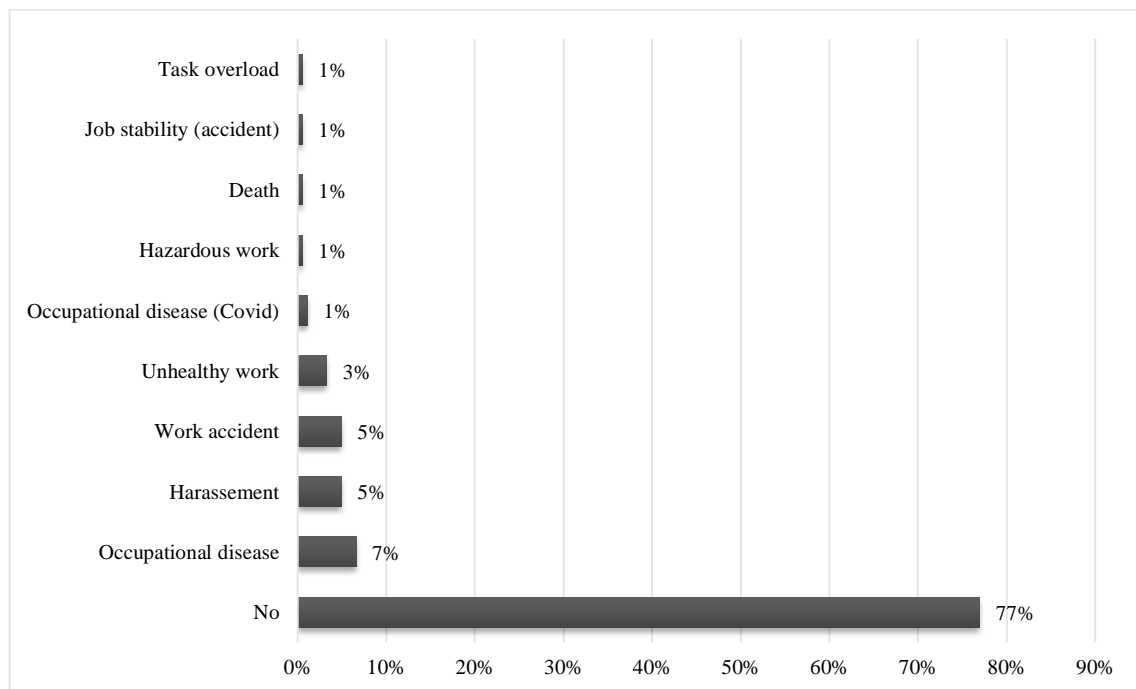


Source: Own elaboration.

The graph also suggests that, depending on the type of domestic activity performed, the male gender is predominant, which was the case for security personnel and (house) keeper. This predominance highlighted the sexual division of labor in domestic workers' demands, for which the activities related with the reproduction of daily lives is developed mainly by women,

We identified that 86% of the judicial decisions were related to the theme of workers' health, with a predominance of discussions about working time: themes related to rest breaks appear in 114 cases and themes related to excessive working hours appear in 156 cases. Topics related to other health aspects (that is, unrelated to working time) appear only in 42 processes and deal with different issues, which involve aspects of physical health (i.e. working in dangerous conditions) and mental health (i.e. work harassment).

Graph 3 – Topics related to occupational health on the judicial decisions



Source: Own elaboration.

Regarding the judge's final decision, we investigated solely the demands regarding to health issues (even in the cases with cumulated requests): the plaintiff's request was fully accepted in only 6 cases; the plaintiff's request was partially accepted in 2 processes that dealt with occupational health issues unrelated to working time. The request was not accepted in the other 34 cases. In cases where there was a discussion about working time, only 18 were not accepted. In the others, the requests were accepted or partially accepted.

Thus, when the lawsuits dealt with working time issues (both in relation to rest breaks and in relation to excessive working hours), probably due to regulation by LC 150/2015, the validity or rejection of the requests was based on evidences (and not whether the subject was regulated by law). There was a tendency for them to be accepted. However, in relation to other health-related topics, questions about the lack of regulation and, consequently, the impossibility of being accepted were more frequent.

Also, we identified lawsuits concerning to the demand of recognition of the employment relationship, cumulated with other requests. When the demand on health was attached to it, the common position was to deny the request, based on the lack of the employment relationship.

Thus, there is a no recognition of the enforcement of the right of health for the “daily domestic worker”, non-recognized as a domestic employee by the CL 150/2015.

2.2 Analysis of the decisions

After describing the data, the judicial decisions were analyzed to verify the results related to health and, beyond that, to other aspects of domestic work in Brazil. Considering the search queries and the keywords used, most of the processes were regarded to health, being divided into related and unrelated to working time. This differentiation stands out as the limit between what was foreseen by Constitutional Amendment 72/2013 and what was regulated by Complementary Law 150. The rights provided for in the CA – which were not contemplated in the infra-constitutional legislation – remained little or almost unregulated.

Even having a restricted scope (compared to the rights recognized by the Constitutional Amendment), the CL also represents an important instrument of protection for domestic workers. Judicial decisions showed that the issues demanded and regulated by the CL seem to be more easily recognized by the Judiciary. This perception is supported by the full non-application of Brazilian Labor Law to domestic work: the decisions showed that structures related to worker protection, founded on the principle of protection (Plá Rodriguez, 2000), were not implemented for domestic workers.

This non-implementation is mainly due to the restricted scope of CL 150/2015 and the invisibilization of domestic work by other Labor Law instruments. For example, the Consolidation of Labor Laws could serve as a subsidiary source to discipline domestic work (which is provided for in Article 19 of CL 150/2015), however, it is not applied to domestic employees based on the legal restriction (Article 7).

This inapplicability remains even with the attempt to reduce the existing gap between the regulation given to domestic work and other work relationships, by the Constitutional Amendment of 2013 and the possibility of recognition of unconstitutionality in the legal system. The aforementioned Article 7, included by Decree-Law 8079/1945, dates back to a historical context of intense industrialization and legal exclusion of domestic workers in the country.

The decisions reiterate the position of non-application of the CLL to domestic workers impacting on the non-recognizing rights guaranteed to other workers (i.e. fines for termination

of the employment contract and guarantee of indemnity for dangerous work). We verified that the Complementary Law is positioned as a “ceiling” to protect the health of domestic workers, in which the Law determines the rights that may be questioned before the Judiciary and provides grounds for judicial demands related to domestic work.

This “ceiling” prevents rights beyond the CL from being recognized. For example, the decisions showed that rights provided for in collective bargaining instruments are not recognized in the investigated Court. There are Brazilian workers' and employers' unions concentrated, above all, in the state of the TRT2 (Scodro, 2022). However, the judicial decisions reiterate a position for the non-configuration of economic category in the case of the domestic employer.

Even though it is a remunerated professional activity, the decisions did not consider that there is a solidarity of economic interests between employers in the domestic environment, which is a requirement for collective bargaining by the CLL. This understanding has repercussions on the supposed impossibility of collective bargaining (even though unions exist in fact and by law in the country and carry out collective bargaining agreements).

The lack of recognition hampers the judicialization of rights provided for in the Federal Constitution and not regulated by the CL. Thus, due to the presence of a “ceiling” in the regulation of domestic work, other mechanisms for health promotion and recognition of rights lose ground.

Finally, regarding health not related to working time, two situations are worth mentioning: the difficulty in recognizing the causal nexus and COVID-19. With respect to the causal nexus, the decisions reiterated that the workplace and the type of activity performed to make it difficult to recognize their relationship with the illness. The decisions that dealt with the theme brought arguments related to the difficulty of demonstrating the link with work since the activity performed professionally (paid domestic work) is also performed in the workers' own homes (unpaid domestic work).

In this sense, Catharina Lopes Scodro (2022, pp. 196) mentioned the difficulty in recognizing private residences as a workplace, which is illustrated by the interview with a domestic worker, transcribed below “Because for us, domestic workers, the same activity you do at work, you do at home. So, it is even more difficult to say that the disease was in the workplace. Why can they claim 'but you also iron clothes at home, right?'. How do you say you

got it at work, right?” When analyzing the judicial decisions, the Judiciary confirms the non-recognition of the house as a workplace, since it hinders the recognition of the risks that the space-activity interaction offers.

As to COVID-related lawsuits, we expected to find a greater number of decisions involving the topic and its health implications. Nonetheless, just one case was found, in which the COVID-19 infection was identified as an occupational disease, with no resistance due to default⁸.

This scenario raises questions: If the defense had been presented, would the outcome of the decision be the same? Is COVID-19 identified as a risk in the domestic workplace by Brazilian Labor Law? Why was there a single case? Based on the number of deaths of domestic workers, the lack of actions involving health, domestic work, and COVID-19 signals an invisibility of the group’s demands before the Judiciary or, as previously suggested, a delay in the judgment of these decisions (and, therefore, the decisions on the subject could not have been captured by this research).

FINAL REMARKS

This research investigated the recognition of domestic workers’ health rights in the Brazilian Labor Judiciary, by using judicial decisions related to domestic work and health, considering the period between April, 2013 and April, 2022. The study was based on the normative gap between Constitutional Amendment 72 and Complementary Law 150.

The research on judicial decisions showed that the Complementary Law represents an important instrument for the protection of domestic workers since the subjects regulated therein seem to be more easily recognized before the Judiciary. In this sense, we observed that the majority of judicialized health issues were related to working time, while other issues are less frequent and tend not to be recognized by the Judiciary.

The hypothesis on the possible violations of the right to health that may be addressed to the Judiciary by domestic workers to guarantee its enforcement was not totally confirmed. in

⁸ The default occurs due to the lack of presentation of defense in the judicial process. In these cases, according to Brazilian law, what was alleged by the plaintiff is considered true.

the time-length, there was no significant impact in the enforcement of the right to health of domestic, beyond what is already in the scope of the Complementary Law.

This position can be related to the access to justice. If the measure for define the increasing of access is the quantity of lawsuits, we confirmed that the access of justice has improved for domestic workers. However, if we intend to look beyond the quantity, to investigate if the law is enforced and the rights are guaranteed, we found out that the access itself was not provided. In this case, the right to health of domestic workers was reduced to working hours issues, impacting in the non-recognition of rights positioned in the normative gap between Constitutional Amendment 72 and Complementary Law 150.

In practice, the Complementary Law appears as a “ceiling” to protect the health of domestic workers. As a “ceiling”, the Law determines the rights that may be questioned before the Judiciary and provides grounds for judicial demands related to domestic work. This “ceiling” prevents rights beyond the Complementary Law from being recognized, for example, in collective bargaining instruments.

This scenario allows us to question whether there is an incompatibility between the structure of Brazilian Labor Law and domestic work since there is a normative gap and the system itself is unable to fill it. This may reflect on the invisibility of their demands before the Judiciary, at a time when the group’s vulnerability is intensifying, such as the COVID-19 pandemic. Nonetheless, despite it is not the currently scenario, we emphasize the potential of the Judiciary to enforce rights, based on Federal Constitution and on the guidelines of ILO C189, for example.

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