

Chapter 10

Posting of workers before Portuguese courts¹

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Introduction

Portugal is traditionally a country ‘exporting’ workers. The first Portuguese workers to provide their services outside the country were the navigators who explored the oceans by boat in the 15th century. In the following centuries, these navigators were present in Africa, Asia and South America. This could be considered the original movement of migration or ‘posting’ of workers from Portugal.

Four classic emigration flows from Portugal can be identified.² The first was directed mainly towards Brazil and lasted until World War Two (Padilla and Ortiz 2012: 161). The second, and probably the most important, was the movement concentrated in Europe between 1960 and 1974, which focused on France and Germany (Padilla and Ortiz 2012: 161). Third was the new European emigration trend started after Portugal joined the EU in 1986 (Padilla and Ortiz 2012: 161-162). Fourth and latest was the movement triggered by the 2008 economic crisis that forced the intervention of the Troika,³ when almost 500,000 workers left the country,⁴ sometimes temporarily, to work not only in other European countries but also in other Portuguese-speaking countries such as Brazil, Angola and Mozambique. In contrast to the other movements, the workers who left the country in this most recent migration were mostly highly skilled professionals, sometimes posted by their companies to countries where they had existing businesses.

This chapter presents an overview of the Portuguese case law on posting. Analysing case law regarding posting of workers in Portugal is, however, a difficult task. First, as will be seen, the number of judgments is very limited. Second, while access to the case law is easy concerning the high courts, it is more difficult when it comes to the first instance courts.⁵ Nevertheless, it is possible to identify the relevant aspects of posting-related case law and conclude that most cases are disputes about outbound posting from Portugal, and that wages are usually the main issue.

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2. Beatriz Padilla and Alejandra Ortiz refer to four individual movements (Padilla and Ortiz 2012).
 3. The Troika is the frequently used name of the team of representatives of the European Commission, International Monetary Fund and European Central Bank that negotiated the terms of the financial assistance to Portugal amidst the recent economic crisis.
 4. An average of 80,000 workers left the country each year from 2007 to 2012 (source: Observatório da emigração - <http://observatorioemigracao.pt/np4/3931.html>).
 5. Consulting first instance cases depends on personal knowledge or on researching all the labour disputes court by court. Moreover, as a civil law country, in Portugal, court decisions do not have a relevant impact, because judges are free to decide according to the law. Only superior court decisions have some effect because they are public and can have some influence on other judges.

To frame the national case law, Portugal's legal concept of posting of workers needs to be defined, and the numbers involved clarified.

1. Portuguese status quo on posting of workers

The flow of posting of workers in Portugal has a negative balance: the number of workers posted from the country is higher than posted workers received. In terms of their profile, the European Observatory of Working Life confirms the observations made by the General Confederation of Portuguese Workers (CGTP-IN) and the Labour Inspectorate that workers posted by national companies work mostly in construction, maintenance, logistics and agriculture,⁶ while workers posted to Portugal by foreign companies are highly qualified technicians.⁷

There is no doubt that the research on posting of workers in Portugal is still at the beginning; even the European Observatory of Working Life admits in its Portuguese report that information about posted work in the country is scarce.⁸ In 2015, the European Commission (EC) provided relevant numbers about the European environment regarding posting of workers. According to this data, Portugal had 64,970 workers posted from Portugal in 2015 under Article 12 of the EU Regulation on social security co-ordination.⁹ In relative numbers, this makes Portugal the 10th highest EU country posting workers to another Member State. These numbers, however, represent just 3.2% of the overall number of workers posted inside the EU.¹⁰ When it comes to posted workers received by Portugal, the country is only the 14th, which represents a mere 1% of all workers. Only 15,734 workers were posted in Portugal in 2015.¹¹ In 2017, according to the National Statistics Institute Employment Survey, the employed population was around 4.8 million.¹² The labour force posted from Portugal was therefore only 1.3% of the overall number of employed workers, while workers posted to the country accounted for just 0.3% from the workforce in 2017.

France is the main destination for posted workers from Portugal, receiving 44.4% of them,¹³ an apparent continuation of the traditional emigration movement. More

6. Portuguese report of the European Observatory of Working Life. <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/portugal/portugal-posted-workers> with data of 5 October 2010.
7. Workers from central and eastern Europe (CEE) posted to work in Portugal in agriculture are the exceptions.
8. The European Observatory of Working Life points out that one of the reasons for this lack of data is the absence of mandatory information for employers before 2009.
9. In the same year, the report on A1 portable documents issued in 2015, claims that 63,799 A1 portable documents were issued by Portugal for a 'posted employed person', while 211 were released for a 'posted self-employed person' (<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes>).
10. The latest data provided by Instituto Nacional de Estatística (Statistics Portugal) points out that in the third quarter of 2018, the Portuguese employed population comprised 4.9 million (please see: https://ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0005555&contexto=bd&selTab=tab2&xlang=en).
11. The report on A1 portable documents issued in 2015 showed that posting of workers to Portugal did not change much between 2010 and 2015 – varying from 10,696 (2013) and 15,374 (2015).
12. More details can be found at <https://ec.europa.eu/eures/main.jsp?catId=2645&countryId=PT&acro=lmi&lang=en®ionId=PT0&nuts2Code=%20&nuts3Code=®ionName=National%20Level>
13. According to data provided by the EC from 2015, Spain receives 16% of workers posted from Portugal, and Belgium 15.7%. It is also relevant to point out the numbers from Germany and Netherlands: 7.6% and

than half of workers posted from Portugal work in the construction sector,¹⁴ and are not usually highly qualified. However, the picture is different with workers posted to Portugal. In 2015, 56.2% of these workers were from Spain and 19.2% from France, with most working in industry,¹⁵ business¹⁶ or personal services.¹⁷ Inbound posted workers are therefore likely to be more qualified.

The nature of posting in the years between 2010 and 2015 is striking. While the number of workers posted in Portugal was stable during these years, the number of workers posted by Portuguese companies to other EU countries fluctuated. The peak was 2013, when more than 80,000 Portuguese workers were temporarily deployed to another EU Member State. This is believed to be the result of the crisis, which had a critical impact on the Portuguese labour market.¹⁸ Between 2013 and 2015, the number of outbound posted workers decreased steadily.¹⁹ It is important to remember, though, that this data is only about workers posted in the EU. In the same period, and also induced by the economic and financial crisis, Portuguese workers were also posted to countries where many companies had business – including Angola, Brazil and Mozambique.²⁰ Thus, the impact of posting can be more significant than the numbers provided by the EC suggest. Posting inside the EU is only part of the Portuguese reality.

Even though the number of posted workers to and from Portugal is, at first sight, significant, the reality is that the country is not in a critical position as other countries are, such as Poland, that had a total of 463,174 workers posted to different Member States in 2015. This is due to a large extent to the difference in population size and workforce of the two countries. However, the number of posting of workers from Poland is almost six times higher than Portugal's, while the population and workforce is only three to four times higher.²¹

2. Portuguese legal framework on posting of workers

The Portuguese labour regulation is easy to gauge because the country has had a Labour Code containing all the key rules since 2003. The Labour Code of 2003 was,

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- 6.2% respectively. The Portuguese report of 2015, available at: <http://ec.europa.eu/social/keyDocuments.jsp?advSearchKey=PostWork&mode=advancedSubmit&langId=en&policyArea=&type=0&country=19&year=0>.
14. The 2015 numbers show that 54.3% of workers posted from Portugal were working in construction. The second most representative is industry with 22.4%.
 15. 36.6% according to 2015 data.
 16. 23.3% in 2015.
 17. 18.8% in 2015.
 18. This impact was not only on the labour market but also in the legal framework. In fact, the Portuguese Labour Code was radically changed with effects and reactions from the unions. The CGTP-IN presented a complaint against the Portuguese government to the ILO's Committee of Freedom of Association (Abrunhosa e Sousa 2016).
 19. According to a report on A1 portable documents issued in 2015 (<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes>), 81,687 workers were posted just to Member State countries in 2013.
 20. Since these countries have native Portuguese speakers, a significant number of Portuguese companies decided to develop their businesses there. This way there was a big movement of workers, mainly to Angola. Brazil was also a relevant destination for workers posted from Portugal, but the massive Brazilian crisis reduced this trend.
 21. According to comparable data from the World Bank in 2017, Poland had a workforce of 18.3 million while Portugal had 5.1 million (please see <https://data.worldbank.org/indicator/SL.TLF.TOTL.IN/>). These numbers are slightly different from EC data.

however, replaced by the Labour Code of 2009. This is still in force, but with several important changes that took place during the intervention of the Troika and smaller reforms carried out by the succeeding government. Of course, Portugal allows collective bargaining, but by having a national regulation that brings all workers and employers together, it is easier for workers to access the legal rules. Likewise, for workers posted to Portugal, the access to an English version of the Labour Code could be enough to enable a worker to understand the essential regulations.

The present Labour Code regulates the posting of workers in Articles 6 to 8.²² The Labour Code regulates workers posted from Portugal to both EU and third countries.²³ Article 6 describes posting to Portugal as the situation where an employer from a different country sends a worker to the country for one of the following reasons:

- (i) as part of a service agreement with a national company
- (ii) to work for a company of the same corporate group
- (iii) to carry out a temporary agency contract.

This definition is also used also when posting from Portugal as stated in Article 8, which makes it the Portuguese general legal concept of posting. Also according to Article 8,²⁴ it seems that the posting of a foreign worker or a stateless person to Portugal depends on the existence a previous employment contract. If the worker has a previous service agreement with the company posting the worker to Portugal and not an employment contract, these rules are not applicable since the Labour Code only regulates traditional employment relations and not similar contracts. All conditions mentioned above are also used by the Portuguese lawmaker to determine the concept of workers posted from Portugal.²⁵ So posting of workers has the same grounds whether to or from the country.

Article 7 stipulates that posted workers have the right to a significant number of minimum conditions provided by law or collective bargaining. These include job security, maximum length of working time, minimum rest periods, vacations, minimum wage and overtime, transfer of workers from temporary work agencies, occasional transfer, health and safety at work, parental protection, protection on child labour and equality of treatment and non-discrimination.²⁶

22. Posting of workers was first ruled in Portugal through Law 9/2000 that assured the transposition of Directive 96/71/CE in the country. Subsequently, in the Labour Code of 2003, posting of workers was regulated in Articles 7 to 9. According to Portuguese doctrine, while Article 6 delimits the posting of foreign workers or stateless people, Article 8 regulates the posting of workers hired by a Portuguese company that provides services in another country (Vaz Marecos 2012: 92).

23. Other authors underline that even though the Portuguese Law is a transposition of the Directive 96/71/CE, the rules are applicable to workers posted to countries beyond the EU (Romano Martinez 2013: 123).

24. In this way, D. Vaz Marecos goes further and argues that the employment contract could not be signed between the worker and the posting company, except in some cases, with a third party, such as temporary agency work (Vaz Marecos 2012: 93). Also, P. Romano Martinez states the same when explaining that posting assumes the existence of a previous employment contract, but not one signed with the work beneficiary (Romano Martinez 2013).

25. Article 8 of the Portuguese Labour Code.

26. In fact, most are similar to the ones provided by Article No. 3/1 of the Directive 96/71/CE.

According to Portuguese law, the definition of minimum wage for posting must include all allowances and grants paid to the worker because of the posting that are not the reimbursement of posting-related expenses, such as travel, accommodation and food. Vacations, minimum wage and overtime payment rules do not apply, however, in cases where a qualified worker is posted to provide the installation of goods by a company that is acting as a supplier.²⁷ The idea is to ensure the identical minimum conditions for workers posted in Portugal as all the other workers. Additionally, with this regulation, companies operating in the same market or within the same sector can compete fairly²⁸ (Vaz Marecos 2012) and avoid social dumping. Nevertheless, the Portuguese lawmaker decided to deviate a little from the Directive by adding job security, and parental and child labour protection as basic conditions. Where parental and child labour protection is a quite remarkable addition, it is not particularly clear what job security provision stands for in this context. In fact, by posting a worker from Portugal, job protection is always ensured upon his or her return. If the worker is posted to Portugal, however, the return to his or her own country will not add job security as provided in Portuguese standards onto his or her local set of rights. So, this effort by the Portuguese lawmaker seems to have no impact on inbound posted workers' rights.

Regarding posting from Portugal, Article 8 provides an exception to the rule that forbids an employer to supply a third party with a worker's labour (Vaz Marecos 2012).²⁹ This rule takes into consideration the workers posted by a Portuguese company to provide their services in a different country. Once again, the posted worker is protected by the minimum conditions considered as the decent basis for work.³⁰ For these workers, at least some Portuguese rules are always applied.

The legal framework on the posting of workers did not change with the replacement of the Labour Code in 2009, except in one respect. This obliged employers to inform the Labour Inspectorate of the identity of the posted worker, the recipient company, the workplace, and the predicted end and term of the posting.³¹

In 2017, Portugal finally adjusted the national regulation according to Directive 2014/67/EU.³² This new regulation reformed the operation of the Labour Inspectorate on the posting of workers and reinforced its powers to control the Portuguese law on posting in Portugal.

When the posting rules are breached there are more ways to enforce the law. For example, administrative offences applied to a posting situation in Portugal can be demanded by the company of another EU Member State through a system of international co-

27. This exception is only acceptable if (i) the installation is essential for the product; (ii) there is a service agreement contract; and (iii) it does not last more than eight days in a year. Also, the exception does not include posting on activities related to construction activities.

28. P. Romano Martinez underlines the same idea, but points to the need to foster fair competition between companies in the EU by not distinguishing between different categories of workers (Romano Martinez 2013).

29. The other exceptions of the Portuguese law are temporary agency work and between group corporations.

30. Bernardo Lobo Xavier argued that the worker posted from Portugal has a minimum of protection ensured by national law (Lobo Xavier 2011: 867).

31. The breach of these conditions can result in the payment of an administrative fine.

32. Law No. 29/2017 of 30 May.

operation. However, it is important to point out that this adjustment went further than the Directive 2014/67/EU on the liability of all the employers involved in a particular posting.³³ In fact, according to Article 12 of Law No. 29/2017, when workers are posted in Portugal, the user company undertaking the work is severally liable to the employer for any minimum wage that was not paid to the worker. This way, national companies are discouraged from accepting the posting of workers from companies from other EU Member States that do not respect the basic wages rules.

Moreover, when a worker is posted from Portugal, there are some additional requirements that should be met regarding the duty of information. According to Article 108 of the Labour Code, a worker with an employment contract regulated by Portuguese law that is bound to work in another state for more than a month should be informed in writing before the departure about the following conditions:

- (i) probable duration of the work to be done in a different country
- (ii) currency and location where the payment will be fulfilled
- (iii) repatriation conditions
- (iv) access to healthcare.

This information is crucial for workers since it allows them to be aware of the effective conditions of work. Sometimes the most relevant information, more than the duration, when work is to be done outside the EU, is the currency of the payment and where it will be made.³⁴

Furthermore, employing illegal workers is a crime in Portugal (2009/52/EC enforced by Law 29/2012). So the posting to Portugal should involve only workers who are permitted to live or work in the country, such as citizens of the European Economic Area or third-country workers with a regular visa.

3. Access to Portuguese courts on labour disputes

As well as having an adequate legal framework to protect labour rights, it is equally important to have instruments in court to make the legal framework enforceable.

Portugal has specialised Labour Courts that deal only with labour disputes. This specialisation improves the enforceability of labour law since the judges are keen to decide these kinds of conflicts. Additionally, these courts can be found in all major cities,³⁵

33. The Portuguese lawmaker accepted the challenge given by Directive 2014/67/EU to take additional measures on a non-discriminatory and proportionate basis to ensure that in subcontracting chains the contractor of which the employer is a direct subcontractor can, in addition to or in place of the employer, be held liable by the posted worker (Article No. 12 of the Directive). Nevertheless, Portugal already has a general rule that makes liable the chain of contracts not only for administrative fines, but possibly also for labour credits (Article No. 551 of the Portuguese Labour Code).

34. A traditional problem in Portugal regards posting in Angola. The local currency has insignificant value, so it is quite difficult to pay into Portuguese banks. If the payment is made in Angola with the local currency, the worker would probably be in the worst working conditions during the posting period. If the posting is made inside the Eurozone this would not be a problem.

35. There are a total of 44 Labour Courts in Portugal according to Decree-Law No. 86/2016.

giving citizens a reasonable proximity to them. These courts can decide on disputes about employment contracts, labour credits, work-related accidents, professional illnesses, civil aspects related to the right to strike, and administrative offences regarding labour law and social security law, among other issues. If the decision is appealed, the case will go to the social section of *Tribunal da Relação*³⁶ and in some cases, to the Portuguese Supreme Court.

An additional, less extensive structure is provided by administrative courts. There are several city courts³⁷ and two appeal courts – one in the north of the country³⁸ and another in the south.³⁹ The final appeal can be made to the Supreme Administrative Court, which usually decides on cases about administrative law or taxes and sometimes on social security issues.

Almost all Portuguese cases decided by Courts of Appeal and Supreme Courts can be accessed for free through a website: www.dgsi.pt. So it is quite easy for anyone to read and analyse the Courts' decisions⁴⁰ if one understands Portuguese. Once again, this helps to make the law more accessible to all citizens.

4. Portuguese case law on posting

The case law on posting in Portugal is rather sparse, or rather, posting does not seem to be central to the judgments. Most of the cases reflect on posting as a side issue. From 2004 until 2018, the author found 16 cases in the following Portuguese courts:

- Labour jurisdiction:
 - Portuguese Supreme Court of Justice - 2 cases
 - Lisbon High Court (*Tribunal da Relação de Lisboa*) – 5 cases
 - Oporto High Court (*Tribunal da Relação do Porto*) – 3 cases
 - Coimbra High Court (*Tribunal da Relação de Coimbra*) – 2 cases
 - Évora High Court (*Tribunal da Relação de Évora*) – 2 cases.
- Administrative jurisdiction:
 - Administrative Supreme Court – 1 case
 - North High Administrative Court (*Tribunal Central Administrativo do Norte*) – 2 cases.

36. Presently there is a social section in all High Courts located in Lisbon, Oporto, Coimbra, Évora and Guimarães.

37. In Aveiro, Braga, Coimbra, Mirandela, Penafiel, Oporto and Viseu.

38. Located in Oporto.

39. Located in Lisbon.

40. The courts of first instance are not included on the website.

These cases can be divided into three groups depending on their subject matter:

- (i) social security/taxes
- (ii) labour law
- (iii) where posting is a completely marginal subject.

These divisions show the kinds of subjects that are usually decided in the Portuguese courts.

4.1. Cases concerning social security/taxes

Social security and taxes were key themes in three cases decided in Portugal. The case decided in the Supreme Administrative Court⁴¹ relates to an important formal condition of posting of workers. For a better understanding of this case, it's important to point out that according to Regulation No. 1408/71 on the application of social security schemes to employed persons and their families moving within the EU, there are some exceptions to the common rule. As a general rule, a worker to whom this Regulation applies shall be subject to the legislation of a single EU Member State only.⁴² So a worker employed in the territory of one EU Member State shall be subject to the legislation of that State even if he resides in the territory of another EU Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another EU Member State.⁴³ An important exception to this rule will occur when a worker employed in the territory of an EU Member State by an undertaking to which he is typically attached, and who is posted by that undertaking to the territory of another EU Member State to perform work there for that undertaking, shall continue to be subject to the legislation of the first EU Member State, provided that the anticipated duration of that work does not exceed twelve months and that he or she is not sent to replace another worker who has completed his or her term of posting.⁴⁴ Therefore, to avoid the unnecessary changes of social security entities, the regulation states that postings under twelve months' duration should continue in respect of the rules of the country where the worker is posted from. This was the key problem in this examined case.

These rules accounted for the refusal of the Portuguese social security services to accept the E101 document (a predecessor of the A1 certificates currently issued) from a Portuguese company that posted a worker in a different Member State.⁴⁵ The company in question had EUR 62,000 in national sales in Portugal in the year before, while the global amount in sales was EUR 4 million. Portuguese social security decided, therefore, that the company did not have significant activity in the country.

41. Case 0405/15, 4 February 2016, available at www.dgsi.pt

42. See Article No. 13 of Regulation 1408/71.

43. See Article No. 13(2a) of Regulation 1408/71.

44. See Article No. 14(1a)(i) of Regulation 1408/71.

45. This document allows the posted worker to continue to be bound to the social security regime of his or her country of residence. According to the Portuguese social security, the exceptions expressed in Article No. 14(1a) shall be interpreted with the support of decision 181 of the Administrative Commission on Social Security for Migrant Workers. To avoid the letterbox companies, the Commission asserts that the E101 document should only be used where companies have a significant activity in the country where the head office is located.

For its side, the company argued that the activity was significant enough for Portuguese standards and appealed to the Supreme Administrative Court. In the decision, the Court pointed out that the workers for whom the E101 was intended had contracts without any fixed term. These were workers who belonged to the company's staff and not precarious workers contracted solely to be posted for another company. Since the workers already had an employment status with the company, the Court's decision was not to intervene in these cases. The obligation to have a significant activity at the head office country only applies to the cases where an E101 document is required for workers employed to be posted. Consequently, the Court decided that the Portuguese social security's refusal was illegal. This was probably one of the most comprehensive cases on posting identified and analysed for the purpose of this chapter.

Two more cases were decided by the administrative jurisdiction, but in the North Administrative High Court. These cases only marginally refer to posting of workers. In the first, the Court had to deal with a problem related to daily allowances and social security,⁴⁶ and had to establish if these allowances were effective remuneration for this matter. Posting was only a small aspect of the problem because the key was to understand if workers and the employer should pay social security for these daily allowances. The possibility of being paid in a context of posting of workers was considered but not admitted by the Court as a relevant subject in the case. The Court decided that the amounts paid to workers should be subject of social security.

A similar case⁴⁷ of legality of daily allowances regarded taxes. Here, however, the Court accepted that the company was paying regular allowances, recognising that the worker in question was indeed posted several times and that therefore, expenses should be paid. The Tax Administration was trying to show that those daily allowances were not motivated to pay expenses and that it was just an attempt to avoid taxes.

4.2. Labour disputes

Only a few Portuguese cases are the result of labour disputes. In addition, it's important to point out that the Portuguese rules on posting are the same irrespective of the worker's nationality or his or her destination country. So, while some of the examples are not related to EU workers, they are critical in understanding how national courts manage these subjects. They also reveal the lack of depth that posting case law has in the country.

A case decided by Coimbra High Court was probably the most important concerning labour law disputes related to posting.⁴⁸ This is one of the few cases in Portugal where the concept of 'posting of workers' became part of the decision's summary.⁴⁹ However, it concerned a posting situation from Brazil - a non-Member State country - to Portugal,

⁴⁶. Case 00431/15.1BEVIS, 4 May 2017, available at www.dgsi.pt

⁴⁷. Case 00764/13.1BEPNF, 10 November 2016, available at www.dgsi.pt

⁴⁸. Case 773/06.7TTAVR.C1, 17 March 2009, available at www.dgsi.pt

⁴⁹. The decisions of Portuguese High Courts are usually underlined with a summary of the key aspects.

where damages were demanded by a Brazilian worker who was dismissed from a Portuguese company where she was supposed to represent a Brazilian company's IT products. However, the Court argued that this was not a case of posting of workers according to Portuguese law because the worker had started work on a tourist visa. The decision stated, except for work accidents, the rules of the Labour Code do not apply to workers who are working in Portugal without a permit (Romano Martinez 2013). Because it was not a posting situation and the worker was not permitted to work in Portugal, she was not protected by the Portuguese labour law.

Another posting-related case was decided by Évora High Court and it concerned the differences in salaries in the course of outbound posting.⁵⁰ In this case, a worker was posted from a Portuguese company to Luxembourg and after his return to Portugal demanded the payment of both the minimum wage during the posting, according to a particular Luxembourgish collective agreement, and the overtime by the same collective agreement standards. The worker's injunction was supported by the fact that the Portuguese employer only paid a reduced hourly rate⁵¹ and paid less for overtime in comparison to that paid in Luxembourg. Although the worker provided evidence of the wage differences, the employment termination and the expiration of the right to demand credits against the employer were relevant side issues taken into account.⁵² Still, this is one of the only cases where a worker posted from Portugal to another country went to court to ask for wage differences. However, for formal reasons, the Court did not accept the worker's claim.⁵³

In another case Coimbra High Court⁵⁴ decided in a dispute on damages after a posted worker had a work accident in France, where he was posted by the employer. He demanded that the 2015 French minimum wage should be the reference for the damages' calculation. The Court decided otherwise. Basing its judgment on Article 8 of the Portuguese Labour Code, the Court's defence was that the application of the most favourable regime should not have the French law under consideration, but the Portuguese one. The main argument was very simple: the employment contract was regulated by Portuguese law. The Court stated that the posting of a worker employed in Portugal to work in France does not implicate, *per se*, the application of the *salaire minimum de croissance*.⁵⁵ This is highly relevant since the Posted Workers Directive explicitly requires that the host country's minimum wage constitutes the minimum that has to be paid to the posted worker. In this regard, the Court did not deny the posting, but defended the application of Portuguese law.

The second case on work accidents was decided by the Évora High Court.⁵⁶ The dispute in this case was related to the calculation of the pension resulting from a work accident.

50. Case 407/13.3TTMR.E1, 30 September 2015, available at www.dgsi.pt

51. According to the case, the worker was paid the equivalent of EUR 8.50, when the Luxembourgish collective agreement demanded EUR 17.44.

52. In Portugal, workers can only demand damages or unpaid wages for one year after the employment is terminated.

53. In this case, the worker did not provide evidence of the wage while posted in Luxembourg.

54. Case 233/16.8T8LRA.C1, 12 January 2018, available at www.dgsi.pt

55. French minimum wage.

56. Case 474/10.1T2SNS.E1, 20 December 2012, available at www.dgsi.pt

The worker was employed by a company that had posted him to the Netherlands on a regular basis for periods of three months, always with ten-day intervals in Portugal. The worker then signed a new contract and returned to the Netherlands for another three months, and so on. The problem was that the worker's wage was EUR 650 per month, but when posted to the Netherlands, the wage was upgraded to EUR 13 per hour (approximately EUR 2,860 per month).

Even though the work accident happened while working in the Netherlands, the first instance court decided to calculate the indemnity and the pension taking the monthly salary and not the salary the worker received as a posted worker into account. The Court took this position because the worker was on the fourth day of the employment contract.⁵⁷ The worker appealed in order to ensure an upgrade on both indemnity and pension, demanding not only the wage paid in the Netherlands as a reference but also the daily allowance for expenses. According to Portuguese law, the compensation resulting from a work accident must be calculated with the regular salary at the time of the event. In this case, the Court decided that the worker was partially⁵⁸ right concerning the pension and indemnity calculation formula. However, the daily allowance to support expenses was not included in this calculation since the Court decided that the worker had not demonstrated an economic advantage with that payment. According to the Court, the allowance was only intended to provide for the cost of living in the Netherlands. This way, it could not be interpreted as remuneration. So, with this case, we see a Portuguese court analysing the posting of a worker from Portugal and the consequences which posting could have in work accidents in terms of compensation. Moreover, the Court's decision gave a restrictive interpretation of remuneration that didn't include daily allowances for pension and indemnity calculations in the context of work accidents when the worker does not show any economic advantage from this payment.

In a different context, Lisbon High Court had to decide a case regarding a plea of unjust enrichment by a posting worker against a temporary work agency.⁵⁹ The appellant worked for this company from 2009 to 2015 and was posted to Germany, Belgium and Denmark as a locksmith. After the final employment, the worker demanded a payment of EUR 23,950.98, an amount that related to several deductions his employer had made from his salary. However, the worker did not demand it within the limitation period of one year after the employment termination. Because of this he decided to seek compensation on the grounds of the employer's unjust enrichment instead. The critical issue was whether the concept of posting applied to that particular work. But the case was closed with the Court deciding on the basis of the end of the time limit for claiming damages against the employer.

With these cases it is possible to remove some of the uncertainty around the concept of remuneration, mainly where daily allowances or compensation for expenses are key facts in disputes. Posting of workers' rules were commonly used to distinguish between

57. The worker signed a new contract every time he returned to the Netherlands.

58. In this aspect, the Court did not give full merit to the worker's position, because his calculations were based on a 10-hour working day and not the 8 hours that were proved in Court.

59. Case 24505/16.2T8LSB.L1-4, 31 May 2017, available at www.dgsi.pt

economic advantage to a worker with daily allowances and expenses compensation. This way, unsurprisingly, work accidents are a relevant factor of dispute, while promoting this debate on remuneration issues. Clearly, Portuguese courts aim to focus this concept of remuneration in a restrictive interpretation. Moreover, it seems that national courts still have limited experience in dealing with this type of case, and case law should be improved with more substantial cases. The current debate on posting has essentially been about remuneration as opposed to any other aspect of employment conditions included in Portuguese law and the EU Directive.

4.3. Cases where posting is a marginal subject

Last but not least, the parties to some of the cases discussed here only use posting to frame their argument in court. Two examples of this were heard before the Supreme Court of Justice. Both examined work accidents in the context of posting. In the first case, the concept of posting was used to add weight to the dispute over the death in Rome of a Portuguese ambassador who was working for the Community of Portuguese Language Countries.⁶⁰ The widow and daughter of the Portuguese ambassador argued that since he was in Rome to hold a meeting shortly after the accident, the rules on posting should be applicable. The Court did not follow this line of argument because the ambassador was in the Rome region on holiday when the accident happened, and so ruled that it was neither a posting situation nor a work accident.

In the second case, the dispute was about international territorial jurisdiction and concerned a work accident that happened to a Portuguese worker in Andorra. The worker was hired by a French company and insured by a French insurance company.⁶¹ Posting was used to frame the case because the Court called it after the reform of the Labour Code process. According to this reform, the international litigation jurisdiction by Portuguese courts regarding posting from Portugal could be accepted. However, in this case, the worker was demanding that the insurance company updated the amount of damages, an issue that is the purpose of particular regulation.⁶² The Portuguese Court decided, however, that it did not have any jurisdiction to rule in this case because it had no connection to Portuguese law: it was the plea of a Portuguese worker against a French insurance company regarding a work accident in Andorra.

The Lisbon High Court decided another case in which posting was a side issue.⁶³ Here, the international litigation jurisdiction of a Portuguese worker employed by a Portuguese couple to work in their home in Austria as a domestic servant was under debate. The employment was arranged by an agency. After a few months, the worker decided to leave and demanded wage credits in a Portuguese court. The Court decided that even though an agency had arranged the employment, the mere fact that there was an intermediary did not create a link that made it a posting situation. Although the

60. Case 08S3047, 9 September 2009, available at www.dgsi.pt

61. Case 1710/10.0TTPNF.P1.S1, 25 January 2012, available at www.dgsi.pt

62. In this case, Regulation No. 44/2001.

63. Case 27891/16.0T8LSB.L1-4, 31 May 2017, available at www.dgsi.pt

parties did not bring up the topic of posting in their allegations, the Court decided to verify whether posting was in question. The Lisbon High Court decided that it was not a posting of workers situation, but rather a domestic dispute that should be claimed in Austria because of the lack of connection to Portuguese jurisdiction - the Portuguese courts had no jurisdiction in this case.⁶⁴

The Lisbon High Court also briefly mentioned posting of workers in an earlier case.⁶⁵ Here, the Court used the concept of posting to show the difference between employing a non-national worker and having a worker posted in Portugal.⁶⁶ Moreover, in three other cases,⁶⁷ the same Court examined some atypical employment contracts⁶⁸ where workers were employed in Portugal to work in several companies in different countries. In this debate, the Court focused on Article No. 6/1a) of the Rome Convention, which is the law applicable to contractual obligations,⁶⁹ including posting of workers. In all these cases, national courts decided that the key is to understand the connection of the employment to Portugal and not the contract signed by both parties.⁷⁰ So it was assumed to be the jurisdiction of the national court.

The record of cases of posting of workers as a side issue is limited to four cases in the Oporto High Court, three of which have relevance here. The first⁷¹ concerned the termination of the fixed-term contract of a worker that was posted by a Portuguese company to Austria. The worker demanded damages, arguing that his fixed-term contract was illegal. However, the Court decided that a term contract is not incompatible with posting of workers. The second case⁷² concerned, once again, the question of jurisdiction of Portuguese courts over international disputes. This was a work accident suffered by a Portuguese worker working for a Spanish company and insured by a Spanish insurance company. The Court felt the need to explain that it would only have jurisdiction if it were a posting of workers situation. In this case, the worker was working for a Spanish company in Spain, so the Court did not have jurisdiction. Finally, in the third case,⁷³ the concept of posting was relevant in a dispute where an employee was demanding the payment of several different wage credits. Some of the amounts demanded were related to the termination of posting to Romania outside the agreed 30-day notice period. The employee received EUR 2,235.80 per month for expenses in Romania, but the employer communicated the termination of the posting with only two days' notice. The Court decided to deny the claim in the part connected to posting, because those amounts were payment of expenses rather than remuneration.

64. The decision was supported by the Regulation (EU) No. 1215/2012.

65. Case 6197/2007-04, 7 November 2007, available at www.dgsi.pt

66. The case about the requirements of employing a Brazilian citizen who was not legally in the country.

67. Case 2998/14.2TTLSB.L1-4, 4 November 2015; Case 149/04.0TTCSB.L1-4, 15 December 2011 and Case 914/09.2TTLSB.L1-4, 18 April 2012, all available at www.dgsi.pt

68. All three cases were called as multi-location contracts.

69. According to this Article 'a contract of employment shall, in the absence of choice (...) be governed: by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country'.

70. In one of the cases, the employment contract stated that the Cayman Islands had jurisdiction, but the work was undertaken in Portugal.

71. Case 1531/11.2TTPNF.P1, 11 May 2015, available at www.dgsi.pt

72. Case 1109/10.8TTPNF.P1, 6 December 2010, available at www.dgsi.pt

73. Case 721/17.9T8PNF.P, 11 April 2018, available at www.dgsi.pt

The Oporto High Court had no cases where posting was the main subject. Nevertheless, the three analysed cases had totally different backgrounds and show that posting could be a part of a different kind of labour dispute, namely, work accidents, court jurisdiction, and breach of period of notice. Overall, all national courts, when needed, use the concepts of posting to understand which regulation should be applied in each case. In most of the cases, posting was used only to frame the judge's arguments.

4.4. Overview of Portuguese case law on posting

As we can see, the case law in Portugal regarding posting of workers is surprisingly limited; it is not a standard subject that workers, the national social security or employers take into court. Nevertheless, 16 cases worthy of report were found.

One interesting finding of the present research is that the most relevant cases were not brought into a Court of Appeal from one of the major Portuguese cities such as Lisbon or Oporto. Indeed, three cases on labour issues were decided by High Courts in Évora and Coimbra. So the subject of posting of workers has a critical impact not on the country's key economic regions, but in the most peripheral. Since the strongest economic regions in Portugal have more opportunities, most workers in these cases live in less developed locations.

Another interesting finding is the fact that work accidents and daily allowances are the subjects that boost the few existing judicial discussions on posting, with one case even dealing with both. Of course, I did not have access to all first instance cases that were decided or resulted in a settlement, but it is surprising that the volume of posting of workers from Portugal does not stimulate more case law in the country. It is important to add that the case law on posting is so limited that some findings relate to decisions where the topic is not relevant at all.

5. Critical reflection on the limited case law in Portugal

We can see from all the cases discussed in Portuguese High Courts that they are not representative of the trend of posting from the country, not even when the number increased during the country's crisis. So it is fundamental to try to understand why there is such a limited amount of case law in Portugal.

First, by taking other national reports into account, it seems that some workers decided to demand their labour dispute in the country to which they were posted. Cases identified in the national reports of Germany, France and the Netherlands seem to show that Portuguese workers are more active in foreign courts regarding posting disputes. So the limited number of cases in Portugal might be partly the result of transferring the conflicts to courts in the countries where the workers were posted.

But what would be the reason for these 'transfers'? One possibility could be the widespread assumption in Portugal that justice is too slow and unfair towards ordinary

citizens.⁷⁴ Portuguese people often have the impression that it is pointless most of the time to present an injunction in court. And indeed, there have been several relevant cases where Portugal was condemned in the European Court of Human Rights (ECHR) because of the slowness of the justice.⁷⁵ But is this a fact or a mere impression? In 2017, Bank of Portugal staff conducted research into civil case law procedure between 1993 and 2013 (Coutinho Pereira and Wemans 2017). The findings were striking. According to this study, Portuguese courts take an average of 30 months to provide a final decision (Coutinho Pereira and Wemans 2017: 8). And in cases that seek exclusively to deliver a judicial debt recovery, the average duration grows to 40 months (Coutinho Pereira and Wemans 2017: 8).

This data shows that, in general, the Portuguese courts do not respect Article 6(1) ECHR regarding the reasonable time a case should be decided. However, most of the research data examines the duration of cases in all the topics, so it is important to underline that labour cases are relatively quicker than disputes in other fields of law and that there is a clear reason for this - most of the labour cases are considered 'urgent'.⁷⁶ When a case is urgent, it means that none of the deadlines for the parties stop at judicial vacation periods.

The author believes, therefore, that in traditional labour cases, the slowness of the courts is only an impression of justice, and that the Portuguese believe in general that justice is slow. It is probably for this reason that workers decide not to demand an injunction against an employer when the posting rules were not correctly applied, or they choose to have the dispute in the country where they were posted.

The substantial economic and financial crisis that Portugal suffered in the past five or six years provides another clue. Several companies started to depend on business outside the country. So for many workers, the only chance to maintain their subsistence⁷⁷ or way of life⁷⁸ was by accepting challenges in a different country. When returning to Portugal to work for the same company, they may well have decided that it would not be advantageous to enter into a judicial conflict with their employer.⁷⁹ Nevertheless, the consequences of the recent boom of posting from Portugal are not yet visible. Workers can demand damages or work credits up to one year after the employment is terminated.

Finally, most workers posted in Portugal are well qualified and have better conditions in their home countries. Consequently, legal disputes during posting in Portugal are not likely to happen.⁸⁰

74. After analysing the data from Portuguese courts, Guilherme Alberto Mendes Pereira argued that the justice in Portugal is too slow (Mendes Pereira 2012). However, this research is supported mainly in the appeal courts.

75. Portugal had 295 cases in the ECHR where the principle of reasonable time provided by Article No. 6/1 of the Convention was under discussion.

76. The most important cases in courts are dismissals disputes, which are urgent in any Portuguese court. In this situation, when the first instance court does not decide within one year, if the dismissal is considered illegal, the State will pay the salaries of the workers after this period on behalf of the employer.

77. For non-qualified workers.

78. For qualified workers.

79. It is important to remember that most cases where posting was an issue were initiated by workers against former employers.

80. Nevertheless, the opposite situation is a more natural occurrence. In fact, the ECJ's case C-164/99 held the dispute on a posting from a Portuguese company to Germany (Gomes 2007: 78).

Conclusion

The posting of workers is not a common topic in Portugal, either in case law or in traditional legal research. This is surprising considering that Portugal is in tenth place in the EU in terms of the number of outbound posted workers; the lack of available data therefore made the present task very demanding.

Moreover, this chapter demonstrated that Portuguese case law on posting is not only insignificant in terms of numbers, but also with regards to the content. The lack of depth in most of the cases means that it is difficult to identify future trends. Domestic courts touched only lightly on the subject for the most part, so that only a few cases could be considered interesting for the present research.

Still, it was possible to identify some trends even from this small number of cases. First, while all cases are about posting from Portugal, they do not represent the overall numbers of posting, so there is no causal link between the impact of posting in the labour market and litigation. None of the cases were about posting to Portugal. Second, in most decisions, courts only needed to rule on posting as a side issue, which suggests that the national legal framework here is not yet mature enough. In particular, it seems that some decisions are not very well directed, such as Case 233/16.8T8LRA.C1, where the Court decided not to apply the basic principle that the host country's minimum wage constitutes the minimum that has to be paid to the posted worker. Third, despite posting not being the main subject on most studied cases, there is a trend for courts to decide against the worker's claim regarding his or her posting. This does not mean that the courts are not right, but for now this is a fact.

Work accidents outside of Portugal and disputes on daily allowances are the topics that usually bring posting to courts, but the insignificant number of examples cannot be identified as a trend. Still, the major issue is always about the different remuneration gaps, since Portuguese workers are usually posted to countries with higher salary standards. The lack of confidence in Portuguese justice does not seem to be the only trigger that causes this absence of case law and academic debate. We can assume some legal disputes are commonly developed by workers in the country to which they are posted, with these cases becoming integrated into a different country's case law.

The posting of workers is an unexplored subject in Portugal, but a more emblematic case could bring it into sharper focus in the future. Sometimes, vital concepts used in our society are not strongly reflected in court decisions and need to be enriched by an effective case law. With the subject of posting of workers in Portugal, that course is still being developed.

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