



Update

Momentum

Contencioso e Arbitragem

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THE NEW AMENDMENT TO THE PORTUGUESE CRIMINAL CODE AND THE EMPLOYMENT LAW IMPLICATIONS OF THE CRIME OF STALKING

On this coming September 5, the 38th amendment to the Portuguese Criminal Code will come into force, as introduced by Law No. 83/2015, of August 5.

This law has added three new crimes to the Criminal Code, namely female genital mutilation, stalking and forced marriage. Regarding this last crime, the so-called “preparatory acts” are now also criminalised and foreseen independently.

Of these new crimes the crime of stalking is worth highlighting, since it complies what is foreseen in the Istanbul Convention (Article 34), which recommends that EU Member States implement in their national legal regimes the norms that guarantee the criminalisation of this conduct.

Stalking is a form of harassment that manifests itself through repeated actions carried out by one individual against another, and which takes the form of various kinds of contact that are undesirable and have not been consented to, which invades the victim’s privacy, and which may cause psycho-emotional and/or physical damage to the victim and impedes his/her freedom of action and choice.

The Portuguese criminal legal system did not specifically foresee the criminalisation of stalking, although the crimes provided in Articles 152 (domestic violence), 153 (threatening), 154 (coercion), 190 (violation of domicile or disturbance of privacy), 192 (intrusion of privacy) or 199 (illicit recordings or photography), all of the Criminal Code, already covered some of the types of conduct of the crime of stalking, and the Portuguese Constitution enshrines in its Articles 33 and 34 the protection of citizens in this respect. In fact, amongst these offences there are at least some partial overlaps that might give cause to complex cases of conflicting applicable crimes, which will make it difficult to enforce the law.

With the aim of granting dignity and criminal legal value to the protection of a victim’s physical and psychical integrity, and to allow for the punishment of offenders, the classification of the crime of stalking, included in the crimes against personal freedom, criminalises the conduct of someone who “...repeatedly stalks or harasses another person, by whatever means, directly or indirectly, in such a way



as to cause fear or disquiet or to undermine their freedom of choice...”, thus adding Article 154-A to the Criminal Code.

For this repeatedly occurring crime, the Article foresees in its Paragraph 2 that the attempt is punishable, and it adds in its Paragraph 5 the filing of a complaint as legal requirement for a criminal procedure to be initiated, reflecting the need for the victim to identify the conduct that has been harmful to his/her personal freedom.

Essentially motivated by the fight against gender-based inequality and violence, this semi-public crime of a socially complex nature introduces, in line with the main criminal legal framework of *“...imprisonment of up to 3 years or a fine, if a heavier penalty is not applicable under other legal provisions.”*, the provision of accessory penalties, namely *“...banning contact with the victim during a period of between 6 months and 3 years...”*, for this purpose, it being indicated that the accessory penalty *“...must include limiting access to the [victim’s] residence or workplace...”*-

Given the scope of the legal formulation, several difficulties with regard to the harmonisation of this norm with the employment law framework may arise, such as the hypothesis in which the defendant and the victim are work colleagues in the same workplace. After all, in this hypothesis, the application of the ancillary penalty of preventing the defendant from getting close to the (victim’s) workplace simultaneously prevents the employee (defendant) from going to work and performing as set out in his/her employment contract.

This reveals contact points with another especially controversial situation which has already been covered by employment doctrine and jurisprudence: the absence of the employee following a criminal conviction and as a result of serving a prison sentence. While the majority of jurisprudence tends to consider that, in these cases, once the final guilty criminal conviction *is res judicata*, the employee is liable for any occurrence of absenteeism on his/her part – a thus, allowing the employer to open disciplinary proceedings against the employee on the grounds of unjustified absences. Notwithstanding this, a significant part of legal doctrine interprets the matter differently: in spite of the criminal conviction, the employee is not liable for any subsequent absence from work since they are merely the result of compliance with a court order. Thus, the employee’s absence from the workplace cannot be qualified as unjustified, nor can a disciplinary process be opened: the employment relationship remains "dormant" during the employee’s absence, being thus suspended, only in specific cases in which the absence due to serving a court sentence may result in a very long absence, may the employer terminate the employment contract due to expiry, based on the fact that the cause of the absenteeism is no longer of a temporary nature, but of a permanent one. In this latter case, however, this termination requires an analysis of the specificities of each case, and, especially, of the impact that the absence of said employee has on the sphere of the employer.

We do anticipate, however, other questions arising from the possible overlap of this conduct with possible cases of “harassment”, as qualified in the Labour Code, in line with the possibility of the criminal conduct of the defendant– the crime of stalking – being, in and of itself, relevant for an autonomous disciplinary case. With regard to these types of cases, one should, however, keep in mind the fundamental principles of the protection of private life and of the necessary separation of the



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personal and professional spheres, both dictating that, only in exceptional cases will the filling of a disciplinary procedure be justified, and only in cases in which the employee's conduct has also meant a violation of his/her contractual obligations, even if only on an ancillary basis.

It should also be noted that, the amendment to the Criminal Code also contemplates a broadening of the scope of certain crimes, and, moreover, an increase in the penal framework for crimes of sexual coercion and rape.

The "formulation of propositions of a sexual nature", for example, is now qualified as a crime of sexual harassment. In spite of commonplace "cat calls" no longer being included in the Criminal Code, the truth is that the "simple" verbalisation of these types of propositions is now effectively considered a criminal conduct.

Finally, reference should be made to the fact that the Public Prosecutor's Office now has the power to initiate a criminal procedure, in cases of sexual coercion or rape, in spite of these being semi-public crimes (i.e. dependent on the filing of a complaint by an alleged victim "*whenever this is advisable for the interests of the alleged victim*").

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