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Labour law vs. public employment law - in particular, the (in) convertibility of fixed-term employment contracts into indefinite contracts and the "law of 35 hours" for public employees in Portugal

Abstract

The differences and similarities between the Labour Law and the Public Labour Law prove to be an ever-present theme, regarding the constant legislative changes in both quarters. Without prejudice to the approach of the regimes in key aspects of any type of labour relationship, there are two points that remain divisive: on the one hand, the (in) convertibility of fixed-term employment contracts into indefinite contracts and, secondly, the differences on the working time regimes. Through this article and after the presentation of the arguments put forward in both directions, we consider, on the first question, that is possible to convert fixed-term public employment contracts into indefinite contracts and, on the second, that the differences between the Labour Code and the General Labour Law on Public Functions, consider the working time, is against the Constitution of the Portuguese Republic.

Keywords: labor law, public labor law, fixed-term employment contracts, working time

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Labor law and public employment law: preliminary approach on the main similarities and diferences

Background

The differences and similarities between the Labour Law and the Public Employment Law - *rectius* between the labour legal relationship and the public employment bond - have long captured the attention of the specialty doctrine. The same happens to the phenomenon of reciprocal influences between one and the other, both in the sense of publicizing Labor Law, and in the sense of privatizing Public Employment. Such influences have gradually contributed to the approximation-and sometimes coincidence of their regimes. As regards the diplomas that will merit our analysis, it should be mentioned that the private labour regime is essentially contained in the Labor Code, approved by Law no. 7/2009, of February 12th (hereinafter referred to as "LC"), and the public employment regime is now relatively concentrated in the General Labor Law on Public Functions, approved by Law no. 32/2014 of June 20th (referred to by the abbreviation "GLLPF").[1] It should also be pointed out that the private employment relationship is based on the employment contract (which may take various forms), while the public employment relationship is established in three ways: public employment contract, appointment and service commission (cf. article 6, paragraph 3 of GLLPF). The current challenge is to understand the rationale behind the differential treatment of private employment relationships and public employment relationships in certain specific aspects of their schemes.

The legal labor relationship

In fact, the main point of identity between the two is that both are labour relations, since both share the essential elements that characterize a labour relationship, whether private or public: in both, the worker (private or public) provides his or her work on payment of a fee and, in both cases, the employer (private or public) enjoys certain powers [(e.g. the power to determine the terms in which work is to be performed and disciplinary power - note the corresponding wording of articles 97 and 98 of the LC and articles 74 and 76 of the GLLPF, respectively) – that place the worker in a position of subordination to the employer (cf. article 11 of the LC and article 6, paragraph 2 of the GLLPF)]. This also gives rise to certain - but not total, as we shall see below - coincidence between the rights and duties of the private and public worker and the private and public employer (cf. articles 126 to 129 of the LC and articles 70 to 73 of the GLLPF). Notwithstanding the material equivalence between the private employment relationship and the public employment bond, must be consider a set of aspects that differentiate them and which have served to legitimate the diversity of regimes. Such diversity - ontological in the words of Paulo Veiga E Moura[1] - is based on

I. the characteristics of authority that are immanent to the public employer,
II. the public interest underlying the activity carried out and
III. the public links to which the activity is subject, such as the pursuit of the public interest and th respect for the principles of equality, impartiality and proportionality, among others (cf. article 266 of the Constitution of the Portuguese Republic, hereinafter referred to as "CPR"). The above linkages are also reflected at the level
IV. of the duties to which public employees are subject - duties which are not shared by private sector employees-and consist of duties of pursuing the public interest, impartiality, impartiality and information (cf. article 73, paragraph 2, (a) to (d) of the GLLPF). This list sums up
V. the principle/right of access to public employment, under

[1] Cf. Paulo Veiga e Moura, "Crise e direito ou direitos em crise" in *Crise e direito(s) da relação de emprego público: atas das II Jornadas do Emprego Público*, 2, Braga, 2013, coordenação de Isabel Celeste M. Fonseca, Sindicato dos Trabalhadores em Funções Públicas e Sociais do Norte, 2014, p. 12.

conditions of equality and freedom, constitutionally enshrined in article 47, paragraph 2 of the CPR.

These are, in short, the specificities of public employment, that diferentiate it from the private employment relationship and which determine the creation and maintenance of different legal systems for one and the other.

The legal systems

Concerning the regimes, Labor Law and Public Employment Law are perfectly synchronized in aspects such as personality rights, equality and non-discrimination, parenting, student work, non-working times, promotion of safety health and safety at work, workers 'committees, trade unions and workers' representatives for safety and health in work, strike and lock-out (cf., in this regard, the express reference made by article 4 of the GLLPF for the provisions in the LC and its complementary legislation). The same is no longer the case in matters such as:

I. the assignment of workers (cf. articles 288 et seq. of the LC and article 241 et seq. of the GLLPF),
II. the service commission (cf. articles 161 et seq. of the LC and article 9 of the GLLPF),
III. mobility (cf. article 120 of the LC and articles 92 et seq. of the GLLPF),
IV. the restructuring of the company / reorganization of the services (cf. articles 359 et seq. of the LC and articles 245 et seq. of the GLLPF) and
V. fixed-term contracts (cf. articles 139 et seq. of the LC and articles 56 et seq. Of the GLLPF).

Finally, there is a situation that must be pointed out given the controversy that traditionally involves the confrontation between the private employment relationship and the public employment bond: the normal working period. This question, together with the diversity of regimes as regards the convertibility of fixed-term contracts into indefenitive contracts, will be examined in the following paragraphs.[2]

The fixed-term contract and in particular the (in) convertibility of fixed-term public employment contracts into indefinite contracts

Main points of divergence between the LC and GLLPF regimes in terms of fixed-term contracts

Until the GLLPF was promulgated, the fixed-term contract was one of the legal institutes in which the differences between the private regime and the public regime were more pronounced. At present, article 56, paragraph 2 of the GLLPF provides for an express reference to the LC regime in everything that is not incompatible with its provisions. In any case, the schemes deviate from the following points:

I. Regarding the bases for concluding the fixed-term contract, the LC provides a exemplary list of situations that fulfill the notion of "temporary need of the company" (cf. article 140, paragraphs 1 and 2 of the LC), while the GLLPF provides for a exhaustive list of situations in which the fixed-term contract may be concluded (cf. article 57, paragraph 1 of the GLLPF);
II. Regarding the procedure for the selection or recruitment of workers, the constitution of the public employment relationship through a fixed-term contract must comply with a bankruptcy procedure in honor of the principle of access to the civil service in conditions of equality and freedom (cf. article 56, paragraph 5 of the GLLPF and article 47, paragraph 2 of the CPR), whilw such a levy is not required in the context of private employment relationships;
III. In the case of renewals and under the rule regime, the fixed-term private employment contract may be renewed up to three times (cf. article 148, paragraph 1 of the LC), while the public employment contract can only be renewed twice (cf. article 60, paragraph 1 of the GLLPF); on the other hand, in the silence of the parties and in the absence of a diferent contractual provision, the private employment contract is automatically renewed (cf. article 149 of the LC), which is not the case with the public employment contract (cf. article 61 of the GLLPF); and
IV. Regarding the conversion into an indefinite contract, this possibility is provided for the article 147, paragraph 2 of the LC, but is expressly removed by article 63, paragraph 2 of the GLLPF.
V. In fact, the truly fractious point between the two regimes - private and public - is that of the (in)convertibility of the fixed-term public employment contract into an indefinite contract, which has given rise to a heated discussion within the doctrine and case law.

The (in)convertibility of fixed-term public employment contracts into indefinite contracts

The data of the problem, that nowadays, summon several diplomas and several norms. First of all, it is necessary to take into account article 147 of the LC, according to which, in short, fixed-term contracts concluded to meet permanent needs are considered to be unfinished or converted into indefinite contracts, in which the period of duration or the number of renewals is exceeded. In the sphere of public employment, article 63, paragraph 2 of the GLLPF stipulates that a fixed-term contract shall not, under any circumstances, be converted into an indefinite contract. From a constitutional point of view, the article 47, paragraph 2 of the CPR enshrines the right of access to the public service on an equal footing and, finally, the Directive 1999/70/EC impose, to Member States, the obligation to take measures to prevent abusive recourse to fixed-term employment relationships (private or public), and it is up to them to define the conditions under which they can be considered to be indefinite. The combined interpretation of all these provisions calls for a response to a number of questions which we shall now examine, bearing in mind the doctrinal differences on the subject and the positions already expressed by the case-law. The following approach, start of the formulation of the following questions:

Is the fixed-term contract established in the GLLPF incompatible with Directive 1999/70/ EC?

For some, the prohibition on the conversion of fixed-term contracts into indefinite contracts, contained in article 63, paragraph 2 of the GLLPF, is not contrary to Directive 1999/70/EC, insofar as the pursuit of the objectives set by this - that is to say, the prevention of abusive recourse to fixed-term employment relationships - is also fulfilled through the civil, disciplinary and financial accountability of the heads of bodies which have concluded or renewed invalid fixed-term contracts (cf. article 63, paragraph 1 of the GLLPF). For others, the GLLPF did not fully transpose the Directive, since the palliatives established to prevent the abuse of fixed-term contracts are insufficient to achieve this objective.[2]

[2] Cf., for all, Joana Nunes Vicente, "Sobre a (proibição) de conversão do contrato de trabalho a termo em funções públicas em contrato de duração indeterminada: algumas observações sobre a controvérsia jurisprudencial recente" in *Boletim de Ciências Económicas*, Vol. 57, T. 3 (2014), pp. 3417-3424 and bibliography cited.

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If the GLLPF is incompatible with Directive 1999/70/EC, what is the result?

For some, internal law must be interpreted in accordance with European Union law and, in that contexto, it is necessary to call for the application of article 147 of the LC as part of public employment ties. Therefore, also in this (public) domain, fixed-term contracts are converted into indefinite contracts when the duration or renewals of those contracts are exceeded or it is proved that they were entered into in breach of the provisions of article 57, paragraph 1 of the GLLPF. Moreover, for those in favor of this solution, the conversion does not oppose norms of internal Constitutional Law. Quite the contrary: the article 53 of the CPR, in enshrining the right to security of employment, provides the same solution, that is to say, the conversion of the contracts in the terms set out above.[3] The Portuguese courts have already recognized it and, by proceeding accordingly, have determined the conversion of fixed-term public employment contracts into definitive contracts. See, to that effect, the judgments of the Porto´s Court of Appeal of 03.12.2007 (Case No. 0712929), 22.02.2010 (Proc. No 375/08.3TTGDM.P1) and 24.09.2012 (Proc. No. 2006/09.5TTPNF.P1). For others, despite the inadequate or insufficient transposition of Directive 1999/70/EC, it is not possible to apply the rules laid down in the LC, for this matter, to the public employment link, failing which such a solution proves unconstitutional for breach of the principle of equal access to public service, provided for the article 47, paragraph 2 of the CPR. That is a fundamental principle of the democratic rule of law and European Union law can not be overlapped (cf. article 8, paragraph 4 of the CPR). This position was covered under the legislation that preceded the GLLPF[4] and, according to which, the constitution of the public employment bond did not always depend on the performance of a bankruptcy procedure. To that end, admitting the conversion of contracts would imply access to a public employment bond without the screening of a public tender and consequent observance of the principles of equality and impartiality. See, to that effect, the judgment of the Porto´s Court of Appeal of 16.03.2009 (Case No. 0847551), the judgments of the Coimbra´s Court of Appeal of 20.01.2011 (Case No. 207/09.5) and 13.12.2012 (Proc. no. 763/11.8TTCBR.C1), the judgment of the North Central Administrative Court of 02.03.2012 (Proc. no. 02637/09.3) and the judgment of the South Central Administrative Court of 05.05.2016 (Proc. No. 13057/16).[5]

Analysing

After this brief outline of the positions drawn by the doctrine and jurisprudence regarding the conversion of the fixed-terme public employment contracts into indefinite contracts, we come to expose our vision of the problem.

As a preliminary point, we are close to those who point out the non-conformity of article 63, paragraph 2 of the GLLPF with the provisions of Directive 1999/70/ EC. In fact, the civil, disciplinary and financial accountability of the public employers is a substitute tutelage, insufficient to address the heart of the problem: to ensure the subsistence and stability of the employment relationship and the legal position of the employee. In addition, it depends on the initiative of the worker to hold the public employer civilly responsible, which ultimately results in the imposition of (more) a burden on the worker, in the context of a difficult situation. In this line of thinking, we admit the possibility of converting the fixed-terme public employment contracts into indefinite contracts, provided that it has been established outside the terms set forth in article 57 of the GLLPF and when they have been exceeded the duration and the number of renewals. On the other hand, the question of the right to equal access to public service (cf. article 47, paragraph 2 of the CPR) no longer arises in the same terms, since the GLLPF, in its article 56 paragraph 5, required an competitional proceeding for the purpose of establishing the public employment relationship for a fixed-term contract. Consequently, equality of conditions of access to the public service is ensured and such constitutional provision no longer constitutes an obstacle to the conversion of a fixed-term contract into a indefinite one. In fact, an identical solution was already advocated by Francisco Liberal Fernandes,[3] under the legislation prior to the GLLPF, in the case of fixed-term contracts whose conclusion was preceded by a competitional proceeding adequate to safeguard respect for the principle of equality.[6] At present, the conclusion of any fixed-term public employment contracts follows a prior competitional procedure, which, in the first place, dispels any objections from the point of view of the principle of equal access to public employment. It follows, therefore, that there are no arguments capable of substantiating a disparity between Private Labor Law and Public Employment Law in relation to the conversion of the fixed-term employment contracts, since the requirements of employment security and precautionary measures in the event of fraud against the law are equally urgent in both cases.

The limits on working hours and, in particular, the "35-hour law" for public servants

legislative developments

As regards the working hours limits, the regime applicable to workers in the private and public sectors was, between 29 September 2013 and 30 June 2016 - the period corresponding to Law 68/2013 of August 29th -, identical. Thus, both article 203, paragraph 1 of the LC and article 105 of the GLLPF (in the version prior to Law 18/2016 of June 20th) laid down the rule of 8 (eight) hours per day and 40 (forty) hours per week.[4] The mentioned matching of schemes was aimed at the entry into force of Law no. 68/2013 of August 29th, which amended the limits previously laid down for public employees, which were 7 (seven) hours daily and 35 (thirty-five) hours per week. At the time, the justification given for this was in line with the uniformity with the regime prescribed for the private sector and the approximation to the schemes provided for in the other Member

[3] Francisco Liberal Fernandes presents an identical solution, starting from another prism. Cf. Francisco Liberal Fernandes, "Relações de tensão entre o ordenamento português e comunitário na disciplina do contrato de trabalho a termo" in *Revista Eletrónica de Direito*, Junho de 2013, n.º 1, p. 25.

[4] Under the legislation prior to the GLLPF, the Constitutional Court ruled several times on the unconstitutionality of the various normative interpretations - of the precepts that have been happening in the time - that implied the conversion of fixed-term employment contracts into indefinite contracts, on the grounds that such a requirement does not derive directly from the Constitution, together with a breach of the principle of equal access to public service. Cf. Judgments of the Constitutional Court Nos. 683/99, 73/00, 82/00, 84/00, 190/00, 191/00, 368/00, 201/00, 434/00, 150/01, 172 01 and 404/01.

[5] Cfr., for all, Joana Nunes Vicente, "Sobre a (proibição) de conversão do contrato de trabalho a termo em funções públicas em contrato de duração indeterminada: algumas observações sobre a controvérsia jurisprudencial recente" in *Boletim de Ciências Económicas*, Vol. 57, T. 3 (2014), pp. 3417-3424 and bibliography cited.

[6] Cf. Francisco Liberal Fernandes, "Sobre a proinição da conversão dos contratos de trabalho a termo no emprego público: comentário à jurisprudência do Tribunal Constitucional" in *Questões Laborais*, Ano IX, n.º 19, 2002, p. 91.

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States of the European Union. However, voices were discordant in the face of the regime implemented by Law no. 68/2013, of August 29th, since the latter, in their opinion, imported a direct reduction in the value of the remuneration of public employees (considering the provision of a greater number of working hours with the maintenance of the remuneration levels), potentiated the reduction of the quality of services provided (due to the increased tiredness of workers and the consequent lack of motivation for work), led to an increase in unemployment and has called into question the right to reconcile work and family life.[7] These arguments were behind Decree no. 28 / XIII, of the Assembly of the Republic,[8] under which the Legislator proposed to replace the regime that preceded Law 68/2013, of August 29th, that is to say, 7 (seven) hours per day and 35 (thirty-five) hours per week as working time limits in the public sector. In fact, this project was welcomed by parliamentarians and gave rise to Law no. 18/2016 of June 20th, which entered into force on 1 July 2016.

The unconstitutionality of the discrepancy of the working time limits between the LC and the GLLPF

In that context, the question arises as to whether or not there is a basis to differentiate the rules of working time between the public and private sectors. Before looking for an answer to the problem, we took the opportunity to leave two notes: first, Law no. 68/2013, of August 29th, did not have an effective application to the entire public sector, by multiple collective agreements of work granted by a wide spectrum of the entities integrating the Regional and Local Administration; secondly, the parliamentary group of the Green Party was the only one which, in its proposal, considered, alongside the amendment to the GLLPF,[5] the amendment to the LC, in order to 7 (seven) daily hours and 35 (thirty-five) hours per week as common working time limits.[9] Taking up the above question, the admissibility, or rather the formulation of a non-unconstitutionality judgment on such a discrepancy of regimes, private and public, will have to be based on objective criteria that ground a positive discrimination of public workers vis-à-vis the workers of the private sector, otherwise it would be concluded that there is a constitutionally unjustified differentiation between the two as a result of breach of the principle of equality (cf. article 13 of the CPR). Briefly, it seems to me that there is no objective criteria, because the specific features of public employment - such as the powers of authority of the public employer, the public interest underlying the activity pursued and the specific links of law Public to which this activity is subject - do not, in our view, have repercussions on the level of working time. For this reason, is evidente, for us, the arbitrariness and discrimination of the duality of regimes, public and private, as regards the limits of working time, due to lack of objective and reasonable justification[6] for the differentiation of treatment of similar situations. The situation is even more conspicuous if we look at the performance of the same professional activity, in the private sector and the public sector. Consider, for example, an "administrative worker" who works in a public hospital and another who performs the same activity in a private hospital.[7] In a hypothesis such as this, we can not foresee the motive, with a constitutional seat, which legitimates the first to do his work for a period of 7 (seven) hours per day and the second for a period of 8 (eight) hours per day. In the light of the foregoing, the (re)establishment of a disparity in the limits of working hours between the public sector and the private sector is, in our view, materially unconstitutional for breach of the principle of equality (cf. article 13 of the CPR). Consequently, such unconstitutionality can only be neglected by consecrating a regime identical to one or the other, be it 7 (seven) or 8 (eight) hours per day or 35 or 40 hours per week. In reality, the choice between a tighter or more extensive limit of working time is a decision of a legal-political nature, calling for a discussion on the rights to rest and reconciliation between family and working life, which are equally impacted by workers in the private sector and the public sector.

[7] Cfr. Proposed Law no. 7/XIII/1.ª and no. 18/XIII/1.ª e Draft Law no. 93/XIII/1.ª available in www.parlamento.pt

[8] Available in www.parlamento.pt

[9] Cf. Proposed Law no. 18/XIII/1.ª available in www.parlamento.pt

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Conflicts of interest

The author declares that there is no conflicts of interest.

References

1. Fernandes, Francisco Liberal. Flexibility as a new way of being of the public employment relation: need or strategy of domination? *Public sector reforms: Iberian perspective in the post-crisis context*. 2005.
2. Fernandes, Francisco Liberal. Voluntary relations between Portuguese and Community legislation in the discipline of the fixed-term contract. *RED: right electronic magazine*. 2013.
3. Fernandes, Francisco Liberal. *On the proclamation of the conversion of fixed-term employment contracts in public employment: a commentary on the jurisprudence of the Constitutional Court*.2002.
4. Neves, Ana Fernanda. *"Crisis and right (s) of the public employment relation: private law and better public law" in Crisis and law (s) of public employment relation: minutes of the II Conference of Public Employment*. 2013.
5. Moura, Paulo Veiga E. *Crisis and rights or rights in crisis "in Crisis and right (s) of public employment relation: minutes of the II Conference on Public Employment*. 2013.
6. Almedina, Ramalho, Maria do Rosário Palma. *Labour Law Studies*. 2016.
7. Vicente, Joana Nunes. About a (Proibição de) Conversão do Contract of Work to Term cm Funções Públicas em Contract of Duração Indeterminada. *Algumas Observações sobre a Controvérsia Jurisprudencial Recente*. 2014;57(3):3417–3447.