

Atypical Employment Relationships: The Position in Portugal

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I. INTRODUCTION

PORTUGAL HAS A demanding system of terminations of employment contracts by the employer: under Portuguese law, the employer may unilaterally terminate an employment contract of indefinite duration only in exceptional cases. This arises from Article 53 of the Portuguese Constitution, which safeguards the employee's right to job security. Hence, although an employer can terminate a contract based on economic grounds, may only in exceptional cases and once substantial and procedural mandatory requirements are met, end the employment relationship. This principle also justifies the exceptional nature of atypical employment, including fixed or unfixed term contracts and temporary work.

Employment relationships are governed by the Portuguese Labour Code, approved by Law No 7/2009 of 12 February¹ (PLC). Article 11 of the PLC 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 their authority'.²

The PLC does not provide definitions of the parties (employee/employer). However, such notions arise from the legal notion of the employment contract: the employee is the natural person (legal persons are excluded) who provides its activity, upon remuneration, to the employer(s) (natural or legal person(s)).³ The employer(s) is/are granted disciplinary authority and the

¹ Amended by Laws No 105/2009 of 14 September, 53/2011 of 14 October, 23/2012 of 25 June, 47/2012 of 29 August, 69/2013 of 30 August, 27/2014 of 8 May, 55/2014 of 25 August, 28/2015 of 14 April, 120/2015 of 1 September, 8/2016 of 1 April, 28/2016 of 23 August, 73/2017 of 16 August and 14/2018 of 19 March. See also Rectifications No 38/2012 of 10 July and 28/2017 of 2 October.

² Please refer also to Art 1152 of the Portuguese Civil Code.

³ Notwithstanding this, the PLC entails definitions of specific types of employees, providing for a set of rules to be applied to such categories as 'pregnant, recently having given birth or employee who are nursing' (Art 36, para 1), 'underage employee' (Art 68) or 'student

power to direct and supervise the employee's activity and the contract's compliance.

Legal subordination remains the main criterion distinguishing employment contracts from other similar contracts (namely services agreements): if legal subordination is determined, an employment contract is deemed to exist without further assessment. Nevertheless, given the complexity of the facts, it is often difficult to assess whether this element can be verified. To determine its occurrence, Portuguese courts apply the 'facts index' system.⁴ According to the general principles of the burden of proof, the employee would have to prove the existence of the employment contract;⁵ however, a legal presumption upon the conclusion of an employment agreement is foreseen in Article 12 of the PLC.⁶

The PLC and all forms of employment regulated therein (namely fixed and unfixed term employment, part-time work, and temporary agency work) require the work to be performed with legal subordination. Work performed independently—service providers/self-employed workers—is excluded.

Apart from the typical employment contract (open-ended and full-time), the PLC covers: (i) term employment contracts and temporary agency work to meet the transitional needs of enterprises and user undertakings, but only for the required period to comply with those needs; and (ii) part-time work.

employee' (Art 89). Furthermore, should the employer be an undertaking, the PLC defines what shall be considered, for the purposes of the Labour Code, a 'micro', 'small', 'medium' and 'large' undertaking (Art 100, para 1).

⁴ According to this evaluation, each element is only approximate and does not automatically provide an accurate and definitive qualification. Thus, Portuguese courts conduct an overall assessment of all factors that can be proven. Only by balancing their overall relevance, is it possible to arrive at a conclusion regarding the contract's legal classification. Portuguese case law refers to the following main criteria: whether the workplace and working time is determined by the beneficiary of the activity, whether a fixed timetable must be complied with, whether the services are provided under the orders and instructions of the beneficiary of the activity, whether the activity is performed within the beneficiary of the activity's organisation, which party is the owner of the work instruments, the regularity of payments, payment of Christmas and vacation allowances, the applicable tax and social security regime, whether the activity is carried out personally or whether it can be provided by third parties, whether the work is performed with exclusivity and who bears the risk of the activity.

⁵ Civil Code, Art 342, para 1.

⁶ 'The existence of an employment contract is presumed when, in the relationship between the person that performs an activity and the other (or others) that benefit from it, some of the following elements can be verified'—only two elements seem to suffice: 'a) the activity takes place in a place that belongs to the beneficiary of the activity or in a place determined by him; b) the equipment and working tools belong to the beneficiary of the activity; c) the person that performs the activity complies with a specific start and end time, as determined by the beneficiary; d) an amount is paid to the provider within a certain period in return for the activity performed; e) the provider performs management or leadership functions in the enterprise'. This legal presumption may, however, be rebutted by evidence to the contrary (Civil Code, Art 350, para 2).

II. TERM WORK

A. Legal Definitions/Formal Requirements

According to the PLC, ‘term work’ (*trabalho a termo*) may be performed (i) for a ‘fixed term’ (*termo certo*), ie determined by a specific date, or (ii) for an ‘unfixed term’ (*termo incerto*), which expires upon completion of a specific task or the occurrence of a specific event. Considering that term work is deemed an exception to the principle of stability of employment, these contracts may only be entered into for specific grounds explicitly provided by law.⁷

Pursuant to Article 140, paragraph 1 of PCL, a fixed-term employment contract may only be entered into to meet the temporary needs of the undertaking and only for the period strictly necessary to meet such needs. Consequently, Article 140, paragraph 2 entails some examples of what, for this purpose, shall be considered ‘temporary needs’:⁸

- (i) Direct or indirect replacement of an absent employee or of an employee who, for any given reason, is not able to render his or her services.⁹ Reference to an ‘indirect’ replacement means that the term employee does not necessarily have to fulfil the work duties of the absent employee. For example, *A* is employed on a term basis to replace employee *B*, who was assigned to the functions previously performed by the absent employee (*C*). Therefore, *A* (hired on a temporary basis) replaces *B*, while *B* replaces *C*;
- (ii) Direct or indirect replacement of an employee in relation to whom there is pending legal action concerning the fairness of the dismissal;

⁷ In a decision of 25 June 2014 (Proc No 3098/08.0TTLSB.L1.S1) the Portuguese Supreme Court ruled on the legality of term work, finding that the special nature of academic work is not compatible with the general (restrictive) rules foreseen in the PLC on fixed-term employment contracts, given the mandatory submission to public examinations, in order to assure scientific and pedagogic abilities. The Court concluded that the PLC should not be applicable to these specific contracts and, therefore, that term employment contracts under these particular circumstances did not have to be entered into in writing; nor would the employee be entitled to any compensation in case of termination (decision available at: www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/da8ea99b906424ea80257d0300315ad4?OpenDocument—Portuguese version).

⁸ The probation period for term work is generally 30 days. However, if the duration of the term is less than six months, the probation period is reduced to 15 days. During the probationary period, both the employer and employee may terminate the agreement without giving prior notice or arguing just cause, and neither party is entitled to compensation (Art 112, para 2 of PLC).

⁹ If the reason for concluding a fixed-term contract is the replacement of an employee who is on annual leave (duly identified in the contract), the employer shall prove its truthfulness, ie that the employee identified in the contract was effectively on annual leave during the period the replacing employee worked for the employer (Oporto’s Court ruling of 7 May 2012, Proc No 376/10.1TTVLG.P1, available at: www.dgsi.pt/jtrp.nsf/d1d5ce625d24d-f5380257583004ee7d7/f215e3bbbcf92815802579ff0032759b?OpenDocument—Portuguese version).