

**EMPLOYMENT AND LABOUR**

Constitutional Court ruling: unconstitutionality of the 180-day first job trial period

In Judgment no. 318/2021, the Constitutional Court declared the unconstitutionality, with general mandatory force, of the 180-day trial period in employment contracts of indefinite duration, in cases of workers "seeking their first job" who had already entered into a fixed-term employment contract for a period exceeding 90 days.

Although this issue was debated in the plenary session on 18 May 2021, the Judgment has not yet been published in the official gazette (Diário da República), so it has not yet taken effect.

However, the 180-day trial periods of contracts entered into before this declaration of unconstitutionality are not safeguarded. Therefore, in practice, we will have terminations of contracts during the trial period that may now be declared to be illegal dismissals.

1. The declaration of unconstitutionality with general binding force

Several amendments to the Employment Code came into force on 1 October 2019. One of them was the amendment to article 112, which now provides for the possibility of a trial period of 180 days in employment contracts of indefinite duration for first-time job seekers and the long-term unemployed.

This change was not without controversy, because workers in this situation had their trial period increased from 90 days to 180 days. They were equated to workers in positions of high technical complexity, with a high degree of responsibility, whose duties require special qualifications or trust.

As a result, a group of 35 members of parliament asked the Constitutional Court to assess and declare the unconstitutionality with general binding force of this rule, among others.

"The Constitutional Court concluded that this doubling of the period is disproportionate to the precariousness it creates."

The Constitutional Court held that the existence of a trial period does not deserve constitutional censure. However, it concluded that this doubling of the period "substantially affects the right to job security" and is disproportionate to the precariousness it creates.

However, only part of the provision was declared unconstitutional and the declaration affects only workers seeking their first job who had been previously contracted on a fixed-term basis for a period of 90 days or more.

- This means that the 180-day trial period is valid for long-term unemployed workers, first-time job seekers who have never been hired on a fixed-term basis or who, having been hired on a fixed-term basis, were hired for less than 90 days.

2. Failure to safeguard legal effects already produced

The declaration of unconstitutionality with general mandatory force takes effect as from the entry into force of the rule declared unconstitutional. In this case we are referring to Law 93/2019 of September 4, which came into force on 1 October 2019.

Therefore, in practice, this law is deemed never to have existed. In other words, the rules that were repealed or replaced will be applied.

There are only two possible exceptions:

- final and unappealable court decisions;
- if, for reasons of legal security, equity or exceptionally important public interest, the Constitutional Court had set a more restricted scope for the declaration of unconstitutionality. That is, if it had decided that the declaration of unconstitutionality would only take effect for the future (which did not happen).

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As a consequence, under an employment contract of indefinite duration with a trial period of 180 days, for a first-time job seeker who had already entered into a fixed-term employment contract for a period of more than 90 days, the trial period will be reduced to 90 days.

3. The effects of the termination of the contract during the trial period

Despite the countless hypothetical – and real – situations that this declaration of unconstitutionality with general binding force will bring us, we will mention three, in each case, from the employer's perspective:

- i) termination of the contract during the first 90 days of the trial period;
- ii) termination of the contract between 91 and 180 days of the trial period; and
- iii) The possibility of maintaining the 180-day trial period by using a convoluted reason to justify it (in cases where the real reason for the trial period is only that it is a worker seeking his/her first job).

"If the first-time job-seeker has also been hired to perform highly complex technical duties, with a high degree of responsibility, whose duties require special qualifications or trust, the 180-day probationary period may continue to apply."

In the first case, as the termination was made during the first 90 days, and as the trial period has been reduced to this period, the termination of the contract will, in principle, be valid.

In the second case, we will be facing a materially different situation: although the contract provides for a trial period of 180 days, this was reduced to 90 days, so any termination after these 90 days will, in principle, be illegal.

- Once the trial period is over, this termination may be held to be an unlawful dismissal because it is out of time.

In the third case, if the first-time job-seeker has also been hired to perform highly complex technical duties, with a high degree of responsibility, whose duties require special qualifications or trust, the 180-day probationary period may continue to apply. ■