v. 2, n. 1

ISSN 2595-9689

Revista Jurídica TRABALHO e DESENVOLVIMENTO HUMANO
Procuradoria Regional do Trabalho da 15ª Região

Mútuo consentimento: considerações sobre o distrato trabalhista

Mutual consent: considerations about the termination of labor contract

Consentimiento mutuo: consideraciones sobre la terminación del contrato de trabajo

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Received on: 05.15.2019
Accepted on: 07.03.2019

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Recebido em: 15.05.2019
Aceito em: 03.07.2019

https://doi.org/10.33239/rtdh.v2i1.35

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RESUMO
O presente artigo objetivo analisar criticamente a reforma trabalhista introduzida pela Lei 13.467, de 2017, pela introdução da possibilidade de distrato como forma de extinção do contrato de trabalho por acordo bilateral. O mútuo consentimento abre novas fronteiras no direito do trabalho para discussão sobre a possibilidade ou não de migração, pela transposição, de conceitos de direito civil, ultrapassados ou atuais, que se referem ao contrato e aos princípios da liberdade e autonomia da vontade ou privada. A delimitação das suas consequências no distrato acarreta o necessário controle do ato jurídico pela validade da manifestação do consentimento, com a observância da incidência de preceitos constitucionais que devem ser observados e a limitação decorrente da autonomia privada que não permite às partes contratantes a livre disposição dos efeitos decorrentes da emissão de vontade.

PALAVRAS-CHAVE: Direito do trabalho. Extinção do contrato. Distrato.

ABSTRACT
The present article aims to critically analyze the labor law reform introduced by Law 13.467, of 2017, throughout the cancellation as an opportunity of terminating the employment contract by bilateral agreement. Mutual consent opens new frontiers in labor law to discuss about the possibility or not of the migration, by transposition, of outdated or current civil law concepts that refer to the contract and the principles of freedom and private autonomy. The delimitation of the consequences of the bilateral cancellation of contract entails the necessary control of the legal act by surveying the validity of the manifestation of consent, compliance with the incidence of constitutional precepts that must be observed and the limitation deriving from private autonomy that does not allow the contracting parties the free disposition of the effects arising from the issue of will.

KEYWORDS: Labor law. Terminating agreement. Bilateral cancellation of contract.

RESUMEN
El presente artículo tiene como objetivo analizar críticamente la reforma laboral introducida por la Ley 13.467, de 2017, mediante la introducción de la posibilidad de terminación como una forma de rescindir el contrato de trabajo por acuerdo bilateral. El consentimiento mutuo abre nuevas fronteras en el derecho laboral para discutir la posibilidad o no de la migración, por transposición, de conceptos de derecho civil obsoletos o actuales que se refieren al contrato y los principios de libertad y autonomía de la voluntad o privada. La delimitación de sus consecuencias de la terminación contractual implica el necesario control del acto legal por la

validez de la manifestación del consentimiento, el cumplimiento de la incidencia de los preceptos constitucionales que deben observarse y la limitación derivada de la autonomía privada que no permite a las partes contratantes la libre disposición de los efectos derivados de la emisión de la voluntad.

PALABRAS CLAVE: Derecho laboral. Extinción del contrato. Terminación bilateral del contrato.

INTRODUCTION

Law No. 13,467, from July 13, 2017 (BRASIL, 2017), known as Labor Reform, changed numerous rules of the Consolidation of Labor Laws (BRASIL, 1943). Immune of doubts that led to an erosion in the normative system, with the collapse of protective rules guaranteed to the worker. And one of the innovations was the legal possibility of bilateral negotiation as a hypothesis for the termination of the employment relationship. Previously, sometimes hidden and simulated, under the guise of an unjustified termination, it has had in the past a rejection response by the ordinary legislator through Act No. 9,491, from September 9, 1997 (BRASIL, 1997), by forcing employers to deposit in the employee's linked account the amounts related to the monthly deposit of 8% of their pay, as well as the indemnity of 40% of all deposits made or owed as fund contribution, during the term of the employment contract, creating barriers to negotiations and, in so doing, trying to deter employee and employer from engaging in practices considered fraudulent.

The new wording that now legalizes what was once considered an execrable practice can be found in Article 484-A, which provides for the possibility of termination of the employment relationship in force, by an agreement between employee and employer. Among the effects provided for by law is (1) the reduction by half (a) of the prior notice, if indemnified and (b) of the indemnity on the balance of the working time guarantee fund provided for in paragraph 1 of article 18 of Act No. 8,036, from May 11, 1990 (BRASIL, 1990), as well as (2) the permission to move the worker's linked account in the working time guarantee fund pursuant to item I-A of article 20 of Act No. 8,036, dated from May 11, 1990 (BRASIL, 1990), limited to up to 80% (eighty percent) of the value of deposits and (3) the non-authorization to enter the unemployment insurance program.

Yet, even before the labor reform, there were those who claimed the possibility and compatibility of termination with the current labor law, even though there was no express

permissive provision in the legislation. In a doctoral thesis, Hainzenreder Junior (2006, p. 247) concludes that the "figure of termination finds no obstacle in articles 9, 444 and 468, of the CLT, since these provisions do not, at any time, prohibit acts of disposition of rights, but rather seek to "prohibit, prevent or defraud rights".

In the same way, Nascimento (2009, p. 954) and Barros (2016, p. 619) list the "agreement signed by the parties" among the forms of termination of the employment contract. Martinez (2012, p. 519) indicates that bilateral consensus resilience, although it is:

> [...] a procedure formally not accepted by labor standards, but materially existing [...] despite this, only from a material point of view, can it be said that adherence to the Voluntary Dismissal Plan – [PDV – as in Portuguese], proposed by the employer and accepted by the employee, is an example of bilateral termination.

Bezerra Leite (2013, p. 463) recognizes the validity and effectiveness of termination: "Employee and employer may enter into an agreement to terminate the employment relationship", provided that the provisions of article 477 of the Consolidation of Labor Laws (BRASIL, 1943) are met, with effects corresponding to and equivalent to those provided for termination without just cause, except for those relating to the guarantee of length of service fund, in the absence of legal provision.

Likewise, Delgado (2006, p. 1170) states that such an "unstoppable circumstance", that is, framing as termination without a gross misconduct, "makes termination, of course, uninteresting for the employer". Jorge Neto and Cavalcante (2011, p. 312) broaden the understanding, arguing that the labor sums to be paid could also be negotiated when contractual subjects opt for a termination; exceptional cases will only be wages and vacation pays.

The indicated change and supposed innovation introduced opens new and more vulnerable flanks in labor law. The aim of this article is to analyze, based on the legal recognition of termination, whether it is possible to think and how a relationship between labor law and civil law can be established to inquire about the possibility of migration, through transposition, privatist concepts of contract, freedom and autonomy with a view to providing answers when assessing the validity of the manifestation of consent of the

subjects of contractuality. Therefore, it is necessary to confront the conceptual notion of contract, will and the transition from autonomy of will to private autonomy.

What one should avoid, *prima facie*, is to interpret and (re)construct the "reformed" labor contractuality wrongly, for not realizing – by ignorance or misunderstanding – the changes that have also occurred in the contemporary civilist field, maximally through doctrine and thus "becoming fully liberal".

As Fachin (2015, p. 63) warned, “in one way or another, the doors were compelled to open, even registering in doctrine that it was forced to identify a civil law more sensitive to the problems and demands of the society". Thus, with the overcoming of the patrimonialized classical private law system, linked to the paradigm of liberalism and the exaltation of a selfish private interest, a new epistemological model had been welcomed by civil law to redirect it to the realization of human dignity and social justice, reaching the core of contractuality.

The adoption of a solidarity profile in the relations between private, and interventionist by a Democratic State of Law and Social, meets demands arising from "social pressures, in search of mechanisms capable of meeting the needs of citizens, especially the excluded" (RAMOS, 1998, p. 15).

Looking at reformed labor law with inadequate lenses can generate a blurred, misrepresented view, imagining that one is facing a reality that is already outdated, even in private law. It cannot be concluded in the hermeneutic process, then, with what it once meant, the contractual theory that welcomed the deification of will; this materiality had been abandoned for lack of dynamism in civilizing conquests. The moment, therefore, brings the opportunity to rethink fundamentals and revise concepts of the regulatory system of subordinate labor through an update more than ever necessary, avoiding any approach to the primacy of a liberalism based on the equality of the contracting parties and the autonomy of the will that even private law would not.

1 AFTER ALL, WHAT IS IT ALL ABOUT?

Orlando Gomes (1980, p. 5-6), in the 1980s, already pointed to the transformations of the philosophical matrices, foundations and purposes of private law, which now embraces a social and ethical orientation that expresses a new juridical conscience and new cultural values, even in the space of obligations, due to its technical structure, the reception comes with greater delay. Noteworthy is the intention – as it remains extravagant discipline – to ensure the unification of private law by the current Civil Code (BRASIL, 2002), which repeals even some provisions of the Commercial Code (BRASIL, 1850, articles 121 to 286) to establish a non-dual legal treatment form of private contracts (RIBEIRO; GALESKI JUNIOR, 2009, p. 12). Thus, there can be seen a present trajectory not restricted to civil law, but accompanied by corporate law.

A contract, in addition to constituting a legal concept – contract-legal concept –, instrumentalizes an economic operation, said economic contract-operation (ROPPO, 1988, p. 7) of the labor force circulation. As a regulation, it expresses in the capitalist society an instrumental function in the economic, social and even legal field, with an eminently ideological connotation. In this way, a relationship that cannot be detached from real life and the people involved are transferred to law. And likewise,

> [...] The political theory of <contratualism> thus shows evidence how the concept of contract (better: a certain concept of contract) can be used, with *an ideological function*, that is – since this is the technical meaning of <ideology> – with a function of partial concealment or disguise of reality, operating to better pursue or protect certain interests (ROPPO, 1988, p. 29).

The contract itself is a guarantor of circulation and, erected in the past under the dogma of liberty, translated into the hands of jusnaturalism and enlightenment the break with a manorial pre-nineteen hundreds model to exalt the individual and their autonomy. However, it is to be observed that, in the face of the ideology of progress that it carries, it conceals and misrepresents, under the guise of the freedom to contract, the real interests presented in the *laissez-faire, laissez-passer.* Similarly, the legal equality of contractors conceals vulnerabilities, so non-Labor indoctrinators warn that:

> Legal equality is only equality of abstract possibilities, equality of formal positions, which in reality may correspond – and in a class-

> divided society they necessarily correspond – to very serious substantial inequalities, profound disparities in the concrete conditions of economic and social force between wealthy and powerful contractors, and to contractors who have nothing but their workforce. The entrepreneur with full control of the labor market and the worker seeking employment with them are legally equal, and equally free – on a formal level – to determine the content of the employment contract. But it is evident (and the history of a whole phase of the development of capitalism often documents it tragically) that the latter, if they do not want to give up work and, consequently, their own subsistence, will be liable to endure (at least until adequate <limiting measures of contractual liberty> provisions arise) all the conditions, even the most wicked, imposed by the former [...] (ROPPO, 1988, p. 37-38).

The employment contract, although pointed out as a "different contract" and "poor cousin" in the face of "celetist over-regulation, which puts in check the concepts of willingness and willingness of the parties" (COELHO, 2006, p. 145) is just one more example that has revealed the necessary paradigm shift already underway in private law itself. The social function of the contract as a limit to the freedom to contract is recognized even in the Declaration of economic freedom rights, as it appears from article 421 of Provisional Measure no. 881/2019 (BRASIL, 2019).

The notion that in the field of private law the contract reveals its translucent face in the contractual freedom and the full autonomy of the contracting subjects, immortalized by the intangibility of the will is, for a long time, only a misleading and erroneous view.

It is true that the Civil Code (BRASIL, 2002) housed the conception of legal business, in which it inserted the contract. However, the theory of the legal business has already been the object of scathing criticism, which had been externalized for a long time and "in the face of the crisis involving the very notion of private autonomy, it is worth questioning the subsistence of the legal business as an object of study within Civil Law [...] "(MATTIETTO, 2002, p. 34) so "[...] it seems historically inappropriate, politically inconvenient and scientifically inadequate to include in the new Civil Code the dogmatic category of legal business, *belíssimo pezzo da vetrina"*(MATTIETTO, 2002, p. 39).

By all, Orlando Gomes (1980, p. 67) indicates the abandonment of the individualistic conception with the rectification of concepts elaborated by the pandectist, as follows:

> Probably the improvement of the objective theory of the legal business, reworked in Italy, will make it possible to remove some of these controversies, if the concept of business effect that corresponds to the anti-individualist conception of the Law is clarified. It is intended, in effect, to distinguish its characteristic, no longer in the circumstance that the legal system attributes effects according to the intention of the subject, but in that the subject is bound by his behavior, in the sense that his successive conduct cannot be developed only in accordance with the commitment made to the act performed. As a consequence, the idea that the notion of contractual or para-contractual legal businesses, which means it may consist in *acting* or in an *omissive behavior.*

The interpreted contract can (and should) be conceptualized, as indicated by Paulo Nalin (2001, p. 255), as being the "subjective juridical relationship, based on constitutional solidarity, aimed at producing existential and patrimonial legal effects, not only between subjective holders in the relationship, but before third parties". The contract therefore corresponds to the legal relationship.

The employment contract is foreseen in article 442 of the Consolidation of Labor Laws (BRASIL, 1943) as being the "tacit or express agreement, corresponding to the employment relationship", since the original wording (although in the Draft Article 427) (BRASIL, 1942, p. 27). Contractuality through the express declaration of will was never the only legal form of the employment relationship. The draft, published in a supplement to the Official Gazette of January 5, 1943 (BRASIL, 1942), indicated:

> [...] the comprehensive and lucid definition of Individual Employment Contract has been set forth. Overcoming the controversies between contractualists and anti-contractulists, which has been the most brilliant and perhaps least fruitful of doctrinal cogitations between the Italian classics, the modern philosophical current of France, and the Germanic enterprise authoritarianism, since social legislation is, for definition, and public order – the proposed statement was encased in all the richness of social complexity. The reference to the agreement frees private labor from the idea of forced grooming. The allusion to the employment relationship situates the work adjustment in spontaneous realism, subordinating it to the juridical-social institutionalism that provides the concept of employee. The

> tacit or express processes of configuring the individual labor contract are in line with the anti-praxism of modern social law.

The explanatory memorandum more precisely summarizes the necessity of the will for labor contractuality, by stating in item 45 that, if the tacit agreement is accepted as the basis of the contract, "[...] it is logical that the 'employment relationship' constitutes the act sufficient to provoke the objectification of the protective measures contained in the labor law in force", demonstrating the departure from the theory of legal business. And, he adds that "what the objectors failed to achieve was the deliberate purpose of recognizing the correspondence and equivalence between the 'employment relationship' and the 'individual employment contract' for the purposes of the legislation [...]" (BRASIL, 1943, item 44), behold, "first revealed the misunderstanding of the institutional spirit so often stressed" (BRASIL, 1943, item 43).

Even in the field of private law, the contract is a "complex solidary relationship" that overcomes individuality and the sovereignty of the will, not being linked to the ideological burden of freedom and full autonomy: "the constitutional perspective of the contract is decisive to declare any concept that reduces it to the formula of the agreement of wills, designed to produce constitutive, amending or extinguishing legal effects of the legal relationship". (NALIN, 2001, p. 255) Will is reduced to mere contractual impulse (NALIN, 2001, p. 256) and to the position taken by contractuality, no longer remaining reduced to patrimonialization, pointing to a social functionality in conformity with the dignity of the person and for instrumentality in the path of social justice and poverty eradication.

It should be pointed out that even if the cancellation points to the recognition of the will as the triggering element of an effective legal act, it does not reign sovereign and the legislative innovation does not lead us back to accept the autonomy of the will, surpassed by the private autonomy, nor the full contractual freedom.

2 THE WILL ON LABOR CONTRACTUALITY

The sovereign will never found a home in labor law; the will comes down to an impulse. For no other reason, any nullity was never questioned as a result of any possible

vices of consent at the time of admission, but nullities due to social vices when the employment contract was concluded, as can be seen from the legislative treatment provided for in Article 9 of the Consolidation of Labor Laws. The treatment of labor contractuality, which through the effort of the doctrine ended up synthesizing the legal form of the employment relationship, is consistent with that of a contract for conclusive behavior and, therefore, it would be incompatible to think of the contract reduced to the mere expression of autonomy of will.

In fact, even in private law, it is imperative to point out that, among the most impactful changes is to be noted the resulting decay of legal voluntarism (GOMES, 1980, p. 9). Autonomy of will, in short, had been surpassed by private autonomy. It turns out that the contract is not at the service of the fulfillment of private and selfish interests, whose will would be able, as an expression of freedom and with the recognition and support of autonomy, to establish the contractual framework, to define beyond the opportunity to conclude the contract, still establishing the content. It is not the will that prevails, but the behavior in accordance with the permissive and legal precepts; it is not what you wish, but what you can, according to current regulations.

The autonomy of the will was superseded, which presupposed the dogma of the internal will as sovereign as the sole and main determinant of the stipulations and adjustments of interests in life in society and, therefore, was expressed by the wide freedom to contract, by the obligatory force of contracts and protection of will by vices of consent.

Private/public autonomy, in contrast, consists in the power of self-regulation of interests derived and recognized from legal norms that bind the validity and effectiveness of the acts to the compliance with the provisions inserted in the interventionist regulatory frameworks. The state is no longer limited to being the guarantor of the will, but restricts the freedom to secure the mark of the civilizing advance in favor of the social, the collective, the public, which does not allow regression. The legal order establishes the conformity, delimiting a space of action to the individuals, allowed by a contractual interventionism present in the work contracts.

In the employment contract, as pointed out by Rocha and Porto (2018, p. 102), the manifestation of a healthy will is so described:

> [...] dá-se por meio do trabalho realizado em favor do empregador, vez que as normas aplicáveis estão previstas em lei (imperativas e cogentes) ou nos instrumentos coletivos (convenção ou acordo coletivo de trabalho). Em síntese: a manifestação volitiva no espectro trabalhista significa a realização do trabalho, e não necessariamente o desejo de uma ou ambas as partes.

The behavior of a person, in this case, the employee working with subordination, acquires the meaning of a purely objective volitional statement as provided by law. Sometimes even silence is recognized as a statement, even though in the outside world it is only inaction, having a binding effect on the person. In the case of the employment contract, acting alone, with the verification of the presence of the elements characterizing the employment relationship, is sufficient to conclude the contract. This is a conclusive behavior, which for Betti (1969, p. 269):

> [...] one qualifies *conclusive,* whenever a conclusion is imposed, a logical *inference*, which is not based on the agent's conscience (who might not even realize the completeness of their conduct), but on the spirit of *coherence* that, according to common viewpoints, any behavior between members of society, and about self-responsibility that is linked must be reported, by a social requirement, to the burden of knowledge.

There has always been no room in labor law to discuss issues related to issuance, mediate declaration of will, to identify any possible vices of consent; whether or not there was an express will, whether the statement corresponds to the intimate will, whether the wording and content of the statement turned to a specific work model, which is subordinate or not, is irrelevant. Once the work done, with appropriation of economic content by others, that is, someone benefiting from it, if it is incorporated in the productive chain, if there is personality, continuity and subordination, it must be recognized as materiality of an existing employment contract, with validity and effectiveness, making it imperative to focus the entire protective labor legislative framework. For no other reason, “the lack of agreement or evidence on the essential condition of the verbal contract is presumed to exist, as if the interested parties had agreed to comply with the legal precepts appropriate to its legitimacy” provides for article 447 of the Consolidation of Labor Laws (BRASIL, 1943). The

presumption is always that work was done in the subordinate form that reveals the centrality of labor in capitalist society.

The protective principle in labor law entails the adoption of the most beneficial interpretation for the employee, consistent with the condition of hypo-sufficiency that stems from the employee's lack of power. The employee submits to the domain and the executive power of the employer and in the face of such circumstance only the right is left to him: after all, those who have power do not need rights.

Along the same path, article 423, caput, of the recent Provisional Measure 881, of April 30, 2019 (BRASIL, 2019), said declaration of rights of economic freedom, provides by establishing norms for the protection of free enterprise and free exercise and, surprisingly, although it deals with economic freedom, it sets guidelines for the State's action as a normative and regulatory agent, since “when there is contact with the adhesion clauses that generate doubt as to its interpretation, the most favorable one will be adopted to the adherent.” And in the sole paragraph, one reads that “in contracts not covered by the provisions of the caput, unless there is a specific provision in law, doubt in interpretation benefits the party who did not draft the disputed clause”.

Protection is not the result of interpretation, but the starting point that goes along the whole chain of meaning. Thus, it does not only act in doubt, or when the graphic text is not clear enough.

The absence of questioning the consent vices can be comprehended as a protective measure to the employee, who becomes holder of labor rights, for two reasons: the first, beholding that the vice will result in the cancellation of the contract and thus its termination, with the entry of employment in a situation of unemployment and, the second, in view of the need to invoke judicial protection to promote the action for annulment, which demands expense and time (GOTTSCHALK, 2018, p. 40). On the other hand, the expression of consent to self-exclusion at work, at the end of the employment bond, deserves more rigorous treatment regarding the validity requirements and, since the bond is already broken, although the concrete consequences on the worker's life not less impactful.

3 REVERSE TRACT

The questions surrounding the possible unconstitutionality (MALFUSSI, 2018, p. 250) of the prediction of termination found no shelter in either doctrine or jurisprudence. The argument about contradiction with constitutional standards pointed to the prohibition of social regression and rights, collision with the social value of work, vilification of the principle of human dignity (Articles 1, IV, 6, 7, *caput*, and 170 of the Constitution of the Republic of 1988).

Principles of continuity, unavailability of rights, primacy of reality, and protection in terms of the most worker-friendly interpretation emerged as arguments to counter the introduction of bilateral termination of employment. The principles can and should be invoked in order to proceed with constructive hermeneutics, establishing parameters for the effective protection of workers' interests before the constitutionality of the possibility of termination is recognized.

The prospect of retrogression of rights is thought against an effective comparison of the hypotheses of mutual agreement (cancellation) and unjustified termination of the employer's initiative. Yet, since constructive and protective hermeneutics of Article 7, paragraph I, of the Constitution of the Republic of 1988, have not been upheld, to ensure the necessary and efficient causality applicable to measures of breach of employment and, with the withdrawal of Convention 158, of the International Labor Organization, it has been affirmed the potestative right of the employer to terminate the employment relationship by an unjustified unilateral initiative. In such a situation, the prior notice would be due in full, the withdrawal of the FGTS deposits and respective indemnity as well; furthermore, the inclusion in the unemployment insurance program would be performed. There can be no denying that this is a situation with a more favorable response to the employee than the expected effects for termination.

It turns out that there will only be cancellation with the employee's volitional expression of interest and if one wishes to disengage from the contract, one will not be able to withdraw the fund deposits, nor receive the indemnity charged, in addition to being the debtor of notice and excluded from the unemployment insurance program. Given the employee's interest in terminating the employment relationship, the legal treatment for termination is more beneficial here.

A more appropriate response in terms of protection, therefore, is to ensure that termination will only take place if it effectively meets the interest of the employee, who should express their will without any vice of consent. Ensuring compliance with the formalities of the act and controlling the absence of vices of consent are strategies more consistent with the effectiveness of a protective labor law. It is, after all, what we have for the moment, since the assistance, with homologation, fell to the ground.

3.1 Considerations on the mutual agreement or dissolution

Some questions then arise when analyzing extinction by mutual agreement, especially considering that the underlying legal relationship is asymmetrical. One might even consider that the employment contract is a form of adhesion contract, with numerous outcomes drawn from the framing in the typology. It concerns even the form that will entail the validity of the pact.

In this case, the rule of symmetry of the form present in civil law does not apply in its article 472 of the Civil Code (BRASIL, 2002), in the sense that the same form required for the contract must be observed for validity. As a general rule, in labor law there are no solemn contracts for which the law requires a certain form as a requirement of the act, that is, informality is the rule for the conclusion of contracts. The prior notice provided for in Article 487 of the Consolidation of Labor Laws (BRASIL, 1943), neither specifies the form in which it must be taken, whether written or verbal; nevertheless, it does not include the tacit form, in particular because of the observance of the restrictive interpretation, since it entails a restriction of rights. And, the term of termination of the employment contract, despite being a written document, is not constitutive of the act.

Although, as pointed out, the employment contract may be entered into by implicit or express agreement, its termination must necessarily be expressed. The willingness to hire is a mere impulse and, although the employment contract is bilateral, it can have a legal existence as a result of only the conclusive behavior of the subjects to acquire rights, by recognizing a legal employment relationship. The behavior, then, is sufficient for the conclusion of the contract, but is not, as never before, for the extinction of the obligatory

legal relationship. Job abandonment, for example, is not a form of termination, but a contractual default resulting from employee conduct.

Would the new hypothesis of agreement be a termination whereby all obligations will be terminated by a mutual consent? Termination is, for the doctrine, a specific situation of bilateral termination of the contract, which consists of a new bilateral agreement of wills directed to the effects of the previous agreement, that is, that will operate only for the future; it is a deal in the opposite direction, that is, a new contract whose content points to the elimination of an established bond (ASSIS, 2008, p. 13).

The mutual agreement for the bond termination is not capable of annihilating or extirpating the legal existence of the terminated contract, voluntarily destroying the relationship from the beginning and its effects. Dissolution, thereby, is a new agreement whose content provides for the effects of the contract to which it refers; it does not terminate all obligations by terminating the contract. It is necessary to understand it in the sense that, as the successive contract of employment, some obligations cease, although others are created, such as compensation. The mutual agreement thus sets a time limit for the effectiveness of the contract being executed and, therefore, acts on the generation of effects, the temporal aspect and the obligations assumed.

It is not a new contract that replaces the previous one; it is an agreement that adheres to the contract in force to determine, as a result of non-causal will, the extinction of the legal effects and, therefore, efficacy is disregarded".

It then ponders on the nature of the mutual agreement: if it were a new contract, it would be governed by the same elements of existence, including validity requirements. It turns out that this new agreement is not another 'employment contract' in the strict sense, but an extrajudicial agreement that provides for the employment contract.

What are the legal effects then arising from the agreement: only those provided for by law or could the parties deliberate below or beyond the intended?

A mutual agreement in labor law will have its own effects, that is, always *ex nunc*. It can by no means be an effective *ex tunc*. For several reasons, the main one is that the effects are legally foreseen and could not be changed by the parties under the contractual rules

specific to labor law. For example, it does not support the valid existence of “nameless contracts”.

Thus, the amount of the land compensation or the possibility of withdrawing the amounts due as fund contribution [FGTS], or the impossibility of being part of the unemployment insurance program, are expressly indicated in the reformed legislation as follows from the expression “in which case the following labor allowances” provided for in the head of article 484-A. And yet, as it is an activity contract, there is no possibility of restitution, that is, to return the extracted workforce.

Moreover, adding other effects would imply the renounce of rights by the employee and would clash with the principle of unavailability of rights, being, therefore, indicated as an exceptional situation before the principle of continuity that governs Labor Law. There is, therefore, no wide freedom of contractual provision assured to the employee and employer, disposed in a different sense.

Although there was nothing in the legislation on unemployment insurance, once cancellation is accepted as a valid form of termination of employment, it must be recognized that it is no longer involuntary unemployment. Thus, it would be outside the provision in Act No. 7,998/90 (BRASIL, 1990), which expressly provides for recipients of the benefit.

Regarding the value of the tariff indemnity indicated in article 484-A, item I, letter “b”, of the Consolidation of Labor Laws (BRASIL, 1943), the hermeneutic process must be the most favorable to the worker, to conclude that mention of the “balance of the Working Time Guarantee Fund” shall be in accordance with Article 18, paragraph 1, of Act No. 8,036/90 (BRASIL, 1990) expressly referred to, that is “[...] forty per cent of the amount of all deposits made in the linked account during the term of the employment contract, monetarily restated and plus the respective interest”, in wording given by Act no. 9,491/97 (BRASIL, 1997). Deposits made or equivalent to amounts that must have been deposited.

Not all hypotheses of contract termination in labor law are free; Resignation by the employee is free, or, given the doctrinal construction, termination without just cause by the employer. Termination for just cause and indirect dismissal will be linked or subordinated (efficient causation), in view of the need to observe the legal typology provided for misconduct, even if in some situations assumptions are erected as undetermined concepts.

Extinction by a mutual agreement is free and not causal, that is, it results exclusively from the will of the subjects of contractuality, but, due to the private autonomy, which governs the contractuality, the power to act is restricted to what is provided in the legislation. Constitutionally guaranteed protection for work is not an imposition, nor is it a duty. Right to work does not have the ability to prohibit individual initiatives by employees to break their contracts with resignations, even before stability or job security situations.

Pursuant to Carvalho (2018, p. 446):

> [...] in the context of relations between particulars, it was realized at a given historical moment that exacerbated individualism could lead to its own negation. Being free, or supposedly free, to hire, man had the discretion to bind himself for a lifetime, preventing himself from promoting the breaking of the contract that no longer served, after years of effect, to his most hidden sphere of interests. The paradox was evident.

In view of this, the contractual breach of the employee and employer subject should be authorized. Nevertheless, workers must be protected by curbing fraud or simulations, so that the incidence of article 9, of the consolidation of labor laws (BRASIL, 1943) results in invalidity, in the nullity mode, all acts performed in order to distort the enforcement of labor law.

What if the employee has some job security or stability that restricts the possibility of breaking the employment relationship?

The labor reform altered the caption of article 477 of the Consolidation of Labor Laws (BRASIL, 1943), which with the new wording determines that when the employment contract is terminated, the employer should make a proper note in the Work and Social Security Card - which constitutes only evidence - communicate the waiver to the competent bodies and make payment of the severance pay within the time and in the manner prescribed by law. Assistance through homologation is then waived, either by the union representing the category of employee, or possibly by the Ministry of Labor body under the assumptions previously provided, except for stable employee.

This, because there was no change in article 500 of the Consolidation of Labor Laws (CESARINO JUNIOR, 1980, p. 333), which expressly links the validity of the employee's

contractual breach of initiative "[...] when done with the assistance of the Union and, if not present, before the competent local authority of the Ministry of Labor and Social Welfare or the Labor Court". It is embodied in a different legal hypothesis than that provided for in article 477, § 1 and is in accordance with the protection of employees holding employment guarantees. There is no obstacle to permanent employees being able to distract, but termination must be approved; in interpretative reinforcement, it is worth remembering the provision for homologation of an extrajudicial agreement, in a process of voluntary jurisdiction (articles 855-B and following), of competence of the Labor Justice (article 652, "f"), provided for in the Consolidation of Labor Laws (BRASIL, 1943).

3.2 Effects of labor termination

Firstly, it should be emphasized that the hypothesis of mutual agreement in the event of bilateral resilience or dissolution is not confused or restricted to situations of adherence to voluntary dismissal programs.

The contract termination operates as a resolution arising from the default of one or both contractors, and therefore generates obligations resulting from the cause on which the extinction is based: losses and damages, which in the labor hypothesis is identified by land compensation (40%) and withdrawal of deposits due (even if not made) in the Service Guarantee Fund account upon indirect dismissal. The obligation to indemnify, as provided by law, arises from the need to share the risks rather than the composition of damages, and the employer is, by legal definition, the one who takes the risks. The indemnity is not only verified if the damage is proven, by intent or fault, but it is a legal effect arising from liability without blame, objective, with a compensation provided by law based on the risk of the activity, to ensure distributive justice.

In the case of termination or bilateral termination, there is no determining cause nor is it identified as a breach of contract; it is in the interest of the contractual persons who express their consent to the end of the pact. As the effects are fixed by law, the agreement will only include the addition of other credits that may possibly benefit the employee, except in situations involving fund contributions and unemployment insurance. With respect to the

Working Time Guarantee Fund, which is only allowed to move to 80% of the total amount, and the exclusion from entering the unemployment insurance program, which affects third party interests, the subjects of the termination cannot be disposed in a different sense from what has been provided by the law. There is no plausible justification for restricting the total withdrawal of FGTS account amounts, as Stürmer (2017, p.60) pondered.

It should be noted that due notice is given and, in the absence of specific rules for bilateral termination, all current regulations regarding form, time and mode of compliance should be observed. The labor reform did not depart from the provisions of Act No. 12,506/2011 (BRASIL, 2011), which deals with prior notice, providing for an increase of 03 (three) days per year of service rendered in the same company, up to a maximum of 60 (sixty) days, which results in ninety (90) days in total. Although the addition applies only to situations of unfair contractual termination in which the initiative is of the employer for doctrinal and jurisprudential construction, in the absence of an express legal provision, it should be interpreted favorably to the employee, concluding to the due notice with the extension.

The reduction in the workday has a different conclusion, since its purpose is for the employee to be able to look for a new job, which in the hypothesis of volitional manifestation of the employee to break the employment contract due to termination is unnecessary. Moreover, the provision of the Consolidation of Labor Laws (BRASIL, 1943) is that it applies only "if the termination has been promoted by the employer".

The *onus probandi* belongs to the employer, mainly due to the recognition of work as a fundamental social right constitutionally guaranteed and, also, in view of the impact of the principle of continuity, unavailability - including non-waiver. Corroborating the most beneficial interpretation to the worker, we highlight the statements approved in the 2nd Journey of Material and Procedural Labor Law (ANAMATRA, 2018) regarding the theme:

> CONTRACT TERMINATION BY MUTUAL CONSENT. TERMINATION OF WORK AGREEMENT BY MUTUAL CONSENT. COMPLIANCE WITH FORMAL AND SUBSTANTIAL VALIDITY REQUIREMENTS. The termination of the employment contract by a mutual consent provided for in article 484-A of the CLT is subject to scrutiny as to the formal and substantial validity of the termination term, in light of

> articles 138 to 188 of the Civil Code w/ art. 8, § 1 of the CLT and Article 9 of the CLT. (Bonded statement No 3 of commission 5)
>
> CONTRACT TERMINATION BY MUTUAL CONSENT AND WITHOUT A UNION ASSISTANCE. BURDEN OF PROOF. Should the worker deny that the breach of contract occurred by a mutual consent (art. 484-A), it is the employer's burden of proof, in view of the repeal of Paragraph 1 of 477 of the Consolidation of Labor Laws (mandatory union assistance/supervision) and in the light of the principles of continuity of employment and the primacy of reality, the guidance of Precedent 212 of the Superior Labor Court being of greater relevance. (Bonded statement No. 3 of Commission 5)

Finally, the wording of Precedents 212 and 276 of the Superior Labor Court (TST, 2019), which imposes the burden of proof of termination of the employment contract for the employer, with a presumption favorable to the employee, applies, when the dismissal of work is denied, and the dismissal that recognizes the non-waiver of prior notice, maintaining the right of the employee to receive the due amount, even if he may have already concluded another employment contract and been admitted to a new job, before application of the principles of continuity and non-renunciation of rights.

FINAL CONSIDERATIONS

When considering the cancellation, the issue of migration of civil law concepts finds obstacles as far as it is present and it is intended to apply concepts and categories already outdated. The mistake of the hermeneutist and enforcer is, therefore, to transpose the concept of contract as an agreement of wills, contractual freedom as the free disposition of content, and the autonomy recognized by the dogma of will. Such conceptual inaccuracies will entail and delimit the consequences when controlling the legal act for the validity of the consent manifestation.

Alongside the concept of contract as a relationship, the acceptance of private autonomy and freedom limited by the effectiveness and supremacy of the constitutional order that affects interpreted relations, and the impact of the theory of abuse of law, a restrictive interpretation of the rules is required taking into account the primacy of the

public interest, fundamental rights, the dignity of the human person and the impact of the principle of objective good faith as criteria for controlling mutual agreement, as adopted in constitutionalized civil law.

Therefore, the novelty is, above all, and much more than the legal provision of termination, the introduction of consent as an element in ascertaining the validity of the practice of the act by the employee and the linking of its effects.

Once mutual consent to the termination has been introduced, the possibility of possible consent biases provided for in the civil code (BRASIL, 2002), namely the error (article 138), the deceit (art. 145) and coercion (art. 151) should be noted, in addition to the social vices provided for in the Consolidation of Labor Laws, such as fraud or simulation (art. 9) (BRASIL, 1943). Yet, the will is not sovereign to let the subjects of contractuality fix the intended consequences with the termination of the contract; Private autonomy presupposes an order to be able to do, and this order removes the absolute domain of wanting to do. Moreover, the vertical effectiveness of constitutional rules and principles must be observed in interpreted relations, as is the case with constitutionalized civil law.

Anyway, the problem is not to adopt rules and principles of private law, but to take it for what it no longer is.

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