Damages derived from mobbing and professional contingencies - State of the art on the Portuguese legal framework and case law

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ABSTRACT: As happens with other jurisdictions, the Portuguese law sanctions moral harassment in the context of the labour law and provides the worker a right to be compensated in the civil terms, for the pecuniary and moral damages suffered. However, the injuries that generate a disability for work due to a phenomenon of mobbing in the workplace are not yet considered as pathologies compensated in the same terms as occupational contingencies (workplace accidents or occupational diseases). In fact, although the Portuguese doctrine has been studying the phenomenon of mobbing for the past years, the case law is still unwilling to accept the compensation and sanction of these conducts in the same terms as the other EU jurisdictions have been allowing.

I – INTRODUCTION

Mobbing is a topic that has gained an increasing importance, due to escalating numbers of cases that are reported and go back to courts. This phenomenon may be characterised as a set of intimidating, humiliating or embarrassing, harmful or unwanted conducts of various kinds, occurring in the context of an employment relationship, that objectively violate the fundamental rights of the worker, namely, his dignity and physical and moral integrity (PEREIRA, 2009, p. 72). Moreover, a systematization of these behaviours is demanded: the repetition of the offensive conduct, which should be extended in time, but also the combination of several acts that complement each other in achieving the purpose it was intended[1]. Therefore, mobbing may cause damage to the physical and psychological health of workers[2]. Indeed, it is responsible for cognitive, psychological, psychosomatic and hormonal changes, as regards the nervous system, muscle tension and sleep, and may ultimately lead to suicide. In September 2012, the Portuguese Health authorities changed the Mental Health Programme for 2007-2016, as they figured that the number of mental diseases and suicides will increase with the financial crises that the country is facing. But the truth is that, despite the recent media coverage, the phenomenon tends to hide in the walls of work units, confining itself to the space frequented by the suicidal colleagues, unrevealing, thus, potentially traumatic events.

The theme that will be analysed requires the assessment of the possibility of a phenomenon of mobbing and the suicide of a worker to be considered as work-related accidents within the Portuguese legal framework. Thus, the possibility of the injuries that generate a disability for work or the death subsequent to a suicide due to a phenomenon of mobbing to be considered as eligible for compensation under the same conditions as a work-related accident will be evaluated. The possibility of such injuries to be qualified as occupational diseases and, as such, eligible for compensation under the same conditions that these contingencies are will also be considered (for further developments, vd. COSTA, 2010 and COSTA, 2012).

II – PRACTICAL RELEVANCE OF THE PROFESSIONAL CONTINGENCIES SYSTEM

The relevance of this study is gauged by the response to the following question: is the provision of civil liability for the practice of mobbing on the article (art.) 28 of the Portuguese Labour Code (Law nr. 7/2009, 12-02 – hereinafter only CT) not adequate and sufficient? The convenience of this research lies not only with the advantages that the institutes of professional contingencies[3] may adduce for the analysis of this matter, but also with the need to give adequate treatment to the figure of mobbing, which has worryingly gained an increasing dimension.

In fact, there are many advantages of the schemes of work-related accidents and occupational diseases. Firstly, these systems allow a more efficient access to a pension or compensation from the worker, to the extent that they include less expensive and quicker mechanisms than the access to the courts through the

[1] *Vd*. the decision from the second instance Court *Tribunal da Relação de Coimbra*, dated 07-03-2013, reported by Jorge Manuel Loureiro, demanding the requirement of intentionality.

[2] The existence of damages is not a requirement of the existence of mobbing, but only a possible consequence. In this sense, the decision from the second instance Court *Tribunal da Relação do Porto* (TRP), dated 08-04-2013, reported by Maria José Costa Pinto.

[3] "Professional contingencies" is a concept that comprehends both work-related accidents and occupational diseases.

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civil jurisdiction[4]. Secondly, these schemes have alternatives that the regime of civil liability does not provide, such as the provision of para. 8 of art. 283 CT: the obligation of the employer to ensure an occupation for the injured worker in well-suited functions. The Law nr. 98/2009, 04-09, that regulates the regime for the compensation of the work-related accidents and occupational diseases (hereinafter only referred to as LAT), also provides for other mechanisms that the mobbed cannot access through civil liability, without forcing the scope of this institute, such as the possibility of professional rehabilitation and adaptation of the workplace (arts. 44 and 154ºLAT), as well as the allowance for frequency of education for professional rehabilitation (arts. 69 and 108 LAT).

It should be noted, furthermore, that these schemes consent constant updating of allowances and their revision in the light of improvement or worsening of the health status of the victim, which is an advantage over the regime of civil liability. Moreover, the claims under the right to compensation established in the LAT are inalienable, unattachable and unrenounceable, enjoying the guarantees provided for in CT (see art. 78 LAT). As such, they're preferential credits, which constitutes another difference with respect to claims arising from civil liability.

Finally, the consideration of certain situations as professional contingencies can bring the advantage of exempting from the hard evidence that there was a phenomenon of mobbing, because it is not necessary to prove the elements of this concept to conclude for the existence of an accident or an occupational disease (although the proof of its constituent elements might be necessary in order to meet the requirements of causality).

Subsequently, various benefits of the submission of the particular regime of work-related accidents to cases of mobbing may be indicated, with regard to safeguarding the State treasury, as the State won't have to pay the pensions due to the victims of that phenomenon[5], who currently seek the pension by the social security's scheme for common diseases. Anyway, in the Portuguese system, if the event integrated into the phenomenon of mobbing is considered as a work-related accident, it makes sense for insurers to appeal for the classification of that event as guilty, so they can get rid of their responsibility, in the cases where the accident is due to a third or a co-worker (art. 17 LAT) or to the employer (in the cases of art. 18 LAT). As regards the advantages of the system of work-related accidents for workers, it should be noted that there is a presumption of irrelevance of the pathological predisposition of the workers, which has consequences in terms of evidence of causation, because the existence of such predisposition could affect the compensation for damage in the scheme of civil liability, to the extent that it may exclude the causation. In addition, the employee's claims arising from work-related accidents benefit from a stronger guarantee of payment, to the extent that the Workers' Compensation Fund is responsible for the payment of pensions established in the LAT, when the responsible entity is not able to comply its obligation (art. 1, para. 1, subpara. a) of Decree Law nr. 142/99, of 30-04, and art. 82 LAT).

Finally, the benefits of the qualification of damages caused by mobbing as occupational diseases shall be described, emphasising the preventive and, consequently, economic dimensions (as the decline on the number of situations verified will lead to lower costs for companies and for the society). Moreover, it may contribute to a broader discussion about the various psychopathological phenomena connected with work.

In common with the occupational diseases in the broadest sense, it shall be pointed, also, the guarantee of solvency of the entity that is responsible for the compensation (the social security system), which constitutes an important benefit for the worker[6]. Moreover, the regime of civil liability will hardly protect a situation of disease as a cause of the damage suffered by the worker. Finally, it shall be noted, as regards the benefits of the system of typical occupational diseases, that there is no need for concrete proof of causation.

As such, we advocate an alternative application of the civil liability and the professional contingencies regimes, to the extent that they are different responses to the same phenomenon. In fact, whenever there is a work-related accident there may be, in parallel, a civil liability proceeding against the real guilty, be it the employer, a co-worker or a third. In addition to this, there is the misdemeanour responsibility of the employer, also provided by law, and the possible criminal liability of the harasser, when the conduct is an illicit typified act (as the para. 2 of art. 18 LAT consents). Thus, the legislature did not intend to exclude the possibility of different solutions for the same event, so we only propose another possibility of reaction to the phenomenon of mobbing. The two paths are, in fact, autonomous and independent.

[4] In Portugal, judicial proceedings due to professional contingencies are considered urgent and, as such, they run even on court holidays. Cfr. art. 26, para. 1, subpara. e) in the Portuguese Labour Procedural Code (Decree-law nr. 480/99, 09-11).

[5] It should be noted that, in what concerns work-related accidents, in Portugal, the employers are obliged to assign an insurance for each worker, which is a particularity of our professional contingencies system, that does not exist in many other European legal systems. Respecting occupational diseases, the compensation is guaranteed by the Social Security System.

[6] Even though, in the present state of the art, one can no longer affirm that the solvency of the Portuguese social security system is a guarantee…

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Therefore, one does not adversely affect the success of the other. However, it may be argued that when the victim chooses not only the rules of professional contingencies, but also the criminal and civil liability, they must be "coordinated" in order to avoid accumulation of compensations that generates unjust enrichment.

On the contrary, it may be affirmed that the application of civil liability to cases of mobbing, under para. 3 of art. 29 CT, excludes the possibility of applying the professional contingencies regime, insofar as this is, itself, a specific regime of civil liability. Anyway, disregarding the discussion concerning its nature, which does not fall within this study, we shall state that the regimes respond to different situations, as mentioned above. Another argument against our theory is that even though the victim is compensated, the system of professional contingencies reparation lacks the protection of a key aspect for his recovery: the effective sanction of the harasser, which has a therapeutic effect for the injured. However, this disadvantage arises only when these regimes are separately considered. Indeed, if applied in combination with the regime of civil liability, as already advocated, there will be no gap in protection.

III - MOBBING AS A WORK-RELATED ACCIDENT

It is essential to analyse the concept of work-related accident in the Portuguese legal system, in order to conclude whether the conducts qualified as mobbing can be therein considered. The condition that has been identified by the scholars as fundamental to the definition of a work-related accident, as well as to the distinction between this and the occupational disease, is the suddenness (DOMINGOS, 2007, pp. 41 e 42)[7]. As such, the work-related accident should be datable, determinable in time, or at least "*of short and limited duration*" (FRANCO, 1979, p. 62). Therefore, to some scholars and case law, this requirement will be a strong deterrent to the consideration of a situation of mobbing as a work-related accident (PARREIRA, 2003, p. 238)[8]. However, the most recent case law, as well as some doctrine, has questioned this, as one must acknowledge the existence of "(...) *grey areas in which the suddenness fades away towards a slow evolution, as for example, resulting from the continuous action of a working tool or the aggravation of a pathological disposition or of pathogenic diseases contracted by reason of the work*" (ALEGRE, 2000, p. 37, RAVISY, 2000, p. 81). In fact, there are several instances in national case law that confirms the mitigation of the requirement of suddenness. These findings emphasize the tenuous boundary between work-related accidents and occupational diseases, although the STJ states that there is a work-related accident when the cause of the injury is not immediate, but is limited to a short and finite period of time, even though the effects suffer a gradual evolution (JOURDAN, 2006, p. 29)[9].

M. A. Domingos focuses on the analysis of the problem of the suddenness (or not) of the action, breaking down the elements of that concept: the unpredictability[10] and the limitation in time. The author also states that the "*grey areas*" arise from circumstances in which the action has a duration that is variable but continued in time, without verification of the elements that characterise the existence of occupational disease, as a particularly dangerous work environment or products used (DOMINGOS, 2007, p. 43).

Moreover, the law does not characterise the event that constitutes a work-related accident, so no one can say that the suddenness corresponds to a legal requirement.

As regards the requirement of repetition for the existence of mobbing, there are also authors who understand that the concept does not always require the practice of several conducts, and that isolated facts should not be excluded from the definition if they're of such gravity that produce the same result that several minor incidents, or entail serious consequences for the worker. Moreover, national legislation does not seem to require that characteristic, referring to harassment in the singular, as an "unwanted behaviour" (art. 29, para. 1, CT).

Note also that M. A. Domingos accepts that a hypothesis of "overwork" triggering an injury on the worker's health can be considered as a work-related accident (DOMINGOS, 2007, p. 44). Hence, one

[7] *Vd*. also the decision from the second instance Court *Tribunal da Relação de Lisboa*, dated 10-11-2005, reported by Manuel Gonçalves.

[8] In the same sense, *vd*. the decision of the TRP, dated 10-03-2008, reported by Ferreira da Costa, and, after the appeal, the decision of the Supreme Court of Justice (STJ), dated 13-01-2010, reported by Sousa Grandão. Anyway, the decision from TRP reported by Domingos Morais, dated 10-09-2007, should also be mentioned, as it states that *"(...) the concept of accident at work is constantly being updated due to changes in social, behavioural (watch out, for example in certain cases of mobbing) and geographical mobility of workers, new situations that enhance multiple and complex causes of accidents at work (...)*" (*Colectânea de Jurisprudência – CJ* -, nr. 201, XXXII, IV, 2007, pp. 236 and 237). It should be noted that, in this case, the event suffered by the worker wasn't qualified as a work-related accident, as there was no evidence of a causal link between the event and the suffered damage.

[9] Cfr., for instance, the decision of the STJ, dated 21-11-2001, reported by Mário Torres.

[10] In what concerns the requirement of unpredictability, cfr. the decision from the STJ, dated 30-05-2012, reported by Gonçalves Rocha, *CJ*, nr. 248, II, 2012, 261-264. This is an important decision, as it states that an event in which a drunk passenger of a flight causes trouble, causing stress and depressive anxiety in a hostess, is deemed to be a work-related accident.

can conclude that the author admits that a situation which is not sudden, but that corresponds to an event that may be considered as an unique cause, can be considered a work-related accident, in case it causes damage to the health of the victim. As such, for some authors, behaviours that may be grouped, yielding a unique phenomenon which may be called mobbing, will fit the concept of suddenness for the purpose of consideration as a work-related accident.

Thus, to reach the result of consideration of mobbing as a work-related accident, two paths may be followed: either extending the concept of work-related accident, or conceiving mobbing as an unique behaviour. However, in our opinion, this second reasoning proves to be unsuccessful, as mobbing is a whole range of conducts, not an isolated one, even when it causes very serious damage, since it isn't the severity or the consequences that characterise this phenomenon. Therefore, even considering the entire process as a single event causing damage, mobbing will never have the characteristics of suddenness and certainty (yet) inherent in the concept of a work-related accident. On the contrary, conceptually, the first path does not shock us, given the scale of the situations that the legislature has been predicting. Think of the protection of the work-related accidents that do not occur in time or place of work, such as worker protection during the credit hours for seeking a new job, where there isn't any proper link between the employer and the employee. Thus, insofar as it is considered that the scheme of work-related accidents is based on the risk of the availability of the work provision, *ie*, that derived from the fact that the worker "*offers others the availability of his work*" (GOMES, 2000, pp. 208 e 211, LEITÃO, 2001, pp. 560 e 579), it is possible to say that it makes sense to consider such as work-related accidents. In conclusion, due to the expansion of the concept of a work-related accident, it does not surprise us that it may be extended to cases of mobbing.

IV - MOBBING AS AN OCCUPATIONAL DISEASE

Our welfare system is mixed: the diseases listed in the legally prescribed and periodically reviewed table (at this point, the *Regulamentar* Decree nr. 6/2001, 05-05, republished by the *Regulamentar* Decree nr. 76/2007, 17-07), where a presumption of causation works (between catching the disease and the nature of the work), shall be referred to as typical occupational diseases, while those not listed shall be entitled work diseases or atypical occupational diseases (para. 2 of art. 94 LAT and para. 3 of art. 283 CT).

It is common to the various European jurisdictions to exhaustively stipulate the illnesses that constitute occupational diseases, and not to consider the consequences of mobbing as such. Therefore, the legal framework prevents a possible classification of mental disorders caused by mobbing in the workplace as occupational diseases, although it seems there is no impediment as regards other diseases (e.g., physical) that may arise as a result of mobbing, as long as they are under the legal framework. In this sense, R. G. Pereira seems to accept that diseases such as "*reactive depression or heart problems*" listed in the table of typical occupational diseases, are compensated as such, when they arise from mobbing (PEREIRA, p. 210). However, the legislative instrument that typifies the occupational diseases connects them to specific risks which, in our opinion, prevents that judgement.

Another Portuguese author supports the need for a "*reformulation of the concept of occupational disease*" so that it can include any injury arising from mobbing (PACHECO, 2007, p. 249). We disagree with the mentioned position, as the changes should not be regarding the concept of occupational disease, but the cast of legally determined occupational diseases (notably by extending this list, allowing the inclusion of certain psychic and psychological pathologies). We do not advocate, however, a qualification of injuries arising from mobbing as occupational diseases, because we understand that the worker must always prove the existence of a causal link between the event and the damage, *ie*, he must demonstrate that there was a situation (that, *in casu*, constitutes mobbing) which originated a specific lesion in his health, which should be protected under the schemes of professional contingencies.

Moreover, the national law already provides a concept under which those damages could be compensated: the above mentioned work diseases or atypical occupational diseases. These are intermediate species between work-related accidents and occupational diseases, category which is necessary, given the unpredictability of the origin and sources of diseases. In fact, this provision sets a special rule for determining the causal link, to the extent that it is necessary to demonstrate the relationship between the performed activity and the pathology or functional disorder, proving that this is not derived from normal wear and tear of the body. While in the typical occupational diseases the characteristic element is the concrete pathological process, in atypical occupational diseases the essential element is the origin of that process. Work shall be the triggering factor and sole cause of the pathology, and not just an occasionality.

However, R. Redinha believes that this hypothesis, although desirable, is not possible, because of the narrow limits of the concept of atypical occupational diseases. The author believes that the law requires a causal link between the disease and the concerned activity, and that in mobbing the disease is not caused by the activity itself, but by a deliberately

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painful exercise of it (REDINHA, 2003, p. 846). Thus, R. Redinha seems to argue that mobbing, as a phenomenon which is strange to the normal labour relations (ÁLVAREZ SACRISTÁN, 2003, p. 4), cannot be considered as a normal exercise of a particular activity.

Nevertheless, in our opinion, the connection of the illness to the activity takes place by the mere exercise of the activity, *i.e.*, it's enough that this condition is a consequence of the worker's availability for work, regardless of the conditions of its practice (REDINHA, 2003, p. 846), and not necessarily within an activity exempt from any risk. Otherwise, injuries suffered by the worker with the employer's fault, for instance, because of the violation of certain rules of safety and health at work, wouldn't be reimbursed as professional contingencies. Therefore, if it is proven that the injury, functional disorder or disease that the worker suffers (due to a situation of mobbing) is caused by the labour activity, and it does not represent the normal body's wear and tear, one may considerer it will be an atypical occupational disease. Moreover, due to the wording of the law, the cause shall be unique, as the pathology will only be necessary and direct consequence of the carried out activity if no any other factor contributes to enhance the appearance of the disease. Although the requirement of a unique cause seriously restricts the scope of this thesis, it may be stated that the narrow normative forecast does not allow another reading.

V – CONCLUSION

The National Mental Health Plan (2007-2016) envisages the need for an intersectorial coordination in prevention and promotion activities, having emphasized this area of "*employment policies and promotion of mental health in the workplace, reducing and management of the stressors related to work and unemployment, reduction in absence due to psychic diseases*" and the "*awareness and information in various sectors such as (...) the workplace*"[11].

Thus, in our opinion, the Portuguese case law should accept the possibility to consider the consequences of mobbing and worker's suicide as eligible for compensation under the professional contingencies legal framework, similarly to what has been happening in other jurisdictions of the EU countries, such as Spain, France and Belgium (LEROUGE, 2010).

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