

A quiet and discrete revolution in the Portuguese courts: the twilight of the employment contract?

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Abstract

The distinction between an employment contract and a provision of services contract is a recurring theme in the Portuguese courts, regularly associated with the use of the provision of services contract to dissimulate an employment relationship under an apparent self-employment rapport. The lawmaker, in order to fight the misuse of the provision of services contract within an employment rapport, established, through Lei 63/2013, 27.08, updated by the Lei 55/2017, 17.07, an administrative procedure in article 15-A of Lei 107/2009, 14.09, and a special lawsuit to recognize the existence of an employment contract, in article 186-K of the Código de Processo do Trabalho (Labour Procedure Code- CPT), whenever there is a provision of activity with the characteristics of an employment contract. The analysis of the most recent higher courts case law reveals a clear trend to qualify rappers, whose legal nature is under analysis, as provision of services contract, in a sense, paradoxically, contrary to the efforts made by the lawmaker. In this paper, we therefore seek to scrutinize this incomprehensible favouring by the higher courts of the provision of services contract, whose maintenance may lead in the future to an inevitable weakening of the employment contract, damaging employees, Labour Law and Society.

Keywords: labour contract, provision of services contract, case law, labour law.

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1. Introduction

The distinction between an employment contract and a provision of services contract is a recurring theme in the Portuguese courts, that is usually associated with the dissimulation of an employment rapport under a written document regarding a provision of services contract.

The qualification of a contract is based on the analysis of the contract, taking into account the terms in which the contract was actually performed. The *nomen iuris* or the negotiation statements of the parties are not decisive.

The determination of legal subordination, the defining criterion of the labour contract, is, therefore, an arduous task, given the various shades that reality offers, assuming relevance a set of signs of subordination, produced by case law and literature.

In view of the difficulties regarding the legal subordination and qualification of the employment contract by the courts and the proliferation of the

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fraudulent use of the provision of services contract, the legislator created a presumption of a labour contract in article 12 of the Código do Trabalho (Labour Code- CT/2003), later amended by Lei 9/2006, dated 20.03, currently assuming the outlines established in article 12 CT/2009.

The legislator, in order to weaken the misuse of the provision of services contract in employment relationships, established, through Lei 63/2013, of 27.08, updated by the Lei 55/2017, 17.07, the administrative procedure provided for in article 15-A of Lei 107/2009, 14.09 and the special lawsuit to recognize the existence of an employment contract, provided for in article 186-K CPT, whenever there is a situation of provision of activity with the characteristics of an employment contract.

The analysis of the most recent case law of the Portuguese higher courts, however, discloses a clear trend to qualify relationships, whose legal nature is under analysis, as a provision of service contract, in a sense, paradoxically, contrary to the efforts made by the lawmaker to combat the abuse of this contract.

It may be referred, as examples of this tendency, the incomprehensible refusal to apply the presumption of article 12 CT/2009 to relationships established before the respective enactment, the easiness required to the employer to disregard the presumption of article 12 CT, the relevance recognized to the contract name (*nomen iuris*), the importance given to employer's directive power in activities characterized by autonomy to the detriment of the inclusion of the services provider within the organization of the beneficiary of the activity, the weighting of indicia, such as the issuance of a receipt concerning an independent activity (also known as green receipt) and the absence of holidays and Christmas and holidays allowances payment, traditionally used to conceal the labour nature of the relationship, and, finally, overvaluation of the possibility of the provider of services replacement by a third party.

In order to contextualize the issue we propose to approach in this paper, it is necessary to make some observations about the difficulty in distinguishing the employment contract from the provision of services contract.

2. The relevance of *nomen iuris* in the qualification of the contract

We begin by emphasizing that the qualification of a contract is based on the analysis of the contract, taking into account the terms in which the contract was actually performed. Therefore, *nomen iuris* or the legal concepts attributed to it by the parties are not decisive².

² See Bernardo da Gama Lobo Xavier, *Manual de Direito do Trabalho*, 2ª ed. (Lisboa: Verbo, 2014), 352-353.

In case law, see among others, the Supremo Tribunal de Justiça decisions of 17.12.2009, Proc. 724/06.9TTCBR.C1.S1, of 22.09.2010, Proc. 4401/04.7TTLSB.S1 and of 16.01.2008, Proc. 07S2713, available in www.dgsi.pt. In Italian case law, we highlight the decision of the Cass 21.11.2000, n. 15001, in *Giust civ Mass*, 2000, 2387.

In this sense, the majority of literature and case law sustains that the qualification, as well as the determination of the contract legal framework, depends essentially on the factuality concerning the effective performance of the activity, in obedience to the reality primacy principle. Under this principle, whenever the qualification attributed by the parties does not correspond to the behavior of the parties during the contract effective performance, the underlying relationship shall prevail³.

Owing to this fact, the legal qualification of the contract shall be performed by the court, through the assessment of the facts concerning the contractual scheme developed and performed by the parties, with disregard of the name assigned to it by the parties.

The understanding of the irrelevance of the *nomen iuris* attributed by the parties demands the articulation with the thesis of the *indisponibilità del tipo contrattuale*, built by the Italian literature⁴.

Succinctly, this literature upholds that, since labour law is mandatory, it is not in the parties' availability to exclude it through the qualification of the contract⁵.

In that sense, whenever the contract developed by the parties corresponds to an employment contract, it cannot be ruled out by a different contract, since the contractual type of the employment contract is governed by mandatory rules⁶.

Thus, if the relationship underlying the contractual scheme adopted is an employment rapport, labour law, as an imperative legal framework, will apply regardless of the parties' will or qualification⁷.

³ See Xavier, *Manual de Direito do Trabalho*, 355. Case law has therefore held that the document written by the parties and the formal designation “only shows the conformity of the declared will of the parties, and does not prevent the author from claiming and proving that the contract was executed in divergent terms, in order to be able to be attributed to it the legal qualification of subordinate labour contract”. See decision of the Supremo Tribunal de Justiça of 22.03.2007, Proc. 07S0042, available in www.dgsi.pt. In the same sense, see decision of the Supremo Tribunal de Justiça of 16.01.2008, Proc. 07S2713, cit. and the decision of the Supremo Tribunal de Justiça of 23.01.2008, Proc. 07S3521, available in www.dgsi.pt.

⁴ See Pietro Ichino, *Trattato di diritto civile e commerciale, Il contratto di lavoro*, vol. I, (Milano: Giuffrè Editore, 2000), 290. This principle is also referred by Oronzo Mazzotta, *Manuale di Diritto del lavoro*, 4^a ed. (Milano: CEDAM, 2015), 192, as “rigidità (tassatività) del tipo contrattuale”. In Portuguese literature, See Xavier, *Manual de Direito do Trabalho*, 354. Joana Nunes Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei* (Coimbra: Coimbra Editora, 2008), 103 e ss.

⁵ Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 103, refers it as an *unavailability of qualification*.

⁶ Giuseppe Suppiej, Marcello de Cristofaro e Carlo Cester, *Diritto del lavoro, Il rapporto individuale*, Appendice di aggiornamento a cura di Carlo Cester, con la collaborazione di Elena Pasqualetto (Milano: Giuffrè Editore, 2012), 10.

This does not call into question the freedom of the parties to adopt the contractual arrangements which they deem relevant for their interests. See Xavier, *Manual de Direito do Trabalho*, 359.

⁷ See Xavier, *Manual de Direito do Trabalho*, 359-360, considering that the imperative nature of Labour law implies the irrelevance of the parties' will to deprive a subordinate labour legal relationship from the injunctive labour legal framework.

This understanding of the unavailability of the contractual type explains why the *nomen iuris* is particularly lessened in the legal qualification of the relationship⁸.

The applicability of labour standards is thus exclusively dependent on the factual outlines surrounding the contract performance by the parties, revealing the will of the parties concerning the enactment of the contract⁹.

In favour of the depreciation of the *nomen iuris*, it is also pointed out the lack of negotiable strength, particularly accentuated in period of high rates of unemployment, of the candidate that applies for the provision of an activity, on a permanent basis, to impose the correspondence between the name of the contract and the terms in which it will be performed, The candidate will only have as option to adhere, albeit formally, to the proposed contract¹⁰.

Therefore the misuse of a provision of services contract does not necessarily correspond to a simulation, given the absence of a common intention to mislead third parties, but to the exclusion of an imperative legal regime intended to benefit the other party¹¹.

We can therefore conclude that the assessment of the factual conditions corresponding to the performance of the contract, revealing the will of the parties, is determinant for the qualification of the employment contract¹².

There is, however, an increasingly pronounced and highly objectionable predisposition to appraise the *nomen iuris*, when the court attributes to the services provider a high level of culture or legal training. The court, bearing in mind the

As the author notes, *ob cit.*, 355, to accept the relevance of the *nomen iuris* to rule out Labour law enforcement would render unnecessary the mandatory employment contract legal framework. In the same sense, Júlio Manuel Vieira Gomes, *Direito do Trabalho, Volume I, Relações Individuais de Trabalho* (Coimbra: Coimbra Editora, 2007), 138.

⁸ This principle also makes possible to understand the reasons why the courts, in the context of the special lawsuit to recognize the existence of an employment contract, consider that the confirmation by the services provider of the existence of a genuine provision of service contract does not detract the lawsuit from its usefulness, considering the public interest underlying it. For this reason, it is upheld that there is no basis for the dismissal of the lawsuit. *See* decisions of the Tribunal da Relação de Lisboa of 08.10.2014, Proc. 1330/14.0TTLSB.L1-4, of 10.09.2014, Proc. 1344/14.0TTLSB.L1-4 e decision of the Tribunal da Relação do Porto of 13.04.2015, Proc. 175/14.1T8PNF.P1, available in www.dgsi.pt.

⁹ We do not agree with Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 105, when the author considers that, although the injunctive framework of Labour Law is quantitatively more pronounced than in other contractual types, it does not justify moving the *quid* of the agreement qualification to the performance.

¹⁰ *See* Xavier, *Manual de Direito do Trabalho*, 353-358.

¹¹ *See* Xavier, *Manual de Direito do Trabalho*, 354. On the difficulties underlying the application of the simulation in a long-term obligatory relationship such as Labour rapport, *see* Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 74 e ss.

¹² In the terminology adopted by Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 92, we understand that the interpretation of the qualification, in the Labour Law, is dependent on the performance phase. This phase, as we have seen, does not dispense the will of the parties, but rather gives priority to the real will, as it manifests itself in the performance of the contract. *See* Miguel Rodríguez-Piñero, *apud* Gomes, *Direito do Trabalho*, 139, note 367.

level of culture and the legal training, assumes that the provider knows the legal framework of the contract signed.

We, however, consider that any knowledge of the legal nature of the contract in question does not attenuate the negotiating weakness existing between the alleged services provider and the beneficiary of the activity¹³.

¹³ In this sense, stands out the decision of the Supremo Tribunal de Justiça of 6.04.2000, *Acórdãos Doutrinários do Supremo Tribunal Administrativo*, N° 471, Ano XL (Rio de Mouro: Simões Correia – Editores, Lda., 2000), 458, that regarding the lawsuit filed against an University by an University Professor, Master of Law in the area of Labour Law, under the pretext that the contract that bound them was not a provision of services contract but an employment contract decided: *“Although the qualification given by the parties to the contracts does not determine the applicable legal regime, it will be appropriate to give relevance to the name attributed taking into account the fact that the provider of services in question dominates the area in which they move, and to that extent is fully aware of the effects of the contract signed. Although the decisive factor for the qualification of the contract is whether, in practice, the contract was performed and not the name attributed to it by the parties, the fact is that cannot be disregarded in general, and in certain cases it should be given particular relevance”*.

In the same sense, see the decision of the Supremo Tribunal de Justiça of 3.02.2010, Proc. 1148/06.3TTPT.S1, available in www.dgsi.pt, also on the qualification of the contract between a teacher and an institution of higher education.

As if knowledge of the law and the nature of the contract by the services provider would allow him to demand an employment contract or to reject the provision of services contract, especially considering the crisis that higher education has been facing since the end of the 1990s. Legal training does not strengthen the negotiating power of the party, nor does it diminish the obvious bargaining imbalance between the parties.

In this sense, the decision of the Tribunal da Relação de Lisboa of 17.12.2014, Proc. 1340/14.7TTLSB.L1-4, available in www.dgsi.pt, referring to the assessment of the employee's declaration, in the context of an lawsuit to recognize the existence of an employment contract, upheld that *“the fact that she is a university lecturer does not preclude the raising of pertinent doubts about the degree of conscience and freedom with which the “worker” issued the said statement, given the economic dependence in which she is in relation to the claimant”*.

The decision of the Supremo Tribunal de Justiça of 20.11.2013, Proc. 2867/06.0TTLSB.L2.S1, available in www.dgsi.pt, states that the *nomen iuris* is one of the elements to be taken into account in the interpretative effort to achieve the real meaning of the declarations, especially when the providers are enlightened persons. We deeply criticize the relevance that the Supremo Tribunal de Justiça attached to the denomination of the provision of services contract referred in the document signed by the parties, given the high cultural level of the conductor of an orchestra. The court, disregarding the fact that conductor was Italian, assumed that persons, such as the conductor, with *“high standards of culture and wisdom”*, were aware of the difference between an employment and provision of service contract and the legal and practical implications of selecting one or other. We cannot fail to point out that this conclusion is unfounded for several reasons, such as the foreign nationality of the conductor, as well as the lack of connection between a high cultural level and specialized juridical knowledge. In the same sense, João Leal Amado e Milena Silva Rouxinol, *“Anotação ao Acórdão de 20 de Novembro de 2013”*, in *Revista de Legislação e de Jurisprudência*, Ano 143°, N° 3985 (Coimbra: Coimbra Editora, 2014), 280.

Also, very similar, the decision of the Tribunal da Relação de Lisboa of 16.01.2008, Proc. 2224/2007-4, available in www.dgsi.pt, in spite of considering that the *nomen iuris* attributed by the parties to the contract is not decisive for its qualification, accepted that it should be weighed in *“the situations in which in the clauses refer expressions corresponding to legal concepts, but whose common sense is generally apprehensible, above all by people, as is the case of a civil engineer, with university education”*. In addition to the obvious lack of negotiating power already

3. The distinction of the contract of employment from the service contract

It is settled in the case law that the distinction between the employment contract and the provision of services contract lies in the characteristics of the activity. From article 11 CT/2009 and article 1152 of Código Civil (CC) results that the activity covered by the employment contract must be provided under the authority of the employer¹⁴

This activity is characterized by the legal subordination of the employee to the employer, which means that the work is performed under the authority of the other party, producing for the employee an obedience duty.

This characteristic will be considered crucial for the qualification of the labour contract, since the article 1154 CC, that rules the provision of services contract, on the contrary, makes no allusion to this subordination, which indicates that, in the context of the provision of services contract, we are dealing with an activity independent and autonomous, regarding the person who will benefit from it.

In this sense, the case law and the literature has chosen legal subordination as a touchstone of the distinction between these two contracts¹⁵.

mentioned, we have serious doubts that university training in the field of civil engineering empowers the services provider to understand legal concepts, even if they are widely used.

That decision, however, concludes that if the performance of the contract reveals an employment contract diverging from the name and clauses of the written document, the court must take into account the performance to qualify the relationship under analysis.

This decision is a touchstone with regard to the scarce relevance of the *nomen iuris*. In fact, irrespective of the legal knowledge, culture or the will of the parties, the qualification of the contract cannot contradict the actual factual reality. See Hörster, *apud*, Albino Mendes Baptista, *Jurisprudência do Trabalho Anotada*, 3^a ed. (Lisboa: Quid Juris, 2000), 56, "For the legal qualification of a contract is decisive not the designation chosen by the parties or the legal effect desired by them, but rather the performance of the contract. In the event of a contradiction between the agreed and the actual performance it must prevail the effective performance".

The weight attributed to *nomen iuris* is not a phenomenon limited to Portuguese case law, being reported by Mazzotta, *Manuale di Diritto del lavoro*, 192.

¹⁴ Joaquim de Sousa Ribeiro, "As fronteiras juslaborais e a (falsa) presunção de Laboralidade do artigo 12.º do Código do Trabalho", in *Direito dos Contratos, Estudos* (Coimbra: Coimbra Editora, 2007), 353-354.

¹⁵ As observed by António Menezes Cordeiro, *Manual de Direito de Trabalho* (Coimbra: Almedina, 1991), 521, "The submission to the authority and direction of others constitutes the ultimate criterion for distinguishing the employment contract from the provision of services contract." This author quotes the decision of the STJ of 10.10.1985, according to which in the provision of services contract the provider shall not be subject to the authority and direction of the person or entity benefiting from the activity, performing the activity leading to the intended result as best he can, in harmony with his will, knowledge and his intelligence".

In this sense, see the decision of Supremo Tribunal de Justiça of 06.03.1991, Proc. 2585, *Boletim do Ministério da Justiça*, N.º 405 (Lisboa: Ministério da Justiça, 1991), 322, stating that "Legal subordination is the touchstone that characterizes the concept of an employment contract, since it places the employee under the authority of the employer, who can give him orders concerning the manner and time of the work to be performed, disciplining and supervising its fulfillment".

3.1 Legal subordination concept

The majority of literature considers that the employee provides his activity under the orders, rules and supervision of the employer, corresponding to the passive side of the directive power¹⁶.

In the employment rapport, the employer is empowered to direct the activity of the employee, arising to the employee certain duties, namely, the duty of obedience foreseen in article 128, al. e) CT/2009¹⁷.

Legal subordination has been understood as a consequence of the indeterminate nature of work, since, under the employment contract, the employee undertakes to provide a generic type of activity, and it is up to the employer, through the directive power, to achieve the expected activity, defining the precise terms on which it is to be provided¹⁸.

¹⁶ The notion of legal subordination most adopted by our case law is that sustained by Monteiro Fernandes, *Direito do Trabalho*, 17^a ed. (Coimbra: Almedina, 2014), 121, when he refers that it consists “in a relationship of necessary dependence of the personal conduct of the employee in the performance of the contract under the orders, rules or guidelines dictated by the employer, within the limits of the contract and the laws that govern it”. See Gomes, *Direito do Trabalho*, 122, Xavier, *Manual de Direito do Trabalho*, 311, Pedro Romano Martinez, *Direito do Trabalho*, 8^a ed. (Coimbra: Almedina, 2017), 303.

In this sense, see decision of the Supremo Tribunal de Justiça of 12.09.2012, Proc. 247/10.4TTVIS.C1.S1, available in www.dgsi.pt, upholding that: “In theory, the employment contract has as its object the provision of an activity and, as a specific differentiating element, the legal subordination of the employee, materialized in the power of the employer to conform the contracted activity by orders, instructions or directives”.

¹⁷ It is also predicted in article the employee’s legitimate disobedience regarding illegal orders. See Xavier, *Manual de Direito do Trabalho*, 312-313, Martinez, *Direito do Trabalho*, 303.

The duty of obedience, as a manifestation of the employee’s subordination towards the directive power of employer, does not have autonomy. See Gomes, *Direito do Trabalho*, 122.

¹⁸ See Gomes, *Direito do Trabalho*, 123, Xavier, *Manual de Direito do Trabalho*, 310-311, Martinez, *Direito do Trabalho*, 303.

Maria do Rosário Palma Ramalho, *Da Autonomia Dogmática do Direito do Trabalho* (Coimbra: Almedina, 2000), 757 e ss e *Do Fundamento do Poder Disciplinar Laboral* (Coimbra: Almedina, 1993), 224 e ss, questions the objectivist perspective of subordination, sustaining its reductive character, since the employer’s powers are not limited to the performance of the work, covering rules concerning the safety, health and functioning of the undertaking.

Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho, Parte I - Dogmática Geral*, 3^a ed. (Coimbra: Almedina, 2012), 445, in the wake of some German literature, sustains that legal subordination corresponds to a state of personal dependence of the employee towards the employer. This reference to a personal dependence seems to be also present in the notion uphold by Fernandes, *Direito do Trabalho*, 121. Rejects this thesis, Gomes, *Direito do Trabalho*, 122.

Ramalho, *Da Autonomia Dogmática do Direito do Trabalho*, 760-761, emphasizes the relevance of disciplinary power to legal subordination to the detriment of the directive power.

Ramalho, *ult. ob cit.*, 447, also denies that the legal subordination corresponds to the reverse of the employer’s, giving it a wider scope resulting from the directive and disciplinary power.

Pietro Ichino, *Subordinazione e autonomia nel diritto del lavoro* (Milano: Giuffrè Editore, 1989), 99, also considers that the employee’s submission to the directive power is insufficient to delimit the concept of subordination.

As we will demonstrate, the directive power has been clearly devalued by more flexible forms of work, such as telework or the performance of activities characterized by particular technical

The legal subordination is, thus, for most literature and case law, the passive side of the directive power that assists the employer, imposing on the employee a duty of obedience regarding the orders and instructions related to the work performance, supported by disciplinary power corresponding to the employer's power to lay down rules relating to the discipline and organization of the undertaking, both in its prescriptive branch, corresponding to the employers power to establish rules regarding the undertaking functioning, and its disciplinary branch, concerning the application of disciplinary sanctions¹⁹.

However, it should be emphasized that, at the present moment, legal subordination cannot be reduced to the passive side of the directive power of the employer.

Indeed, as some literature notes, the labour reality has offered forms of work organization in which it is notorious the less importance of hierarchies and directive behaviors in the characterization of subordinate work and the higher autonomy of the employee in the provision of activity²⁰.

This devaluation of the directive power has emphasized the importance of the organizational component of the employment relationship, through which the employee carries out his activity in favour of the beneficiary of the activity, within an organization structured and controlled by the latter²¹.

autonomy, emphasizing the importance of other elements such as the inclusion of the employee within the employer organization. See Fernandes, *Direito do Trabalho*, 123-124. On the contrary, rejecting that legal subordination corresponds to the employee's inclusion within the employer's organization, see Ichino, *Subordinazione e autonomia nel diritto del lavoro*, 98 e ss.

Legal subordination is also a technical necessity of the undertaking, as pointed out by the Xavier, *Manual de Direito do Trabalho*, 114, followed by Martinez, *Direito do Trabalho*, 304.

¹⁹ Maria do Rosário Palma Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 5ª ed. (Coimbra: Almedina, 2014), 34-35.

Orders and instructions are not to be confused with mere submission to instructions or a generic control that can also be found in self-employment relationships.

In this sense, the decision of the *Supremo Tribunal de Justiça* of 12.09.2012, cited in footnote 15, refers "Legal subordination, which identifies the contract of employment, implies a position of supremacy of the employer and the correlative position of submission of the employee, whose conduct is necessarily dependent on the orders, rules or guidelines dictated by the employer, within the limits of the contract and its legal framework".

Decision of the Tribunal da Relação de Lisboa of 02.02.2000, Recurso n.º 7108/4/99, *Colectânea de Jurisprudência*, Ano XXV, Tomo I (Coimbra: Casa do Juiz, 2000), 170, states that "In a provision of service contract, there is nothing to prevent orders or instructions from the beneficiary of the service regarding the object of the contract and not to the way of complying with it, without implying legal subordination".

²⁰ Xavier, *Manual de Direito do Trabalho*, 315. Fernandes, *Direito do Trabalho*, 123, in this sense, refers that, if the occurrence of orders and instructions by which the employee, obeying, rules his behavior while performing the contract, is the touchstone criterion, an increasing number of situations of true "employment" will be excluded from Labour law, even though deserve labour law protection.

²¹ The organizational component, which comprehensively covers the relationship between the employer and the employee in the contract, Ramalho, *Tratado de Direito do Trabalho, Parte I - Dogmática Geral*, 455, "is evidenced by the daily influence that the organization predisposed by the employer has in this bond, resulting by the direct analysis of the respective legal framework".

In this sense, we emphasize the relevance recognized by the legislator to the inclusion of the employee within the undertaking organization controlled by the employer revealed by the enclosure in labour contract notion, in article 11 CT/2009, that the provision of activity occurs *within the organization*²².

This inclusion of the employee within the organization, through which he has to respect the rules concerning the functioning and discipline of the undertaking, which do not have a direct relation with the work provided, is supported by the disciplinary power of the employer, in its prescriptive branch²³.

This means that inclusion within the organization of the employer does not preclude legal subordination, since it necessarily implies the recognition of the employer's ability to discipline the functioning of the undertaking, which is inseparable from the directive power and the employee's obedience duty²⁴.

It is in this context that the literature sustains the existence of legal subordination, recognizing the submission of the employee to the authority of the employer, without, however, receiving "orders and instructions" that shape the activity²⁵.

Legal subordination does not mean an absolute submission of the employee to the arbitrary will of the employer, since it is delimited by the type of functions contracted (professional category), the period of work agreed or legally fixed (working hours) and the space established for the provision of work (place of work)²⁶.

It is, therefore, sufficient for the employer to have the power to direct, guide and supervise the employee's activity, as it is the case when he merely generically determines the activity²⁷.

²² According to Xavier, *Manual de Direito do Trabalho*, 305, this expression already appeared as a presumption of the contract of employment in the version of CT/2003, as well as after being amended by Lei 9/2006, of 20.03, according to the literature that emphasizes the employee's inclusion within the undertaking organization.

We, however, disagree that the inclusion in the legal notion of article 11 CT/2009 of the locution "*Within the organization*" is meant to replace "*direction*", which underlies the reference to the authority, which is, as we have referred, indispensable for the effective inclusion of the employee within the employer's organization, as Fernandes, *Direito do Trabalho*, 124 seems to sustain.

²³ Ramalho, *Tratado de Direito do Trabalho, Parte I - Dogmática Geral*, 446.

²⁴ For Ramalho, *Tratado de Direito do Trabalho, Parte I - Dogmática Geral*, 445, this is the duty of obedience, as a duty in the strict technical-legal sense opposing to the duty of compliance with disciplinary sanctions, as a state of subjection.

²⁵ In this sense, Fernandes, *Direito do Trabalho*, 123-124, supports as a key element in the identification of subordinate work, the fact that the employee does not act within an organization of his own, but integrates a work organization belonging to the employer, designed to fulfill the employers purposes, under the rules, issued by the employer in accordance to authority recognized by law. In the same sense, Luís Manuel Teles de Menezes Leitão, *Direito do Trabalho*, 3ª ed. (Coimbra, Almedina, 2012), 123.

²⁶ See decision of the Supremo Tribunal de Justiça of 04.10.1995, Proc. 004218, available in www.dgsi.pt. In literature, Martinez, *Direito do Trabalho*, 304.

²⁷ In this sense, Ribeiro, "As fronteiras jusLaborais e a (falsa) presunção de Laboralidade do artigo 12.º do Código do Trabalho", 356, states that the existence and maintenance of the authority is not dependent on its real use, being enough the recognition that the employer may use it whenever it is necessary. See, in the same sense, the decision of Supremo Tribunal de Justiça, cited in footnote 15.

According to article 112 CT/2003 and currently article 116 CT/2009, activities in which the respective nature implies the technical autonomy of the provider, e.g. lawyer, doctor, nurse, musician, teacher, engineer, may be subject to an employment contract²⁸.

The employee in this cases is only bound to observe general guidelines on work organization (location, time, rules of bureaucratic procedure, disciplinary rules), with legal subordination, but without technical dependence.

Literature, bearing this in mind, sustains that the legal subordination is a notion with variable scope, that admits diverse degrees of accomplishment²⁹.

The decision of Supremo Tribunal de Justiça of 17.02.1994, Proc. 003820, available in www.dgsi.pt, also states that “*legal subordination is a situation that will exist whenever the mere possibility of orders and direction occurs, as well as when the employer can somehow guide the work in itself, even though limited to the place or schedule of the activity performance*”. The decision of the Supremo Tribunal de Justiça of 21.05.2014, Proc. 517/10.9TTLSB.L1.S1, available in www.dgsi.pt, also states that “*Subordination must be considered as a concept of “variable geometry”, as it involves varying degrees of intensity, depending on, in particular, the nature of the activity and / or the confidence that the employer has in the employee, assuming a legal and non-technical nature, in the sense that it is compatible with the technical and deontological autonomy and is articulated with the specific professional skills of the employee himself and with the autonomy inherent to the technical specificity of the activity, and thus , consistent with highly specialized professional activities or having a strong academic or artistic component, as may be merely potential, with the possibility of exercising the inherent powers by the employer*”.

This means that subordination can be merely potential, thus dispensing an effective and constant performance of the labour powers, being enough the possibility of exercising these powers. See Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 38-39. In the same sense, Fernandes, *Direito do Trabalho*, 121.

²⁸ The compatibility of the autonomy with Labour contract justified the inclusion, in article 120, al. c) CT/2003 of the employer's duty to “*Respect the technical autonomy of the employee who carries out an activity whose professional regulations require it*”, currently provided for in article 127, al. e) CT/2009.

²⁹ In this sense, Ribeiro, “As fronteiras jusLaborais e a (falsa) presunção de Laboralidade do artigo 12.º do Código do Trabalho”, 356, states that legal subordination “*depending on the nature of the activity and the specialization and qualification of the employee, it may be more or less strong, admitting a large gradual scale*”. Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 39, also stresses that subordination entails degrees in the sense that it may be more or less intense, according to the skills of the employee himself, the position in the organizational chart or the level of confidence, considering that the subordination of a skilled employee is usually less intense than the subordination of an undifferentiated employee.

In the opposite sense, see Gomes, *Direito do Trabalho*, 125, denying different levels of intensity. In case law, see decision of the Supremo Tribunal de Justiça of 17.02.1994, Recurso n.º 3820, *Acórdãos Doutriniais do Supremo Tribunal Administrativo*, N.º 391, Ano XXXIII (Cacém: Simões Correia – Editores, Lda., 1994), 905, by noting that “*in addition to cases where the employer manifests his position of supremacy on a daily basis, scheduling, directing, controlling and supervising the employee 's activity, there are others where, due to the conditions of performance of the work, the employee enjoys a certain autonomy in the execution of its work activity, without ceasing to be submitted to legal subordination*”.

In activities whose nature implies technical and scientific autonomy of the employee safeguarding, the employee has to comply with the directives on the activity characterization and organization, in particular as regards the place of work, a working schedule, undertaking internal discipline and other elements that reflect the inclusion of the employee within an organization controlled by the employer³⁰.

In the assessment of relationships involving activities characterized by the technical and scientific autonomy of the employee, the directive power is naturally weakened to the detriment of the employee's inclusion within the employer organization.

There are, however, several decisions of the higher courts in favour of the provision of service contract, arguing that the directive power, naturally reduced, does not allow to assert that there is legal subordination, without taking into account the high degree of inclusion of the provider within the organization of the beneficiary³¹.

3.2 The Indicia method

The distinction between the employment contract and the provision of services contract, in the practice, presents many difficulties, since in many cases the employment contract has characteristics of autonomous work, while self-employment assumes characteristics of subordinate work³².

³⁰ How do you refer Fernandes, *Direito do Trabalho*, 122, there is legal subordination, without technical dependence.

In this sense, the decision of the Supremo Tribunal de Justiça of 17.10.2007, Proc. 07S2187, available in www.dgsi.pt, regards the autonomy and potential of legal subordination, which "*its existence can only be verified by means of deduction, which is not an easy task, not only because legal subordination entails different gradations, since there are activities whose performance presupposes a greater or lesser degree of technical autonomy, which, for itself, is not irreconcilable with the power of management of the employer, since the law expressly allows the coexistence of technical autonomy with the managerial power of the employer (article 5, paragraph 2, of the LCT), but also because the existence of this power does not depend so much on its actual use as on the mere possibility of being*". As noted Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 118-119, in the case of professions, whose performance implies the technical and deontological autonomy safeguard, being excluded the employee's instructions regarding the concrete activity performance, legal subordination is revealed by aspects external to the service itself, which necessarily refer to the organizational and administrative conditions that characterize it and, as such, to forms of subordination "attenuated".

³¹ In this sense, *see* the decisions of the Supremo Tribunal de Justiça of 9.12.2010, Proc.1155/07.9TTBRG.P1.S1 and Tribunal da Relação do Porto of 15.06.2015, Proc. 1250/15.5TTVNG.P1, available in www.dgsi.pt, that, in spite of the proven inclusion within the organization of the beneficiary of activity, resulting from the performance of the activity by a nurse in the beneficiary facilities and work instruments, the compliance with clinical procedures, wearing uniform and submitted to working hours, upheld that the rapport was a provision of services contract.

³² According to Xavier, *Manual de Direito do Trabalho*, 349, "*in certain employment contracts the work is carried out with such autonomy that it is difficult to see the features of legal subordination*

The purpose of concealing a real employment contract, with the characteristics of a provision of services, in order to avoid labour legal framework, renders even more complicated the assessment of legal subordination, the criterion defining the employment contract³³.

Thus, the qualification of the contract is achieved on the basis of the available evidence interpretation resulting from the way the parties developed and executed the contract, using the so-called *indicia* method³⁴.

Literature and case law currently indicate as *indicia* of legal subordination the existence of working hours, the performance of the service in a place defined by the employer, the existence of external control of activity, compliance with

or the remuneration is so dependent on the result that the situation is very close to that of self-employment". See Martinez, *Direito do Trabalho*, 331.

³³ As refers Xavier, *Manual de Direito do Trabalho*, 354.

³⁴ In this sense, see Martinez, *Direito do Trabalho*, 333 e ss, Fernandes, *Direito do Trabalho*, 130 e ss, Xavier, *Manual de Direito do Trabalho*, 361 e ss, Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 43 e ss.

In case law, the decision of the Supremo Tribunal de Justiça of 20.11.2013, Proc. 2867/06.0TTLSB.L2.S1, cited in footnote 12, states that "Given the difficulties inherent to drawing a rigid and absolute concept of "legal subordination", it is above all the operationalization of this contractual element (as far as its organizational moment is concerned) that, as a rule, the *indicia* method is used, based on a "grid" of topics or signs of qualification (elements that express assumptions, consequences or collateral aspects of a certain type of contractual bond), for which there is a significant consensus in literature and case law, although their cast is not rigid and none of them may alone assume decisive relevance, and it is not therefore required that all point in the same direction".

The decision of the Supremo Tribunal de Justiça of 10.07.2008, Proc. 08S1426, available in www.dgsi.pt, points out that in "situations where, in practical terms, the distinction is not immediate, as it happens, even in the context of the employment contract, when the work must be provided with technical autonomy or with knowledge that is not accessible or controllable by the employer; or where, in the provision of services contract, guidelines and instructions from the beneficiary of activity, in particular of a technological nature, are essential for the result achievement, it is indispensable to use *indicia* method attain the legal qualification of the contract". In the same sense, see the decision of the Supremo Tribunal de Justiça of 14.01.2009, Proc. 08S2278, available in www.dgsi.pt.

So, in order to be able to conclude that there is an employment contract, it is necessary to use evidence that reveal the existence of the employment contract typical elements.

In case law, the decision cited above of the Supremo Tribunal de Justiça of 10.07.2008 considers that "At the time of the LCT, it was already settled case law (see, for example, the decision of this Supremo Tribunal de Justiça of 25 September 1996, Case 4424 - Fourth Chamber) sustaining that were evidence of legal subordination:

- working hours compliance; - the performance of the activity in a place defined by the employer;
- the existence of external control over the way in which work is provided; - obedience to orders; - submission to company's discipline; - the form of remuneration, as a rule in relation to working time, the right to a paid leave and the payment of holiday and Christmas allowances; - ownership of working instruments; and - the tax and social security scheme.

More recently, but still under LCT, other signs have been added, such as: - the use of collaborators; - the absence system; - the disciplinary system; - the allocation of risk; and - inclusion within the organization.

Along with these indications, which are internal in nature, others arise, of an external negotiating nature, such as: - the exclusivity of the service; - the type of tax paid by the provider of the activity; - enrollment in Social Security; and - trade union membership".

orders, submission to the undertaking discipline - all elements that being accompanied by the inclusion of the worker within the organization structured and controlled by the employer, respect the so-called "*organizing moment*" of subordination, deserving, therefore, particular emphasis³⁵.

Indicia related to the regular and fixed remuneration and ownership of the instruments of work by the activity beneficiary are also considered indicia of employment contract³⁶.

As external indicia, we may point out tax and social security systems applicable, trade union enrollment and the existence of exclusivity. Concerning the latter, it is important to stress that multi-employment is allowed in employment contract, although it is considered an evidence of autonomous work if the provider performs the same activity for more than one beneficiary.

The qualification of contract on the basis of an indicia method does not require the presence of all subordination evidences, as the value of each element varies according to the situation under analysis³⁷.

Indeed, not all the indicia are worthy of the same significance, since some of these indicia, as Monteiro Fernandes points out, correspond to the elements commonly used in the dissimulation of the employment contract and should not be considered without other decisive evidence regarding the contract qualification³⁸.

³⁵ See, in this sense, Martinez, *Direito do Trabalho*, 333 e ss, Fernandes, *Direito do Trabalho*, 134. In Italian literature, see. Mazzotta, *Manuale di Diritto del lavoro*, 181-184.

³⁶ See Fernandes, *Direito do Trabalho*, 134.

³⁷ Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 47.

It is important to note that the traditional evidences of employment contract have been outdated by technological evolution and different ways of organizing work. See, in this sense, Martinez, *Direito do Trabalho*, 333, Fernandes, *Direito do Trabalho*, 133, Gomes, *Direito do Trabalho*, 130-131.

Refers thus Fernandes, *Direito do Trabalho*, 133, that "*the value of this or that characteristic varies with the nature of the activity and with the relative weight that in fact it should be attributed*", giving as an example that "*the existence or non-existence of a working time definition has a different value in the case of an blue collar and of a white collar employee*" Finally concluding, *ibidem*, that "*each "sign" must be considered according to the "function" it plays in the situation to be qualified. Then, and as a consequence, the indicia should be viewed globally, composing a comparative "image" with the alternative types, in order to be as close to one as possible*".

In this sense, see the decision of the Supremo Tribunal de Justiça of 04.11.2009, Proc. 322/06.7TTGDM.S1, available in www.dgsi.pt, upholding that "*The subordination, which translates the ability of the employer to direct and orient the activity or to give instructions to the employee in order to pursue the ends to be achieved by the activity, is deduced from facts, all to be appreciated in particular and in its interdependence*".

It accentuates this global appraisal, the decision of the Supremo Tribunal de Justiça of 17.10.2007, already cited in footnote 29, stating that, "*it becomes clear that each of the signs, taken as such, assume natural relativity, which implies the formulation of a global judgment in relation to the particular relationship. It is to say that the qualification of the contract should be done on a case-by-case basis without valuing the evidence in an atomistic manner, which necessarily entails some margin of indetermination, and even subjectivity, in the valuation of the various indicia*". (See, in the same sense, the decisions of the Supremo Tribunal de Justiça of 12.09.2012, cited in footnote 15, e de 8.05.2012, Proc. 539/09.2TTALM.L1.S1, available in www.dgsi.pt).

³⁸ *Direito do Trabalho*, 123, note 4. See in the case law, of the Supremo Tribunal de Justiça dated 12.09.2012, cited in footnote 15.

There are, however, several decisions of the courts emphasizing the importance of these indicia to affirm the existence of a provision of services contract³⁹.

³⁹ In this sense, the decision of the Supremo Tribunal de Justiça of 12.01.2012, Proc. 2158/07.9TTLSB.L1.S1, available in www.dgsi.pt, upheld that “*The indicia, regarding the provider that performs the expert activity, receiving a fee, by the activity beneficiary, for each report, issuing green receipts, enrolled in Social Security as a self-employed worker, without receiving any amount when he was absent or when he was on vacation, without having to comply with the schedule, using his own vehicle in his activity, bearing the expenses thereof, without having to justify the absences and being able to choose the periods during which he had paid leave, without receiving holiday and Christmas allowance and without claiming any labour right, favour the existence of a provision of services contract. Even if it was proved that “the expert activity was performed on an exclusive basis and that, in order to carry out it, the provider had to visit car workshops in the places indicated by the the activity beneficiary to travel during his the business opening hours and to use work tools provided by the same the activity beneficiary for the performance of his tasks and to receive guidance on the performance of the work and to be reimbursed of travel expenses”.*”

The decision of the Supremo Tribunal de Justiça of 15.09.2016, Proc. 329/08.0TTFAR.E1.S1, available in www.dgsi.pt, that appreciated the bond between musicians and a Musical Association, also upheld, despite the fact that one of the plaintiffs, a musician, benefited from the demanding presumption of article 12 CT/2003, that the contract under analysis was a provision of services contract. The court argued that musicians never had, during the performance of the contract, paid vacations or received holiday and Christmas allowances. In 15.06.2015, Proc. 1250/15.5TTVNG.P1, cited in footnote 30, the Tribunal da Relação do Porto also gave prominence in the assessment of the bond between a nurse and Santa Casa da Misericórdia regarding the activity of nurse in a health establishment, property of Santa Casa, to the fact that the nurse issued a green receipt, Santa Casa has never granted the nurse paid vacation, nor paid her holiday or Christmas allowances, concluding in favour of provision of services contract, even though it has been proven that the activity of a nurse was developed in facilities and with instruments of work of Santa Casa da Misericórdia, complying with clinical procedures, working time registration and uniform dressing.

In the same sense, the decision of the Tribunal da Relação do Porto of 5.12.2016, Proc. 738/14.5T8VNG.P1, available in www.dgsi.pt, concerning a relationship involving the activity of a shipping inspector refers that “*Regarding the nomen iuris assigned to the contract, the issuance of so-called “green receipts” and non-payment of vacation and Christmas allowances, are factors that could constitute a manifestation of the parties’ contractual will to grant a provision of services contract, elements that, in the abstract, should, together with the others, be weighed and subject to a global assessment*”, even though the court is aware that “*evaluation must be done with due caution and depending on each case*”. But the court upheld, in manifest opposition with the decision of the Tribunal da Relação do Porto the 14.03.2016, Proc. 237/14.5T8MTS.P1, in which the activity of inspector was performed in similar terms, that the relationship was a provision of services contract, even if there were an exclusivity clause, the place of work and the working hours were determined by the beneficiary of the activity and it was paid a fixed amount for inspection.

These two decisions are paradigmatic examples of the casuistic assessment of the evidences, since the same exclusivity clause was considered in the decision of 14.03.2016, to constitute “*a very relevant clue to qualification as it excludes any other possibility for the provider to benefit from Labour Law protection, while reveals an absolute economic dependence of the alleged provider on the beneficiary of the activity, which is a particularly relevant element of the legal qualification*”, whereas in the decision of 5.12.2016, regarding the same exclusivity clause, refers that, although it is acknowledged that such a clause could reveal the existence of an employment

We must also point out, in this respect, the overvaluation of the possibility of the activity provider being replaced by a third party⁴⁰.

3.3 The presumption of employment contract in the Labour Code

The burden of proof of the facts revealing the existence of the employment contract falls on the employee, pursuant to article 342 (1) CC⁴¹.

contract, rather than a provision of services contracts, it was lessened, since it did not prove that the activity under analysis was the only source of income of provider.

⁴⁰ See Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 93-101, with particular reference to the clause allowing the substitution of the provider by a third party, contrary to the *intuitu personae* nature of the employment contract, thus indicating a self-employment relationship, and the manner in which the parties actually put in practice this substitution, which may reveal the existence of a contract of employment.

In the case law, on the importance of this element to the qualification of the contract as provision of services, see the decision of Supremo Tribunal de Justiça of 9.12.2010, Proc.1155/07.9TTBRG.P1.S1, cited in footnote 30, in which it was decided, regarding the contractual relationship between seven nurses and the Santa Casa da Misericórdia to perform nurse's activity in the health establishment, owned by Santa Casa, the given the "*nature and content of the functions included in the nursing activity, are not sufficient to conclude in favour of legal subordination, the obligation to comply with protocols; the monthly payment of the remuneration calculated on the basis of the hours actually worked; the compliance with a pre-set time; the fact that the place of work is located in the premises of the activity beneficiary and the provision of uniforms and instruments of work by the Santa Casa*", since it has been proven that nurses "*did not operate on an exclusive basis; that working hours were fixed by agreement, taking into account the conveniences of the nurse, that, in their absence, were able to be substituted by another nurse, with the sole consequence that they were not paid the hours in which they had not worked*".

In the same sense, the Relação do Porto, in decision of 15.06.2015, cited in footnote 30, also highlighted to qualify the relationship between a nurse and Santa Casa da Misericórdia, regarding nursing in a health establishment owned by Santa Casa, under the terms identified in the above mentioned decision, the evidence usually used to camouflage the employment relationship and the possibility of the nurse being able to be replaced by other colleagues, even though after attaining the Santa Casa da Misericórdia agreement. As we have seen, the performance of nursing activity was developed in facilities and with instruments of work of Santa Casa da Misericórdia, "*with the need for compliance with clinical procedures, wearing uniforms and working time registration*".

The decision of the Supremo Tribunal de Justiça of 15.09.2016, Proc. 329/08.0TTFAR.E1.S1, cited in footnote 38, that analyzed the contract between musicians and a Musical Association, concluded, although one of the authors, musician of Orchestra, benefited from the demanding presumption of employment contract of article 12 CT/2003, for the existence of a provision of services contract, based on the traditional evidence that conceals the employment relationship identified above, on the fact that failure to attend concerts and rehearsals does not give rise to a disciplinary proceeding, only implying the loss of the corresponding retribution, and that, in these absences, the musicians could be replaced by other musicians, to whom the musicians themselves paid. The Supremo Tribunal de Justiça forgot that it was proved that the replacement had to be accepted by the Musical Association, that also demanded to the musicians a written justification for the absences. The replacement of the provider by a third party and the absence of disciplinary action is a clear result of the needs imposed by the activity in question, whose main interest is the maintenance of the normal functioning of the Orchestra and is therefore not a decisive indication of the qualification of the relationship as self-employment.

The assessment of these indicia was also ground to qualify the contract as provision of services in the decision of the Supremo Tribunal de Justiça of 3.02.2010, Proc. 1148/06.3TTPRT.S1, cited in footnote 12.

The lawmaker has foreseen, therefore, in article 12 CT/2003, a presumption of employment contract, in order to facilitate the proof of the labour contract, reversing the burden of proof, under the terms of article 350 CC.

This presumption, however, was a failure, because the employment contract presumption depended on five conditions: the inclusion of the services provider within the organization of the beneficiary of the activity, the performance of the activity under the latter's guidelines; the performance of the activity at the beneficiary premises or in a place controlled by the beneficiary, observing a previously defined working time; payment of remuneration according to the working hours or the economic dependence of the services provider towards the beneficiary; the supply of the work instruments by the beneficiary of the activity; and finally, that the situation with these characteristics lasted, without interruption, more than ninety days⁴².

This means that it would be indispensable to prove all these requirements to benefit from the employment contract presumption.⁴³

This article 12 CT/2003 seemed to enact a legal presumption, but, as Monteiro Fernandes points out "*it was a simple appearance, a bit bizarre*"⁴⁴.

The literature further considered this presumption to be dangerous and counterproductive, since it could lead the courts to deny employment contracts which did not meet all the requirements⁴⁵.

⁴¹ See the decision of the Supremo Tribunal de Justiça of 04.11.2009, cited in footnote 36.

⁴² Martínez, *Direito do Trabalho*, 338. In this sense, the decision of the Tribunal da Relação de Lisboa, of 12.09.2007, Proc. 4420/2007-4, available in www.dgsi.pt, expressly mentions that "*the cumulative requirements demanded by the presumption are some of the indicia frequently pointed out as revealing legal subordination, although it is consensual that the valuation of it is not predefined, since they may assume different relevance from case to case, and must be submitted to a global appraisal*".

⁴³ Fernandes, *Direito do Trabalho*, 137-138, notes that this standard revealed that "*The first of the grounds of the* presumption of employment contract "*would already fulfill the legal concept of that contract; the first four conditions would assure the existence of an employment contract, more than presumption that could be rebutted according to 350/2 CC; and the fifth element (a length superior to ninety days) seemed entirely devoid of qualifying ability*".

⁴⁴ *Direito do Trabalho*, 137.

⁴⁵ Fernandes, *Direito do Trabalho*, 138 e Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 53, Isabel Ribeiro Parreira, "Qualificação do Contrato de Trabalho e Presunção Legal: Notas para a interpretação e aplicação do artigo 12º do Código do Trabalho", in *VII Congresso Nacional de Direito do Trabalho, Memórias*, Coord. António Moreira (Coimbra: Almedina, 2004), 131, João Leal Amado, "Presunção de Laboralidade: nótula sobre o art. 12.º do novo Código do Trabalho e o seu âmbito temporal de aplicação", in *Prontuário de Direito do Trabalho*, 82, (Coimbra: Coimbra Editora, 2009), 161. Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 135, refers that presumption may reduce the "malleability margin" that the judge had in the absence of the presumption.

It also notes the pernicious nature of it, Gomes, *Direito do Trabalho*, 143, highlighting the reference to a minimum period of time that our law does not require for the existence of an employment contract, as well as the overvaluation, in the face of the heavy burden of proof requested to the employee, the indicia in favour of provision of services, leading to the denial of the contract as an employment contract. Regarding the existence of this period, it should be noted

However, it remained the possibility of the employee, in the absence of one of elements referred in the article 12 CT/2003, to prove legal subordination and consequently the employment contract⁴⁶.

At this point, we cannot fail to highlight one of the most paradigmatic Supremo Tribunal de Justiça decisions of this quiet and discrete revolution that is taking place in the Portuguese courts, that, in spite of the presence of all the requirements of article 12 CT/2003, upheld that the relationship under appraisal was a provision of services contract⁴⁷.

This article 12 CT/2003 was later amended by Lei 9/2006, dated 20.03. Unfortunately, the amendment did not contribute to the effectiveness of the presumption, since it depended on the proof of elements included in the employment contract legal notion, provided for in article 10 CT/2003; had more two new elements beyond the legal notion – inclusion of the employee within the organization controlled by the employer and economic dependence. In favour of this amendment, we may only refer that requirement demanding that duration of the activity achieved more than 90 days was eliminated⁴⁸.

that Albino Mendes Baptista, *Estudos sobre o Código do Trabalho* (Coimbra: Coimbra Editora, 2004), 69-70 agreed with it.

⁴⁶ Pedro Romano Martinez et al., *Código do Trabalho, Anotado*, 2^a ed. (Coimbra: Almedina, 2004), 89, Martinez, *Direito do Trabalho*, 338

In the same sense, see decision of the Supremo Tribunal de Justiça of 16.12.2010, Proc. 996/07.1TTMTS.P1.S1, available in www.dgsi.pt, whose summary states: “II - If this presumption does not work, by not fulfilling any of its cumulative requirements, the employee can prove that the elements of the employment contract are fulfilled, through the demonstration of facts concerning the pertinent labour indicia”.

This assessment was maintained concerning the presumption of employment contract, after being amended by Law no. 9/2006, dated 20.03, and is currently valid with respect to the presumption contained in article 12 CT/2009.

⁴⁷ In this sense, see the decision of the Supremo Tribunal de Justiça of 15.09.2016, Proc. 329/08.0TTTFAR.E1.S1, quoted in note 38, that qualified the contract between Musical Association and a musician, who played a percussion instrument, owned by the Musical Association, the benefited from the presumption of article 12 CT/2003, accompanied by facts such as exclusivity, submission, from a certain date, to the subordinated employees Social Security and Tax framework, inclusion within the organizational structure of the Musical Association, receiving a treatment similar to the others musicians hired under employment contract, being part of the Committee of the Orchestra, representative body of the musicians in meetings with the Association administration, and the Audit Committee of the Orchestra, with the right to vote; being granted the right, like musicians hired under employment contract, to take vacations in August and four weeks of unpaid leave, acting in concert with the other members of the Orchestra, which included musicians with employment contract, receiving reimbursement of the expenses regarding the journeys to the various places where the Orchestra performed and the value of € 10.00 per meal outside Algarve, with the Association being its only source of income. The Supremo Tribunal de Justiça, however, supported by the possibility of the musician being replaced by another musician, although subject to the agreement of the Musical Association, and the absence of paid vacations and vacation allowance, assessed the contract as provision of services, ignoring surprisingly the other strong indicia in favour of employment contract.

⁴⁸ Martinez, *Direito do Trabalho*, 340 e Maria do Rosário Palma Ramalho, “Delimitação do contrato de trabalho e presunção de Laboralidade no novo Código do Trabalho – Breves notas”, in *Estudos em Homenagem ao Professor Doutor Carlos Ferreira de Almeida*, vol. III (Coimbra: Almedina,

The presumption, contained in article 12 CT/2009, is significantly better, rendering easier for the employee to prove the existence of an employment contract⁴⁹.

First of all, the presumption depends on the elements already known in literature and case law, regarding the indicia method, instead of copying labour contract legal notion.⁵⁰

On the other hand, it finally abandons the cumulative nature of the requirements of the failed CT/2003 presumptions, in the original version and in the version resulting from Lei 9/2006, dated 20.03, being sufficient the proof of two indicia to benefit from the employment contract presumption⁵¹.

This presumption, finally, achieves the reversal of the burden of proof, under the terms of article 350 CT/2009, releasing the employee, after the proof of two of indicia listed in article 12, of evidencing, according to article 350 CC, the existence of legal subordination. The proven evidence allows inferring the existence of an employment contract.

2011), 572. As refers, Leitão, *Direito do Trabalho*, 120, the presumption, containing the legal notion of employment contract, cannot be considered very useful. In the same sense, Vicente, *A Fuga à Relação de Trabalho (Típica): em torno da simulação e da fraude à lei*, 141-142. Amado, “Presunção de Laboralidade: nótula sobre o art. 12.º do novo Código do Trabalho e o seu âmbito temporal de aplicação”, 163 disapprovingly states that this presumption “was a real scam”.

This presumption continued to produce a harmful effect, when it established requirements that did not appear in the legal definition of article 10 CT/2003, as the inclusion within the organizational structure of the beneficiary of the activity, raising doubts about the need to complete the legal concept of article 10 CT. See Gomes, *Direito do Trabalho*, 143-144.

⁴⁹ It has therefore been considered a presumption with a useful effect. See Ramalho, “Delimitação do contrato de trabalho e presunção de Laboralidade no novo Código do Trabalho – Breves notas”, 580, Amado, “Presunção de Laboralidade: nótula sobre o art. 12.º do novo Código do Trabalho e o seu âmbito temporal de aplicação”, 165. Although, Martinez, *Direito do Trabalho*, 340, sustains that is not a genuine presumption since it leads to the conclusion that there is a contractual type.

⁵⁰ See, in this sense, Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 55.

⁵¹ See, in this sense, Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 55, Fernandes, *Direito do Trabalho*, 137, João Leal Amado, *Contrato de Trabalho* (Coimbra: Coimbra Editora, 2009), 76, Leitão, *Direito do Trabalho*, 121, Joana Nunes Vicente, “Noção de Contrato de Trabalho e Presunção de Laboralidade”, in *Código do Trabalho, A revisão de 2009*, Coord. Paulo Morgado de Carvalho (Coimbra: Coimbra Editora, 2011), 64.

It is notorious legislator's sanctioning intention, when committing with a very serious offense, the provision of subordinate activity, under apparent autonomous work, that may cause injury to the employee or to the State. Leitão, *Direito do Trabalho*, 121 e Ramalho, *Tratado de Direito do Trabalho, Parte II – Situações Laborais Individuais*, 55.

This counter-ordering protection will be enlarged by Lei 63/2013, of 27.08 and Lei 55/2017, of 17.07, which instituted mechanisms to combat the misuse of the service contract in subordinate labour relationships, through which ACT (Labour Conditions Inspection Authority) was empowered to file a procedure if it understands that someone provides services complying with employment indicia listed in the presumption of article 12 CT/2009. If the undertaking does not confirm the existence of an employment contract, the procedure is referred to the Public Prosecutor, which, on its own initiative, files a lawsuit to recognize the existence of an employment contract.

However, it is a presumption *iusuris tantum*, therefore it may be suppressed on the basis of proof to the contrary. The employer though has to demonstrate “*the occurrence of other indications, whose quantity and impressiveness impose to the court the qualification of the relationship as another contract different from the employment contract*”⁵².

In the absence of evidence to the contrary, the presumption is not rebutted. Consequently, the court is required to qualify the contractual relationship as an employment contract⁵³.

3.3.1 Temporal scope of the presumption of article 12 CT

The Supremo Tribunal de Justiça position on the temporal scope of presumption is also an evidence of the quiet and discrete revolution that is occurring in Portuguese courts.

In fact, the Supremo Tribunal de Justiça obstinately sustains that the presumption is to be applied to legal relationships established after its entry into force, denying its application to relationships constituted before.

The court has been arguing that, since this presumption is supported by the fulfillment of several indicia, which implies an appraisal of the facts, it should only be applied to new facts, that is to say, to relationships constituted after its enactment⁵⁴.

This argument leads us to the analysis of article 12 (2), part 2 of the CC on the application of the law regarding time when it states that “*whenever the law rules the performance of a relationship, disregarding the facts giving rise to it, the law shall be understood as covering the relationships that were already established on the date of its entry into force*”.

From the reading of this rule, Baptista Machado extracted the contract statute, according to which, in obedience to the private autonomy and legal security, based on the balance of interests of the parties, the new law does not

⁵² See the decision of Tribunal da Relação de Lisboa of 11.02.2015, Proc. 4113/10.2TTLSB.L1-4, available in www.dgsi.pt.

⁵³ In this sense, Adriano Vaz Serra, “Anotação ao Acórdão do Supremo Tribunal de Justiça de 28 de Novembro de 1972”, in *Revista de Legislação e de Jurisprudência*, Ano 106º, Nº 3512 e 3513 (Coimbra: Coimbra Editora, 1973-1974), 383, with regard to the legal presumption *iusuris tantum*, states that the burden of proof means that, since the evidence produced is not produced by other elements brought to the file, the presumed fact must be considered proved.

This was clearly violated in the decision of the Supremo Tribunal de Justiça in 15.09.2016, Proc. 329/08.0TTFAR.E1.S1, cited in footnote 38, as we have shown in footnote 46, since the court has ruled in favour of the provision of services contract, even though the Association failed to prove evidence that, due to the quantity and impressive nature, revealed a provision of services contract..

⁵⁴ See decisions of the Supremo Tribunal de Justiça of 22.09.2011, Proc. 192/07.8TTLSB.L1.S1, of 14.04.2010, Proc. 1348/05.3TTLSB.S1 and 10.07.2008, Proc. 1426/08, all available in www.dgsi.pt.

disregards from the fact that gave rise to it, the contract, thus determining the regulation by the law in force at the date of the contract conclusion⁵⁵.

However, as the author himself does recognized the "*status of the contract*" or the "*status of private autonomy*" is not absolute, concluding that whenever a new law assumes as a scope to protect the weaker category or defend rights, private autonomy is restricted, imposing the application of this law⁵⁶.

In the case of a contract which is subject to injunctive rules such as the contract of employment, pursuing the public interest, and therefore assuming private autonomy a minor role in shaping the content of the employment relationship, it is understood that the new law, disregarding the contract that gave rise to the relationship established before its entry into force, but which subsists after that date, is immediately applicable.

For this reason, either the rule of article 7 (1), of Law no. 7/2009, of 12.02, and that of article 8 (1) of Law no. 99/2003, of 27.08, apply, in a solution close to that supported by article 12 (2) part 2 of the CC, excluding employment contracts and collective labour regulation instruments concluded or adopted before the entry into force of said law, on 17.02.2009, only in matters involving conditions of validity and effects of facts or situations occurred before that moment.

Since it is common ground that the rules designed to protect the weaker contracting party must be immediately applied, even if it implies the sacrifice of private autonomy, the immediate application of a protective standard, such as article 12 CT/2009, to the employment contract must be allowed⁵⁷.

In addition to this argument, as it has been pointed out, by literature, that the presumption of labour contract is not clearly related to conditions of validity, nor does it contend with effects of past events or situations⁵⁸.

In fact, it has also been established that the qualification of the legal relationship is dependent on the facts in which, in particular, the actual performance of the contract is revealed, which subsists on the date of entry into force of presumption. The presumption will, as the literature has repeatedly mentioned, focus on current facts, thus excluding its enforcement regarding past facts⁵⁹.

Lastly, it also favours the immediate application of the presumption to relationships established prior to the date of entry into force, the fact that Lei 63/2013, of 27.08, which instituted mechanisms to fight the misuse of the provision of services contract in subordinate labour relations, as the procedure established in

⁵⁵ This leads João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador* (Coimbra: Almedina, Coimbra, 1985), 241, to admit the application of the new law when the effects can be dissociated from the conclusion of the contract.

⁵⁶ Machado, *Introdução ao Direito e ao Discurso Legitimador*, 241-242.

⁵⁷ Despite the less achieved forms in CT/2003, in the original version and after Lei 9/2006, 20.03, the presumption is intended to benefit the employee, facilitating, through the reversal of the burden of proof, the qualification of the employment contract.

⁵⁸ Amado e Rouxinol, "Anotação ao Acórdão de 20 de Novembro de 2013", 277. In the same sense, Vicente, "Noção de Contrato de Trabalho e Presunção de Laboralidade", 70.

⁵⁹ Fernandes, *Direito do Trabalho*, 139.

article 15-A of the Law no. 107/2009, of 14.09, and the subsequent the special lawsuit to recognize the existence of an employment contract, provided for in articles 186-K of the CPT, in order to qualify the relationship between the services provider and the beneficiary of activity as an employment, applies the presumption of article 12 CT/2009, without exempting the relationships initiated prior to the entry into force of the CT/2009.

In fact, this administrative procedure and, consequently, the presumption of employment contract as provided for in article 12 CT/2009, is applicable to relationships that reveal some of the evidences that underlay the presumption of employment contract of article 12 CT/2009, regardless of the date on which the legal relationship in question was established⁶⁰.

It is thus the legislator himself who, in this case, applies the article 12 CT/2009 to relationships constituted prior to its entry into force on 17.02.2009.

It seems to us, therefore, possible to sustain that the presumption of article 12 CT/2009 to relationships, constituted before its entry into force, which subsist after that date⁶¹.

4. Conclusions

The analysis of the most recent case law of the higher courts reveals a clear tendency towards the qualification of contractual relationships, whose legal nature raises doubts, as a provision of services contract.

Bearing that in mind, it should be emphasized that the *nomen iuris* is increasingly valued, when it is common ground that the qualification of a contract subject to the assessment of the court is based on the analysis of the factual terms

⁶⁰ The same happens, of course, with the recognition of the existence of an employment contract. The Resolução de Conselho de Ministros n.º 32/2017, published in DR, 1st series, n.º 42, de 28.02.2017, uses the presumption of article 12 CT/2009, within the framework of the PREVPAP (Program for the extraordinary regularization of precarious ties in the Public Administration), to identify cases related to jobs that correspond to the permanent needs of the Public Administration services without the appropriate legal relationship, without excluding the rapports prior to the entry into force of the CT/2009.

⁶¹ This position has already been echoed in the case law. The decision of the Supremo Tribunal de Justiça of 20.11.2013, Proc. 2867/06.0TTLSB.L2.S1, already cited in footnote 12, considers, in view of the existence of two successive contracts, one starting on 17.07.2001 and terminating on 31.07.2004 and the other on 1.09.2004, applicable, according to article 8 (1) Lei 99/2003, of 27.08, the presumption of labour contract enshrined in article 12 CT/2009, even though the contracts are prior to the presumption enactment. The decision of the Tribunal da Relação de Lisboa of 07.05.2008, Proc. 1875/2008-4, available in www.dgsi.pt, also considered applicable article 12 CT/2009 to a relationship started before its enactment. The decision of Tribunal da Relação de Lisboa of 21.11.2012, Proc. 3805/11.3TTLSB.L1-4, available in www.dgsi.pt, also supported the application of article 12 of the CT/2009 to the relationships whose beginning is prior to the entry into force of said Code. The immediate applicability of the presumption of article 12 of the CT/2009 is also supported by the decisions of the Tribunal da Relação de Lisboa of 03.12.2014, Proc. 2923/10.0TTLSB.L1-4, available in www.dgsi.pt and of 11.02.2015, Proc. 4113/10.2TTLSB.L1-4, already cited in footnote 51.

in which it is performed and the *nomen iuris* or the negotiating declarations of the parties are not decisive.

Another clear evidence of the higher courts favour of the provision of services contract is the importance given to the directive power in activities characterized by technical autonomy, within which, of course, this power appears attenuated to the detriment of the inclusion of the provider within the organization structured and controlled by the activity beneficiary, as in the case of nurses, musicians or lawyers.

It also corroborates this case law tendency the overvaluation of the possibility that the provider of the activity has to be replaced by a third party, as a sign of a provision of services contract, accompanied by the assessment of evidences, in a rather inconsistent way, that are usually used in the dissimulation of the employment contract, such as the issuance of green receipt or the absence of paid vacations and vacation and Christmas allowances.

Finally, the unexplained Supremo Tribunal de Justiça refusal to apply the presumption of article 12 CT/2009 to relationships established before the respective entry into force.

This presumption simplifies the determination of legal subordination and the qualification of the contract by the courts, being enough to prove two indicia to benefit from the presumption of employment contract, falling on the beneficiary of the activity the burden to prove evidences that, by its quantity and impressiveness, impose a distinct qualification of the relationship.

In the light of the foregoing, it must be concluded that this indecipherable favouring by the higher courts of the provision of service contract may lead in the future to an inevitable weakening of the employment contract to the detriment of Employees, Labour Law and Society.

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