

The Portuguese Framework of the Professional Internship without Public Funds

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Abstract—In an economic crisis such as the one that shook (and still shake) Europe, one does not question the importance of the measures that encourage the hiring and integration of young people into the labour market. In the mentioned context, enterprises tend to reduce the cost of labour and to seek flexible contracting instruments. The professional internships allow innovation and creativity at low cost, because, as they are not labour contracts, the enterprises do not have to respect the minimum standards related to wages, working time duration and so on. In Portugal, we observe a widespread existence of training contracts in which the trainee worked several hours without salary or was paid below the legally prescribed for the function and the work period. For this reason, under the tripartite agreement for a new system of regulation of labour relations, employment policies and social protection, between the Government and the social partners, in June 2008, foresaw a prohibition of professional internships unpaid and the legal regulation of the mandatory internships for access to an activity. The first Act about private internship contracts, i.e., internships without public funding was embodied in the Decree-Law N. 66/2011, of 1st June. This work is dedicated to the study of the legal regime of the internship contract in Portugal, by analysing the problems brought by the new set of rules and especially those which remains unresolved. In fact, we can conclude that the number of situations covered by the Act is much lower than what was expected, because of the exclusion of the mandatory internship for access to a profession when the activity is developed autonomously. Since the majority of the activities can be developed both autonomously or subordinated, it is quite easy to out of the Act requirements and, so, out of the protection that it confers to the intern. In order to complete this study, we considered not only the mentioned legal Act, but also the few doctrine and jurisprudence about the theme.

Keywords—Intern, internship contract, labour law, Portugal.

I. THE MODALITIES OF PROFESSIONAL INTERNSHIP CONTRACTS

THE internship contract is signed between an intern and an internship entity and its main objective is the training of the intern. There are several forms of professional internship contracts. For starters, we can distinguish between curricular and extracurricular internships. The last ones can be financed with public funds or not.

The curricular internship is an integrated course in the curriculum of a degree, namely, bachelor and master. They are designed to enable the students' practical skills related to their learning area and, by doing that, to allow them to get a job easily. The intern has to approve at curricular internship to finish his degree. The internships are seen as a useful tool of rapprochement between educational institutions and

employers and to integrate young people into active life. They do not confer, however, a double certification.

The extracurricular internships are carried out after completion of the degree and, usually, are not promoted and executed under supervision of an educational institution. We can still find two types of extracurricular internships: those funded with public money and those who are not.

The Portuguese State, through successive governments, have funded internship programs, either in the local administration, either in local government or in private companies. It intends to combat unemployment, especially among young people, to facilitate integration into the labour market, to contribute to the improvement of professional skills, and so, for the country development. Each of these training forms have its specific regulation, which we will not study in this work. However, until 2011, there were several internships without specific regulation: The ones that did not have public funded. They are our study object. So, we will focus on the regulation of – professional internships not publicly funded.

II. THE LEGAL REGULATION OF INTERNSHIPS NOT PUBLICLY FUNDED IN PORTUGAL

A. The Genesis of Legal Framework

The first legal regulation of non-funded internships came up with the Decree N. 66/2011, of 1 June. This Act was the result of the tripartite agreement for a new regulation system of labour relations, employment policies and social protection, between the Government and the social partners, in June 2008, which provided for the prohibition of unpaid internships and for the legal regulation of the mandatory internships for access to a profession. Note that, before 2011, the Portuguese doctrine and jurisprudence admitted the existence of training contracts, under the principle of contractual freedom [1]. However, because there was no specific regulation and because they did not create labour relations (and, therefore, were not regulated by the Labour Code), it became common to find internship contracts in which the intern worked more hours than allowed to an employee and does not receive a salary or any payment, precisely because he was in training and was the main beneficiary of it. In some industries, and companies - particularly in the case of professions in which the internship is mandatory - was common the idea that the trainee still was "very lucky" to be allowed to learn in that company or with that person. As mentioned in the Decree preamble, the aims of the Government were to end with the unpaid internship and unify the legal framework of internships. To understand if those objectives were achieved,

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first we will analyse the legal framework established by Decree N. 66/2011 so secondly, we can figure if those objectives were achieved.

B. The Legal Framework

The internship contract must be written, under penalty of considering it an employment contract. In addition, it has to fulfil the procedural requirements of Article 3.º Decree N. 66/2011, of 1 June - from which we highlight the mandatory indication of the probationary period, the training grant and the amount of meal allowance - and Article 5.º, n. 3, Decree N. 66/2011, of 1 June, if the internship has a very short duration.

The legislation established the maximum duration of internship contracts: as a rule, they should not last more than 12 months. However, if the internship is mandatory for access to a profession, it can last up to 18 months. Within the maximum duration period, the contract may be renovated as many times as the parties want. It also provides a special arrangement for the so-called very short internship contracts (those that do not exceed 3-month duration): they have to be justified (although the legislature did not give information on the nature or type of motives that can determine its celebration; so any motive can justify the celebration of an internship contract with three or less months) and relieve the promoter entity of the internship subvention (but do not relieve him/her to pay the meal allowance).

The intern and the promoter can only conclude one very short internship, but the intern can conclude another very short internship with another promoter. This is, in fact, a criticism that can be done to the legal framework of the internship contract (both to very short internship and "regular" internship): trainees can celebrate successive internship contracts with the same or with another promoter, which promotes the precariousness. We believe that the legislator should prevent this effect with two measures: *i)* only admitting the conclusion of internship contracts between the same intern and promoter if the trainee had acquired new skills and *ii)* prohibiting the conclusion of successive internship contracts not only with the same promoter, but also with the companies that had common organizational structures or a group relationship, unless the trainee had acquired new skills or had not reached the maximum stage contract in the preceding promoter.

During the internship, the working hours regime, daily and weekly rest, holidays, absence and health and safety at work, applicable to the generality of promoting entity employees, are applied. The reference "to the generality of the promoter's employees" can get us some questions, for not being a numerical criterion, because generality is not equivalent to majority. It seems that the legislator wanted to regulate these aspects without creating discrepancies between employees and interns, but "forgot" that, in practice, there are many working time arrangements resulting, in particular, from the application of collective bargaining.

According to Article 6.º, Decree N. 66/2011, of 1 June, the employee's legal framework of absence is applicable to

interns, in everything that is not regulated in Decree n. 66/2011 - Articles 8.º, 9.º e 12.º.

To understand what is meant by absence, the absence types and respective supporting reasons, as well as the form and reporting deadlines and justification, we should consult the Portuguese Labour Code - Articles 248.º to 257.º. In fact, Labour Code gives us a definition of absence - Article 248.º -, says when an absence is justified or unjustified - Article 249.º - and the procedure to communicate an absence - Article 253.º and 254.º.

As for the effects of absences we must look at Decree N. 66/2011. Unjustified absences always determine loss of the traineeship allowance and meal allowance - Article 8.º/2 / al. b) and Article 9.º/3, Decree N. 66/2011. Justified absences only determine loss of traineeship allowance and meal allowance when they are given by accidental reasons (and in this case only if the civil liability is transferred to an insurer) or when exceeding 15 days, consecutive or not, during the probationary period. The regime of the effects of absences established by Decree N. 66/2011 is more penalizing for traineeships that aim to acquire one legally appropriate qualifications for access to the exercise of a profession, because they are longer.

For the implementation of rules on safety and health at work, the trainee is considered as a subordinate employee of the promoter.

Besides the duty to respect the legal and contractual rights of the trainee (e.g. the personality rights), the promoter is required to: *i)* pay the intern an internship and meal allowances; *ii)* contract a personal accident insurance for the trainee; *iii)* appoint a training supervisor.

The value of the internship allowance is, at least once the Social Support Indexation, which means that by 2016, this minimum value is € 419.22.

The fact that the promoter has to celebrate, in favour of the trainee, a personal accident insurance and not a labour accidents' insurance, is the result of the non labour nature of the internship relation. The promoter also has the duty to appoint a training supervisor - Article 7.º Decree N. 66/2011, of 1 June. He/she cannot keep more than three interns and has, among others, the duties of: preparing the individual internship plan; performing technical and pedagogical support of the trainee; evaluating the trainee. When the internship is mandatory for access to a profession the rules of the professional association that supervises that profession are applied.

Allowances concerning the internship contract (internship and meal allowances), are not subjected to compulsory deductions for social security, but they are subject to personal income tax - Article 2.º of Portuguese Individual Income Tax Code. The legislator also provided suspension and termination causes of the internship contract.

The internship contract is suspended for reasons related to the promoter, since his impossibility to receive the trainee does not exceed one month, or for reasons related with the trainee, since the impossibility is no longer than 6 months -

Article 11.º, n. 1, Decree N. 66/2011, of 1 June. The mentioned motives are not exhaustive.

Regarding the moment when the internship's contract suspension starts, JOÃO LEAL AMADO e MARGARIDA PORTO [2] defend the application of Labour Code rules. According to the authors, the contract will be suspended when the trainee impediment lasts for more than 1 month or, alternatively, from the time it becomes foreseeable that the impediment will last more than one month. We believe that this should be, in fact, the rule, given the reference in Article 6.º for the Portuguese Labour Code absences regime. However, it seems that the absence motivated by parental leave should be treated as an internship contract suspension, even if its duration is less than 30 days, taking into account, on one hand, the wide possibility of termination of the internship contract for absences and, secondly, the fact that the legislator has stated that the reasons for maternity / paternity leave determine the suspension of the contract.

We can also ask if during the suspension, we keep counting the contract duration or, instead, if the suspension period is irrelevant in order to establish the end of the contract. The Decree n. 66/2011 does not give us an answer, so we think we need to regard the general rule of limitation of actions: the limitation period it is not suspended or interrupted unless the law determines it [Article 328.º Portuguese Civil Code]. So the suspension does not have effects in limitation period [3]. However, the suspension has effects in the payment of internship and meal allowances - Articles 8.º and 9.º Decree N. 66/2011, of 1 June.

The internship contract may be terminated by expiration, withdrawal, dissolution and resignation, as predicted in Article 12.º. The internship contract termination framework is very flexible, according to the non labour relationship that is behind.

Finally, one considers that the trainee has a labour contract (instead an internship contract) if the activity is not consistent with the internship's purposes, when the parties did not sign a written contract and when the trainee continues serving the promoter entity after the expiration of the contract - Article 13.º Decree N. 66/2011, of 1 June. As already said by LEAL AMADO e MARGARIDA PORTO [4], in mandatory internships for a profession, the conversion of the internship contract into a labour contract brings no advantages whatsoever to the trainee, since the labour contract will be invalid once the employee does not have the legal capacity for performing the functions - Article 117.º/1 of Portuguese Labour Code. Nevertheless, as the Article 122.º of Portuguese Labour Code says that the nullity gives the "employee" the right to receive the retribution provided for the job during the time he/she worked.

As stated in the preamble to the Decree N. 66/2011, this law had two main objectives: the first was to end the unpaid extracurricular internships and the second was to harmonize the legal framework. It is therefore necessary to know if the objectives were reached.

III. CONCLUSIONS

A. The End of Unpaid Internships - a Goal Still to Reach

As we can see in the preamble of the Decree n.º 66/2011 "the tripartite agreement to a new system of labour relations, employment policies and social protection, signed between the Government and the social partners, in June 2008, has predicted the prohibition of the unpaid extracurricular internships" [5].

In consequence, Article 8.º of Decree N. 66/2011 stipulates that the promoter entity has to pay to the intern an internship subvention at least equal to the Social Support Indexation (in 2016, 419, 22€). This subvention is not payable in the situations listed in Article 8.º, n. 2: when the internship contract is suspended; when the trainee has unjustified absences; when the reason for the trainee absence is an accident, if there is an insurance; when the trainee has more than fifteen justified absences along the contract. The intern will also receive a meal allowance for each day of training, as the employees of the promoter, or, alternatively, the meal provided by the promoter, according to his preference. The promoter does not have to pay the meal allowance in the same situations that the internship subvention it is not due - Article 9.º Decree N. 66/2011, of 1 June.

If the promoter does not have employees at service or having them, they do not receive a meal allowance or the meal itself, it seems that interns cannot claim the allowance referred in Article 9.º Decree N. 66/2011, of 1 June.

As seen above, it seems that, in Portugal, there are no unpaid internships. In fact, the extracurricular internships that are funded by public money and the ones regulated by Decree n.º 66/2011, are paid. The problem is that the decree we are analysing excludes some internships: i) curricular internships (the ones inserted in a degree); ii) the extracurricular internships funded by public money; iii) internships in Central Government and Local Public Administration; iv) mandatory internship for entry or access to certain career or category in a legal relationship of public employment; v) internships for the doctors and for the nurses; vi) internships independently executed. It is in the last ones – the internships independently executed – that we find the problem (once the others extracurricular internships have special regulation).

First, it is extremely difficult to determine when an internship is independently executed: if nowadays the difficulty to distinguish autonomous work from subordinated work is high, the assignment is even harder on internships. Aware of these difficulties, the Portuguese legislator clarified that for the trainee's activity be considered independent is necessary to check two requirements: i) that the trainee expressly executed on their own tasks and activities related to the internship; ii) has delivered the financial service, before the start the internship, the Start-Up of Activity Statement - Article 2.º, n. 2, Decree N. 66/2011, of 1 June.

The difficulties begin soon in the interpretation of the rule: it is necessary that the trainee expressly exercises on his/her own tasks and activities related to the internship. However, the exercise of the tasks and activities related to the

stage is always explicit. The adverb there expressly refers to the manner of exercise - independent. But the manner of exercise is not something that is declared; rather, it is something that has to be demonstrated with facts. This means that any statement on the manner of exercise (independent or not) as the trainee performs the tasks and activities related to the internship cannot reveal if the declaration is not in line with practice. The problem is therefore to know how it assesses the independence if, by definition, the trainee has very little autonomy. He does not necessarily have technical autonomy, i.e., need guidance on how to perform the task or activity, because he is still learning. Therefore, the autonomy is organizational. For example, the promoter assigns a number of tasks to the intern, setting a delivery date and the trainee can define the priorities and his execution time. We believe that the organizational autonomy will continue to exist even if the activity is held in the workplace and with the promoter's instruments, provided that it happens to get things easily and not because it has to be that way, that is, the trainee uses the promoter's facilities because, for example, it is where the processes to resolve are and he prefers that they do not leave the installations, but the activity could be perfectly developed elsewhere. These are, in our view, residual cases.

The second requirement is that the trainee has declared in the tax office, that he will start the activity. It is an easily proof requirement, unlike the previous one.

What is occurring in practice is that the Decree N. 66/2011 is not being applied to the mandatory internship for the exercise of a profession, primarily for two reasons: on one hand, these professions can be executed in an autonomous or an independent way; on the other hand, some professional associations publicly fought for the diploma inapplicability to their internship. That happened, for instance, in the mandatory internship of lawyers, because the Bar Association defends the inapplicability of this law to those internships, invoking, among other reasons, the illegality of the law due to the fact that, for regulating the profession in accordance with its Statute, that the Bar should have been heard, which did not happen [6].

B. The Standardization of the Legal Framework of Internships - a Partially Achieved Goal

The second, and last, objective of the Decree N. 66/2011 was to uniformed the legal framework of internships in Portugal.

We think that this goal was only partially achieved because, on one hand, there are several internships that have their own rules and, secondly, because the exclusion of internships performed independently of its scope allowed that, in practice, many situations where the unpaid traineeship with few or no rights remain without regulation.

C. The Necessary Review of the Diploma

Apart from some inconsistencies of the Decree that can difficult its application (for instance, the reference in Article 8.º, n. 3, Decree N. 66/2011, of 1 June, to the collective bargaining – because, in Portugal, the unions only represent

employees and trainees and not employees, so they cannot benefit from collective bargaining), we believe that diploma has two fundamental problems that cannot be solved by mere interpretative task: one of these problems is the aim to regulate all internships; another is to exclude internships performed independently.

In our opinion, to regulate mandatory internships and those which are not mandatory in the same decree is a mistake because they are two different realities.

The first, as its name implies, is imposed by law; is required for the exercise of the profession. The second is optional. If the person did not do the first one, he cannot exercise the profession to which he is academically qualified, incurring even in criminal penalties. If the subject does not perform the second, he will not incur in any illegality or crime; only, perhaps, will be, in the practice and/or deontological, less able to exercise the profession. We can even say that, from the perspective of the professionalism of the subject, that the first internship is much more in the trainee's interests than the second one (although, in all internships, the training is conducted also in the intern's interest), because without the mandatory internship, the subject may not exercise the profession for which he studied (and sometimes is the main or the only professional output of your course!), while without the other he can. We think the regulation of the mandatory internships for the exercise of a profession should be made by the respective professional association or, when it does not exist, by special law that would regard the specific needs of training / profession.

Finally, we do not understand why, in the Portuguese context, the independent internships are excluded from a Decree that regulates the extracurricular internships. In fact, in Portugal, the extracurricular internships are not regulated by Labour Law. The dichotomy dependent / independent work is a Labour Law issue because, in Portugal, it defines the boundaries of labour law – Labour Law only regulates dependent work. Thus, in this context, the extracurricular internship is always beyond Labour Law boundaries, no matter how the trainee works (dependently or independently) and needs the same protection. Thus, as the legislator chose to leave internships outside the scope of Labour Law (which deserves reserves, except in cases of mandatory internships for the profession), it makes no sense to distinguish between "independent stages" and "autonomous stages".

To conclude, we may say that Decree N. 66/2011 fell far short of expectations.

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