

Rozdział 13

Labor outsourcing in Brazil: an atypical contract that legitimizes the legal and social setback

Outsourcing pracowniczy w Brazylii: atypowa umowa, która legitymizuje prawne i społeczne uwstecznienie

Marta Zbucka-Gargas

Assistant Professor of the Faculty of Law and Administration of the University of Gdansk,
PhD and LLM
<https://orcid.org/0000-0003-4013-0531>

Cláudio Iannotti da Rocha

Professor of the Law Department of the at Federal University of Espírito Santo (UFES),
Post-Doctorate, PhD and Master's in Law
<https://orcid.org/0000-0003-2379-2488>

Abstract

Labor law reform in Brazil has fundamentally changed the archetype of labor law, both in terms of substantive law and procedural law, from an individual and collective perspective. The new regulations have introduced the normative regulation of outsourcing in Brazil, which was previously absent. The issue identified in the following article is: labor outsourcing resulting from the Labor Reform can be considered a Brazilian legal advance or failure. Practice shows that Law No. 13,429 lowered the level of labor rights and allowing outsourcing in the main business of the borrowing company, without equalizing rights between the employees.

Keywords: labor law, outsourcing, temporary job; services provision

Streszczenie

Reforma prawa pracy w Brazylii zasadniczo zmieniła archetyp prawa pracy, zarówno w zakresie prawa materialnego, jak i prawa proceduralnego, w perspektywie indywidualnej i zbiorowej. Nowe regulacje wprowadziły normatywne regulowanie outsourcingu w Brazylii, które dotychczas nie występowało. Zagadnienie wskazane w poniższym artykule brzmi: „outsourcing pracy wynikający z reformy pracy może być uznany za brazylijski postęp prawny lub niepowodzenie”. Praktyka pokazuje, że ustawa nr 13,429 obniżyła poziom praw pracowniczych i pozwala na outsourcing w głównej działalności firmy pożyczającej, bez zrównania praw między pracownikami.

Słowa kluczowe: prawo pracy, outsourcing, praca tymczasowa, świadczenie usług

Introduction

Labor law, which emerged at the beginning of the 20th century, was designed and constructed in a two-way relationship between worker and employer, when the production cycle took place in a company, with the input of raw material and the output of the final product. Factories were large and built the certainty of tomorrow.

The fact is that since 1970, based on the Toyota production model, the industrial world started producing outside the companies, through decentralized production, guided by the specialization of the production process and by the outsourcing of labor. The lean production and the business horizontalization gave rise to new industrial arrangements, producing only what is necessary, the stock is almost zero. Porto and Iannotti da Rocha show: “The performance of a service or activity that the company itself performed or could perform is transferred to another company, since the former is specialized in its execution and the latter can concentrate on the achievement of its corporate purpose”.¹ At the same time that companies were fragmenting and shrinking within themselves, they were expanding geographically to other places. It was as if the companies became smaller and larger at the same time, gaining elasticity, new contours and physical spaces. Delgado teaches: “Outsourcing is a relatively new phenomenon in the country’s Labor Law, assuming structural clarity and amplitude of dimension only in the last decades of the twentieth century in Brazil”.² Outsourcing in Brazil is a sample of a trend that is estimated to have the potential to capture the labor market globally. As a consequence of new regulations in this area, companies now have the right to outsource employees related to end activities, not just indirect activities. The outsourcing of services registered a 94% growth in Brazilian companies during the pandemic, according to a survey by the Administration Institute Foundation (FIA-SP).³ According to a study by the Brazilian Institute of Geography and Statistics (IBGE), 22% of Brazil’s formal workforce is now outsourced, and that number is trending upward.⁴

Outsourcing is the first modality of an atypical employment contract in labor law. It happens that unlike other atypical contracts, such as telecommuting, intermittent work, temporary work and home-based work, outsourcing is a camouflaged

1 L. Vasconcelos Porto, C. Iannotti da Rocha, *A Terceirização Pós Reforma Trabalhista*, “Revista LTr. Legislação do Trabalho” 2020, vol. 84, p. 30.

2 M. Godinho Delgado, *Curso de Direito do Trabalho*, São Paulo 2019, p. 542.

3 *Terceirização de serviços cresce no Brasil*, 2022, <https://www.bemparana.com.br/noticias/economia/terceirizacao-de-servicos-cresce-no-brasil/> (accessed: 12.12.2022).

4 *Terceirização no Brasil: como essa tendência mundial afeta você*, n.d., <https://netsupport.com.br/terceirizacao-no-brasil/#:~:text=Segundo%20pesquisas%20do%20Instituto%20Brasileiro%20de%20Geografia%20e,vez%20maior%20e%20atingindo%20os%20mais%20diversos%20setores> (accessed: 12.12.2022).

atypical contract, within the typical contract itself, because it assigns labor rights provided by the Consolidation of Labor Law (CLT), but at a level lower than the existing rights of the borrowing company's employees, due to the occupational category to which the outsourced employee belongs. In other words, workers who perform the same function, day in and day out, have different labor rights before the union, which is affiliated with the company providing temporary labor or services, not the company that takes them on. In Brazil, it is the employer's activity that determines the unionization of the worker.

The fact is that outsourcing has significantly changed labor law itself, thinking of a bilateral and linear relationship, in favor of a tripartite relationship with the presence of a third party that brings the provision of services. The ontology and morphology of the employment contract have been (re)thought, after all, from now on there is a dialogue between: the employment contract (signed between the employee and the temporary labor or service company) and the service contract (signed by the temporary labor or service company and the borrowing company). As Delegado points out: "the progress of the outsourcing process in the labor market in recent decades has challenged the hegemony of the classic formula of the bilateral employment relationship, as expressed in Article 2 and Article 3 CLTs." It was a path with no turning back: outsourcing is here to stay, increasingly strong and robust, and is a daily practice in the world of work. The relationship that until then was bilateral, became trilateral with the entry of a new subject and who, as a rule, determines the rules of the game: the contracting company. What used to be a straight line became a triangle: on one side the job, on the other the employer (service company) and, at the apex of the triangle, the company that takes the job (called by many the mother company).

It is important to emphasize that outsourcing is the intermediation of services, which can never be confused with the intermediation of labor – which is strictly forbidden, since labor is not merchandise.

Outsourcing in Brazil

Until 2017, in private relations, outsourcing in Brazil had no regulation, being the subject of Precedent No. 331 of the Superior Labor Court (TST). It was a binding precedent that was obeyed by Labor Courts. The main reason for this was the fact that it prohibited outsourcing in the main activity of the contracting company – in case this happened the employment relationship of the worker with the temporary work or service providing company was declared null and void and the employment relationship of the worker with the contracting company would be declared by the

Judiciary. Personality and subordination could not be present either, under the same penalties – recognition of the employment bond of the worker with the contracting company. Correia indicates that that outsourcing was one of the issue topics that underwent the greatest change in 2017. Outsourcing occurs when a company, instead of performing services directly with its employees, hires another company to perform them, with its personnel, under its responsibility. The employee is contracted by the intermediary company (employer), which provides services in another location (borrowing company).⁵ In 2017, Law no. 13.439 amended Law no. 6.019/1974, which until then only regulated temporary work, by inserting articles, paragraphs and sections, and began to legally regulate outsourcing, allowing outsourcing in two situations: temporary work (art. 2) and the provision of services (art. 5-A). Thus, outsourcing in Brazil is now expressly permitted in two hypotheses: 1 – temporary work and 2 – rendering of services. Furthermore, it should be pointed out, according to Vasconcelos Porto and Iannotti da Rocha: Law No. 6.019/74, with the amendment promoted by Law No. 13.429/2017 and Law No. 13.467/2017 (labor reform), now allows the outsourcing of any activities of the company, through the conclusion of a contract for the provision of services, including its core activities. However, such contract will be null in its own right if the legal elements of the employment relationship (subordination, personality, non-occasionality and burden) between the outsourced workers and the company taking services are present.⁶

As for outsourcing in public administration, it was regulated by Laws No. 8,666/1993 and No. 14,133/2021. And outsourcing in private activities, it should be noted that the Supreme Court (STF) in the Appellation of Violation of the Fundamental Commandment (ADPF) 324 judgment constituted the following thesis: It is lawful to outsource any activity that is not an employment relationship between the outsourcer and the outsourcer's employee. It is incumbent on the outsourcer to: (1) verify the suitability and economic capacity of the outsourcer; and (2) bear subsidiary responsibility for non-compliance with labor standards, as well as social security obligations, according to Art. 31 of Law no. 8,212/1993.⁷ The Federal Supreme Court (STF) in the judgment of Extraordinary Appeal (RE) 958252, with recognized General Repercussion, constituting binding precedent setting the following thesis: Outsourcing or any other form of division of labor between distinct legal entities is lawful, regardless of the corporate purpose of the companies involved, maintaining the subsidiary liability of the contracting company. In this sense, based on the joint interpretation of the aforementioned and quoted judgments, outsourcing was permitted in Brazil in the activities of the contracting companies' core business, without establishing an employment relationship between the contracting company and the employee of the contracted company.

5 H. Correia, *Curso de Direito do Trabalho*, Salvador, p. 483.

6 L. Vasconcelos Porto, C. Iannotti da Rocha, *A Terceirização...*, p. 32.

7 Supremo Tribunal Federal, RE 958252, Plenário, Rel. Ministro Luiz Fux, Data do julgamento 14.09.2022.

Outsourcing in temporary work

Temporary work is work done by an individual hired by a temporary work company that makes him/her available to a company that takes services to meet the need of temporary replacement of permanent personnel or to meet the additional demand for services. Hiring temporary work to replace striking workers is forbidden, except in the cases foreseen by the law. The demand for services that arises from unforeseeable factors or, when arising from foreseeable factors, is of an intermittent, periodic, or seasonal nature, is considered to be complementary.⁸ The activity of the temporary work company is recognized and becomes part of the basic plan of the union framework referred to in art. 577 of the CLT.⁹ The temporary work company is the legal entity, duly registered in the Ministry of Labor, responsible for placing workers at the disposal of other companies temporarily.¹⁰

The contracting company is responsible for ensuring the safety, hygiene and health conditions of the workers, when the work is carried out on its premises or at a place designated by it. The contracting company will provide the temporary work company's workers with the same medical, ambulatory and meal services as those provided to its employees, which exist in the contracting company's facilities or in a place designated by it. The temporary work contract can be related to the development of middle and end activities to be executed in the company that contracted the services.

The contract between the temporary work company and the company that is taking services from must contain the worker's qualification, a justified reason, the period for which the services will be rendered, the value of the services, health and safety provisions, as well as a maximum period of 180 days, which can be extended for another 90 days (as long as the need for maintenance is proven), consecutive or not.

Temporary workers that complete the maximum period can only be made available to the same service taker in a new temporary contract, ninety days after the end of the previous contract. Hiring prior to the maximum period characterizes an employment relationship with the service taker. The contracting company is subsidiarily responsible for the labor obligations referring to the period in which the temporary work occurs, and the payment of the social security contributions

8 Brasil. Art. 2º da Lei no. 6.019, de 3 de janeiro de 1974. Dispõe sobre o Trabalho Temporário nas Empresas Urbanas, e dá outras Providências, https://www.planalto.gov.br/ccivil_03/leis/l6019.htm (accessed: 17.01.2023).

9 Brasil. Art. 3º da Lei no. 6.019, de 3 de janeiro de 1974. Dispõe sobre o Trabalho Temporário nas Empresas Urbanas, e dá outras Providências, https://www.planalto.gov.br/ccivil_03/leis/l6019.htm (accessed: 17.01.2023).

10 Brasil. Art. 4º da Lei no. 6.019, de 3 de janeiro de 1974. Dispõe sobre o Trabalho Temporário nas Empresas Urbanas, e dá outras Providências, https://www.planalto.gov.br/ccivil_03/leis/l6019.htm (accessed: 17.01.2023).

will observe the provisions of Law no. 8.212.1991 – social security. Temporary workers are guaranteed the following rights a) remuneration equivalent to that perceived by employees of the same category of the borrowing company or client calculated on an hourly basis, guaranteed, in any case, the perception of the regional minimum wage; b) eight-hour work day, overtime hours not exceeding two being remunerated with an increase of 20% (twenty percent); f) compensation for dismissal without just cause or for the normal termination of the contract, corresponding to 1/12 (one twelfth) of the payment received; g) insurance against accidents at work; h) social security protection.

In case of bankruptcy of the temporary work company, the borrower or client company is jointly and severally liable for the payment of the social security contributions, regarding the time that the worker was under its orders, as well as in reference to the same period, for the compensation and indemnity foreseen in Law no. 6.019/1974. It is important to emphasize that only in the case of bankruptcy will the temporary work company have joint liability, not being a hypothesis for such judicial or extrajudicial recovery.

Outsourcing in the services agreement

Third-party service provision is defined as the transfer by the contracting party of the performance of any of its activities, including its core business, to a private legal entity that provides services and has the economic capacity to perform them. The service provider hires, remunerates and directs the work done by its workers, or subcontracts other companies to perform these services. There is no employment relationship between the workers or partners of the service provider, whatever their field of business, and the contracting company. The employees of the service providing company are assured the same conditions when and while the services, which may be any of the contractor's activities, are performed on the contractor's premises: I – relating to: a) guaranteed food for the contractor's employees, when offered in cafeterias; b) right to use transportation services; c) medical or ambulatory care existing on the contractor's premises or place designated by it; d) adequate training, provided by the contractor, when the activity requires it. II – sanitation, health protection measures, occupational safety and adequate facilities to provide the service.¹¹

11 Brasil. Art. 5º-A da Lei no. 6.019, de 3 de janeiro de 1974. Dispõe sobre o Trabalho Temporário nas Empresas Urbanas, e dá outras Providências, https://www.planalto.gov.br/ccivil_03/leis/16019.htm (accessed: 17.01.2023).

The legal regime of outsourced workers

Law no. 6.019/1974 with applications to the private initiative spectrum; as well as Law no. 8.666/1993, with modal for the Public Administration are intended to guarantee labor rights to the outsourced workers of the service provider company and temporary work companies. A point of great magnitude that must be highlighted is the fact that workers of temporary work companies have the right to an equitable wage (art. 12), while workers of service providing companies do not have this right (art. 4-C), being an option of the service providing company to negotiate such hypothesis with the contracting company. Thus, we can see a clear inequality and discrepancy of rights between the workers of the temporary work company and the workers of the company providing services.

Although outsourced workers have access to the labor rights established in the Federal Constitution, in the CLT and in the international treaties ratified by Brazil, the point to be analyzed is which qualitative rights will be assigned to them, since because these workers are employees of service providers or temporary work companies, As these workers are employees of service providers or temporary work companies, they are automatically bound to collective negotiations (collective conventions and agreements) agreed upon by their respective Unions, which are different from the Unions of the companies that take them on – since the unionization of the worker in Brazil is according to the branch of the employer's activity and not the employee's activity. Thus, what can be noticed and verified in the Brazilian labor world is that workers in the private sector that perform the same work, the same function, daily and side by side, receive different labor rights, due to the fact that they belong to different companies (borrower on one side and service or temporary work provider on the other) and consequently are linked to different unions, which attracts different collective rights. Thus, the qualitative rights destined to these workers are different, with the workers of the contracting company receiving more. It should be emphasized that fair pay is already a legal step backwards, and a service provider employee who does not even have this right is a huge legal and social step backwards. The difference in wages strikes at the very essence of the Labor Law, since wages are compensation for work done by an employee for an employer. In this sense, it can be said that the legal regime of outsourced workers in Brazil is a mitigated labor regime, since formally they have access to the labor rights foreseen in the Federal Constitution, in the CLT and in the International Treaties ratified by Brazil, but when compared to the workers of the contracting company they receive less in qualitative terms – even though they perform identical work, function and work together on a daily basis.

Conclusion

Outsourcing, with a tripartite morphology, consisting of a contract for services and employment at the same time, integrated by the employee, the company that provides the services or temporary labor and the company that accepts them, is a great challenge and denaturalizes Labor Law. Outsourcing is something foreign to Labor Law. Workers realistically lose acquired qualitative labor rights, because outsourcing means a relaxed legal regime, which leads to violations of labor rights and equality. Workers in different formulas, after all, do the same work and should receive equal pay, but because they are affiliated with different unions the quality of their labor rights varies. It should also be emphasized that an outsourced temporary worker is entitled to the same pay as an outsourced worker from an outsourcing company, while an outsourced worker from a service provider has no such right.

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