

OPEN ACCESS

ISSN 2280-4056

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 3, No. 2 May-June 2014



**ADAPT** *International School of Higher Education in Labour and Industrial Relations*

*Scientific Directors*

Lauren Appelbaum (USA), Greg Bamber (Australia), Stuart M. Basefsky, (United States), Daria V. Chernyaeva (Russia), Richard Croucher (United Kingdom), Maurizio del Conte (Italy), Tomas Davulis (Lithuania), Tayo Fashoyin (Nigeria), József Hajdu (Hungary), Ann Hodges (USA), Richard Hyman (United Kingdom), Maarten Keune (The Netherlands), Chris Leggett (Australia), Guglielmo Meardi, (United Kingdom), Shinya Ouchi (Japan), Massimo Pilati (Italy), Valeria Pulignano (Belgium), Michael Quinlan (Australia), Juan Raso Delgue (Uruguay), Raúl G. Saco Barrios (Peru), Alfredo Sánchez Castaneda (Mexico), Malcolm Sargeant (United Kingdom), Jean-Michel Servais (Belgium), Silvia Spattini (Italy), Michele Tiraboschi (Italy), Anil Verma (Canada), Stephen A. Woodbury (USA)

*Joint Managing Editors*

Malcolm Sargeant (Middlesex University, United Kingdom)  
Michele Tiraboschi (University of Modena and Reggio Emilia, Italy)

*Editorial Board*

Lilli Casano (Italy), Francesca Fazio (Italy), Emanuele Ferragina (United Kingdom), Antonio Firinu (Italy), Valentina Franca (Slovenia), Maria Giovannone (Italy), Erica Howard (United Kingdom), Karl Koch (United Kingdom), Lefteris Kretsos (United Kingdom), Attila Kun (Hungary), Felicity Lamm (New Zealand), Cristina Lincaru (Romania), Nikita Lyutov (Russia), Merle Muda (Estonia), Boaz Munga (Kenya), John Opute (UK), Eleonora Peliza (Argentina), Daiva Petrylaite (Lithuania), Ceciel Rayer (The Netherlands), Aidan Regan (Ireland), Marian Rizov (United Kingdom), Salma Slama (Tunisia), Francesca Sperotti (Italy), Araya Mesele Welemariam (Ethiopia), Barbara Winkler (Austria), Machilu Zimba (South Africa)

*Language Editor*

Pietro Manzella (ADAPT Senior Research Fellow)

*Book Review Editor*

Chris Leggett (James Cook University, Australia)

*Digital Editor*

Avinash Raut (ADAPT Technologies)

*E-Journal of  
International and Comparative*

# LABOUR STUDIES

Volume 3, No. 2 May-June 2014

**@ 2014 ADAPT University Press**

---

Online Publication of the ADAPT Series  
Registration No. 1609, 11 November 2001, Court of Modena  
*www.adaptbulletin.eu*

The articles and the documents published in the *E-Journal of International and Comparative LABOUR STUDIES* are not copyrighted. The only requirement to make use of them is to cite their source, which should contain the following wording: **@ 2014 ADAPT University Press.**



# Moral Harassment under Portuguese Law: One Step Behind?

Ana Cristina Ribeiro Costa \*

---

## 1. Introduction

Mobbing refers to intimidating, humiliating or embarrassing, harmful or unwanted conduct occurring in the context of an employment relationship that objectively violates the fundamental rights of the worker, namely his dignity, physical and moral integrity<sup>1</sup>. Mobbing also results from systematic behaviour: not only behaviour which is repetitive and offensive, but also the combination of different acts that complement one another to achieve an intended purpose.

According to sections of either legal opinion or case law, the intention to do harm is an essential prerequisite to assess mobbing. Yet the author of this paper does not support the view that mobbing is the result of a particular purpose<sup>2</sup>.

---

\* Ana Cristina Ribeiro Costa is a PhD Candidate at Catholic Portuguese University – Oporto Law School, and a visiting teacher at the Masters’ Degree in Labor Law at the same University. The author collaborates with the Católica Research Center for the Future of Law, is a member of the Editorial Board of the Review *Questões Laborais*, and a lawyer at Gama Lobo Xavier, Luis Teixeira e Melo e Associados, Sociedade de Advogados, R.L. [ana.ribeiro.costa@hotmail.com](mailto:ana.ribeiro.costa@hotmail.com). This paper was presented at the international conference *Violence, Health and Work at the Time of Crisis* (Congreso internacional *Violencia, Salud y Trabajo en Tiempo de Crisis: Violencia de Género, Psicológica y Sexual en el Derecho del Trabajo*) held on July 15-17, 2013 at the University of Santiago de Compostela (Spain).

<sup>1</sup> Pereira, Rita Garcia, *Mobbing ou Assédio Moral no Trabalho. Contributo para a sua Conceptualização*, Coimbra Editora, Coimbra, 2009, p. 72.

<sup>2</sup> See the “intention” requirement, *ibid.*, pp. 87 and following.

The author's opinion is that no individual purpose exists, since the volitional criterion is "accidental and not essential"<sup>3</sup>. Therefore, mobbing can affect workers physically and emotionally. Mobbing might also cause cognitive, psychological, psychosomatic, hormonal changes and lack of sleep; it might act on the nervous and muscular system, and ultimately lead to suicide. In this sense, there have been certified cases of depression, post-traumatic stress syndrome, chronic fatigue, allergic responses, alcohol and drug abuse, cardiac and endocrine disorders, physical injuries and psychological distress.

Thus, mobbing entails a psychosocial risk resulting from inadequate organization and management and poor health and safety conditions at work. Certain work-related circumstances exist that can affect workers in either psychological or psychopathological ways. Examples of this are the company's shaky financial situation<sup>4</sup>, a negative performance evaluation, a situation of extreme tension with colleagues or superiors, a continuing worsening of working conditions, receiving notice of termination of employment, a disciplinary sanction, an instance of verbal or physical aggression having occurred in the workplace, long periods of overwork, lack of job stability<sup>5</sup>, stress arising from restructuring, organizational changes, the lack of resources to carry out the assigned tasks and shift work<sup>6</sup>.

Aside from mobbing, burn out<sup>7</sup>, karoshi syndrome<sup>8</sup>, post-traumatic stress<sup>9</sup>, work addiction<sup>10</sup>, technostress<sup>11</sup>, or simply work-related stress<sup>12</sup>,

---

<sup>3</sup> C. Molina Navarrete, *La Tutela Judicial frente al Acoso Moral en el Trabajo: de las Normas a las Prácticas Forenses*, Editorial Bomarzo, Albacete, 2007, p. 28.

<sup>4</sup> G. García González, "Crisis Económica y Riesgos Psicosociales: el Suicidio como Accidente de Trabajo. Perspectiva Jurídico-Preventiva", *Revista de Derecho Social (RDS)*, No.º 50, 2010, pp. 134 e 135.

<sup>5</sup> Job stability has been widely investigated in this connection. See Pimpão, Céline Rosa, *A Tutela do Trabalhador em Matéria de Segurança, (Higiene) e Saúde no Trabalho*, Coimbra Editora, Maio 2011, p. 35.

<sup>6</sup> Sánchez-Anguita Muñoz, Ángel, *Psicopatologías Laborales*, Publicaciones Universidad Pontificia, Salamanca, 2008, pp. 69 e 70.

<sup>7</sup> Cfr. Pereira, Rita Garcia, *op. cit.*, pp. 152 e 153.

<sup>8</sup> Cfr. Martínez Plaza, César Alfredo, "El Estrés Laboral como Factor de Riesgo de Suicidio (III)", *cit.*, p. 35.

<sup>9</sup> *Ibid.*, p. 35.

<sup>10</sup> Cfr. Rivas Vallejo, Pilar, *La Prevención de los Riesgos Laborales de Carácter Psicosocial*, Editorial Comares, Granada, 2009, p. 6.

<sup>11</sup> *Ibid.*, p. 6.

<sup>12</sup> Cfr. Viergol Lanzagorta, Amaya Martínez de, "La Consideración del Síndrome del "Burnout" como constitutivo de la Contingencia Profesional del Accidente de Trabajo Origen de la Declaración de Incapacidad Permanente Absoluta", *Revista del Ministerio de*



can be relevant and justify certain forms of disability. A pioneer in the regulation of mobbing, Sweden was the first country to qualify it as an occupational risk, imposing on the employer the obligation to promote a healthy working environment.

Following on from these considerations, this paper will investigate the scope for mobbing to be considered as an occupational injury under Portuguese law. Attention will be given to the extent to which work-related accidents arising from mobbing can qualify as a disability or an occupational disease – either in a strict or a broad sense – for which compensation can be paid.

## **2. The Relation between Mobbing and the Portuguese Occupational Health System: Some Practical Aspects**

The significance of the present study may be assessed by evaluating the adequacy and effectiveness of Art. 28 of the Portuguese Labour Code (*Código do Trabalho* – hereinafter CT) assigning civil liability in the event of mobbing. From a research perspective, this aspect is noteworthy either for the national occupational health system (the “professional contingencies” system) or to raise awareness of the increasing relevance of research relating to mobbing.

It seems that the compensation system associated with work-related accidents and occupational diseases attends to different issues than those covered by civil liability schemes. In the event of non-contractual liability, compensation is paid for damage suffered by the victim and concerns one’s physical and moral integrity, honour, intimacy, personality or dignity. Conversely, contractual liability entails damage resulting from a breach of the employer contract<sup>13</sup>.

Further, the laws on occupational health are provided in order to compensate for the harm suffered by workers in the performance of their

---

*Trabajo y Asuntos Sociales*, Madrid, No. 59, 2005, p. 217. Vd. also Tolosa Tribiño, César, “Delimitación de las Contingencias Profesionales: Nuevos Riesgos Laborales”, *Revista Información Laboral, Legislación y Convenios Colectivos*, No. 20, 2003, p. 15. Mella Méndez argues that personality plays a role in the emergence of work-related stress. Cfr. “El Acoso Moral Profesional (Harcèlement Moral Professionnel) en Francia: Análisis Crítico de sus Rasgos Configuradores”, *RDS*, No. 53, 2011, p. 113.

<sup>13</sup> Among the authors discussing the punitive nature of civil liability, see Pereira, Rita Garcia, *op. cit.*, p. 216. On this subject, see Gomes, Júlio, “Uma função punitiva para a responsabilidade civil e uma função reparatória para a responsabilidade penal”, *Revista de Direito e de Economia*, ano XV, 1989, 105-144.



activities. In other words, health-related issues limiting the worker's ability to work or make a living are indemnified.

Cantisani argues for the need to clearly distinguish between the possible compensation resulting from mobbing and that ensured by the compensation system typical of civil liability<sup>14</sup>.

As of Portuguese legal opinion, Menezes Leitão stressed that, rather than determine the employer's liability, the compensation system for occupational accidents established by law is intended to adequately indemnify damage suffered by the worker<sup>15</sup>.

The occupational health system compensates for biological damage<sup>16</sup>, where human integrity is affected in relation to the ability to generate wealth, and the tasks carried out in the surrounding environment bearing economic, social, aesthetic, cultural or biological relevance, including damage to health (but not existential and moral damage).

Given the current regime, if the possibility is acknowledged to compensate for damage due to harassment in accordance with the criteria used to assess work-related accidents or occupational diseases, those workers with higher levels of resilience will not be compensated, as they will only suffer damage to their dignity and their general right of personality<sup>17</sup>. On the contrary, the regime of civil liability will indemnify patrimonial and non-patrimonial damage, based on static and dynamic aspects of the value in question (life).

Moreover, compensation might come in many forms; full compensation is provided according to civil law, whereas the compensation award paid by the occupational health system is insurance-based, being that it is either legally or contractually defined<sup>18</sup>. The determination of one's civil liability results in the award of compensation in a limited number of cases, and Portuguese courts tend not to allocate significant amounts of money.

---

<sup>14</sup> Cantisani, Daniela, *Mobbing e INAIL*, available in [http://dirittolavoro.altervista.org/mobbing\\_e\\_inail\\_cantisani.html](http://dirittolavoro.altervista.org/mobbing_e_inail_cantisani.html), accessed 29-11-2009.

<sup>15</sup> Leitão, Luís Manuel Teles de Menezes, «A reparação de danos emergentes de acidentes de trabalho», in *Estudos do Instituto de Direito do Trabalho – vol. I*, cord. Pedro Romano Martinez, Almedina, Coimbra, 2001, p. 566.

<sup>16</sup> Cfr. Decision of the Supreme Court of Justice of 10 July 2008, reported by Salvador da Costa, available at [www.dgsi.pt](http://www.dgsi.pt) (if not specified otherwise, all court decisions referred to in this paper are available at this website).

<sup>17</sup> Cfr. Gomes, Júlio, *Direito do Trabalho. Volume I. Relações Individuais de Trabalho*, Coimbra Editora, Coimbra, 2007, p. 438.

<sup>18</sup> As for work-related accidents, employers in Portugal are obliged to purchase a private insurance for each worker, a requirement which can only be found in the national occupational health system. When it comes to occupational diseases, compensation is ensured by the Social Security System.

Conversely, under the occupational health system, the criteria for determining compensation are based on the classification of damage<sup>19</sup>, which means it will always be limited in quantitative terms.

In reference to occupational diseases, compensation awarded is variable, and does not cover personal injury. As far as the protection granted in the event of a work-related accident is concerned, when the employer's or his representative's fault is proven (cfr. par. 1 and 3 of Art. 18 of Law No. 98/2009 regulating compensation for work-related accidents and occupational diseases, hereinafter only referred to as LAT), and although the worker and his family are fully indemnified, such compensation will be calculated pursuant to par. 4 and 5 of this provision. This means that the maximum amount of compensation will be equal to the wage earned by the injured party. Thus, it is difficult to foresee which of the foregoing schemes will ensure the victim the largest compensation award, although Menezes Leitão has argued that "social security systems (...) rarely give full reparation for damage, focusing on easing the victim's struggle", so civil liability frequently arises<sup>20</sup>.

After making a necessary distinction between these two schemes, we will list the many advantages of that concerning work-related accidents and occupational diseases. First, this system facilitates workers' access to pension or compensation through less expensive, quicker and out-of-court procedures (e.g. civil jurisdiction). Second, they provide an alternative to civil liability schemes, such as the obligation of the employer to assign suitable tasks to the injured worker (par. 8 of Art. 283 CT). LAT also provides for further advantages which would be inaccessible to the victim under civil liability schemes, such as vocational re-training, the adaptation of the workplace (Art. 44 and 154 LAT) and the provision for action taken under the professional rehabilitation sections (Art. 69 and 108 LAT). Another advantage lies in the fact that these schemes provide for the regular adjustment of compensation according to any improvement or worsening of the victim's health. Moreover, the claims made in accordance with the right to compensation established in LAT are inalienable and unquestionable and are safeguarded by the CT (see Art. 78 LAT). As such, they are seen as preferential claims, drawing another difference with the claims arising from civil liability.

---

<sup>19</sup> See the National Table of Incapacities for Work-related Accidents and Occupational Diseases, on the Decree Law 352/2007, 23-10.

<sup>20</sup> Our translation. Leitão, Menezes, "A reparação de danos...", cit., p. 553. See also Alegre, Carlos, *Regime Jurídico dos Acidentes de Trabalho e das Doenças Profissionais*, Almedina, Coimbra, 2000, pp. 73, 74 e 77.

Finally, considering certain situations taking account of the categories provided by the occupational health system can question the existence of mobbing, even if supported by hard evidence. In fact, the assessment of the existence of work-related injuries does not require the evaluation of their main factors, although this might be necessary at the time of evaluating the causal nexus.

In the following pages, we will analyse the determination of work-related accidents as a form of mobbing, particularly with regard to the State treasury. In this case, it is not up to this entity to compensate victims, who will then submit their request for compensation to social security, being these accidents considered as common diseases.

In the Portuguese system, if a work-related accident is identified as mobbing, it is more convenient for the party involved to be found guilty, so they will not be liable to other actions, save for when the accident affects a third party, a co-worker (Art. 17 LAT) or the employer (in the cases of Art. 18 LAT). Employers may also benefit from this legal mechanism and recourse to escheat (par. 3 of Art. 18 LAT)<sup>21</sup>.

As regards the advantages of the system of work-related accidents for workers, a presumption of irrelevance exists of their genetic predisposition, which has consequences on the determination of the causal nexus. If such predisposition is verified, compensation for damage in the event of civil liability might be rejected. In addition, the claims arising from work-related accidents are more likely to obtain compensation, and the Workers' Compensation Fund is tasked with making the payment pursuant to LAT (al. a), par. 1, Art. 1 of Decree Law No. 142/99, 30-04, and Art. 82 LAT).

Another interesting aspect is the assessment of damage in the event of mobbing which qualifies as an occupational disease. Emphasis is given to the preventive and economic aspects of this form of mobbing. More specifically, such classification will come along with lower costs for employers and society, given that these cases are unlikely to take place.

An aspect which enormously benefits the worker is that the social security system must always be able to pay compensation<sup>22</sup>. Moreover, the civil liability regime does not usually make provisions for the damage suffered by a worker as a result of a disease. Still on this topic, for the purposes of compensating for occupational diseases, there is no need to effectively

---

<sup>21</sup> *Cfr.* Ramalho, Maria do Rosário Palma, *Tratado de Direito do Trabalho. Parte II. Situações Laborais Individuais*, 4 ed., Almedina, Coimbra, 2012, p. 755.

<sup>22</sup> Yet at present we can no longer affirm that the solvency of the Portuguese social security system is certain.

prove the causal nexus. Consequently, one's civil liability in relation to occupational diseases can be evaluated through an alternative mechanism. More specifically, in the event of a work-related accident, the person liable to civil action might be identified, irrespective of whether the perpetrator is the employer, the co-worker or a third party. In addition, the harasser might be liable to criminal action in the event of unlawful acts as those provided by the law.

In general terms, the author of this paper questions the view that in the event of work-related injuries, the employer will have to face charges as the harasser (civil liability) and as the entity which has to pay for compensation, if the work-related accident scheme is considered. This is because the employer's misbehaviour may be the result of either criminal offences or misdemeanours (as laid down in par. 2 of Art. 18 LAT)<sup>23</sup>. It may be argued that when victims opt for determining the perpetrator's liability according to civil law and the occupational health system, such action must be coordinated to avoid the simultaneous and unjust award of different forms of compensation.

Those diverging from this view are of the opinion that the determination of civil liability in the event of mobbing, under par. 3 of Art. 29 CT, excludes the possibility of referring to the occupational health system, the latter being a special form of liability itself.

There is another argument which runs counter to the hypothesis put forward in this paper: even though the victim is compensated, the occupational health system fails to ensure that the sanction is effectively paid by the harasser, an aspect that would have a positive effect on the injured party<sup>24</sup>. However, this issue arises only when we consider these schemes separately. Indeed, if applied in combination with the civil liability regime, the legal vacuum discussed above will not arise.

---

<sup>23</sup> However, as pointed out by Anne-Marie Laflamme "*ce difficile arrimage entre le droit du travail contemporain, fortement imprégné par la protection des droits fondamentaux, et le régime de la responsabilité civile, invite à la recherche de solutions nouvelles*". *Le Droit à la Protection de la Santé Mentale au Travail*, Éditions Yvon Blais, Canada, 2008, 63.

<sup>24</sup> Concerning the employer's liability, whether or not he is the mobber, see P. Ravisy, *Le Harcèlement Moral au Travail*, Delmas Express, Paris, 2000, p. 165.

### 3. Mobbing as a Work-related Accident

In this section, the concept of “work-related accident” in the Portuguese legal system will be considered in order to assess whether or not certain conduct at the workplace can qualify as mobbing.

As rightly pointed out by Domingos, a distinction should be drawn between “accident” and “injury”: what is legally compensated is the consequence of work-related accidents or any resulting injury<sup>25</sup>. Alternatively, the notion of “work-related accident” can be legally defined taking account of the damage suffered. Reference should also be made to the fact that in many cases occupational accidents have an emotional rather than physical component.

Legal opinion has clarified that at the time of defining a work-related accident and distinguishing it from an occupational disease, suddenness is usually taken into consideration<sup>26</sup>. As such, the work-related accident should be datable, determinable in time or at least “of short and limited duration”<sup>27</sup>. Therefore, to some legal opinion and case law, this requirement will be a strong deterrent to the consideration of mobbing as a work-related accident. Nevertheless, either most recent case law or legal opinion has questioned this feature. In fact:

(...) grey areas exist where suddenness is difficult to establish. An example of this is the continuous action of a working tool or the worsening of an existing predisposition or a disease originated from the work performed<sup>28</sup>.

In fact, there are several instances in national case law that confirm the mitigation of the requirement of suddenness. These findings emphasize the blurring boundaries between work-related accidents and occupational diseases, although the Supreme Court has ruled that a work-related accident exists when the cause of the injury is not immediate, but is

---

<sup>25</sup> M. Adelaide Domingos, *Algumas Questões Relacionadas com o Conceito de Acidente de Trabalho*, in *Prontuário de Direito do Trabalho*, No. 76-78, 2007, p. 38, and R. Garcia Pereira, *op. cit.*, p. 63.

<sup>26</sup> Cfr. M. Adelaide Domingos, *op. cit.*, p. 41 e 42. See also the decision from the second instance Court of Lisbon, from 10-11-2005, reported by Manuel Gonçalves.

<sup>27</sup> Sachet, Adrien, *Tratado Teórico e Prático da Legislação sobre Acidentes de Trabalho e Doenças Profissionais, em comentário à Lei Francesa de 1898*, vol. I, p. 261, in Franco, João Augusto Pacheco e Melo *Acidentes de Trabalho e Doenças Profissionais, Direito do Trabalho, Boletim do Ministério da Justiça, Suplemento*, Lisboa, 1979, p. 62.

<sup>28</sup> Our translation. Cfr. Alegre, Carlos, *op. cit.*, p. 37, and P. Ravisy, *op. cit.*, p. 81.

limited to a short and determined period of time, even though the effects gradually evolve<sup>29</sup>.

Domingos focuses on the possible suddenness of the action, breaking down the elements of that concept: its unpredictability and limitation in time. The author also states that the “grey areas” arise from circumstances in which action is variable, albeit continued, and does not feature the elements characterizing the existence of an occupational disease (e.g. a particularly dangerous work environment or products). Moreover, the law does not define the events determining a work-related accident, so suddenness is not viewed as a legal requirement. Significantly, neighbouring Spain has considered merging the two concepts<sup>30</sup>. A part of legal opinion has argued that the notion of “occupational disease” should be widened so as to include progressive diseases, also in consideration of the risks that have recently emerged.

As for “reiteration”, that is one of the criteria to assess mobbing, a part of the academic community has argued that isolated incidents should also be regarded as mobbing when they result in serious consequences for the worker. Moreover, national legislation does not seem to require reiteration in referring to harassment resulting from isolated acts or “unwanted behaviour” (Art. 29, par. 1, CT).

Further, Domingos agrees with the view that overwork causing the worker’s injury can be considered as a work-related accident<sup>31</sup>. In keeping with this view, the author welcomes the theory that a once-off and expected incident can be considered as a work-related incident if affecting the victim’s health. As such, for some authors, a range of behaviours that can be grouped producing the same incident amount to mobbing since it satisfies the requirement of suddenness used to define a work-related accident. Accordingly, the argument that the Portuguese occupational health system prevents the qualification of mobbing as a work-related accident – the latter being based on unpredictability – is untenable.

In the author’s view, it is the resulting injury or disability that qualifies mobbing as an occupational accident.

This classification can take place in two ways: by extending the concept of “work-related accident”, or by conceiving mobbing as a once-off incident.

---

<sup>29</sup> Cfr., for instance, Decision of the Supreme Court of Justice of 21 November 2001, reported by M. Torres. Cfr. also M. Jourdan, *L’Accident (sur le Chemin) du Travail: Notion et Preuve*, Études Pratiques de Droit Social, Waterloo, Kluwer, 2006, p. 29.

<sup>30</sup> Cfr. C. Tolosa Tribiño, *op. cit.*, p. 4.

<sup>31</sup> M. Adelaide Domingos, *op. cit.*, p. 44.

The first interpretation is not striking, at least in conceptual terms, given the different situations provided by the law. Take the safeguards provided in the event of work-related accidents; they do not cover all the possible events that can take place at the workplace, among others jobseekers sitting an interview in a company. The latter reasoning proves to be unsuccessful, as mobbing consists of a range of behaviours rather than an isolated event – even when it causes great damage – being that seriousness is not a defining characteristic. Even when treating it as a single event causing damage, mobbing will never have the characteristics of suddenness and certainty featuring work-related accidents.

#### 4. Mobbing as an Occupational Disease

Occupational diseases are caused by harmful agents to which workers are habitually or continuously exposed at their place of work. Moreover, these diseases are scientifically tested and can be recognized in advance according to a list issued by the legislator, so that the causal nexus with the work performed is usually acknowledged.

This is usually done by means of a table which is regularly reviewed (Decree nr. 6/2001, 05-05, republished by Decree No. 76/2007, 17-07), and contains traditional work-related diseases and the occupations causing them. Those not listed are usually seen as atypical diseases.

In determining the list of occupational diseases, many European countries did not make mention of mobbing. Accordingly, mental disorders caused by mobbing at the workplace are not seen as a work-related accident, while the opposite is true for physical illnesses.

Consequently, in Garcia Pereira's words, "reactive depression or heart problems" are listed in that table and are compensated as occupational diseases even though arising from mobbing<sup>32</sup>. Yet this interpretation is made more difficult by the legal relationship between the elements of the occupational disease and the ensuing risks.

Mago Pacheco argues for the need for a "reformulation of the concept of occupational disease" to include any injury arising from mobbing<sup>33</sup>. Nevertheless, the author of the present paper disagrees with this view, as possible amendments should not involve the notion of occupational disease in a strict sense but the foregoing table so as to extend to certain

---

<sup>32</sup> R. Garcia Pereira, *op. cit.*, p. 210.

<sup>33</sup> Pacheco, Mago, *Assédio Moral em Portugal. "O Elo mais Fraco"*, Almedina, Coimbra, 2007, p. 249.



physical and mental illnesses. This is not to advocate the qualification of injuries arising from mobbing as an occupational disease, because the worker must always prove the existence of a causal nexus between the incident and the damage suffered.

Moreover, national law already compensates for damage resulting from work-related or atypical occupational diseases, as laid down in par. 2, Art. 94 of LAT and par. 3 of Art. 283 of the CT. They are treated as a halfway measure between work-related accidents and occupational diseases, due to their unpredictability. In fact, this provision sets a special rule for determining the causal nexus, to the extent that it is necessary to demonstrate the relationship between the work performed and the functional disorder, proving that this is not caused by normal wear and tear. While in traditional occupational diseases the characteristic element is the pathological process, in atypical ones the essential element is the origin of the whole process. Work shall be the triggering factor and the sole cause of the disease.

Considering mobbing as an atypical occupational disease is feasible, although Redinha believes that this is not possible, because of the narrow limits of the residual definition of this notion. Conversely, the author of this paper is of the opinion that the law requires a causal nexus between the disease and the activity concerned, and that when mobbing arises, the disease is not caused by the task itself, but by the “deliberately painful performance of it”<sup>34</sup>. Thus, Redinha seems to argue that mobbing, not being classified in traditional labour relations<sup>35</sup>, cannot be considered as originating from the performance of an ordinary task. However, the connection between the disease and the working activity is realised by the mere exercise of the activity. In other words, it is sufficient that this state of affairs is the consequence of the worker’s willingness to work, irrespective of the way such work is performed<sup>36</sup>. Otherwise, the injuries suffered by the worker due to the employer’s fault and resulting for instance from an infringement of health and safety rules will not be compensated under this provision. Therefore, it is submitted that any injury, functional disorder or disease suffered by the worker and

---

<sup>34</sup> Redinha, Maria Regina Gomes, *Assédio Moral ou Mobbing no Trabalho*, in AAVV, *Estudos em Homenagem ao Professor Doutor Raúl Ventura*, vol. II, Coimbra Editora, Coimbra, 2003, p. 846.

<sup>35</sup> Statement by Álvarez Sacristán, D. Isidoro, “Tratamiento jurídico de los daños morales causados por los accidentes de trabajo”, *Actualidad Jurídica Aranzadi*, ano XIII, No. 567, 2003, p. 4.

<sup>36</sup> Redinha, Regina, *op. cit.*, p. 846.

stemming from mobbing is caused by the working activity. If not the result of wear and tear, these circumstances should correspond to a particular occupational disease. Finally, the law provides that the disease should be the direct consequence and the only cause of the activity carried out at work.

## 5. Conclusion

At a time when the economic component is widely debated, it should be noted that job dissatisfaction and the ensuing costs impact on workers – directly (on their health) and indirectly (on their productivity and the well-being of colleagues and family<sup>37</sup>) – and on employers. Example of this are the high rates of absenteeism<sup>38</sup>, demands for changing current working conditions, early retirement<sup>39</sup>, lower levels of productivity and performance, deterioration and greater hostility at the workplace and negative behaviour towards health and safety issues, all factors contributing to higher accident rates and higher costs for the health and safety management system<sup>40</sup>. Evidently, this state of affairs favours a

<sup>37</sup> On the consequences of workers' suicide, see Valdés Alonso, Alberto, "Informe sobre la Valoración de los Comportamientos Autolesivos y el Suicidio como Accidente de Trabajo", Gabinete Jurídico de UGT, Convenio de asesoramiento entre la Confederación de la UGT y la UCM, Janeiro 2008, p. 2, available at [http://www.ugtcantabria.org/saludlaboral/informe\\_comportamiento.pdf](http://www.ugtcantabria.org/saludlaboral/informe_comportamiento.pdf), accessed 31-10-2010. The cost for the relatives may be called "préjudice par ricochet", *cfr. Ginon, Anne-Sophie and Guiomard, Frédéric, Le Suicide peut-il constituer un Risque Professionnel?*, Le Droit Ouvrier, Julho 2008, p. 367.

<sup>38</sup> According to the Portuguese Public Institution for the Working Conditions (Autoridade para as Condições do Trabalho - ACT), psychosocial risks will be the main cause for absenteeism in 2014. *Cfr. [http://www.ionline.pt/portugal/stress-violencia-assedio-serao-principais-fatores-absentismo-laboral-partir-2014?quicktabs\\_sidebar\\_tabs=1](http://www.ionline.pt/portugal/stress-violencia-assedio-serao-principais-fatores-absentismo-laboral-partir-2014?quicktabs_sidebar_tabs=1)*, accessed 12-03-2012.

<sup>39</sup> A study concluded in Portugal in 2004 in the banking sector found that the main consequences of mobbing on workers were: long-term illnesses (11,8%), early retirement (17,6%), disability pensions (5,9%), change of company (23,5%) and work-related stress (5,9 %). Almeida, Paulo Pereira de, "Assédio Moral no Trabalho. Resultados de um Estudo", *Dirigir*, No. 98, Abril, Maio e Junho 2007, Lisboa, p. 45.

<sup>40</sup> Díaz Descalzo, M. Carmen, *Los Riesgos Psicosociales en el Trabajo: el Estrés Laboral, el Síndrome del Quemado y el Acoso Laboral. Su Consideración como Accidente de Trabajo*, in *RDS*, No. 17, 2002, p. 184. The World Health Organization estimates that by 2020, depression will be the main cause of disability at work. García Viña, *El Mobbing [sic] en las Relaciones Laborales en España*, in *Tribuna Social – Revista de Seguridad Social y Laboral*, No. 223, 2009, p. 15.

higher number of disputes arising from work-related accidents, concurrently heightening the risk of seeking compensation for injuries that were not actually suffered. Therefore, the National Mental Health Plan (2007-2016) envisages the need for coordination between different institutions on prevention and promotion initiatives, chiefly “employment policies and the promotion of mental health care in the workplace, in order to reduce and manage the stressors related to work and unemployment, and leave due to psychological illnesses”, increasing “awareness and information in various areas, such as [...] the workplace”<sup>41</sup>. At times, case law has acknowledged some disabilities as deriving from psychosocial risks, as confirmed by Supreme Court Decision of 30 May 2012<sup>42</sup>. On that occasion, the courts ruled that the disrupting behaviour on the part of a passenger towards a hostess causing her stress, depression, disturbed sleep, and emotional instability amounted to a work-related accident and resulted in a work-related disability.

In the author’s opinion, the Portuguese legal system has adequate instruments to align itself to other EU countries and compensate for the consequences of mobbing through the occupational health system. However, an examination of case law shows that some resistance still exists in this connection, making Portugal struggle to keep up with the rest of Europe.

---

<sup>41</sup> Resolution of the Ministers Counsel No. 49/2008, published on the *Diário da República*, 1<sup>st</sup> series, No. 47, from 06-03.

<sup>42</sup> Reported by Gonçalves Rocha, in *Colectânea de Jurisprudência*, No. 248, tomo II, 2012.





By combining legal and language expertise, ADAPT LANGUAGES supplies professional translation and interpretation services in the field of labour law, industrial relations, and Human Resources Management (HRM). Our services include the following:

- translation, editing and proofreading of documentation, books, and academic papers;
- conference interpreting;
- language courses for businesses and stakeholders;
- linguistic assistance in international events.

Different language combinations are possible. Make contact with [\*linguelavoro@adapt.it\*](mailto:linguelavoro@adapt.it) to request our services and to get a quote.

# Adapt International Network



**ADAPT** is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with DEAL – the Centre for International and Comparative Studies on Law, Economics, Environment and Work, the Marco Biagi Department of Economics, University of Modena and Reggio Emilia, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at [www.adapt.it](http://www.adapt.it).

For more information about the E-journal and to submit a paper, please send a mail to [LS@adapt.it](mailto:LS@adapt.it).

