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Employment contract and appointment as statutory director (gerente) of a private limited company - can the two positions coexist?

It is frequent to appoint a company's employee as its statutory director. Those situations may occur as of the incorporation of the company (in which one of the shareholders - or a third person - is appointed as statutory director and at the same time executes an employment contract with the company), or at a later stage, when a company's employee is appointed as director.

Though frequent, these situations create legal and practical issues that are not always easy to navigate. In fact, while the Companies Code ("Código das Sociedades Comerciais" - "CSC") contains a specific rule for public limited companies (sociedades anónimas) that covers issues relating to the cumulation in the same person of the qualities of employee of the company and board member, this is not the case for private limited companies (sociedades por quotas). Stemming from the lack of a specific rule for private limited companies, a long and heated debate around the application of the rule for public limited companies to private limited companies is still ongoing, both in the realm of legal opinion and case law.

Under article 398 of the CSC, during the period for which they have been appointed, members of the board may not perform any temporary or permanent duties in the company or in a company with which it is in a control or group relationship, under a subordinate or autonomous employment contract, nor may they enter into any such contracts for the provision of services when they cease to be board members. The article also adds that when an employee is appointed as member of the company's board (or of companies in a controlling or group relationship with it), the respective employment contract is suspended[1].

It flows from these rules that, in the case of employees who are appointed board members of public limited companies with which they have an employment relationship, their employment contracts are suspended for the duration of their mandate. When the mandate comes to an end, the employment contract resumes in full[2].

[1] Mentioned rule differentiated between situations in which the appointment to the board occurred before one year had elapsed from the beginning of the employment relationship (case in which the employment contract was automatically terminated) or after that (case in which the employment contract was suspended for the period of duration of the appointment as board member). The Constitutional Court Ruling No. 774/2019 declared, with general biding force, the unconstitutionality of the rule in the part that foresaw the termination of the employment contract.

[2] As a consequence of this legal framework, in case there is an intention to simultaneously terminate the mandate and the employment relationship, it is necessary to have a specific cause for the termination of the employment contract (which is independent from the contractual relationship as board member). Indeed, last year, it became

However, there is no similar rule for statutory directors (gerentes) of private limited companies, so the debate on the fate of the employment contracts of employees who are appointed for that position in the respective companies remains open.

Last November, two higher courts ruled in different directions on this issue. In the Ruling of the Lisbon Court of Appeal ("TRL") of 23/11/2023´syllabus[3] one can read:

«As a rule, the legal positions of employee and statutory director of a private limited company are not compatible in the same person; this will only not be the case if it is shown that there is a relationship of subordination between the statutory director and the company, which involves demonstrating relevant evidence of legal subordination to other statutory directors or to resolutions of the management as a whole, the respective burden of proof being on the plaintiff.
If this relationship of subordination is not proven, given the effective nature of the statutory director functions, the employment relationship is considered to have ended when the employee began to perform the functions of statutory director, since his legal subordination to the company ended there.»

On the other hand, in the syllabus of the Ruling of the Supreme Court of Justice of 23/11/2023[4] one can read:

«Although one cannot bluntly ignore the legal framework foreseen in article 398, paragraph 1 and 2 of the CSC for members of the board of directors of public limited companies, such framework is not directly applicable to statutory directors of private limited companies, as the models of both type of companies differ significantly.
In light of the ratio legis *and the legal principles inherent and reflected in the mentioned article 398, paragraph 2 of the CSC, one should conclude that what is therein foreseen in relation to the suspension of employment contracts also applies in the case of private limited companies.*
It would be, both from a dogmatic and systematic stance – and with practical unfair consequences –, incomprehensible that the employment contract would be suspended in the case of public limited companies and, in the case of private limited companies, the more extreme consequence of termination of the employment contract would apply.»

widely known and discussed the case of an agreement between TAP and one of its board members who was also a company's employee which envisaged, precisely, the termination of both contractual relationships.
[3] Case No 1050/20.6T8VFX.L1-4.
[4] Case No 2529/21.8T8MTS.P1.S1.

Now, while the TRL ruling espoused the view that, except in cases where it is possible to show the existence of legal subordination between the statutory director and the company (which is very difficult, particularly when the person is also company's shareholder), not even considering the possibility of applying by analogy reasoning the regime provided for in article 398 of the CSC, the appointment as statutory director may lead to the automatic termination of the employment relationship, the STJ ruling adopted the view - which we also support - of admitting the analogy, which leads to the possibility of recognising the maintenance of both relationships in parallel (though the employment contract being suspended), in the case of employees who are appointed statutory directors of private limited companies.

This is a theme of the utmost practical relevance. Just consider a situation in which a statutory director who also has an employment contract with the company carries out an act in his capacity as director that irreparably jeopardises the trust placed in him by the company's shareholders. If the TRL's position is adopted, once the employment contract has been extinguished, it will be enough to terminate the management relationship in order to put an end to the contractual relations between the parties. On the other hand, if we adopt the thesis espoused in the STJ ruling, we will still have to analyse whether the manager's conduct is also serious enough to put definitively at stake the relationship of trust that is the basis of the maintenance of the employment contract. In this context, to definitively terminate the relationship between the parties, in addition to dismissing the director, disciplinary proceedings will have to be started aimed at terminating the employment contract on grounds of just cause.

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