



Update

Momentum



Labour

June 6, 2016

EMPLOYMENT CONTRACTS VERSUS SERVICE AGREEMENTS:

THE NEVER ENDING (JUDICIAL) TALE?

Article 11 of the Portuguese Labour Code (hereinafter 'PLC')¹ defines an employment contract as an agreement '*in which a natural person undertakes, upon remuneration, to provide its activity to another or others, within an organisation and under the latter's authority*'.² The PLC and all forms of employment regulated therein require the work to be performed with **legal subordination**: work performed independently – i.e. service providers/self-employed workers – is excluded. Nevertheless, given the complexity of the facts, it is often difficult to assess whether or not this element can be verified.

Similarly to other countries, bogus self-employment requires close monitoring, since it is a form of fraud: the relevance of the problem is reflected in the high number of legal disputes on the qualification of contracts (as civil law or employment contracts)³.

¹ Approved by Law No. 7/2009 of February 12 (hereinafter 'PLC') and amended by Laws No. 105/2009, of September 14, 53/2011, of October 14, 23/2012, of June 25, 47/2012, of August 29, 69/2013, of August 30, 27/2014, of May 8, 55/2014 of August 25, 28/2015, of April 14, 120/2015 of September 1 and 8/2016, of April 1. See also Amendment No. 38/2012, of July 10.

² Emphasis added.

³ E.g. Supreme Court decisions of January, 31, 2012, ruling No. 121/04.0TTSNT.L1.S1, available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/ccbf2ac7a9202b5a8025799900386737?OpenDocument> (Portuguese version) and of May, 21, 2014, ruling No. 517/10.9TTLB.L1.S1, available at <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/fff20b913171b0b680257ce50037ad80?OpenDocument> (Portuguese version).



Article 12, No. 2 of the PLC already qualified as ‘a very serious misdemeanour to perform an activity with the formal appearance of a service agreement but according to the typical conditions of an employment contract, in a way that might cause damages to the employee or to the State’. More recently, Law No. 63/2013, of August 27⁴ introduced a special judicial procedure – thus amending the Labour Procedure Code – to assess the qualification of contracts (as service agreements or employment contracts). It also reinforced the competences of the Authority for Labour Conditions (*ACT – Autoridade para as Condições para o Trabalho*) in monitoring fraud and expediting such cases to court, when a suspicion of bogus self-employment is verified and not corrected within the deadline set forth by law.

Since this judicial procedure is carried out officially, regardless of a complaint by the employee, it has been **questionable whether the new regime introduced a system pursuing a mandatory public interest (against fraud and bogus self-employment) or if the free will of the parties shall prevail and the employee be empowered to withdraw the proceedings** – e.g., by entering into an agreement with the employer or by legitimately arguing no interest in (re)qualifying the contract as an employment contract.

In this regard, Courts have not been following a common and straightforward response: under the decision of September 24, 2014, the Lisbon Court of Appeal ruled that this Act had the goal of protecting the employee and **not any public interest** related to the general requalification of contracts⁵; a different understanding was, nevertheless, followed by the Lisbon Court of Appeal decision of October 8, 2014⁶, where the Court ruled that the employee was not entitled to withdraw the judicial procedure, since the Public Prosecutor is empowered to proceed with the action even against the employee’s will, **given the public interest** inherent to this procedure.

⁴ Available at <https://dre.pt/application/dir/pdf1sdip/2013/08/16400/0516805169.pdf> (Portuguese version).

⁵ Ruling No. 4628/13.0TTLSB.L1-4, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ae64f6d87fa1dc4e80257d66004d6808?OpenDocument> (Portuguese version).

⁶ Ruling No. 1330/14.0TTLSB.L1-4, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/ab51b7bd12deab0380257d70004bff04?OpenDocument> (Portuguese version).



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In December 2014, the Lisbon Court of Appeal underlined these different understandings: in its ruling of December 17⁷, the Court decided that even if employee and employer agreed on the termination of the employment contract (after the judicial procedure had been initiated), the Public Prosecutor was empowered to proceed with the judicial action, given the public interest inherent to this special procedure and the duty to comply with past obligations (namely, Social Security and Tax duties). A different construction of the law had, however, been disclosed by the Lisbon Court of Appeal in its ruling of December 3⁸, 2014, where it stated that the Public Prosecutor was not empowered – by lack of interest – to proceed with the judicial action in a similar case.

More recently (on April 20, 2016), the Lisbon Court of Appeal ruled that employee and employer are **free to negotiate** the end of the judicial procedure - hence the legal claim entailed disposable rights⁹. However, on May 4, 2016, the **Constitutional Court** ruled (on nine different cases) that the judicial decisions that decided that the Public Prosecutor is empowered to proceed with legal action even against the employee’s will were **not unconstitutional** by infringement of the freedom of choice of the way of working, of the right to legal action and to fair hearing and of the equality principle. Given the different rulings, close attention should be paid to upcoming developments on the topic.

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⁷ Ruling No. 1332/14.6TTLSB.L1-4, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/cfdb333be58db5e780257db700313f42?OpenDocument> (Portuguese version).

⁸ Ruling No. 233/14.2TTCSC.L1-4, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2618781679a74f3280257dab002e017c?OpenDocument> (Portuguese version).

⁹ Ruling No. 2203/14.1TTLSB.L1-4, available at <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2230e8719859374480257fb5004ca548?OpenDocument> (Portuguese version).