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Modalities of dismissal in Portugal

Modalidades de despido en Portugal

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Abstract: Time has shown that the legal historical background shapes the regulation by sedimentation. After an overview of the legal framework of termination of employment contract and that of dismissal, this paper aims to offer a critical analysis on the Portuguese law of dismissal, focusing on unfair dismissal and collective redundancy.

Resumen: *El tiempo ha demostrado que el trasfondo histórico jurídico configura la regulación por sedimentación. Después de una visión general del marco jurídico de la extinción del contrato de trabajo y del despido, este artículo tiene como objetivo ofrecer un análisis crítico de la legislación portuguesa en materia de despido, centrándose en el despido improcedente y el despido colectivo.*

Keywords: Portugal, objective dismissal, collective dismissal, disciplinary dismissal.

Palabras clave: *Portugal, despido objetivo, despido colectivo, despido disciplinario.*

I. Introduction and legal historical background[1]

The issue of termination of the employment contract is inextricably linked to the issue of its duration, although this has not always been historically recognised. In fact, the principle of the indefinite duration of the employment contract imposes the need to condition its ending, whether through the requirement of a notice period for the termination of contractual effects, the provision of compensation for dismissal or the provision of a formal dismissal process. Now, if this connection is generally the common feature of the historical evolution of labour conditions in all countries, in Portugal the termination of the employment contract (in addition to the theoretical and practical importance that any other legal system gives it), has a long record of historical vicissitudes in its regulation that contributes to the high social, economic and even cultural sensitivity of the topic. Until 1974, the legal framework for the termination of the employment contract and in particular for dismissal was marked by a strong civil law influence, with the mutual agreement of the parties, the expiry, the termination by the employer and by the employee for just cause and termination with prior notice — Article 98, no. 1 of the so-called Contract of Employment Act (Lei do Contrato Individual de Trabalho LCT) , Act 49408, of 24th November, 1969. In addition to these causes, the law also permitted termination and dismissal *'ad nutum'*, although in association with an obligation to compensate the counterparty.

In short, the employment ending in the period prior to the establishment of democracy, allowed the modalities of expiry, revocation, contract recission and unilateral termination, each with a design very close to its long established effects. Contractual breaches were framed within the notion of just cause, which thus had a markedly subjective nature[2].

With the fall of the political regime in 1974, labour law underwent profound changes. One of the most relevant was aimed at the termination of the employment contract, in general, and at dismissal in particular. As early as 1975, in a reactive impetus to the previous situation, Decree-Law 372-A/75, of 16th July, restricted the possibilities of unilateral unmotivated dismissal, unequivocally stating that its application was intended to "guarantee the protection of the right to work" — Article 2, paragraph a)[3].

1 This topic was authored by Maria Regina Redinha, Professor of Civil and Labour Law of the Faculty of Law, University of Porto, President of the Board of Directors of APODIT and editor of *Questões Laborais*. The views and opinions expressed herein are solely her own.

2 For a detailed description of the legal framework under Act 49408, of 24th November, 1969, A. Monteiro Fernandes, *Direito do Trabalho*, 22.ª ed., Almedina, Coimbra, 2023, pp. 52, ss.

3 For further developments, Jorge Leite, *Direito do Trabalho — Da Cessação do Contrato de Trabalho*, https://repositorio-aberto.up.pt/bitstream/10216/111867/2/264665.pdf, accessed 15th May 2024.

The possibility of dismissal without any subjective or objective cause was eliminated, although the other operative motives for terminating the employment contract have been maintained — revocation, expiry, dismissal (for just cause — Article 9, et seq. and for valid reason — Article 13) as well as the termination by the employee (recission), Article 4, n. 1.

In terms of termination by the employer, however, the changes did not stop there, as both individual dismissal and collective redundancy were required to be made under a complex procedural iter aiming to effectively control the causes invoked by the employer for seeking an end to the contract. Unlawful dismissals were henceforward invalidated, which has paved the way for the right of the employees' reinstatement.

The following year, this legal framework was modified by the elimination of the dismissal for valid reason — Article 3 of Decree-Law 84/76, of 28th January. This first phase of democracy, which we can call transactional, was thus marked by a retraction of the circumstances legitimising termination of subjective or objective aetiology. To such an extent that, even after successive legislative reforms that have greatly attenuated the initial rigidity of the dismissal regulations, the conviction still persists in some sectors that the Portuguese legal system is the most 'guarantee- orientated' in the European Union. The Constitution of the Portuguese Republic (CPR), promulgated in 1976, places labour, its collective organisation and participation, as well as individual workers' rights in a prominent role, especially in terms of their scope and effectiveness, since it recognises them as fundamental rights or rights similar in nature to rights, freedoms and guarantees — Articles 17 and 18 of the CPR.

Seven constitutional revisions have taken place to date and in spite of very limited modifications as to what concerns labour and employment rights, no substantial changes have been introduced in the structure or axiology of these provisions. Portugal therefore has a solid social constitution, which recognises a "minimum social status"[4] for employees that by its extension and meaning can be considered a very interesting anticipation of the concept of decent work.

The catalogue of constitutional rights includes universal individual rights with an impact on labour and employment, individual workers' rights, collective rights, rights of collective exercise, as well as participation rights. Amongst this very broad list of rights, a central principle emerges in Article 53, on the right to job security.

This is the core rule of the Portuguese labour law system, since it enshrines the principle of stability as a duty imposed upon any labour and employment legal intervention. From a conceptual point of view, this rule is broken down into two propositions. The first concerns the guarantee of job security, i.e., it involves the exceptionality of contractual modalities that weaken the indefinite duration of the employment relationship, the unilateral and burdensome modifiability of working conditions, or the marked unpredictability of the execution of the contractual rendering[5]. The second proposition establishes a ban on dismissals without just cause or motivated by political or ideological reasons. Two vectors are therefore included here: the need for any dismissal to have an enabling reason, either from a subjective or objective perspective, and the inadmissibility of political or ideological considerations as a

4 Wording and classifications of JORGE LEITE, *Direito do Trabalho*, vol. I, ed. Universidade de Coimbra, 2004, pp. 78, ss.

5 *Ibidem*, pp. 82 and JOÃO LEAL AMADO *et als*, *Direito do Trabalho — Relação Individual*, 2nd ed., Almedina, Coimbra, pp. 50.

cause for terminating the employment contract. In short, there can be no arbitrary dismissals, they all have to have a *rationale* which, under no circumstances, can include political or ideological reasons. The CPR and the set of rights it enshrines, based on the principle of job security, made it possible, not without much debate on the legal and economic field, to consolidate the termination of employment during the first phase of democracy without any major structural changes regarding the pre-democracy legal system. Notwithstanding, during this period, an imbalance in the correlation between the possibilities of hiring and the possibilities of terminating employment contracts emerged with increasing force. In fact, the issue of terminating the employment contract, especially through dismissal, is of paramount importance in labour law. So much so that it even goes beyond its borders to be made also a social and economic issue[6].

As far as the employee is concerned, termination of the contract implies much more than the loss of the main or even only source of income. It also has negative repercussions at a personal, social and family level and these repercussions are exacerbated when the labour market experiences adverse employment conditions or when it is marked by opacity or asymmetrical requirements[7]. Knowing the many negative effects of unemployment, legal policies have always been adopted to guarantee a certain level of job protection (and, conversely, to limit the employer's ability to unilaterally terminate the contract), as well as to try to mitigate the effects of job loss, specifically through the social security system, vocational training or the creation of economic and financial incentives to increase employment. However, the fact that job stability can often come into conflict with the requirements of the dynamics of economic activity has led the law to seek a compromise between job security and the freedom to terminate the contract on the employer's initiative. In fact, it is often argued that job stability is something that does not fit easily with the principles of freedom of economic initiative, in itself also a constitutional right — Article 61 of CPR. It is commonly said, that since the employer has the power to manage the company or the business and bears the risks of productive activity, he/she should therefore be recognised the right to freely organise the company, including the freedom to adjust the number of employees to the needs of the economic activity or the pressure of demand.

However, if the labour law system is constructed upon the values of job and employment stability and recognises its social advantages, then it cannot fail to introduce limits on the employer's freedom to terminate employment contracts. The heated argument around this unresolved dilemma led to the publication of Decree-Law 64-A/89, of 27th February, an Act that for the very first time combined the regulation of termination of employment contracts and fixed-term contracts. This law was referred to officially as the "law on the termination of individual employment contracts, including the conditions for the conclusion and expiry of fixed term employment contracts" and marked simultaneously a profound revision of the approach begun in 1975 and a re-reading of the constitutional provisions. The existing forms of contract termination were maintained, but the regulation

6 For the tensional nature of termination of contract, DAVID CABRELLI, "Duration, Lawful Termination and Employment Contract", in Mark Freedland, and others (eds), *The Contract of Employment*, Oxford, 2016; online edn, Oxford Academic, 18 Aug 2016), https://doi.org/10.1093/acprof:oso/9780198783169.003.0024, accessed 15th May 2024.

7 Refering to the challenges of labor market regulation, Michael Piore, "Flexible Bureaucracies in Labor Market Regulation", in GUY DAVIDOV *et al.* (eds), *The Idea of Labour Law*, OUP, Oxford 2011, pp. 385,ss

in respect of redundancy for objective reasons were considerably relaxed. The weight of administrative intervention in the collective redundancy procedure was reduced and the redundancy for work position suppression was introduced. For the first time, the dismissal procedural rules were also differentiated according to the size of the company. For companies with fewer than twenty workers, the disciplinary procedure was simplified. On the other hand, fixed term contracts (certus quando and incertus quando) were restricted to a strict causal list.

Decree-Law 400/91, of 16th October, added personal unsuitability for the job to the list of objective redundancies, thus increasing its justifications. From the 1989 reform onwards, the Portuguese legal system for terminating employment contracts took on a pendulum movement between the rigidity of dismissal and openness to fixed-term contracts and other even more precarious employment relations. The legal provisions were at this stage made up of multiple pieces of legislation from different political and ideological quarters and the result of different cyclical changes. But that was about to come to a close.

In 2003, the first Portuguese Labour Code (PLC) was published (Law 99/30003, of 27th August), which systematised and compiled the previous dispersed Acts, not without giving them some makeover. The substantial and formal rearrangement translated into an alignment very close to the Civil Code, both in terms of the ordering of subjects and their inner logic. However, with regard to the termination of employment contracts in general and dismissal in particular, the changes were topical and concerned mainly the unlawfulness of dismissal and its procedure. This Code underwent a thorough overhaul in 2009 — Law 7/2009, of 7th February — and the result has been the issue of an almost different code. Different in philosophy, formal arrangement and legislative technique. Where the 2003 Code was closer to civil law, the 2009 Code reclaimed the labour matrix; where the 2003 Code was conservative, the 2009 Code innovated. The very definition of employment contract changed; the modalities of the employment contract including telework were brought into the Code, to mention only some of the most relevant new features that illustrate its innovative strike.

As for the termination of the contract, however, there have been no relevant overturns. The exhaustive legal framework of causes for termination of contract remained, as did the types of dismissal and redundancy. This was, as in what concerns the ending of the employment contract, an almost uneventful reform. The continuity was overturned by Law 23/2012 of 25th June, following the *Memorandum of Understanding with the Troika*[8] in the context of the country's serious economic and financial crisis. This Act, which left the systemic architecture untouched, turned its focus once again to an increased degree of flexibility in the termination of contracts and reducing the amount of compensation owed to employees at the end of their contract[9].

Not very many changes, one would say, but enough to cause important shock waves.

After this Act and the intervention of the Troika the criteria and amounts of compensation laid down in the law have not been restored to previous levels. Dismissal and redundancy

8 https://www.historico.portugal.gov.pt/media/1397626/11R_MoU_EU_20140424.pdf, accessed 15th May 2024,

9 For a concise comment on the Troika intervention in Portugal, José João Abrantes, "Sociedade e Direito — algumas notas sobre as suas relações", in Vinte Anos de Questões Laborais, Coimbra Editora, Coimbra, 2013, pp. 522.

became cheaper. Presently the constitutional guarantee of job stability remains in place, as do the bases that the legal system for dismissal and redundancy established since the CPR. Article 338 of the Labour Code even reaffirms the constitutional principle of prohibition of dismissal without just cause or for political or ideological reasons and the termination of the labour relationship must be caused by one of the reasons laid down in the law. In any event, the termination of the employment contract — from a legal point of view, the employment contract is terminated when it definitively ceases to produce its effects — is still such an important issue for employees and employers (even if for opposing reasons), and, in general, for the development of productive activity, that the modalities and the terms of the employment contract termination are of mandatory nature. This means that, with the exception of situations legally provided for, the objective scope of these legal provisions comprises all employees regardless of their professional category or the nature of their contract, and cannot be modified by infra-legal sources, not even in a more favourable way for the employee — Article 339 of the Labour Code. On the other hand, termination of employment contracts is not uniform, since the protection of the principle of equality and non-discrimination has led the legislator to foresee special provisions for certain categories of employees: pregnant, puerperal and nursing employees — Article 63 —, and members of employees' collective representation structures — Article 410.

II. Modalities of dismissal in Portugal and amount thereof[10]

The term «dismissal» encompasses various legal situations that can be qualified as *resolution*[11] ("resolução"), which have in common the fact that the employment contract ends by the *employer's initiative*[12], on the grounds of *just cause* (Article 53 of the Constitution of the Portuguese Republic ("CRP") and Articles 351 et seq. of the Labour Code).

However, the legislator does not provide a general notion of just cause to assist the interpreter-applicant in filling this *indeterminate concept*[13], except in Article 351, No. 1, regarding subjective or disciplinary just cause attributable to the employee, where it defines just cause

10 This article (in points 3, 3.1, 3.1.2, 3.1.3 and 3.2) was written exclusively by Mariana Pinto Ramos, PhD student in Law at the Faculty of Law of the University of Lisbon, Young Scholar at ISSLSSL and APODIT and Lawyer, and all opinions presented are her own.

11 Contract resolution is generically provided for in articles 432 et seq. of the Civil Code and is characterised by the fact that, unlike revocation, it always takes place through a unilateral legal transaction, i.e. it occurs by the unilateral decision of one of the parties, without the other party being required to agree to it. However, termination is not a discretionary exercise, but essentially a binding one, in that it can only occur if there are legal or conventional grounds authorising its exercise (article 432, no. 1 CC). In fact, the contract can only be resolved if such grounds exist, otherwise it is not permitted (article 406, paragraph 1 of the CC).

12 We therefore exclude from our analysis the methods of terminating the employment contract on the employee's initiative or situations where the employment contract expires (e.g. due to retirement).

13 It is therefore up to the interpreter-applicator to investigate this concept in the light of the general principles of labour law.

as "*the culpable behaviour of the employee which, due to its severity and consequences, makes the immediate and practical subsistence of the employment relationship impossible*," complementing the concept with an *demonstrative list*[14] of situations that constitute just cause (No. 2) and with a set of elements and circumstances to be taken into account in fulfilling this precept (No. 3).

Despite the lack of fulfilment of the concept, the doctrine currently admits, consensually, the duality between (i) objective just cause (non-culpable), which depends on reasons related to the company (e.g., economic, structural, or technological reasons), that make the continuation of the employment relationship unfeasible; and (ii) subjective just cause (culpable), which is based on a culpable and unlawful[15] behaviour of the employee (disciplinary just cause).

In the first case, we are facing causes for the termination of the employment contract not attributable to the parties (*i.e.*, without culpability), such as collective dismissal (Article 359 of the Labour Code), dismissal due to the extinction of the job position or individual redundancy (Article 367 of the Labour Code); or dismissal due to unsuitability (Article 373 of the Labour Code) and which, nonetheless, require the employer to comply with certain absolute legal formalities (under penalty of the dismissal being unlawful), as well as to prove the underlying reasons for the termination of the contract (*i.e.*, the proof of the reasons underlying the dismissal decision that, in *ultima ratio*, substantiate the existence of objective just cause).

In the second case, we are facing a subjective cause for the termination of the employment contract by the employer within the scope of exercising their disciplinary power (Article 351 of the Labour Code), being bound by a burden of demonstrating the impossibility of the subsistence of the employment relationship in light of the principle of good faith[16]. Subjective just cause necessarily entails a serious and culpable breach of contract by the employee, *i.e.* the occurrence of a *disciplinary offence*[17] (cf. article 351, No 1 of the Labour Code).

14 Supported by the adverb " namely" when identifying the list of situations that could fulfil the concept of just cause in article 351, no. 2 of the Labour Code.

15 Arguing that culpability cannot be dissociated from unlawfulness in the context of contractual liability, so that "culpable behaviour" presupposes an unlawful and censurable act by the employee, see Pedro Romano Martinez, *Da Cessação do Contrato*, Almedina, 3rd edition, Coimbra, 2020, pp. 425-426.

16 Ricardo Nascimento, *Da Cessação do Contrato de Trabalho — Em especial por iniciativa do trabalhador*, Coimbra Editora, 2008, p. 172.

17 Although we know that we must be dealing with behaviour that merits the employer's censure, doctrine and case law have contributed to filling in the concept of disciplinary infraction (which is not to be confused with that of disciplinary sanction), analysing it by analogy with the (elastic) concept of just cause provided for in article 351 of the Labour Code. Thus, for its qualification, the law proposes the following elements: (i) the existence of employee behaviour (by action or omission) that is unlawful and culpable; (ii) behaviour that can be attributed to the employee by way of intent or negligence. It is therefore expected that the behaviour is reprehensible, regardless of whether it causes actual damage to the employer, but that it has an impact on the relationship of trust established between the two. The lack of a concept of disciplinary infraction, despite allowing more flexibility and proximity of the law to the specific case, also allows for disparities between disciplinary actions, as a result of regionalisms or cultural traditions that vary depending on the location of the employer and employee, as well as differences between employers, since what may constitute a disciplinary infraction for one employer may not for another. In order to determine the

It is only in this subjective context that the Labour Code uses the expression "just cause", although the doctrine, in particular Rosário Palma Ramalho, uses the expression *broadly* in its application to the termination of the employment contract by the employee's initiative[18], distinguishing between the grounds for termination that result from a culpable and serious breach of the employer's duties and the grounds for termination that are based on objective and reasonable reasons — the distinction that arises from Article 394, Nos. 2 and 3 of the Labour Code[19].

As for the termination of the employment contract by the employer's initiative (and for reasons attributable to the employee), the law refers to just cause only in a subjective sense, which necessarily presupposes a serious and culpable breach of the contract by the employee, that is, the occurrence of a disciplinary infraction (cf. Article 351, No. 1 of the Labour Code).

Therefore, in assessing the concept of just cause, the concept has a different scope depending on whether the termination of the contract was initiated by the employee or by the employer, and we will focus only, in this study, and as far as subjective just cause is concerned, on the latter modality.

Thus, it follows that the concept of "subjective just cause", by the employer's initiative, aims to sanction situations that, due to reasons attributable to the employee, and due to their severity, put the employment relationship in an irremediable crisis and, consequently, the relationship of trust necessary for the maintenance of the employment bond.

Differently, Articles 359 and 367 of the Labour Code, for example, refer to forms of termination of the employment contract promoted by the employer and based on (objective) market, structural, or technological reasons related to the company, excluding, in this context, any culpable behaviour of the employee, contrary to what is required in subjective just cause.

Nonetheless, although the law presents, as demonstrated, different notions of dismissal, highlighting the subjective/objective binomial of labour termination, it does not concretize the concept of just cause underlying these modalities of dismissal.

Moreover, the Labour Code does not provide a precise idea as to its content, which puts the method of subsumption in crisis and, consequently, its application can never be automatic.

boundaries of disciplinary infractions, Rosário Palma Ramalho considers that, on the one hand, the employee's duties set out in Article 128 of the CT should be combined with the situations that constitute just cause set out in Article 351 no.2 of the CT, although this is a complex task, given the exemplificative content of both rules — *Tratado de Direito do Trabalho Parte II — Situações Laborais Individuais*, 9.ª ed., Almedina, Coimbra, 2023. António Menezes Cordeiro considers useful to consider the notion of disciplinary infraction provided for in the General Law on Labour in Public Functions, approved by Law 35/2014, of 20 June — Cf. *Direito do Trabalho*, II, Almedina, 2019, p. 752.

18 Which we won't go into in detail in this study.

19 Cf. Rosário Palma Ramalho, *Tratado de Direito do Trabalho, II, cit.*, pág. 858.

The concretization of an indeterminate concept such as "just cause" therefore refers us to an operation of weighing the values at stake, applying them to the specific case.

However, the concretization of this concept is not obvious, and the solution has been to resort to the concretization made by jurisprudence, supported by specific cases, making the treatment of this concept more complex, elastic, and prone to the risks of judicial activism in the context of concretizing indeterminate concepts.

Judicial activism is visible in the so-called "jurisprudence of sentiment", in which the legal rule is disregarded for reasons of justice related to the protection of the weaker party or the (alleged) restoration of contractual balance. This implies, as observed by MENEZES CORDEIRO[20], that "stabilized regimes, such as compensation or solidarity, are tampered with to allow, in certain cases, the condemnation of bankers in favour of small investors".

Regarding indeterminate legal concepts, their proliferation in contemporary legislative technique enhances this judicial activism, where the judge takes advantage of the semantic manoeuvring space[21] that these indeterminate concepts leave open, to decide according to their personal conviction.

In the context of the concept of "just cause", there are numerous jurisprudential decisions that refer to very vague and difficult-to-control formulas — e.g., "absolute breach of trust", "secure justification", or "practical impossibility" of the subsistence of the employment relationship — and that can easily be instrumentalized and manipulated by interpreters practicing the aforementioned "jurisprudence of sentiment".

Consequently, and although MENEZES CORDEIRO[22] argues that "[e]ntire institutes have been developed without support in the law and on the margins of any minimally plausible interpretation: just think of personality rights, the prerequisites of civil liability, or the transmission of obligations", the truth is that the concretization of the concept of labour just cause has been due, in part, to a jurisprudential development that sometimes falls into this so-called "jurisprudence of sentiment", being influenced by regionalisms, personal perceptions of the interpreter-applicant, or personal senses of justice.

Thus, the main criticism of this type of judicial decisions is the fact that they refer, to a certain extent, to the arbitrator's discretion, compromising structural principles such as legal certainty and the predictability of judicial decisions.

Having made this brief excursion into the modalities of dismissal and the objective and subjective binomial of the concept of just cause, it is appropriate to consider each of these aspects next.

20 Cf. ANTÓNIO MENEZES CORDEIRO, *Tratado de Direito Civil. I — Introdução. Fontes do Direito. Interpretação da Lei. Aplicação das Leis no Tempo. Doutrina Geral*, Almedina, 4.ª ed., reimpr., Coimbra, 2019, pág. 770.

21 Cf. ERNST A. KRAMER, *Juristische Methodenlehre*, Stämpfli Verlag AG, 3.ª ed., Berna, 2010, pág. 91, *apud* Miguel Nogueira de Brito, *Introdução ao Estudo do Direito*, AAFDL Editora, 2.ª ed., Lisboa, 2018, pág. 211.

22 Cf. ANTÓNIO MENEZES CORDEIRO, *Tratado de Direito Civil. I*, *cit.*, pág. 770.

III. Objective dismissal

Currently, dismissals for objective reasons unfold into three modalities: (i) collective dismissal; (ii) dismissal due to the extinction of the job position or individual redundancy; and (iii) dismissal due to unsuitability.

3.1. Collective dismissal

3.1.1. Origin[23]

The labour relationship between employer and employee would ideally only come to an end when the employee retires. However, this is not always the case.

The issue of ending an employment contract can bring relevant social, human and economic aspects, and is a particularly sensitive topic nowadays.

From an idealistic point of view, the employment contract would be concluded for the duration of the contract and would only expire if the employee was unable to perform his work, or if the employer was unable to pay him, or if he retired due to age or disability.

However, in today's society, marked by globalisation, dynamism and innovation, the idea of "employment for life" has been disappearing.

Therefore, in addition to expiry, there are other ways of terminating the employment contract, either at the initiative of the employer (dismissal for reasons attributable to the employee, collective dismissal, dismissal for termination of employment or dismissal for unsuitability), at the initiative of the employee (termination or denunciation) or at the will of both through revocation of the employment contract.

In this case, collective dismissal is included in the types of termination of the employment contract at the initiative of the employer and is regulated in articles 359 et seq. of the Portuguese Labour Code.

Despite the fact that collective dismissal is currently accepted, its constitutional framework can still raise different questions, especially regarding to the concept of "just cause" provided for in Article 53.º of the Constitution of the Portuguese Republic and the question of whether this concept encompasses subjective and objective elements. After a great deal of discussion by the legal profession and case law on this matter, it has been understood that we should distinguish between two types of just cause: subjective just cause, which is based on the employee's culpable behaviour; and objective just cause, which depends on reasons related to the company that make it impossible to continue the employment relationship.

23 This topic was authored by Diana Cunha Silva guest lecturer at the Faculty of Law of the University of Porto. The views and opinions expressed herein are solely her own.

This constitutional precept covers non-prohibited dismissals, and therefore collective dismissal itself. Even so, despite the fact that this is a lawful dismissal, the general idea of possible protection for job security is maintained.

A). General considerations on Collective Redundancies in Portuga. Concept. The qualitative element — the reasons for collective redundancy

Collective redundancy can be defined as a set of terminations of employment contracts, determined by a single reason which may be market, structural or technological, thus having an objective justification.

The grounds for collective redundancy are listed in Article 359.º of the Labour Code and are essentially economic reasons, which must be assessed in the light of the company, its current context and the future of its operations.

In Article 359.º, n.º 2 of the Labour Code, the legislator helps the interpreter by offering a notion of market reasons (point a), structural reasons (point b) and technological reasons (point c). It is, however, an exemplary identification of the aspects that make up these reasons, which "can be traced back to an economic basis, because even technological reasons must have an economic basis. (...) there is no doubt that the indication is exemplary, and there may be other reasons justifying dismissal."[24]

The legislator wanted collective redundancies to be a way of avoiding crises in companies, not a solution when the crisis is already in place. This is a mechanism designed to scale and reorganise the company, thus avoiding redundancies in a crisis. That is why collective redundancies are related to the management of the company, and not to individual workers, and are therefore objective redundancies.

However, judicial control of the grounds for collective dismissal plays an important role in this matter. In this respect, the court must take into account an appropriate weighing up of the various interests at stake, be it "the interest of the employer — the holder of the power exercised — but also the collective interests in the persistence of the labour base of all the staff."[25] The court must also take into account the interests of the employer — the holder of the power exercised — but also the collective interests in the persistence of the labour base of all the staff.

However, "it is not up to the court to assess the merits of such decisions, because the entrepreneur is free to embark on a ruinous path; the court only has to verify that the employer is not acting in abuse of rights or that the motive has not been fictitiously created."[26] The decision to make a collective redundancy is a managerial one, based on present and objective facts, but also on forecasts, trends and expectations of the future.

It should be noted that the collective redundancy decision is a management decision, based on present and objective facts, but also on forecasts, prognoses, trends and evolving expectations perceived by the person who holds decision-making power within the company.

24 Pedro Romano Martinez, *2013 Direito do Trabalho*, 6th edition, Almedina, Coimbra, pp. 928.
25 Bernardo da Gama Lobo Xavier, *Estudos do Instituto do Direito do Trabalho*, Volume III, pp. 246.
26 Pedro Romano Martinez, *2013 Direito do Trabalho*, 6th edition, Almedina, Coimbra, pp. 928.

The judge's intrusion into the assessment of the grounds that justified such a business management decision is unconstitutional, representing a violation of Article 61.º, n.º 1 of the Constitution of the Portuguese Republic and contradicting the fundamental right to private property.

The truth is that the grounds for dismissal are common to the termination of various contracts, which gives specificity to this form of termination of the labour relationship. However, let's not be fooled, since, in the end, dismissal (despite being "collective") results in the issuing of individual termination declarations. Thus, even though collective dismissal involves a number of workers, a statement must be issued to each worker, even if there is a common reason for the individual termination of several employment relationships. In fact, "it is true and certain that in the judicial control of collective redundancies, the court may consider a motivational framework relating to some workers to be subsisting and valid and other motivations relating to other workers to be unfounded."[27]

It follows that the employer must duly substantiate the reasons for collective dismissal, otherwise the justification will not be declared unfounded and the dismissal will be unlawful (Article 381.º, b) of the Labour Code).

B). Quantitative element — the number of workers affected

Collective redundancy entails terminating the employment contracts of at least two or five workers, depending on whether the company has fewer or more than fifty workers (Article 359.º, n.º 1 of the Labour Code). As far as the quantitative element is concerned, it is important to distinguish between a micro or small company and a medium or large company. Article 100.º of the Labour Code states that: "The following are considered to be: a) Micro-enterprises: those employing fewer than 10 workers; b) Small enterprises: those employing from 10 to fewer than 50 workers; c) Medium-sized enterprises: those employing from 50 to fewer than 250 workers; d) Large enterprises: those employing 250 or more workers."

Thus, in the case of micro and small companies, in order for there to be a collective redundancy, at least two workers must be made redundant within a three-month period. In the case of medium and large companies, at least five workers must be made redundant during the same three-month period. It must be understood that we are dealing with a genuine collective redundancy not only when the quantitative element is fulfilled, but also when the contracts of the redundant workers are not replaced. In other words, the contracts of those workers, in that specific category or profession, are terminated and, as a result, they are not replaced.

A pertinent question arises on the subject of the quantitative element, and has to do with "knowing the relevant moment for verifying whether the quantitative criteria are met[28]". It seems to be believed that this will have to happen "at the beginning of the procedure (...), although it is common for the employer and some workers to reach an agreement during the course of the procedure". It is important to note that the final number of redundancies will not always correspond to the number of redundancies that were expected to take place. However,

27 Bernardo Gama Lobo Xavier, *O Despedimento Coletivo no dimensionamento da empresa*, Verbo, Lisbon, 2000, pp. 401-402.

28 Pedro Rica Lopes, *Collective Dismissal - its historical and legislative evolution, Prontuário de Direito do Trabalho* (2012) n.º. 93, pp. 225-226.

the doctrine has taken the view that what matters is the number of redundancies intended a priori and not the number of redundancies finally decided, since this second number, even if lower, cannot imply the procedure. In fact, this situation has been confirmed by the case law itself, with countless cases in which the dismissal began with several workers and ended with only a few or even one.

C) The Procedure

The initial notice of collective redundancy

Article 360.º, n. º 1 of the Labour Code stipulates that: "The employer who intends to carry out a collective redundancy communicates this intention, in writing, to the workers' committee or, failing that, to the inter-union committee or to the trade union committees of the company representing the workers to be covered." This phase is of particular relevance to the worker. This phase represents a process of internal reflection by the company associated with management decisions and the reasons for the dismissal.

This consideration and reflection on the part of the employer is easily related to the paradox between the freedom that the employer has to manage his company and, on the other hand, the right of workers to job security. However, there is no doubt that "entrepreneurs are the right people to create or close companies and to scale them (...)[29]" and that the courts play the role of arbitrator, whose function is to analyse "the company's management criteria and verify the existence of a link between the grounds and the dismissal"[30].

The Portuguese legislator has a duty to harmonise the two positions, finding a balance between the two parties, without, on the one hand, weakening the employee's position, and without, on the other hand, harming the employer's freedom to dispose of his company.

With regard to the notice sent to employees, case law has ruled that it must contain an express mention of the reasons for the dismissal, with a reference to both the economic grounds for the dismissal and the reasons for choosing the employees concerned.

The Portuguese legislator sought to clarify in Article 360.º, n.º 2 of the Labour Code the information that must be included in the initial notice referred to in Article 360.º, n.º 1, making reference to the reasons given, the selection criteria, the number of workers covered and the professional categories covered, the period of time intended for the dismissal and the method of calculating compensation. Such information guarantees the transparency and fairness that should guide collective redundancy procedures.

D) Negotiations and information phase

After the communication referred to in Article 360.º, n.º 1 of the Labour Code, within five days thereafter, the information and negotiation phase follows "with a view to reaching an agreement on the size and measures to be applied, as well as other measures that reduce the number of workers to be made redundant" (Article 361.º, n.º 1 of the Labour Code), in which

29 Bernardo Gama *Lobo Xavier, O Despedimento Coletivo no dimensionamento da empresa*, Verbo, Lisbon, 2000, pp. 401-402.

30 *Judgement of the Lisbon Court of Appeal*, 13 December 2007.

the competent department of the ministry responsible for the labour area will participate (Article 362.º of the Labour Code). The participation of the competent department of the ministry responsible for the labour area in the negotiation aims to "promote the regularity of its substantive and procedural instruction and the conciliation of the interests of the parties."

The law requires this stage of negotiation and information in order to prevent employers from carrying out unjustified dismissals without allowing workers to unionise over the measures adopted. Case law has been constant on this issue, warning of the need to promote the information and negotiation phase, pointing out that such an omission would lead to a dismissal almost without procedure, encouraging individual dismissals by invoking collective dismissals[31].

The main aim of this phase will be to find other measures to reduce the number of workers to be made redundant, such as suspending employment contracts, reducing normal working hours, retraining or retraining or even early retirement or pre-retirement (article 361.º of the Labour Code).

At this stage, the workers' representative structure or, failing that, the individual worker is allowed to present their proposals or suggestions. Also at this stage, the employee can contest the choice of being covered by the collective dismissal, as well as the reasons invoked by the employer to justify the collective dismissal.

This phase is marked by a notorious imbalance between the parties, and it is common to see only the fulfilment of formalities on the part of the employer and not a real phase of negotiations, with a spirit of openness and understanding.

E) Collective redundancy decision

Once the agreement has been signed or, in the absence of such an agreement, 15 days have passed since the initial notice of intention to make the employee redundant, the employer will notify the workers' representative structure or (in the absence of such structure) each worker concerned of the decision to make the employee redundant, expressly mentioning the reason and the date of termination of the contract and indicating the amount, form, time and place of payment of compensation, accrued claims and claims due as a result of the termination of the employment contract. This notice must be sent by writing at least 15 to 75 days before the termination date, depending on the employee's length of service (Article 363.º of the Labour Code).

It should also be noted that if the redundancy involves spouses or unmarried partners, the notice must be given at least as far in advance as the step immediately above that which would apply if only one of them were involved in the redundancy.

According to Article 363.º, n. º 4, if the employer does not give the minimum notice period, the contract will only end once the missing notice period has elapsed, and the employer must pay the remuneration corresponding to that period. According to article 364.º, "during the notice period, the worker is entitled to credit hours corresponding to two working days per week, without prejudice to pay.

31 *Judgement of the Porto Court of Appeal*, Case no. 1222/10.1TTVNG-A.P1, of 04 June 2012.

F). Compensation

Law n.º. 13/2013 of May 29 altered the amount of compensation to be granted to the employee in the event of collective redundancy: "the employee is entitled to compensation corresponding to 14 days' basic pay and seniority for each full year of seniority." (Article 366.º 1 of the Labour Code).

Thus, as of 1 May 2023, and with regard to the duration of the contract from that date, the amount of compensation due to the employee in the event of collective redundancy will be 14 days of basic pay and seniority for each full year of seniority. However, this new rule only applies to the duration of employment contracts after 01/05/2023.

With regard to fixed-term employment contracts (fixed or uncertain), the compensation due on termination has been increased to 24 days' basic salary and seniority pay for each year of seniority. Previously, in the case of fixed-term employment contracts, this compensation was set at 18 days' basic salary and seniority pay for each full year of seniority; and in the case of uncertain-term employment contracts, the compensation corresponded to 18 days' basic salary and seniority pay for each full year of seniority in the first 3 years of the contract, and 12 days' basic salary and seniority pay for each full year of seniority in subsequent years.

G) Protecting the position of workers

Analysing the legal provisions relating to collective redundancies, it can be concluded that the protection of the position of the workers covered by the procedure is achieved through various aspects, of which the protection afforded with regard to the obligation for dialogue, justification and grounds for the employer's decision, as well as the search for alternative solutions to the redundancy, stand out. The requirement to follow a procedure with dialogue with the worker, representative structures, official bodies and appropriate formalism guarantees the necessary transparency. On the other hand, this protection can also be seen in the employer's obligation to comply with a notice period, which varies between 15 and 75 days, and the dismissal is only effective after this period has elapsed. There is also a credit of hours given to workers to be used during the notice period in order to give them the conditions and time to look for a new job. In addition, collective dismissal entails the payment of compensation according to a legally established calculation formula, plus the payment of labour credits. Last but not least, the possibility of judicial review of the dismissal is maintained.

H) Unlawfulness and unfoundedness of the dismissal

The general grounds for unlawful dismissal are set out in Article 381.º of the Labour Code. On the other hand, in addition to the general cases, in a collective dismissal process we are faced with an unlawful dismissal in the special cases of article 383.º of the Labour Code.

According to article 388.º of the Labour Code, the unlawfulness of collective dismissal can only be declared by a court of law, and the employee has a period of 6 months to bring the respective action, counting from the date of termination of the contract, under penalty of forfeiture of the right of action. By virtue of the reference made in Article 388(3), it can be concluded that the employer can only invoke facts and grounds contained in the dismissal decision communicated to the employee in the context of an action for judicial review of the dismissal.

By means of a precautionary measure, the employee affected may request a preventive suspension of the dismissal, within five days of receiving the notice of dismissal, which will only be ordered on the basis of the existence of formal irregularities in the dismissal, or the failure to make the legal compensation due or labour credits available to the employee, in accordance with articles 386.º of the Labour Code and articles 34 et seq. of the Labour Procedure Code.

The process of challenging collective dismissal is a special declaratory process, under the terms of article 48.º of the Code of Labour Procedure, the procedures for which are regulated in articles 156.º et seq. of the Code of Labour Procedure

In the event that the collective dismissal is declared unlawful by the court, the consequences of the unlawfulness are listed in article 389.º of the Labour Code, and include the obligation to compensate the worker for all the damage caused (pecuniary and non-pecuniary) and the reinstatement of the worker in the same establishment of the company, without prejudice to their category and seniority, except in the cases provided for in articles 391.º and 392.º of the Labour Code.

In this respect, it should be said that "the Code's choice to enshrine reinstatement as normal is to be applauded, even if this is perhaps not the statistically most desired by the worker (...)"[32]. Even so, the worker can choose not to be reinstated and to receive compensation instead, in accordance with article 391.º of the Labour Code.

In fact, the employer itself may oppose reinstatement in limited cases such as those in Article 392.º of the Labor Code. However, in these cases, the legislator requires that the employer's return be "seriously detrimental and disruptive to the operation of the company". In other words, mere inconvenience is not enough. What is required is damage, serious disruption to business activity. However, when we are dealing with an unlawful dismissal based on the grounds of Article 392.º, n. º 2 of the Labor Code, the possibility of replacing reinstatement with compensation is immediately ruled out.

Finally, in addition to compensation for damages and reinstatement or substitute compensation, the employee is also entitled, once the court has declared the dismissal unlawful, to interim benefits, under the terms of article 390.º of the Labor Code, i.e. "the remuneration he has ceased to receive since the dismissal until the final decision of the court declaring the dismissal unlawful."

I.) The need for effective judicial control

Doctrine has sought to call for a broader judicial review of the syndicability of collective dismissal decisions. The thesis that the company belongs to the employer contaminates the entire negotiation procedure. If, on the one hand, the court has the power to control acts of day-to-day management, it no longer controls the employer's decision to resort to collective redundancy.

32 Júlio Gomes, Júlio Manuel Vieira - *Direito do Trabalho, Volume I - Relações individuais de trabalho*, Coimbra Editora, Coimbra 2007, p.1019.

It is imperative that the judge has the final decision on the adequacy of the reasons given to justify the collective dismissal, confirming the proportionality between the reasons given and the decision to proceed with the dismissal.

Although free economic initiative and the right to private property play a fundamental role, it is essential to ensure that they are in line with other constitutional canons, specifically the principle of security. If the employment relationship is characterized by being a relationship between unequals, the Court will inevitably be the point of balance.

On the other hand, the employer's unlimited freedom in choosing the criteria for selecting the workers to be made redundant is reprehensible, and the Court does not play a role in scrutinizing them. Where is the employer's legitimacy in choosing certain workers from among the others? How can the employer know if the dismissal is more damaging to some than to others?

For this reason, it should be argued that the final notice of dismissal, in addition to referring to the reasons for the termination of the contract, should also refer to the individual reason that determined the choice of a particular employee.

Although today there is doctrine that defends this view, such as Fraústo da Silva, the case law has been more restrained, arguing that collective dismissal has an insurmountable subjectivity behind it, since the law does not establish criteria for preference in maintaining employment.

J) The Outsourcing Ban

Law n.º. 13/2023, of April 3, which amends the Labor Code and related legislation, as part of the Decent Work Agenda, added a new article (338.º-A) to the Code, under the heading "Prohibition on outsourcing services", which expressly prohibits employers from outsourcing services in order to meet the needs previously met by a worker whose employment contract was terminated in the previous 12 months, through the mechanisms of collective dismissal or termination of employment. However, from a constitutional point of view, this article is dubious. This amendment constitutes a novelty that is highly restrictive and highly offensive to entrepreneurial freedom. As is well known, outsourcing of services consists of the process by which the contracting and subcontracting companies establish a mutual relationship, based on the performance of an activity by the subcontracting company, which is generally a specialist in that function. This form of structural organization allows companies to reduce or control costs, increase productivity and competitiveness in the market and reduce risks. With this change, a company cannot, for example, replace a security guard with a security company, even if that company represents a reduction in the associated costs. We can therefore ask: where does this leave private property rights, entrepreneurial freedom or private economic initiative?

K) Conclusion

In recent years, collective redundancies in Portugal have increased substantially, functioning as a response mechanism for companies to major financial crises, such as the pandemic situation. Although collective redundancy can be considered the only viable solution for companies to survive, it involves a complex and delicate decision. Even so, social responsibility and respect for workers' rights are pillars that should guide any action taken within companies, seeking to minimize the negative impact on their lives as much as possible.

However, the labour legislator can and must improve the shortcomings that the doctrine has identified in the collective dismissal procedure: what is the applicable sanction for the omission of the information and negotiation phase, beyond a mere administrative offence? What is the deadline for the final decision on collective dismissal? Isn't the system invalid by default? What are the consequences of failing to pay the compensation due?

From the worker's point of view, the mechanisms at their disposal to respond to potentially unlawful situations must be made visible, either at an earlier stage, during the procedure itself, through the obligations that fall on the employer, or in the right to challenge the collective dismissal through the special procedure for challenging it, or through the precautionary procedure for suspending the dismissal.

Even so, we realise that collective dismissal is, by its nature, a mechanism that cannot provide adequate protection for the workers affected by it, and that there is a long way to go to achieve the much-desired balance between the parties.

3.2. Historical evolution[33]

3.2.1. Individual redundancy

Dismissal due to the extinction of the job position or individual redundancy[34], for economic, market, structural, or technological reasons, is equivalent to collective dismissal[35], with the particularity of being individual in nature and is currently provided for in Articles 367 et seq. of the Labour Code.

33 Part by Professor Maria Regina Redinha

34 Although the law does not define the concept of "job post", António Nunes de Carvalho describes it as "an organisational reality" that "refers to the size and structure of the production organisation" and which results from "the way in which the production cycle of a given good or service is broken down into certain tasks and operations" — cf. "Reflexões sobre o conceito legal de posto de trabalho", *in Para Jorge Leite — Escritos Jurídico-Laborais*, Vol. I, Coimbra Editora, 2014, (pp.119-141), pp. 121-122. Recognising that it would be difficult for the law to define a single legal concept of the workplace that is valid and operational for all purposes, the author proposes the following concept: "The legally relevant meaning of the job post corresponds, generically, to a position in a specific organisation, which is designed by the holder of that organisation and is subject to his management choices, a position which implies a certain functional content, requires a certain professional qualification and/or aptitude, involves certain means, equipment and risks, may have associated with it a set of working conditions (namely in terms of the temporal scheme of the performance of the service) and to which the employee is assigned by the employer within the framework of the execution of an employment contract" — cf. Similarly, Pedro Furtado Martins, *Cessação do Contrato de Trabalho*, 4th edition, Principia, 2017, pp. 251 to 257.

35 Pedro Furtado Martins considers that collective dismissal and dismissal for individual redundancy are two types of termination that are part of a common figure, whose differences essentially concern the respective procedure and the number of employees involved, while the grounds and rights that the law associates with them are common — cf. *Cessação do Contrato de Trabalho*, cit. pp. 257 and 258. In the same direction, Pedro Romano Martinez, *Direito do Trabalho*, 10th edition, 2022, pp. 1008 and 1009.

The termination of the employment contract due to the extinction of the job position[36] was a novelty introduced by the LCCT of 1989[37] to correspond to situations where the maintenance of the employment bond was not feasible for reasons related to the functioning of the company, but which could not fit into the figure of collective dismissal.

The original configuration of this figure was maintained in the Labour Code of 2003, which only introduced minor formal changes[38], until the Labour Code of 2009, which systematically altered the regime and introduced some relevant changes regarding notice periods (in conjunction with the changes also introduced for collective dismissal), but these changes did not necessarily contribute to the greater operability of the figure[39].

The regime for dismissal due to the extinction of the job position is currently provided for in Articles 367 et seq. of the Labour Code, with Article 367, No. 1, qualifying as "the termination of the employment contract promoted by the employer and based on that extinction when it is due to market, structural, or technological reasons related to the company.". The explanation of these reasons is referred, by No. 2, Article 359 concerning collective dismissal[40].

36 In its original wording, in 1989, the legislator avoided using the term "dismissal", and this denomination was due to the vicissitudes of the process of amending the 1975/1976 Law on Dismissals, in particular the doctrine of Constitutional Court Ruling 107/88, according to which individual dismissals for objective causes were prohibited. Thus, the legislator, being obliged to comply with this imposition by the Constitutional Court, "took refuge in an enigmatic passage of the text of the judgement" — where the understanding prevailed that the constitutional principle of job security and, in particular, the concept of just cause for this purpose, prohibited arbitrary dismissals (i.e. without just cause), but did not oppose the admissibility of objective and justified causes for dismissal. This understanding contributed to the strictness and rigidity of the legal version of the law, which consequently resulted in it being less operational. — cf. Pedro Furtado Martins, *Cessação do Contrato de Trabalho*, cit. pp. 258 and Rosário Palma Ramalho, *Tratado* II, cit. pp. 798 and 958.

37 Decree-Law no. 64-A/89 of 27 February approving the legal framework for the termination of individual employment contracts, including the conditions for the conclusion and expiry of fixed-term employment contracts, available for consultation at https://diariodarepublica.pt/dr/home.

38 Even though, as Pedro Romano Martinez explained in his annotation to article 402 of the 2003 Labour Code, "the subterfuge used in previous legislation had been avoided, and this form of termination was now unabashedly referred to as a type of dismissal" — cf. *Código do Trabalho Anotado*, 5th edition, p. 702. This solution was maintained in the current Labour Code.

39 However, the current Labour Code, with regards to individual redundancy, underwent significant changes with Law no. 23/2012 of 25 June (following the Troika Memorandum of Understanding imposed by the European Commission on Portugal): the replacement of the seniority criterion for the job to be terminated, in the event of there being several jobs with identical functional content, by the mere requirement that the termination criterion not be discriminatory; and the elimination of the employer's duty to offer the employee an alternative job as a condition for the lawfulness of the dismissal. These changes were aimed at promoting greater practical implementation of this regime, but were deemed unconstitutional by Constitutional Court Ruling 602/2013, of 20 September, which led to the approval of Law 27/2014, of 8 May, which defined new criteria for choosing the job to be terminated and reinstated the duty to offer an alternative job. — cf. Rosário Palma Ramalho, *Tratado* II, cit. pp. 958-959.

40 In the corresponding rule in the LCCT (art. 26), the law included the content of these economic reasons, while in the Labour Code 2003 this was included in relation to the grounds for collective dismissal, so much so that today the law merely sets out the reasons and refers to the collective

Therefore, there are not many distinctive characterizing elements of this regime that can be drawn from the legal notion, as they approach the regime of collective dismissal (*e.g.*, in the reasons to justify the cessation or in the fact of intending to terminate an employment contract of an employee who occupies a certain job position).

In fact, the only differentiating trait of this regime is not contained in Article 367, but in the negative delimitation of the notion that arises from paragraph d), of No. 1 of Article 368, where it is established that this modality of dismissal can only be used when "collective dismissal is not applicable." That is, it is a *quantitative criterion*[41], because if the dismissal operated by the employer does not cover the minimum number of employees set by Article 359[42], the termination of the employment contracts must be promoted through the regime of dismissal due to the extinction of the job position.

Indeed, once the extinction of the job position is verified, dismissal can only take place upon verification of the following cumulative requirements listed in Article 368, No. 1:

a) "*The reasons indicated for the extinction of the job position cannot be due to the fault of the employer or the employee*" (paragraph a)): this means that dismissal due to the extinction of the job position is *subsidiary* to dismissal for reasons attributable to the employee or subjective/disciplinary just cause. The exclusion of this modality of dismissal in the case of culpable action by the employer is a situation of difficult practical assessment, since the decision of dismissal is, in *ultima ratio*, a management decision of the employer, whose criteria are not always easily reviewable[43].

b) "*It is practically impossible for the employment relationship to subsist*" (paragraph b)): the unfeasibility of maintaining that job position must thus be the logical consequence of the market, structural, and technological reasons invoked, that is, there must be a causal link between the managerial reasons and the specific job position to be extinguished, excluding recourse to dismissal due to the extinction of the job position whenever this link is not verified[44]. Therefore, this requirement presupposes that the non-subsistence

dismissal regime (art. 357, no. 2).

41 Pedro Furtado Martins, *Cessação do Contrato de Trabalho*, *cit.*, pág. 273.

42 That is, if the dismissal covers at least two or five employees, depending on whether they are a micro or small company, on the one hand, or a medium or large company, on the other.

43 On the difficulty of assessing an employer's culpable conduct, Rosário Palma Ramalho, *Tratado* II, cit. pp. 961-962 and, in case law, Supreme Court judgement of 9/9/2009 (Case no. 08S4021, Relator Sousa Grandão), available at www.dgsi.pt, in which the Court states that "In the jurisdictional assessment of the economic grounds invoked for dismissal for extinction of the job post, the business management criteria must be respected, and it is the sole responsibility of the judge to verify the accuracy of these grounds and the existence of a causal link between them and the dismissal". For Pedro Romano Martinez, what is at issue is the assessment of negligence in weighing up the reasons for the dismissal and not in its occurrence. Therefore, for the author, disastrous management that has led to a reduction in the company's activity, for example, is not an obstacle to redundancy — cf. *Direito do Trabalho*, cit. Luís Menezes Leitão, on the other hand, states that this situation can only arise in cases of extreme, incomprehensible or manifestly erroneous management — cf. *Direito do Trabalho*, 8th edition, 2023, p. 483.

44 See Judgement of the Court of Appeal of Lisbon from 11/11/2009 (Relator Natalino Bolas), available at www.dgsi.pt.

of the employment relationship must necessarily be serious, but it cannot be reduced to one of the elements of the subjective just cause provided for in Article 351, No. 1 of the CT, as it is objectified by force of No. 4 of Article 368. Therefore, although it is a complex[45] requirement to analyse and fulfil, it is considered that the subsistence of the employment relationship is practically impossible when, once the job position is extinguished, the employer does not have another compatible with the professional category of the employee.

c) "*There are no fixed-term employment contracts in the company for tasks corresponding to the extinct job position*" (paragraph c)): this requirement intends to privilege indefinite-term employment bonds over fixed-term bonds and avoid the extinction of a necessary permanent job position, which the law presumes to occur if there are corresponding functions being performed by fixed-term employees and that, in this case, the employer should not renew these fixed-term contracts as an alternative to the extinction of the job position.

d) "*Collective dismissal is not applicable (paragraph d))*": as mentioned, dismissal due to the extinction of the job position is subsidiary to the regime of collective dismissal.

Article 368, No. 5, provides that "*dismissal due to the extinction of the job position can only take place provided that, by the end of the notice period, the due compensation is made available to the employee, as well as the accrued and due credits as a result of the termination of the employment contract*." Some Authors[46] argue that No. 5 corresponds to a fifth requirement, but we do not agree with this understanding for two reasons: firstly, for lack of support in the letter of the law, as it does not arise from the cumulative list of Article 368, No. 1, and secondly, because we understand that the payment of compensation is not a requirement for recourse to this modality of dismissal, but of its lawfulness.

Article 358, No. 3, provides that "*The employee who, in the three months prior to the commencement of the procedure for dismissal, has been transferred to a job position that is to be extinguished, has the right to be reassigned to the previous job position if it still exists, with the same base remuneration.*" Therefore, in order to avoid fraudulent[47] situations, the legislator prevented the dismissal of the employee whose job position has been extinguished if they occupied it for less than three months through internal mobility; in this case, the employee has the right to reoccupy the old job position, except if it was also extinguished, in which case they will be dismissed.

Similarly, dismissals due to the extinction of the job position are also subject to the limitation imposed by Article 338-A of the CT, which came into force with Law No. 13/2023, of April 3, prohibiting the use of external services (outsourcing) to meet needs previously ensured by employees who, in the prior 12 months, have been dismissed for the reasons mentioned above[48].

45 Rosário Palma Ramalho, *Tratado II*, *cit*., pág. 963.

46 In this spirit, Luís Menezes Leitão, *Direito do Trabalho*, cit., p. 484. On the contrary, Rosário Palma Ramalho, *Tratado,* II, cit. p. 964.

47 Pedro Romano Martinez, *Direito do Trabalho*, *cit.*, pág. 1010.

48 Recently, a request was made under the provisions of Article 281(2)(b) of the Constitution of the Portuguese Republic (CRP) for the Constitutional Court (TC) to declare the unconstitutionality of

In addition to the requirements listed in No. 1 of Article 358, No. 2 of the same normative establishes, in *imperative terms*, *criteria of preference*[49] in the choice of the job position to be extinguished, in the event of a plurality of job positions with identical functional content in the same section or equivalent structure of the company.

Thus, the law establishes that if there is a plurality of job positions with identical functional content in the section or equivalent structure, to determine the job position to be extinguished, the employer's decision must observe, with reference to the respective holders, the following order of relevant and non-discriminatory criteria: a) Worst performance evaluation, with parameters previously known to the employee; b) Lower academic and professional qualifications; c) Greater cost of maintaining the employee's employment bond for the company; d) Less experience in the function; e) Less seniority in the company.

These *selection criteria* are intended to ensure the objectivity of this dismissal, thus preventing the employer from being able to select a particular employee whose contract they wish to terminate, but without necessarily having objective reasons for that choice. The criteria are *imperative and successive*, that is, they are assessed in legal order, moving to the next criterion only if the previous one is not applicable or if it is found that the employees to be compared are in a situation of equality.

Article 338-A of the Labour Code with general binding force. This article has sparked controversy among legal scholars, who claim that it constitutes an unacceptable attack on freedom of business organisation, the right to private property and freedom of private economic initiative, enshrined in Article 61 of the CRP. The rule in question does, in fact, raise major problems, firstly of an interpretative nature, which will not be analysed here. For more on this subject, see João Leal Amado, "A proibição de recurso à terceirização de serviços e o despedimento — para-terceirizar: nótula sobre o novo artigo 338.º-A do Código do Trabalho", *in RLJ*, no. 4040, May/June 2023, pp. 312-320 and "Sobre a (des)conformidade constitucional do novo artigo 338.º-a do Código do Trabalho", *in Minerva: Revistas de Estudos Laborais*, Vol. 13 N.º 6 (2024): Edition commemorating the 50th anniversary of 25 April, pp. 49-92; Maria Regina Redinha, "Agenda do trabalho digno: what's in a name?", *in APODIT, Newsletter Primavera'23*, pp. 6-8; Pedro Romano Martinez E Luís Gonçalves Da Silva, "Constituição e Agenda do Trabalho Digno", *in Revista Internacional de Direito do Trabalho*, no. 4, 2023, pp. 279 et seq, especially pp. 292-311 (legal opinion drawn up by the authors at the request of the National Council of Employers' Confederations); and Rosário Palma Ramalho, *Tratado*, II, cit.

49 In the original wording of this rule (which did not deviate from the previous regimes of the LCCT and Labour Code 2003), if there were several jobs with the same functional content, a preferential criterion was established in which the employee with the least seniority in the company and in the job was given preference. However, these criteria were highly criticised because they had no economic or management basis — in this regard, Bernardo Lobo Xavier, *Manual de Direito do Trabalho*, Rei dos Livros, 2011, pp. 830 and following. Thus, the norm was changed in the 2012 revision and the choice was now made on the basis of a business criterion, with the employer having to define relevant and non-discriminatory criteria. However, this solution was found to be unconstitutional by Constitutional Court Judgment no. 602/2013 of 20 September, which ruled that the selection criteria were excessively vague and therefore infringed on the principle of job security (Article 53 of the CRP). Following this ruling, Law 27/2014 of 8 May amended Article 368(2) by introducing a set of positive criteria for choosing the job to be terminated in the event of a plurality of jobs with identical functional content.

A note, also, on the *procedure* to be adopted, since all the modalities of dismissal now analysed require compliance with a legal procedure, whose violation necessarily implies the unlawfulness of the dismissal.

The procedure for dismissal due to the extinction of the job position is similar to that of collective dismissal and involves (i) a *phase of communications*, (ii) a *phase of consultations*, and (iii) a *decision-making phase*.

The procedure begins with a written communication from the employer to the representative structure of the employees (if it exists) and to the employee to be dismissed (Article 369 of the CT), indicating, with reasons, the motives, and grounds for the intention to proceed with the extinction of the job position[50].

Once the communication is made, the consultation phase begins, which takes place over the 15 days following the communication of the intention to dismiss. This phase allows both the representative structure and the employee to make an opposition, through a reasoned opinion, and to request the intervention of the competent services of the Ministry of Labour (Article 370, whose objective is to verify the observance of the criteria of preference of the employees to be affected and the requirements related to the absence of fixed-term employment contracts for the same function, and the inapplicability of the collective dismissal regime).

Five days after the issuance of the opinion (or once that period has elapsed), we enter the decision-making phase, and the employer, wishing to resort to the extinction of the job position[51], will issue a reasoned written decision (Article 371), explaining the reasons for the extinction of the job position, the confirmation of the selection criteria and the criteria for choosing the affected employees, as well as the amount of the compensatory indemnity and the date of termination of the contract (Article 371, Nos. 1 and 2).

The communication of the final dismissal decision must be communicated individually to each employee (No. 3), as well as a copy to the representative structure of employees. The employment contract ceases fifteen to seventy-five days after the employee receives the communication of the dismissal decision (Article 371, No. 3). Finally, employees affected by individual dismissal due to the extinction of the job position have the same rights that the law granted to those who are subject to a collective dismissal[52].

50 The communication must be accompanied by details of the reasons for the extinction of the job post and the need to dismiss the employee (Article 369(1)(a) and (b)); under the terms of point (c), the communication must also include an indication of the criteria for selecting the employees to be dismissed.

51 If the dismissal decision concerns a pregnant employee, an employee who has recently given birth or is breastfeeding, or an employee on parental leave, the file must be sent to the Commission for Equality in Labour and Employment ("CITE") for an opinion, under the terms of Article 63(3)(c) of the Labour Code.

52 By express reference in Article 372 to the collective redundancy regime, the following rules are also applicable to redundancy due to the extinction of the job post: (i) If the minimum notice period is not complied with, the contract ends after the period of notice has elapsed from the date of the communication of redundancy, and the employer must pay the remuneration corresponding to this period. (ii) during the notice period, the employee is entitled to credit hours, under the terms of article 364, the purpose of which is to give the employee time to look for a new job; and (iii) during the

Dismissal due to unsuitability

The last modality of objective dismissal at the initiative of the employer is dismissal due to unsuitability[53], regulated in Articles 373 to 380 of the Labour Code[54]. This modality of dismissal allows the employer to terminate the employment contract whenever it is determined that the employee is incapable of performing their duties, making the subsistence of the employment relationship practically impossible[55].

Unsuitability is a modality of dismissal for objective reasons (as it does not depend on the culpable conduct of the employee), but it directly relates to the employee, that is, it is the employee's unsuitability for their job position that is at issue, whether revealed during the course of the contract (i.e., supervening unfitness — Article 373) or, notably, following changes introduced by the employer to the job position, in the exercise of their management powers. Unsuitability, therefore, results from a supervening impossibility, but since the legislative change of 2012, two types of unsuitability have been verified: (i) the traditional situation, in which unsuitability arises from changes introduced to the job position; and (ii) the new unsuitability, where there is a substantial modification of the employee's performance, namely a continuous reduction in productivity or quality, regardless of whether changes have been introduced to the job position[56].

Thus, dismissal due to unsuitability is provided for in Article 373 but can only occur when the cumulative requirements set out in Articles 374 and 375 of the CT are met.

notice period, the employee can terminate the contract with at least 3 days' notice, without losing the right to compensation (article 365).

53 Unsuitability is without prejudice to the protection afforded to employees with reduced working capacity, disabilities or chronic illnesses (Article 374(3)) and must not result from a lack of health and safety conditions at work attributable to the employer (Article 374(4)).

54 The possibility of terminating the contract on the grounds of the employee's unfitness was included in the LCT (Article 102(a)) and was included in the original version of the 1975 Dismissal Law as one of the "good grounds" for dismissal (Article 14(3)(b) of the LD), but was removed from the subsequent version of this law. It was reintroduced by Decree-Law no. 400/91, of 16 October, following the Economic and Social Agreement of 1991, from where it moved to the Labour Code of 2003 (articles 405 et seq.) and, finally, to the current Labour Code (articles 373 et seq.). Law no. 23/2012, of 25 June, in compliance with the Troika Memorandum of Understanding, introduced significant changes to the figure of dismissal for unsuitability, both in terms of grounds and procedure. However, some of these changes were deemed unconstitutional in Constitutional Court Ruling no. 602/2013 of 20 September. The changes to this regime are partly the result of the need to make labour legislation more flexible, and some authors, such as António Menezes Cordeiro, referred to this type of dismissal as a "technological dismissal", because they assumed that it would affect employees whose jobs had changed as a result of technological developments and who, to that extent, had not adapted — cf. "Da cessação do contrato de trabalho por inadaptação do trabalhador perante a Constituição da República", *in RDES*, 1991, no. ¾, pp. 369-421, p. 402.

55 For Pedro Romano Martinez, unsuitability is based on a relative impossibility for the employee to carry out his/her work, since if the incapacity is absolute and definitive, the employment contract expires — cf. *Direito do Trabalho*, cit. For a more detailed analysis of the current system, see Cláudia Madaleno, "Dismissal for objective reasons. In particular, unsuitability", *in Estudos dedicados ao Professor Doutor Bernardo Lobo Xavier*, I., Lisbon, 2015, pp. 509 et seq.

56 Pedro Romano Martinez, *Direito do Trabalho*, *cit*., pág. 1013.

Now, in Article 374, No. 1, unsuitability is specified, with the law providing[57] that it occurs in any of the situations provided for in the following paragraphs, when, being determined by the way the employee exercises their functions, it makes the subsistence of the employment relationship practically impossible: a) Continuous reduction in productivity[58] or quality[59]; b) Repeated breakdowns in the means assigned to the job position; c) Risks to the safety and health of the employee, other employees, or third parties.

These requirements are applicable, however, to the so-called "common employees", for whom unsuitability occurs whenever the way the employee exercises their functions causes a continuous reduction in productivity or quality or any other grounds of No. 1 of Article 374.

Regarding employees who hold positions of technical complexity or management, unsuitability can be determined based on objectives previously set and formally accepted, as provided for in No. 2 of Article 374 of the CT. The fulfilment of dismissal due to unsuitability, concerning "common" employees, also depends on the requirements of Article 375, No. 1 of the CT, namely: a) Modifications have been introduced to the job position resulting from changes in manufacturing or marketing processes, new technologies, or equipment based on different or more complex technology, in the six months prior to the commencement of the procedure; b) Adequate professional training has been provided for the modifications to the job position, by a competent authority or certified training entity; c) The employee has been given, after the training, a period of adaptation of at least 30 days, at the job position or elsewhere whenever the exercise of functions in that position is likely to cause damage or risks to the safety and health of the employee, other employees, or third parties; d) There is no other available job position in the company compatible with the employee's professional category.

Regarding the procedure, dismissal due to unsuitability, if there have been no modifications to the job position, can take place provided that the following cumulative requirements are met:

a) Substantial modification of the performance carried out by the employee, resulting in, namely, a continuous reduction in productivity or quality, repeated breakdowns in the means assigned to the job position, or risks to the safety and health of the employee, other employees, or third parties, determined by the way the functions are exercised and which, given the circumstances, can reasonably be expected to be definitive;

b) The employer informs the employee, attaching a copy of the relevant documents, of the assessment of the activity previously provided, with a detailed description of the facts, demonstrating a substantial modification of the performance, as well as that they can pronounce in writing on the said elements within a period of no less than five working days;

57 Inadaptation of an employee assigned to a technically complex or managerial position is also verified when the objectives previously agreed in writing as a result of the way they carry out their duties are not met and it is practically impossible to maintain the employment relationship — cf. article 374, no. 2 of the Labour Code.

58 The 2003 Labour Code referred in this context to an "abnormal" reduction in employee productivity. The new Labour Code emphasises the continued loss of productivity and also the quality of work.

59 For Pedro Romano Martinez — *Direito do Trabalho*, cit., p. 1014 — the loss of income can be related to the employee's culpable behaviour, allowing, depending on the circumstances, the so-called dismissal with just cause, for reasons attributable to the employee. Also see Júlio Gomes, *Direito do Trabalho, Vol. I — Relações individuais de Trabalho*, Coimbra Editora, 2007, pp. 997 et seq.

c) After the employee's response or after the period for this purpose has elapsed, the employer communicates to them, in writing, appropriate orders and instructions relating to the execution of the work, with the intention of correcting it, bearing in mind the facts invoked by the employee;

d) The provisions of paragraphs b) and c) of Article 375, No. 1, have been applied, with the necessary adaptations. Regarding positions of technical complexity, the law provides that, if there have been no modifications to the job position, it can take place provided that the following cumulative requirements are met: a) If there has been the introduction of new manufacturing processes, new technologies, or equipment based on different or more complex technology, which implies modification of the functions related to the job position; b) If there have been no modifications to the job position, provided that the provisions of paragraph b) of No. 2 of Article 375 are complied with, with the necessary adaptations.

The contract ceases fifteen to seventy-five days after the communication of the dismissal decision (Article 378, No. 2 CT), and, until the moment of cessation, the legal compensation must be paid to the employee.

If the contract ceases due to unsuitability, within 90 days, the company must ensure the maintenance of the employment level, namely by hiring another employee (Article 380). The employee affected by a dismissal due to unsuitability has the same rights as a employee affected by collective dismissal, with the nuance that, in the case of the second modality of dismissal due to unsuitability, the employee can terminate the contract immediately after having received the communication which contains a detailed description of facts demonstrating the continuous reduction of productivity or quality, breakdowns, risks, among others (cf. Article 379, No. 2, ex vi Article 375, No. 2, paragraph b) of the CT).

It is unanimously accepted by doctrine and jurisprudence that the degree of demand of the law in the configuration of dismissal due to unsuitability, not only by the admissibility requirements but also by their cumulative nature, has made the figure highly complex and difficult to apply in practice, and therefore of little practical utility, which is confirmed by the almost total absence of jurisprudence on the matter[60].

3.3. Disciplinary dismissal. A) Origin. B) Historical evolution. C) Current regulation to author

According to Article 351 of the Labour Code, dismissal for reasons attributable to the employee (or disciplinary dismissal) necessarily rests on the employee's behaviour that constitutes a situation of just cause (in this case, subjective).

Therefore, when we talk about "disciplinary" dismissal or for reasons attributable to the employee, we are facing a subjective cause for the termination of the employment contract,

60 Rosário Palma Ramalho, *Tratado*, II, cit., p. 990. In the same sense, Menezes Cordeiro, *Direito do Trabalho*, II — Direito Individual, Almedina, 2019, pp. 1006-1007, states that "the scheme of dismissal for unsuitability, due to the legal circumstances that surround it, has little practical projection" (...) and that "the current scheme of 'unsuitability' appears to be frankly inadequate. This is borne out by its sheer non-application".

in this case by the employer within the scope of exercising their disciplinary power (Article 351 of the Labour Code), in contrast with the right of resolution to be exercised by the employee (Article 394 of the Labour Code), both being bound by a burden of demonstrating the impracticability of the subsistence of the employment relationship in light of the principle of good faith[61].

In this context, the law refers to just cause only in a subjective sense, which necessarily presupposes a serious and culpable breach of the contract by the employee, that is, a *disciplinary infraction*[62] (cf. Article 351, No. 1 of the CT).

The law is particularly demanding[63] in the configuration of just cause for dismissal. To this extent, for it to be verified, it has been the understanding of doctrine and jurisprudence that the cumulative requirements of Article 351, No. 1 of the CT must be met, namely: (i) an illicit, serious, in itself or by its consequences, and culpable behaviour of the employee (subjective element); (ii) the practical and immediate impossibility of the subsistence of the employment bond (objective element); and (iii) the verification of a causal link between the two elements (subjective and objective).

The concept of "subjective just cause", at the initiative of the employer, therefore aims to sanction situations that, for reasons attributable to the employee, and due to their severity, put

61 Ricardo Nascimento, *Da Cessação do Contrato de Trabalho — Em especial por iniciativa do trabalhador*, Coimbra Editora, 2008, p. 172.

62 Although we know that we must be dealing with behaviour that merits the employer's censure, doctrine and case law have contributed to filling in the concept of disciplinary infraction (which is not to be confused with that of disciplinary sanction), analysing it by analogy with the (elastic) concept of just cause provided for in article 351 of the Labour Code. Thus, for its qualification, the law proposes the following elements: (i) the existence of employee behaviour (by action or omission) that is unlawful and culpable; (ii) behaviour that can be attributed to the employee by way of intent or negligence. It is therefore expected that the behaviour is reprehensible, regardless of whether it causes actual damage to the employer, but that it has an impact on the relationship of trust established between the two. The lack of a concept of disciplinary infraction, despite allowing more flexibility and proximity of the law to the specific case, also allows for disparities between disciplinary actions, as a result of regionalisms or cultural traditions that vary depending on where the employer and employee are located, as well as differences between employers, since what may constitute a disciplinary infraction for one employer may not for another. In order to delimit disciplinary infractions, Rosário Palma Ramalho believes that the duties of the employee set out in Article 128 of the Labour Code should be combined, on the one hand, and the situations that constitute just cause set out in Article 351(2) of the Labour Code, on the other, even though this is a complex task, given the exemplary content of both rules — *Tratado*, II, cit. António Menezes Cordeiro considers it useful to consider the concept of disciplinary infraction provided for in the General Law on Labour in Public Functions, approved by Law no. 35/2014, of 20 June — Cf. *Direito do Trabalho*, II, cit.

63 The demanding wording of the law in defining the requirements for just cause for dismissal is explained by the importance of protecting employees when their employment contract is terminated, which, as we have seen, corresponds to a constitutional principle (Article 53 of the CRP) and also with a view to preventing abusive and arbitrary use of the figure of dismissal with just cause to terminate the contract on the employer's initiative, with the employer also bearing the burden of proof of just cause — cf. Rosário Palma Ramalho, *Tratado*, II, cit, p. 860.

the employment relationship in an irremediable crisis, and doctrine has understood that the employee's action must fall under a judgment of illegality and fault.

To these criteria is added one of a volatile nature — trust — which can only be framed and analysed in the specific employment relationship in question.

Moreover, the subjective just cause and the elements on which it depends — the illegality, the fault, the "impossibility" of maintaining the employment relationship — must be demonstrated by whoever has the burden of proof (generally, the employer), which leads to a high degree of subjectivity, as the analysis of the grounds for just cause may vary according to the sensitivity of the applicant (the employer) and the judge (the judge), being subject to the risk of the aforementioned judicial activism. Hence, there is still a reality of totally contrasting[64] jurisprudential decisions regarding the valuation of the concept of subjective just cause for dismissal.

Indeed, neither doctrine nor jurisprudence are unanimous regarding the concretization of the concept of labour just cause, particularly in subjective just cause, advancing casuistic interpretations of the concept that do not always have a basis in law or, if they do, fall short of the expected development of the concept, as they tend to, mostly, "stick" to the illustrative list of Article 351, No. 2, of the Labour Code.

However, it is peaceful that the situations that frame the concept of disciplinary just cause must respect illicit and culpable behaviours of the employee, therefore reprehensible by Law. This culpable illicit act may result from an action or omission of the employee that will necessarily derive from the violation of legal duties. Therefore, the illicit behaviour of the employee can proceed from the disrespect of primary duties — such as the performance of work with zeal and diligence (Article 128, No. 1, paragraph c) of the Labour Code, to which corresponds one of the illustrative provisions of Article 351, No. 2, paragraph d)) — as well as secondary duties — for example, to ensure the conservation and good use of the work instruments (Article 128, No. 1, paragraph g) of the Labour Code) — as well as accessory duties of conduct, derived from good faith in the fulfilment of the contract, such as treating the employer with civility and probity (Article 128, No. 1, paragraph a) of the Labour Code)[65].

In the face of the culpable behaviour of the employee, a weighing of interests is imposed: it is necessary that, objectively, it is not reasonable to demand from the employer the subsistence

64 By way of example, see comparatively the Court of Appeal of Guimarães ruling of 03.03.2016, Case no. 20/14.7T8VRL.G1, Relator Manuela Fialho, available at www.dgsi.pt, which considered just cause for dismissal in the case of an employee who declared that he had travelled more kilometres than he had and who had tampered with the GPS device to prevent the reliable transmission of data. On the other hand, in the Supreme Court judgement of 11 February 2015, Case no. 3390/13.1TTLSB.L1.S1, Relator Melo Lima, available at www.dgsi.pt, it was considered that the case of an employee who left the shop where he worked to go and watch a football match at a nearby establishment did not fall within the concept of just cause, as it was understood that there was no damage to the employer or that if there was, it was minimal, in contradiction with other judgements of the Supreme Court and other higher courts.

65 On this classification of duties, see Pedro Romano Martinez, *Direito do Trabalho*, cit. pp. 986-988.

of the employment relationship[66], since the breach of the trust relationship motivated by the culpable behaviour will be at stake.

Indeed, for the concretization of the concept of "subjective just cause," Rosário Palma Ramalho points out that attention should be paid to the methodology used to develop this modality of contract termination at the employer's initiative: (i) firstly, the law presents a general clause of "just cause," which integrates with recourse to various criteria (Article 351, No. 1 of the Labour Code); then, it enumerates an illustrative set of typical situations of "just cause" for dismissal (No. 2); and finally, it presents some criteria for assessing situations of "just cause" within the company (No. 3).

Thus, according to the Author, this methodology obliges to resolve three major issues: (i) the question of interpreting the concept of "just cause" itself; (ii) the question of combining the typical situations of "just cause" stated by the law with the general clause of just cause and the problem of the admissibility of other situations of just cause beyond those typified in the law; and (iii) the question of how to assess situations of "just cause."[67].

Returning to Article 351 of the Labour Code, in its No. 2, the law exemplifies typical situations of just cause[68] as the following employee behaviours: a) Illegitimate disobedience to orders given by hierarchically superior managers; b) Violation of rights and guarantees of employees in the company; c) Repeated provocation of conflicts with employees in the company; d) Repeated disinterest in fulfilling, with due diligence, the obligations inherent to the exercise of the position or job to which they are assigned; e) Injury to serious patrimonial interests of the company[69]; f) False statements relating to the justification of absences; g) Unjustified absences from work that directly cause serious damage or risks to the company, or whose number reaches, in each calendar year, five consecutive or ten intermittent, regardless of damage or risk; h) Culpable failure to observe safety and health at work rules; i) Practice, within the company, of physical violence, insults, or other offenses punishable by law on a employee of the company, a member of the corporate bodies, or an individual employer not belonging to these, their delegates or representatives; j) Kidnapping or, in general, crime

66 Bernardo Lobo Xavier, *Manual de Direito do Trabalho*, cit., pp. 779 alludes to a prognostic judgement on the viability of the employment relationship, indicating as reference points the verification of "an untenable situation", "an intolerable relationship", "danger to the future contract" or "behaviour that violates the fiduciary premise of the contract". In the same direction, António Monteiro Fernandes, *Direito do Trabalho*, 22nd edition, Almedina, 2023, p. 727 et seq.

67 Cf. Rosário Palma Ramalho, *Tratado de Direito do Trabalho II*, cit., pág. 859.

68 As stated by Rosário Palma Ramalho, *Tratado de Direito do Trabalho* II, cit., p. 867, "From the comparison of these typical situations of just cause with the list of the employee's duties, made by art. 128 of the Labour Code, it results that the situations contemplated by art. 351, no. 2 are far from covering the whole of the employee's duties, which gives a very particular scope to the law's reference to the exemplary nature of this list".

69 With regard to this exemplary situation, Pedro Romano Martinez explains that the company's property interests affected by the employee's culpable act do not have to be huge, because what matters is the breach of trust, so even if the property damage in question may be derisory, there may still be just cause for dismissal — cf. *Direito do Trabalho*, cit.

against the freedom of the persons referred to in the previous paragraph; l) Non-compliance or opposition to the fulfilment of a judicial or administrative decision; m) Abnormal reductions in productivity[70].

It is emphasized that the list is not exhaustive, with frequent situations analysed in jurisprudence that do not fit into any of the paragraphs of No. 2 of Article 351, but that fit into the general clause of No. 1, including situations that embody a violation of the duty of loyalty or practices of harassment by employees[71].

Furthermore, in assessing just cause, the law states, in No. 3, that attention should be paid, within the company's management framework, to the degree of injury to the employer's interests, the nature of the relationships between the parties or between the employee and their colleagues, and other circumstances that are relevant in the case.

This norm reinforces the casuistic nature of the assessment of the concept, taking into account the circumstances in which the disciplinary infraction capable of substantiating a dismissal with just cause occurs. Similar to the objective forms of dismissal, disciplinary dismissal, as a manifestation of the employer's disciplinary power, when exercised by the employer, obeys the principle of proceduralism, which means that it must be preceded by a disciplinary process expressly provided for and protected in Articles 353 to 358 of the Labour Code, with the ultimate *ratio* of this process being the application of a disciplinary sanction that may be dismissal.

This procedure is an essential requirement for the lawfulness and validity of the dismissal. Additionally, the *principle of proceduralism* requires that the application of any disciplinary sanction — with dismissal being the most severe — be preceded by a disciplinary process, ensuring the employee's right to defense (Article 329, No. 6 of the Labour Code)[72].

Also relevant is the *principle of celerity* in disciplinary action, justified both by the need and desire to resume the regular employment relationship, in the case of conservatory sanctions, and by the need to terminate the employment bond as soon as possible in cases of dismissal with just cause[73].

70 As these situations listed in Article 351(2) of the Labour Code constitute just cause for dismissal, proof of the existence of this fact indicates that the general assumption has been met (see paragraph 1), although the employee is allowed to provide negative proof. So, for example, if the employer has proved that there have been five unjustified absences in a row, it is up to the employee to prove that it has not become impossible for the employment relationship to continue, which is usually extremely difficult to prove.

71 For a jurisprudential analysis of "atypical" situations of just cause, see Pedro Furtado Martins, *Cessação do contrato de trabalho*, cit. pp. 170-177.

72 The law provides for two types of disciplinary procedure: (i) the ordinary disciplinary procedure (article 329) for the application of sanctions that preserve the labour relationship and (ii) the special disciplinary procedure, with the intention of dismissing the employee (articles 353 et seq.), whose formalism is more rigid, particularly with regard to the time limits for the exercise of disciplinary power.

73 This principle of celerity presupposes compliance with various deadlines, in particular the general statute of limitations for disciplinary offences of one year after the offence is committed, unless the offence also constitutes a crime under the terms of the Criminal Code (article 329, no. 1 of the

Finally, the *principle of the cumulation*[74] of disciplinary responsibility with other sources of the employee's responsibility presupposes, albeit with some independence[75], the cumulation of labour disciplinary responsibility with the civil and criminal responsibility of the employee for the infractions committed[76].

Having made this framework, for the purposes of dismissal with just cause, the employer will have to initiate a "special" disciplinary procedure, more rigorous and complex, under penalty of the dismissal being unlawful. Article 352 states that, if there is a need to substantiate the note of accusation ("nota de culpa"), the employer may make use of the preliminary inquiry procedure, which is an optional phase, but has the particularity of interrupting the counting of the prescription and expiry periods established in Article 329, Nos. 1 and 2.

Concluding that a certain behaviour of the employee constitutes a disciplinary offense, and that it is susceptible to constitute just cause for dismissal, the employer issues a written note of accusation against the employee, in which they make a detailed description of the facts attributed to them (Article 353).

In the disciplinary procedure with a view to dismissal, the employer may decide to preventively suspend the employee, without loss of remuneration, whenever their presence is shown to be inconvenient (Article 354, No. 1), as is generally the rule for any disciplinary procedure (cf. Article 329, No. 5 of the Labour Code). The suspension may also precede the charge sheet by thirty days, provided that the employer, in writing, justifies that, taking into account indications of facts attributable to the employee, their presence in the company is inconvenient, namely for the investigation of such facts, and that it has not yet been possible to prepare the charge sheet (Article 354, No. 2).

Labour Code); and the time limit for initiating disciplinary proceedings of 60 days from the employer's knowledge of the offence (article 329, no. 2 of the Labour Code). Regarding the concept of "knowledge of the offence by the employer", there is already unanimity in the case law that it is a matter of actual knowledge of the facts that give rise to the drawing up of the notice of accusation against the employee, which means that it is not enough for the employer to have knowledge of mere facts, not duly detailed or framed, in order to trigger the statute of limitations for disciplinary action. For further developments on the issue of the limitation period, see Bernardo Lobo Xavier, "Prescrição da infração disciplinar", *in RDES*, 1990, pp. 225-267. On the disciplinary procedure, see also Pedro Sousa Pinheiro, *O Procedimento Disciplinar no Âmbito do Direito do Trabalho Português*, reprint, Almedina, 2021.

74 Or c*omplementarity*, as defended by Bernardo Maria Cremades, with whom we agree, and who states that "Disciplinary liability and compensation for damages are, with all certainty, linked in a mutual relationship of complementarity" — cf. *La Sanción Disciplinaria en la Empresa*, Instituto de Estudios Politicos, Madrid, 1969, p. 168.

75 Rosário Palma Ramalho, *Tratado de Direito do Trabalho*, II., cit., pp. 640-641.

76 Distinguishing labour disciplinary liability from civil contractual liability, cf. Jorge Leite, *Direito do Trabalho*, II, cit., p. 103, who states that "it is important to stress that the aforementioned [disciplinary] power cannot be confused [...] with the idea of contractual liability: the worker can be 'punished' for not having fulfilled the duties resulting from the contract or for having violated duties related to the requirements of the organisation in which he works. Moreover, the sanction has more to do with the idea of 'punishment' than with the idea of compensation". In the same direction, Pedro Sousa Pinheiro, *O Procedimento disciplinar*... cit. pág. 41.

As a basic principle of the disciplinary procedure, once the note of accusation is received, the employee may, if they wish, request a preliminary hearing and present a response to the note of accusation, submitting in writing the elements they consider relevant for the clarification of the facts attributed to them and their participation in them, for which they have ten working days after the communication of the charge sheet, being able during this period to consult the process, add documents, and request the evidentiary steps that are pertinent for the clarification of the truth (Article 355).

Once a response to the note of accusation is presented by the employee, the employer, directly or through an instructor, is obliged to promote the evidentiary steps (instruction)[77] requested by them in the defence, except if they are patently dilatory or irrelevant (Article 356, No. 1).

Once the evidentiary steps are concluded, a complete copy of the process must be sent to the employees' commission (if it exists) and, in the case of union representatives, also to the respective trade union association, which may, within five working days, add to the process their reasoned opinion (Article 356, No. 5).

In cases involving a pregnant, postpartum, or breastfeeding employee, a prior opinion from the competent authority in the area of equality of opportunities between men and women is required (Article 63, No. 1), which must be communicated within 30 days (Article 63, No. 4). If the opinion is unfavourable to the dismissal, it determines that the dismissal can only be carried out by the employer after a judicial decision that recognizes the existence of a justifying reason, and the legal action must be filed within 30 days following the notification of the opinion (Article 63, No. 6). This opinion is also required in the case of a caregiver employee (Article 101-F).

Once the instruction phase is completed, and the period for statements from the aforementioned entities has concluded, if the employer understands that there is just cause for dismissal, they will issue a written decision to that effect, duly substantiated, which is communicated to the employee, the employees' commission and/or trade union association (Article 357) within 30 days from the last evidentiary step (Article 357, No. 2), or, if these do not occur, from the communication of the response to the charge sheet by the employee, or, in the absence of a response, after the period of 10 working days for this purpose has ended (Article 355).

The dismissal decision must be substantiated and contained in a written document (Article 357, No. 5) and communicated, by copy or transcription, to the employee, the employees' commission (if it exists), and, in the case of a trade union representative, to the respective trade union association (Article 357, No. 6). Regarding the effectiveness of the dismissal communication, it will only be effective if the dismissal communication is received or comes

77 On the unnecessity of the instruction phase, Pedro Furtado Martins, *Cessação do contrato de trabalho*, cit., who states that "[...] *since this is an internal or partial procedure, which serves as support for the decision of the person carrying it out, it would only make sense to demand that the facts invoked be demonstrated in the procedure itself if the investigation were conducted by an external and independent body, or at least one that was obliged to act independently and impartially. None of this occurs in the dismissal procedure, either with regard to the instructor or the conduct of the procedure, nor should it be required*", p. 179.

to the knowledge of the employee within the said period of 30 days, and it is also effective if the communication was not timely known due to the employee's fault.

Finally, a last note to mention that the procedure required for individual dismissal with just cause is considered simplified in relation to micro-enterprises, unless the employee is a member of the employees' commission or a trade union representative (Article 358, No. 1)[78].

78 Communication to the employees' committee is unnecessary, requiring only communication of the notice of fault and the employee's hearing, and the employer must make its decision within 30 days or after the absence of a response or the last evidentiary step. The dismissal decision must be substantiated (Article 358(2)) and communicated, by copy or transcription, to the employee (Article 358(5)).