FIXED-TERM CONTRACTS AND PRINCIPLE OF EQUAL TREATMENT IN PORTUGAL

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Introduction

Portuguese Constitution establishes the principle of stability of employment (article 53 of the Portuguese Constitution[59]). This principle covers several aspects, including the one according to which the employment shall be for an indefinite period. In this context, fixed-term contracts, although admitted in Portuguese legal system, are an exception to the rule. Therefore, as we shall see, the Portuguese Labor Code[60] makes the admissibility of fixed-term contracts dependent on the existence of a motive that objectively justifies it. Indeed, employment stability must be reconciled with other relevant interests, such as the temporary needs of employees and the promotion of employment. In these cases, the law admits the exception to the rule, legitimizing the fixed-term contracts.

The principle of stability of employment also implies that fixed-term contracts, even in the situations in which they are admitted, can not be of an unlimited duration or renewed unlimitedly, which was also a concern of the Portuguese lawmaker when regulating this matter.

Although the fixed-term contract allows the worker to occupy a job, this modality of contracting is associated with a major drawback – job insecurity. However, companies often find in this disadvantage of the worker a great advantage for them – the fact that they can expeditiously and in a simple way promote the extinction of employment contracts. For them, the temptation is to hire workers under fixed-term contracts in order to avoid the application of the rules regarding open-ended contracts. The legislator also worked hard to fight this reality.

In Portugal, in 2016, out of a total of 3787.2 thousand employees, 705.4 thousand were fixed-term workers, with 353.4 thousand men and 352.1 thousand women. This means

[59] http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf.
[60]http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=1047A0144&nid=1047&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

that approximately 19% (almost one fifth) of employees had a fixed-term contract[61]. Regarding the distribution by sex, there are no discrepancies to be pointed out.

Moreover, in 2016, out of a total of 1094.8 thousand employed workers aged between 15 and 34 years old, 393.3 thousand were fixed-term workers[62], which represents already 36%. This means that more than a third of young workers are hired on a fixed-term basis. Unfortunately, it wasn't found data regarding labor conditions for fixed-term workers in comparison with indefinite workers.

1. Is it possible to subscribe a temporary or fixed-term contract? Also to carry out the company's permanent needs or activities?

The Portuguese Labor Code (articles 139 to 149) allows for the subscription of fixed-term contracts.

Considering that term employment contracts are deemed as an exception to the constitutional principle of stability of employment (article 53 of the Portuguese Constitution), they may only be entered into force under certain grounds expressly provided by law.

As a rule, fixed-term contracts are allowed only for the satisfaction of temporary needs of the undertaking.

Still, article 140(4) does allow them in cases where permanent needs of the employer may be at stake, in two exceptional circumstances: i) the launching of a new activity of uncertain duration, as well as the start-up of an undertaking or of an establishment of an enterprise with at least 750 employees; ii) and the hiring of employees looking for their first job, long-term unemployed workers or other situations foreseen in special legislation of labor policy.

2. Which fixed-term contract exist?

According to the Portuguese Labor Code, "*term employment contracts*" may be entered into (i) for a "*fixed term*", e.g. determined by a specific date, or (ii) for an "*unfixed term*", which expires on completion of a specific task or by the occurrence of a specific event.

As stated by article 140(1), a term employment contract can only be entered into force to

[61]https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0006418&contexto=bd&selTab=tab2

[62]file:///C:/Users/Lu%C3%ADsa/Downloads/EE_Destaque_Estudo_16Dezembro2016.pdf

satisfy temporary needs of the undertaking and only for the period strictly necessary to comply with those needs. The Labor Code adopted a system based on a general clause followed by examples of what represents a temporary need (e.g., direct or indirect replacement of a sick employee; seasonal or other activities whose yearly production cycles presents irregularities due to the structural nature of the market; exceptional increases in the undertaking's activity; performance of an occasional task or certain, precisely defined and short-term service; performance of a work, project or other defined and temporary activity).

However, the general clause system does not apply to an undetermined term: in the case of a contract with an unfixed term, article 140(3) establishes that such a contract is only allowed in a number, albeit a large number, of outlined cases.

In the exceptional circumstances mentioned above (question no. 1), it is possible to hire fixed-term employees to satisfy permanent needs.

Article 141(1) states that term employment contracts are generally subject to written form and that they must contain the identification and signature of the parties. It also establishes that a written term employment contract must mention the '*name or designation and domicile or headquarters of the parties'* (a), the '*activity to be rendered and the salary of the employee*' (b), the '*place and normal work period of the employee' (c), the 'starting date of the work*' (d), the '*identification of the agreed term and the justifying reason'* (e), the '*contract date and, in the case of a fixed-term, the date of termination'* (f). The lack of this information is not subject to the same treatment. Some references are so essential that its omission in the written contract has the consequence that the contract will be considered as an open-ended one. According to article 147(1)(c), a contract lacking written form, the signature of the parties, their name or designation or simultaneously the date on which it was entered into and the date on which the work was to begin, as well as the lack or insufficiency of the references concerning the motive or grounds for the term, will be considered as an open-ended employment contract. The mention of the reason must not be so succinct that it does not allow the court to control whether the reason is truthful or not. Therefore, one must expressly mention the facts that represent the reason and a link should be established between the facts and the term.

The 2009 Labor Code introduced a new rule according to which the written form is not required in some term employment contracts of very short duration. According to article 142, term employment contracts concerning seasonal agricultural activities or tourist events which last less than 15 days are not subject to a form requirement although the employer must inform the social security by electronic means. The law allows for several of these contracts between the same employee and the same employer, but in order to be

exempted from written form they must not exceed 70 days per calendar year.

Fixed-term employment contracts (i) shall not, as a general rule, exceed 3 years, and (ii) shall not be renewed more than 3 times (article 148(1)).

Nevertheless, lower limits are foreseen for contracts with long-term unemployed workers and contracts based on the launching of a new activity (2 years) and contracts with employees looking for their first job (18 months).

The duration of an "*unfixed term*" contract may not be more than 6 years (article 148(4)).

Very short-lived fixed-term contracts are deemed exceptional and as a result they are only allowed in a number of cases (article 148(2)) namely in those covered in article 140(2). Where a contract for less than 6 months is allowed the duration of the contract must not be less than the time anticipated for the task or service to be performed.

In principle, a fixed-term contract is automatically renewed if the parties do not state otherwise. The parties may, nevertheless, agree in the contract itself that the contract may not be renewed (article 149(1)). Within the temporal limits for a fixed-term contract, its tacit renewal will be for the same period of time (article 149(2)). If the parties want the contract to be renewed but for a different period of time, they will have to make a formal agreement and in that written agreement they will have to present the reasons for the renewal.

3. Does the legal regulation establish a maximum duration for hiring fixed-term workers?

The Portuguese Labor Code does not set a maximum percentage of fixed-term contracts, but it establishes a maximum duration for hiring fixed-term and "*unfixed-term*" workers, as stated above.

According to article 148(5), it is included within the 3-year limit the duration of previous term employment contracts, temporary contracts or service contracts for the same position between the same employee and the same employer (or any other society that belongs to the same group of corporations or that has a common organizational structure with to the employer).

Besides, the Labor Code establishes limits to successive contracts.

In principle, according to article 143, the termination of a term employment contract for a reason not attributable to the employee bars the employer (or any other society that belongs to the same group of corporations or that has a common organizational structure with the employer) from hiring an employee for the same position or from entering into a services contract with the same person with the same object for at least a period equal to one-third of the length of the contract, including renewals. Even the hiring of the same employee for the same position will be allowed if one of the following circumstances occurs: seasonal activities, further absence of the replaced employee, exceptional increase of the undertaking activities after the termination of the term-contract and if the employee was previously contracted as an employee in search of his/her first job. A contract entered in breach of article 143(1) is considered an open-ended contract (article 147(1)(d)) and all work rendered by the worker to the employer is counted in determining the worker's seniority.

4. Does the legal system regulate fixed-term contracts aimed at fostering employment and job creation?

As already stated, the Portuguese Labor Code allows for fixed-term contracts in cases where no temporary need is at stake or, at least, in cases where we do not know whether the need fulfilled by the contract is temporary or not.

In effect the Code allows fixed-term contracts for the hiring of employees looking for their first job or long-term unemployed workers or other situations foreseen in special legislation of labor policy (article 140(4)(b)) with the aim of fostering the hiring of young people and also mature unemployed.

Long-term unemployed workers are considered those who are unemployed for more than one year.

Employees looking for their first job is a concept that has been interpreted by Portuguese case-law (eg. Decision of the Supreme Court of Justice of 24 September 2008, Proc. No. 08S1159[63]) as excluding those employees who already had an open-ended contract, but not the ones who previously only had fixed-term employment contracts. As a result, an employee may contract several successive "*term employment contracts*" with different employers and he/she will still be considered as looking for the first job. The danger of this kind of interpretation is that it fosters the term employment contract of those who have already had such contracts in the past.

[63]http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/ba73c4cc0a03e272802575630041377 3?OpenDocument&Highlight=0,trabalhador,%C3%A0,procura,de,primeiro,emprego

5. Does the legal regulation recognize fixed-term workers a preferential right to occupy a vacant job position in the firm?

The employee with a term employment contract is entitled to preference of entering into an open-ended contract if the employer decides to recruit externally to fulfil services identical to those performed by the worker (article 145(1)).

This right exists up to 30 days after the termination of the fixed-term contract and if the employer infringes it the employee will be entitled to get damage compensation equivalent to three times the monthly basic salary.

6. Does the legal regulation allow differences in working conditions of fixed-term workers (worktime, wage, schedule, etc.) in comparison with indefinite workers?

The Labor Code expressly states the principle of equal treatment of employees engaged under term employment contracts and employees with permanent contracts, unless objective reasons justify a different treatment (article 146).

However, article 131(2), in regulating the continuing vocational training to which workers are entitled, establishes a difference in relation to fixed-term workers: while workers with an open-ended contract are entitled each year to a minimum of 35 hours of continuous training, fixed-term workers who are hired: (i) for a period of three months or more, are entitled to a minimum number of hours commensurate with the duration of the contract in that year; (ii) for a period of less than three months, are not entitled to a minimum number of hours of vocational training.

Moreover, in what concerns with economic compensation due to employees in case of dismissal based on economic, technic, organizational or production grounds, while indefinite workers are only entitled to 12 days of basic salary plus seniority allowance for each year of seniority, "*fixed-term*" workers are entitled to 18 days of basic salary plus seniority allowance for each year of seniority, and "*unfixed-term*" workers are entitled to 18 days of basic salary plus seniority allowance for the first 3 years of contract and to 12 days of basic salary plus seniority allowance in subsequent years (article 366).

7. Are workers entitled an economic compensation for the extinction of the fixed-term contract according to the agreed terms?

As a rule, a fixed-term contract expires at the end of its term; however, the termination of the contract is not automatic as it is required that the employer or the employee notifies

the other in writing on the intention to terminate the contract, 15 or 8 days, respectively, prior to the end of the term (article 344(1))

If the fixed-term contract expires at the initiative of the employer, the employee has a right to severance pay equal to 18 days of base salary plus seniority allowance for each year of seniority (article 344(2))

Article 345(1) concerning "*unfixed term*" contracts establishes that the contract expires when, foreseeing the occurrence of the term, the employer notifies the employee of the contract's termination with a minimum prior notice period of 7, 30 or 60 days depending on whether the contract has lasted up to 6 months, more than 6 months up to 2 years or for a longer period. Lack of previous notification by the employer does not avoid the termination of the contract but it simply implies that the employer must pay the salary due for the period of prior notice missing (article 345(3)).

In this case, the employee has a right to severance pay equal to 18 days of base salary plus seniority allowance for each year of seniority regarding the first 3 years of contract and 12 days of base salary plus seniority compensation for the following years (article 345(4)).

In both cases, the severance pay calculation should follow the rules established by article 366.

8. What is the amount of the economic compensation recognized in favor of workers for the valid termination of the fixed-term contract? Is it of an equivalent or different amount than the one recognized in cases of extinction of the contract due to business-related reasons?

As already mentioned, the Portuguese Labor Code provides that, in the event of expiry of a fixed-term contract at the initiative of the employer, the worker is entitled to 18 days of basic salary plus seniority allowance for each year of seniority (article 344(2)).

In the case of an "*unfixed-term*" contract, the severance pay is equivalent to 18 days of basic salary plus seniority allowance for each year of seniority for the first three years of contract plus 12 days of basic salary plus seniority allowance for each year of seniority in the following years (article 345(4)).

In any case, the calculation shall be made in accordance with article 366:

- The amount of the basic monthly remuneration plus seniority allowance may not exceed 20 times the minimum guaranteed monthly remuneration;
- The total amount of the severance pay may not exceed 12 times the basic monthly salary plus seniority allowance or, where the limit provided in the preceding paragraph is applicable, 240 times the minimum guaranteed monthly remuneration;
- The daily value of basic salary plus seniority allowance is the result of the division by 30 of the basic monthly remuneration plus seniority allowance;
- In the case of a fraction of a year, the amount of the compensation will be calculated proportionally.

The compensation to which workers are entitled if the contract is extinguished due to business-related reasons is established by article 366. In accordance with Article 366 (6), in the case of a fixed-term contract, the compensation corresponds to the one recognized in article 344(2) or Article 345(5), depending on if the contract is a "*fixed-term*" contract or an "*unfixed-term*" contract. Thus, in the case of term employment contracts, the workers' compensation is equal for both the events: i) valid termination of the term employment contract at the initiative of employer; ii) extinction for economic, technical, organizational or production reasons.

However, the amount of the compensation is different in the event of extinction of an open-ended contract for economic, technical, organizational or production reasons. These employees are only entitled to 12 days of basic salary plus seniority allowance for each year of seniority, calculated in accordance with article 366.

9. What are the consequences derived from breach of the regulation regarding fixed-term contracts? In particular, is the contract declared indefinite? Are workers recognized a higher economic compensation in case of extinction of the contract?

If the employer fails to comply with the legal regulation regarding the fixed-term contracts, in most cases it determines the declaration of the contract as an open-ended one, and the seniority of the worker is assessed from the moment when he began to perform the activity under the contract (article 147). This happens in the following cases:

- When the term stipulation intends to avoid the application of the provisions regarding open-ended contracts;
- When the contract is concluded outside the cases stated in article 140(1), (3) or (4) (see answer to question no. 2);
- If the contract is not written, or if it lacks the identification or signature of the parties, or if it lacks, at the same time, the dates of the conclusion of the contract and of the

commencement of work, as well as if the references to the term and its justification are omitted or insufficient;
- When the contract is concluded in breach of article 143(1) (as indicated in the answer to question no. 3), which determines the counting of the working time provided in fulfillment of successive contracts in the workers' seniority;
- When the contract's renewal has been made in violation of the provisions of article 149 (see answer to question no. 2);
- When the larger contract's duration or the number of renewals allowed have been exceeded (see answer to question no. 3)
- In the case of "*unfixed term*" contracts, if the employee remains in service and continues to perform his/her activity after the date when the termination of the contract takes effect or 15 days after the disappearance of the contract's motivation (the service, activity, task or project for which he was hired is completed, the replaced employee returns or his/hers contract ends).

If a worker with a fixed-term contract is victim of unlawful dismissal, the general rules laid down for illicit dismissal are applied, although with the specificities set out in article 393:

- The compensation to which the worker is entitled should not be less than the remuneration he has lost since the dismissal until the term provided for the contract, or until the final judicial decision, if that term occurs later;
- The worker only has the right to reintegration in his workstation if the term provided for the contract occurs after the final judicial decision.

10. What consequences on the legal regulation can arise from the decision of the ECJ of September 14th, 2016, which does not allow differences between fixed-term and indefinite workers regarding compensation for extinction of the contract?

As we have already stated, the Portuguese Labor Code settles that the economic compensation for the valid extinction of the fixed-term contract is different from that corresponding to indefinite workers in case of dismissal based on economic, technic, organizational or production grounds. While indefinite workers are only entitled to 12 days of basic salary plus seniority allowance for each year of seniority, "*fixed-term*" workers are entitled to 18 days of basic salary plus seniority allowance for each year of seniority, and "*unfixed-term*" workers are entitled to 18 days of basic salary plus seniority allowance for the first 3 years of contract and to 12 days of basic salary plus seniority allowance in subsequent years.

However, unlike in the case Diego Porras, C-596/14, the Portuguese legislation establishes a more favourable treatment to fixed-term workers than the one laid down for indefinite workers.

As it is stated in the decision of the European Court of Justice of September 14th, 2016 (case Diego Porras, C-596/14), "*the aim of the framework agreement is, in particular, to improve the quality of fixed-term work by setting out minimum requirements in order to ensure the application of the principle of non-discrimination", " in order to prevent an employer using such an employment relationship to deny those workers rights which are recognised for permanent workers*".

The principle of non-discrimination requires that comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified. It seems that, in the case of Portuguese legislation, differential treatment is justified by an objective reason: to compensate fixed-term workers for their precariousness in employment. Thus, the decision of the ECJ in the case of Diego Porras may not require any changes in Portuguese law.

11. Other relevant aspects of the regulation regarding fixed-term contracts.

Collective agreements are given a very large – perhaps even too large – field of intervention in what concerns fixed-term contracts. According to the black letter of article 139 of the Labor Code, "*the rules of fixed-term contracts contained in the present sub-section, may be waived or altered by collective labor regulation instruments, except for article 140(4)(b) and article 148(1), (4) and (5)*".

As a result, it would seem that a collective agreement might, for instance, establish that fixed-term contracts are allowed without the need of any justification and even for the fulfilment of needs which are not of a temporary nature. It would even seem possible for a collective agreement to remove the need of any justification for the renewal of a fixed-term contract – a result which would be tantamount to a possible violation of the Portuguese Constitution. In fact, it seems like collective agreements are limited by the principle of employment security, and they cannot allow freely conclusion of fixed-term contracts. So, collective agreements can regulate the matter of fixed-term contracts, but it seems they must do so respecting the legal spirit of "*exceptional circumstances*".

During the three-year austerity plan laid out in the Memorandum of Understanding on Specific Economic Policy Conditionality (MoU)[64], a temporary special regime entered into force, allowing for the extension of fixed-term employment contracts, without being deemed as open-ended contracts. This measure aimed to increase the continuation of employment relations over a period of crisis - where finding an alternative job might be particularly difficult. This regime was established by Law No. 3/2012, of 10th January[65] and by Law No. 76/2013, of November 7th [66].

In order to comply with the Memorandum of Understanding, the amount of severance pay due for termination of fixed-term contracts was changed by the following acts: Law no. 53/2011, of 14th October[67]; Law no. 23/2012, of 25th June[68]; Law no. 69/2013, of 30th August[69]. Legal expectations of workers were safeguarded through the implementation of transitional arrangements.

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[64] The MoU had a quarterly monitoring system that led to twelve updates. See http://www.portugal.gov.pt/pt/o-governo/arquivo-historico/governos-constitucionais/gc19/os-temas/memorandos/memorandos.aspx.

[65] http://data.dre.pt/eli/lei/3/2012/p/dre/pt/html

[66] http://data.dre.pt/eli/lei/76/2013/p/dre/pt/html

[67]http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1503&tabela=leis&ficha=1&pagina=1&so_miolo

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