The Employment Law Review

Seventh Edition

Editor
Erika C Collins

Law Business Research

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EDITOR'S PREFACE

Every year around this time when we update and publish *The Employment Law Review*, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this seventh edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past six years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up to date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2015 in nations across the globe, and is the topic of the second general interest chapter. In 2015, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where homosexuality is a crime, and multinational companies have many challenges still with promoting their diversity programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our fourth and newest general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this seventh edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Roberton and Sophie Arkell, for their hard work and continued support. I also wish to thank all of our contributors and my associates, Michelle Gyves and Ryan Hutzler, for their efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2016

Chapter 36

PORTUGAL

Magda Sousa Gomes and Rita Canas da Silva[1]

I INTRODUCTION

The Portuguese employment law framework is generally known for its high degree of employment protection. While this is true for those employees with an indefinite-term employment contract, in practice it has led to significant labour market segmentation, because employers tend to use other forms of employment, such as fixed-term contracts, temporary agency work, contracts for services (which often are merely disguised employment contracts), and outsourcing of services (that frequently are concealed forms of hiring out of labour or loaning of employees).

Labour courts in Portugal are part of the system of ordinary courts, as courts with a specialised competence. The specialisation also led to the creation of special labour divisions within the higher courts: the social divisions of the appeal courts (courts of second instance) and the social division of the Supreme Court of Justice. There are no 'social judges' or other forms of employer and employee representation, as the cases are ruled by normal judges.

Almost all of the relevant legal rules concerning employment relationships are in the Labour Code (LC), which contains not only the rules of the labour law as it concerns individuals, but also of the collective labour law, including rules about workers' committees, trade unions, collective bargaining agreements (CBAs) and strikes. The LC presently in force was approved in 2009 (Law No. 7/2009, of 12 February). The last significant revisions occurred between 2012 and 2014, as a result of the measures foreseen in the agreement with international organisations (see Section II, *infra*).

The LC – and the respective complementary legislation – covers private employment relationships. Civil servants or public employment relationships are subject

1 Magda Sousa Gomes and Rita Canas da Silva are senior associates at Sérvulo & Associados – Sociedade de Advogados.

to special legislation. Employment relationships with public enterprises (owned or controlled by the state or other public bodies) are generally covered by the LC, although in the past three years they have been subjected to several rules of the public employment status resulting from the implementation of austerity measures (see Section II, *infra*).

The main entity with responsibility for inspection and enforcement of compliance with the labour legislation is the Authority for Working Conditions (ACT), which performs the duties of the Labour Inspectorate as foreseen in ILO conventions. Another relevant public agency is the Commission for Equality in Labour and Employment (CITE), whose main responsibilities cover matters related to equality and non-discrimination between women and men and the protection of parenting rights.

II YEAR IN REVIEW

The year 2015 was marked by an uncharacteristic calm in labour law terms, especially when compared to the previous three years (2011–2014) which, in contrast, saw several amendments to the labour law. The amendments were a result of the implementation of measures regarding the labour market and labour legislation foreseen in the Memorandum of Understanding on Specific Economic Policy Conditionality, signed between Portugal, the International Monetary Fund, the European Central Bank and the European Union in May 2011.

The decision of the Constitutional Court that confirmed several modifications of the LC made in 2012 (see Section III, *infra*) was reflected throughout 2014 and 2015.

Recently, the main statistic related to labour law concerns unemployment. The unemployment rate increased consistently between 2011 and 2013, rising from an average annual rate of 12.7 per cent in 2011, to 15.6 per cent in 2012, to 16.4 in the second quarter of 2013. However, in 2014 the situation took on a positive trend and the unemployment rate fell to 14 per cent at the end of the second quarter, revealing a significant decrease compared with the same period in 2013. The unemployment rate remained stable in 2015. Other relevant data regards collective dismissals. From 2010 to 2011 the number of employment contract terminations due to collective dismissals that followed the formal legal procedure increased more than 85 per cent, and from 2011 to 2012 more than 115 per cent. Since 2013 the tendency has been towards a stabilisation in the number of collective dismissals and 2015 was no exception to that trend.

As already mentioned, 2015 was a quiet year for labour law amendments, and although 2014 brought some legal changes, the main modifications in the legal framework occurred in 2013, namely:

a the reduction of the severance pay due in most cases of termination of employment contracts (see Section XII, *infra*);

b the creation of the Work Compensation Funds (see Section XII, *infra*); and

c the increase of the length of employment contracts for a fixed period (see Section IV, *infra*).

It is not possible to forget the decision of the Constitutional Court No. 602/2013, of 20 September 2014, regarding the main measures adopted in the reform of the LC made by Law No. 23/2012. Some of its effects were observed during 2015 (see Section III, *infra*).

The reduction in remuneration for civil servants and employees of public enterprises should be noted, given that a new reduction of between 3.5 per cent and 10 per cent was approved by the government. However, these cuts only apply to gross salaries above €1,500. Another fact that occurred in 2013 and which revealed its consequences in 2014 and 2015 was the decision of the Constitutional Court to not accept the elimination of holiday bonuses (See Section III, *infra*). This led to the government decision to pay both holiday and Christmas bonuses in monthly twelfths.

III SIGNIFICANT CASES

The individual redundancy regime has suffered dramatic changes since the first amendment introduced by the revision of the LC made in 2012 when the existing legal criteria were eliminated, followed by the Constitutional Court decision that rejected this amendment, until the approval of Law No. 27/2014, of 8 May, which introduced a new set of mandatory criteria to which individual redundancy is now subject (see Section XII. ii, *infra*).

The years 2014 and 2015 were closely linked to the decisions of the Constitutional Court regarding the LC reform of 2012, since some of the repercussions occurred during these two years.

In decision No. 602/2013, of 20 September, the Court accepted the majority of the modifications made to the LC, such as the rules regarding: working time arrangements allowing more flexibility; the reduction of compensation due for overtime and the elimination of time off in lieu granted by the previous legislation; the elimination of four mandatory public holidays; the elimination of the possibility to increase the duration of annual leave by up to three days if the employee was not absent from work in the previous year; and the provision of a new form of dismissal due to failure to adapt. On the other hand, some of the modifications made in the legal regime of individual redundancies and the rules that prevented the CBA from granting time off in lieu for overtime and increasing the duration of annual leave were declared unconstitutional. Finally, the Court accepted the suspension for two years of the CBA rules that foresee a compensation for overtime higher than the one granted by law, but did not accept the legal rule that reduced by 50 per cent the payments for overtime foreseen in CBAs that were not renegotiated during the suspension period of two years.

This two-year period should have ended in July 2014. However, due to strong pressure from Portuguese employers, in July 2014, Law No.48-A/2014, of 31 July was approved and extended the abovementioned suspension period of the CBA rules regarding overtime, prolonging it until 31 December 2014.

Also in 2013, the State Budget foresaw the suspension of the holiday bonus for civil servants and public sector employees. Following its previous decisions of 2012, the Constitutional Court did not accept this measure (Decision No. 187/2013). Although an equivalent measure was adopted for private sector employees by means of an increase

to the tax revenue, as this increase was also applied to public employees (who were further affected by a reduction of remuneration that did not cover private employees), the Court ruled that the suspension of the payment of the holiday bonus for public employees (combined with other measures that affected their revenue) was not compatible with the principle of equal treatment.

This decision had repercussions in 2014 and 2015, given that the government approved the mandatory payment of holiday and Christmas bonuses in monthly twelfths for public employees and pensioners. The payment in monthly twelfths was an option for private sector employees.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Portuguese law assumes that employment contracts entered into for an undetermined period of time should be the rule in hiring; therefore, fixed-term employment contracts are permissible only in some cases. In practice, however, fixed-term contracts are the normal form of hiring of new employees.

Contracts of indefinite duration are not subject to any written form requirement, but their execution in writing is recommended in order to clearly establish the conditions between the parties and to comply with the information duty regarding the rules and conditions applicable to the labour relationship that has to be provided in writing. In practice, the written form is usually applied.

The written form is mandatory for some special employment contracts, such as fixed-term employment contracts; employment contracts with foreign employees; part-time employment contracts; teleworking employment contracts; and temporary employment contracts. Also some specific clauses must be in writing, such as non-compete clauses (see Section V, *infra*).

Fixed-term employment contracts are permitted only if necessary to satisfy temporary needs of work or for reasons of employment politics, such as to promote the hiring of certain categories of employees (first-time jobseekers and long-term unemployed) and the start-up of new enterprises or establishments.

Indefinite-term employment contracts may not exceed six years.

Parties may amend or change the employment contract, unless it is expressly forbidden by law. For example, except where permitted, the employer is not allowed – even with the consent of the employee – to reduce the employee's level of remuneration or rank.

ii Probationary periods

Employment contracts are subject to a trial period with the following duration:

a For employment contracts entered into for a temporary period (fixed or uncertain):
- 15 days when such term is less than six months; and
- 30 days when the term is equal or superior to six months.

b For contracts entered into for an indefinite period of time:
- 90 days for most employees;

- 180 days for employees performing services of a highly complex technical nature, or requiring high responsibilities or a high degree of trust; and
- 240 days for senior management and other senior staff.

c For service commission employment contracts: 180 days.

The trial period is set by law. The duration of the trial period may not be increased, only reduced or removed, either by collective or individual labour agreements. If the parties wish to exclude or reduce it they must agree to it in writing, except in the case of service commission employment contracts where the trial period must be expressly stipulated by the parties.

During the trial period, either party may terminate the contract without the need for justification and without any right for compensation. However, if the contract has lasted for more than 60 days, the employer must communicate its termination with a prior notice of seven or 15 days (the latter if the contract has lasted for longer than 120 days).

iii Establishing a presence

If a foreign company without any form or representation in Portugal or any permanent establishment within Portuguese territory intends to enter into an employment contract to be executed within Portuguese territory, Portuguese social security law is applicable. This implies that both the employer and the employee must be registered with Portuguese social security. Given that, for this purpose, it is necessary to have a Portuguese VAT number, the first step to be carried out is to request the VAT number for companies without any permanent establishment within Portuguese territory from the National Registry of Companies by means of the presentation of a signed form. This form must be accompanied by a certificate of legal existence of the company (which is issued by the competent authorities of the company's country) and with a statement containing the reasons for the request.

On the other hand, since the employer does not have any form of representation within Portuguese territory, it must have a representative for social security purposes, who must be one of the employees hired by the company. In this case, a contract of mandate with representative powers must be executed – through which, and strictly for the purposes connected with the payment of contribution amounts, the employee would act on the employer's behalf. This contract will only concern the acts connected with social security and does not include any other representative powers.

A foreign company may also hire employees through a temporary agency or another third party without having the need to register with Portuguese social security. Foreign companies are also allowed to enter into contracts for the rendering of services with independent contractors.

If, however, the independent contractor income is paid mostly by the foreign company (this will be held to be the case when 80 per cent of the income arises from one single contractual relationship) the foreign company will have to register with Portuguese social security, following the procedure mentioned above.

The lack of the incorporation of a permanent establishment prevents the foreign company from making personal income tax (IRS) withholdings. Therefore, employees hired by companies without a permanent establishment in Portugal are not subject to IRS withholdings, but only to social security deductions.

Foreign companies are obliged to comply with the mandatory legal provisions, in particular with those regarding minimum wage and working hours.

V RESTRICTIVE COVENANTS

During the execution of the employment contract, employees are forbidden by law from engaging in any activity that may compete with the activities of the employer. Failure to comply with this obligation constitutes a disciplinary offence.

As a general rule, the principle of free choice and practice of an occupation implies that any clauses in employment contracts or CBAs which may prejudice this principle after the termination of the employment relationship are inadmissible. However, exceptions are permitted provided that four requirements are met simultaneously:

a the limitation is agreed, in writing, in the employment contract or in the termination agreement;

b the restriction must concern activities whose practice, if developed in favour of a competitor, may cause prejudice to the former employer;

c the period of restriction may not exceed two years (regarding employees who develop an activity based on a special relationship of confidence or with access to privileged information this limit may be extended to three years); and

d the employee is granted compensation during the period in which he or she is forbidden to work for the competition.

There are no legal standards regarding the amount of this compensation. The law only foresees that if the termination results from a dismissal without just cause or from the termination due to a culpable behaviour of the employer, compensation must be raised in order to equal the employee's basic remuneration at the moment of the termination or else the non-compete clause will not be valid. It also admits the reduction of the compensation if the employer supported significant costs towards the employee's professional training. Although the appropriate amount of the compensation varies with the particular circumstances of each case, the Supreme Court has already decided in one case that a compensation equivalent to 30 per cent of the annual remuneration was acceptable and, in another case, that 20 per cent was an insufficient sum.

If the employee fails to comply with the non-competition clause, the employer may request him or her to reimburse the amount of the compensation paid as counterpart for the said clause plus the value of the prejudice arising from the violation of the restriction agreed.

VI WAGES

i Wages

The amount of the retribution is established by means of an agreement between the parties; however, it cannot be inferior to the minimum wage set by the government, which, from 2014, is €505 per month (this amount having increased for the first time since 2010). CBAs may also establish minimum amounts of monthly retributions, which must be observed in the employment contract.

The LC establishes that all employees are entitled to holiday and Christmas bonuses that amount, in general, to a basic monthly remuneration.

The law and the CBAs also foresee several special payments related to particular characteristics of work, establishing minimum amounts, for example, for night work and shift work.

ii Working time

The LC foresees the following maximum working hours: eight hours per day and 40 hours per week. Some CBAs establish lower limits, such as 35 or 36 hours per week.

By means of CBAs or of an agreement directly entered into with the employee, it is possible to increase normal working hours per day and per week, provided that, in average terms, the employee does not work for more than 40 hours per week in a reference period. A similar system, a 'time bank', can be implemented either by CBAs or by mutual agreement negotiated at plant level.

The LC defines night work as work performed between 10pm and 7am (CBAs may apply different definitions), which should be paid with an enhanced rate of at least 25 per cent. There are no specific limits for the number of night work hours different from the limit applicable in general.

iii Overtime

All work performed outside normal working hours is considered overtime and can only be performed when there are specific reasons for that and within certain limits: a maximum of 175 or 150 hours per year (depending on the company's size) and two hours per working day. CBAs can extend the annual limit up to 200 hours per year.

The minimum additional remuneration due for overtime is: on a normal working day, 25 per cent for the first hour and 37.5 per cent for the following hours; and on holidays and normal rest days, 50 per cent. Those rates were recently revised and represent a reduction of 50 per cent on the rates previously foreseen. For overtime rendered on a mandatory rest day the employee also has the right to a full day of compensatory rest. The LC revision eliminated the compensatory rest equal to 25 per cent of the number of hours of overtime worked on other days. The elimination of the compensatory rest also covered the situations foreseen in CBA, but the Constitutional Court did not accept this provision (see Section III, *supra*).

VII FOREIGN WORKERS

As a general rule, a foreign worker who is authorised to perform a professional activity in Portuguese territory is entitled to the same rights and subject to the same duties as a Portuguese worker.

There are neither limits regarding the number of foreign workers a company may hire nor time limits for the duration of the respective employment contracts. Furthermore, the company does not have to support any additional taxes or local benefits in relation to them.

Companies are not obliged to keep a register of foreign workers. However, these workers are identified separately in the company's annual report and companies must ensure that they are duly authorised to work in Portugal. The admission of a foreign employee must be communicated to the ACT. Termination of employment contracts with foreign employees must also be communicated within 15 days after it has occurred. Both communications are done electronically.

Concerning the authorisation to stay and work in Portugal, the law (Law 23/2007, of 4 July, modified by Law 29/2012, of August 9) demands that, if a foreigner intends to perform his or her professional activity within Portuguese territory, he or she must apply for a visa. This is not necessary if the person in question is a national of an EU Member State or a citizen of third states with which the EU has signed a free movement of persons agreement.

The types of visas that allow a person to work in Portugal are the following:

a a temporary stay visa, which allows entry into Portuguese territory for several purposes, in particular for accomplishing a professional assignment either dependently or independently and whose duration does not exceed, as a rule, a six-month period; and

b a residence visa, which allows its holder to enter into Portuguese territory in order to apply for a residence permit (e.g., for the purpose of subordinated professional activity). The residence visa is valid for two entries into Portuguese territory and enables its holder to remain for a period of four months.

VIII GLOBAL POLICIES

The LC contains several rules on disciplinary action, contemplating the type of disciplinary sanction that may be applicable and some general rules regarding the disciplinary procedure that must be observed by the employer.

The employer can draw up internal work rules (called internal regulations) regarding the organisation and discipline of work, but this is not mandatory. Employees do not have to approve or agree with the internal regulations, but in the preparation of it the employer must inform and consult the workers' committee or the trade union representatives in the enterprise.

It is not necessary to obtain any approval of the internal regulations by the public authorities, neither is it necessary to send them those regulations. The internal regulations must be made generally known to the employees by being displayed in the enterprise's head office and all workplaces.

Although it is not mandatory to use local language, if the rules are not written in Portuguese the employer must be in a position to prove that all employees understand the language used.

CBAs may establish the duty of the employer to draw up internal regulations on specific matters.

Internal regulations represent a form of exercising the employer's particular powers and therefore they are not incorporated into employment contracts, nor do they need to be accepted by the employees. Only if the internal regulations include some of the terms and contractual conditions the employer wishes to offer the employees (instead of including those conditions in each employment contract) will it be necessary to obtain the employee's acceptance of these conditions. However, the LC establishes a presumption of acceptance: unless the employee states an objection, in writing, within a period of 21 days, he or she is deemed to have accepted the rules that may be qualified as contractual conditions.

IX TRANSLATION

Portugal does not have any legislation regulating the language that must be adopted for employment contracts and other related documents. The only requirement is that the language used shall be one that both parties understand.

Although there are no limitations in these situations, if any document not written in Portuguese has to be presented in court, a translation of its content must be presented.

All documents that have to be presented to the Portuguese authorities (and, in particular, to the ACT) must be written in Portuguese or accompanied by a Portuguese translation.

X EMPLOYEE REPRESENTATION

Employees have the right to create workers' committees at the company level. This right applies to all employees, regardless of the size and the nature of their employer. Only the number of the workers' committee members varies according to the number of company employees, going from two (in companies with fewer than 50 employees) up to 11 (in companies with more than 1,000 employees).

The creation of a workers' committee is not mandatory and the employer has no duty to encourage its formation, although it must allow the use of its premises and other facilities if one exists. If employees decide to create a workers' committee, the law imposes a special electoral procedure, regulated in detail, since the workers' committee is a representative body of the enterprise's entire workforce. The election must be by direct and secret ballot and the law also imposes the principle of proportional representation. Workers' committee members may be elected for a maximum period of four years.

The law grants workers' committees several rights, such as the right to information; to scrutiny of management; to manage or co-manage welfare facilities; to have regular meetings with the enterprise management bodies (at least once a month); the right to be consulted on the reorganisation of production units; the right to distribute information and display notices; and the right to organise meetings in the workplace.

Despite the relevance the law gives to workers' committees, in practice, the significance of these representative bodies is very small. There are only a couple of hundred companies with workers' committees, mostly state-owned.

Trade unions also have the right to carry out their activity within the enterprise. For this purpose they, can appoint union representatives at company level (called union delegates), who are elected by the unionised employees. If there are several union delegates in the company, they can organise themselves into a workplace union committee. These committees are different from the workers' committees (since they do not represent all the company's employees but only those who belong to the trade unions) and do not have the same kind of rights related to the participation of the employees within the enterprise.

Employee representatives (workers committee' members and trade union representatives at enterprise level) enjoy a privileged status which aims to ensure the conditions enabling them to fulfil their functions and to protect them against discriminatory acts. The most relevant is the time-off right or 'hours credit', which is the right to interrupt their work performance for periods of varying duration, notwithstanding any other right or entitlement, including the right to receive the remuneration corresponding to the time off. Members of the workers' committee are entitled to a 25-hour credit per month. Trade union representatives have a five-hour credit per month.

XI DATA PROTECTION

i Requirements for registration

The Portuguese Data Protection Law (DPL) provides for the registration of all personal data processing by the Portuguese Data Protection Agency (CNPD); for this reason, the data controller must notify the CNPD of all data processing.

The CNPD can exempt certain specific data processing from such notification requirements. With regard to employees' data, the CNPD has issued general exemption decisions that cover the basic processing of employees' data that is necessary for the management of the staff and also for payroll purposes.

If the employer processes employees' personal data for purposes beyond these basic purposes, then notification and registration with the CNPD is mandatory (a notification is due for every different purpose for which the employer uses the data). The notification must identify what data is being processed and for what purpose, along with the identification of any data processors to whom the information is disclosed and measures related to security and transparency of the data processing.

The consent of the employee is not necessary if the data processing is considered necessary for the performance of the employment contract. In any case, since it is difficult to determine exactly what data is strictly necessary, it is prudent to obtain consent from the employee to process his or her data.

The employer, as data controller, must ensure that the personal data of the employees is processed in secure technical conditions and that access to the information is limited to those staff members who need to access this information to perform their functions.

ii Cross-border data transfers

Cross-border data transfers shall be disclosed to the CNPD when registering a data processing.

The transfer will require the CNPD's prior approval if it is made to a nation that is not an EU Member State, unless it is a country listed by the EU as guaranteeing an adequate level of protection. Without such a level of protection, an agreement shall be entered into according to standard clauses approved by the EU (when transferring data to the United States, registration in the Safe Harbor programme may not be sufficient). Onward transfers are restricted to parties that are bound by agreements setting a minimum level of protection.

iii Sensitive data

Portuguese law considers as sensitive data that 'reveal philosophical or political beliefs, political party or trade union membership, religion, privacy and racial or ethnic origin, and the processing of data concerning health or sex life, including genetic data'. Processing sensitive data is prohibited unless there is a prior approval of the data processing by the CNPD. In the employment field, there are some other kinds of data processing that are subject to such prior approval, such as the use of remote surveillance mechanisms (video surveillance, for example).

iv Background checks

The LC states that the employer cannot demand that a potential employee disclose information related to his or her private life, unless such information is strictly necessary and relevant to evaluate the applicant's ability to perform the job. The motives for requesting such information must be explained to the applicant in writing. The employer is also, in principle, prohibited from requesting health information, in particular relating to pregnancy.

The processing of credit data is subject to prior approval by the CNPD. As a general rule, the CNPD does not authorise credit information to be used for the purpose of recruitment. Criminal records checks are allowed, but information provided by the Central Criminal Register is very limited, since it only covers what may be considered strictly relevant for this specific purpose. The job applicant must authorise this criminal records check.

XII DISCONTINUING EMPLOYMENT

i Dismissal

General rules

Article 53 of the Portuguese Constitution states that 'workers are guaranteed security of employment, and dismissal without just cause or for political or ideological reasons is prohibited.' This rule implies that all dismissals must be justified or based on circumstances that are considered to be 'just cause'. Thus, the concept of just cause includes not only the disciplinary dismissal but also other forms of dismissal, provided they are justified according to the law. Presently the LC foresees the following kinds of dismissal: dismissal

based on unlawful conduct of the employee (or disciplinary dismissal); redundancies or dismissals resulting from the elimination of jobs (collective dismissals and individual redundancy); and dismissal for failure to adapt.

If the dismissal is not justified according to the law or if the employer does not observe the proper procedure, and also if the court rules that the reasons invoked for the dismissal were insufficient or have not been properly proven, the termination of the employment contract can be considered null and void, and, therefore, the contract remains in force, which can lead to reinstatement or compensation.

For this reason, it is necessary that the employee contests the dismissal in court (labour courts have exclusive jurisdiction over the legality of dismissals) within 60 days of being dismissed, or six months in the case of collective dismissals.

If the court considers the dismissal unlawful, the employee is entitled to receive the pay that he would have otherwise received from the date of the dismissal up to the date of the final ruling. With respect to the period subsequent to the ruling, the employee may choose to be reinstated with all rights and guarantees unaffected or to receive compensation that shall be established by the court at a sum of between 15 and 45 days' basic pay and seniority allowances for each year or part year of service to the company, with a minimum of three months' pay.

Reinstatement can only be avoided by the employer in limited cases: if the dismissal took place in a company with fewer than 10 employees or if the dismissed employee is a member of the senior managerial staff. However, the decision not to reinstate the employee must be made by the court. If this is the case, the compensation due to the employee shall be established by the court as between 30 and 60 days of basic pay and seniority allowances for each year or part year of service to the company.

Disciplinary dismissals

Just cause, as defined in law, consists in a culpable behaviour of the employee, which, due to its seriousness, makes the continuance of the employment relationship immediately impossible in practice. The essence of the concept of just cause consists in the impossibility in practice of continuing the employment relationship. The law gives some examples of situations qualified as just causes, such as:

a unjustified disobedience of the orders of a superior;
b repeated lack of due diligence in the performance of duties;
c unjustifiable absences that caused serious damages or risks to the employer, or, regardless of damages or risks, when the absence exceeds in each calendar year more than five consecutive working days or more than 10 non-consecutive working days;
d failure to observe standards of hygiene or safety at work; and
e unusual reductions of productivity.

Even when the employee's behaviour is of such seriousness that it may justify a dismissal, this may only occur after following the proper procedure. The procedure is quite complex and usually takes several weeks to complete. The workers' committee should be informed of the procedure and has the right to give a written opinion, although it is not binding.

In general, this kind of dismissal does not require any notification to government authorities. If, however, the dismissal concerns a pregnant worker, any worker who has

recently given birth or who is breastfeeding, or a male worker during parental leave, CITE must be notified and has the right to give a binding legal opinion. In case of a negative opinion, the dismissal can only take place if the employer obtains a court decision confirming the existence of a cause for termination.

In case of a disciplinary dismissal, the employer does not have to pay any compensation for the termination of the employment contract.

ii Redundancies

Redundancy is understood as the termination of the employment relationship, initiated by the employer for business reasons leading to the elimination of jobs. Redundancy can assume two forms: collective dismissal and individual redundancy.

A dismissal is considered to be collective whenever the employer terminates, either simultaneously or within a period of three months, the employment contracts of at least:

a two employees, in companies with up to 49 employees; or
b five employees, in companies with 50 or more employees.

If these numbers are not met, the system regulating 'individual redundancy' is applicable.

In both cases, the dismissal must be justified by the closure of one or more departments of the company or by the elimination of jobs or work positions due to economic or market forces, technological or structural reasons.

For individual redundancies, the LC foresees a duty of the employer to offer the employee it intends to dismiss the transfer to another available work position provided that this position is compatible with the employee's category (such obligation was eliminated in the revision made by Law 23/2012, but the Constitutional Court did not accept the solution and therefore the ancient rule was re-established). Although a similar provision is not foreseen for collective dismissals, in both types of redundancy, it is understood as a rule that, whenever there are work positions or posts available that match the occupational category and the qualifications of the workers, the employer should offer such positions to the workers affected by the dismissal.

For both types of dismissal, the law foresees a complex procedure that implies the previous notification of the intention to carry out a dismissal and the respective reasons to the workers' committee (or if the company does not have one, the trade union representatives within the enterprise) and the Ministry of Employment. If there are no employee representative structures, all employees potentially affected must be notified and may elect from among them a committee to negotiate the collective dismissal with the employer. In an individual redundancy, the initial notification is always sent to the employee in question. For collective dismissals, the initial communication sent by the employer must contain the criteria that he or she chooses to use in selecting the employees to be dismissed. In individual redundancies the criteria are set by law, whereby employees are selected for redundancy in the following order:

a worst performance evaluation, according to previously established criteria;
b those with fewer professional and educational qualifications;
c those representing the highest cost to the enterprise;
d those with less experience in the occupational category; and
e those with a shorter period of service in the enterprise.

These are the new criteria introduced by Law No. 27/2014, of 8 May, which amended the LC, and became the solution to deal with rejection from the Constitutional Court regarding the elimination of any criteria for individual redundancies in the revision of the LC made in 2012.

In collective dismissals, a phase of negotiations and consultation is open between the employer and the employees, in order to reach an agreement regarding the method of carrying out the dismissals and the adoption of alternative measures (what could be called a social plan, although in practice it is very rare to actually draw up such a plan). In individual redundancies, negotiation is replaced by the possibility of the employee affected and the employees' representative structure to issue a written opinion about the dismissal.

Representatives from the Ministry of Employment participate in the negotiation process of the collective dismissals, attending the meetings between the parties, but they do not have any power to authorise or prevent the employer's decision to carry out the dismissal.

In collective dismissals, 15 days after the initial communication, the employer may issue its decision, giving written notice to each employee to be dismissed, stating the specific grounds for the dismissal and the date on which the contract is to be terminated. The dismissal decision must also be sent to the Ministry of Employment, accompanied by several documents, including a list detailing each employee dismissed and other measures that have been decided. This list must also be sent to the employee representative structure.

In individual redundancies, the employer must wait five days (after the employee or his or her representatives have issued their opinion on the dismissal) before making the final decision. This must also be sent to the employee representatives and to the ACT.

In all redundancies the employer is obliged to grant a prior notice period to the employees, going from the date of the final decision to the date of the actual termination of the employment contracts. The prior notice can be of 15, 30, 60 or 75 days, depending on the employee's seniority.

If the employer does not comply, wholly or partially, with the prior notice period the employment contract will only terminate on the date on which the prior notice would have terminated should it have been given by the employer, and therefore the employee is entitled to receive the remuneration and other benefits inherent to that period.

These dismissals are accompanied by the payment of compensation. As said, the rules about compensation were changed in 2011, 2012 and 2013, which means that the regime varies depending on whether it applies to contracts concluded after 1 October 2013 (new contracts); contracts concluded between 1 November 2011 and 30 September 2013; or contracts concluded before 1 November 2011 (old contracts).

For new contracts compensation corresponds to 12 days of basic pay and seniority allowances for each year of employment (in the case of a fraction of a year, payment is calculated proportionally), the total amount being subject to the following limits:

a the base for calculation may not exceed 20 times the guaranteed minimum monthly salary, which presently corresponds to a total amount of €10,100; and

b the total value of the compensation may not exceed 12 times the basic monthly salary and the seniority allowances of the employee in question or 240 times the minimum wage (currently €121,200).

For contracts entered into between 1 November 2011 and 30 September 2013, compensation is made up of three parts:

a the first covers the period between 1 November 2011 and 30 September 2013, the compensation being equal to 20 days of basic pay and seniority allowances for each year of service;

b the second covers the period between 1 October 2013 and the date on which the contract completes three years of duration, the compensation being equal to 18 days of basic pay and seniority allowances for each year of service; and

c the third part covers the period subsequent to the first three years of duration of the contract and the date of the termination and corresponds to 12 days of basic pay and seniority allowances for each year of service.

For contracts entered into before 1 November 2011, the compensation also includes three parts, in accordance with the legal regime in force in each period:

a the first part covers the period of duration of the contract until 31 October 2012, the compensation being equal to one month's basic pay and seniority allowances for each year of service;

b the second part covers the period between 1 November 2012 and 30 September 2013, the compensation being equal to 20 days of basic pay and seniority allowances for each year of service; and

c the third part covers the period of duration of the contract after 1 October 2013 and corresponds to 12 days of basic pay and seniority allowances for each year of service.

For old contracts that had not yet been in operation for three years when the new law that imposes the 12-days rule entered into force a special rule is foreseen; the compensation for the period between 1 October 2013 and the date on which the contract completes three years will be equal to 18 days of basic pay and seniority allowances per year.

The maximum limits created for the new contracts are also applicable in this case, as follows:

a if the value of the first instalment is equal to or higher than 12 basic monthly salaries and seniority allowances or 240 times the amount of the minimum salary, the employee receives the calculated amount but does not receive the other instalments; and

b the sum of the instalments may not exceed the two referred limits.

The law presumes that the employee accepts the dismissal when he or she receives the compensation.

Work Compensation Funds

Law No. 70/2013, of 30 August, establishes the legal regime of the work compensation funds: the Work Compensation Fund (WCF) and the Work Compensation Guarantee

Fund (WCGF). Both are funded with the contributions that employers are obliged to make in relation to the employees hired from 1 October 2013. The employer must contribute to the WCF an amount corresponding to 0.925 per cent of the employee's basic remuneration and seniority allowances, the contribution to the WCGF being 0.075 per cent.

The amount registered in the WCF in the name of each employee can be used by the employer to pay the seniority compensation. The WCGF can only be used by the employee and its purpose is to guarantee the payment of half the amount of the compensation for termination if the employer did not pay this amount.

Termination by agreement

Portuguese legislation does not establish any limitation regarding the possibility of signing termination agreements. Such an agreement may be concluded at any time and no justification is necessary. Only if the agreement is an alternative to a redundancy is it necessary to state before the social security administration the reasons for the termination, for purposes related to unemployment benefit.

There are, however, some formal requirements: the agreement must be in writing, two copies must be made and signed by both parties and it has to mention the date of its signature and also the date of the beginning of its effects.

The agreement can be revoked by the employee up to seven days after its signature, provided that the employee gives the employer written notice and returns the amount received. This right is not granted whenever the agreement is properly dated and the signatures of the parties are recognised before the public notary.

In practice, many cases of proposed redundancies are settled through what can be called 'agreed redundancy'. This is an expression used to designate situations where, by an agreement with the employer, the employee consents to end the contract of employment in return for compensation, as an alternative to a collective dismissal or an individual redundancy. The legal form of termination is then not dismissal but termination by agreement.

However, the law recognises that, in reality, the initiative to terminate the contract originates from the employer, and therefore classes this as a situation of involuntary unemployment carrying entitlement to unemployment benefit (provided some conditions are fulfilled).

XIII TRANSFER OF BUSINESS

Portuguese labour law in this area is, broadly speaking, a direct transposition of the regulations contained in the EU Directive 2001/23/EC, of 12 March. These rules are applicable when there is a transfer of an undertaking, which, for this purpose, is considered as any contract or legal act which results in the transfer of an economic unit, that is an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

In these cases, employment contracts will be automatically transferred to the transferee in the exact terms and conditions in force at the moment the transfer occurs. Therefore, the transfer is supposed to not affect the employee's legal position, since

all rights and obligations corresponding to an existing employment relationship are automatically transferred as a matter of law. The transfer itself cannot be considered as a cause of termination of the employment contracts.

The transferor and the transferee are jointly and severally liable for the payment of any credits due to the employees until the date of the transfer. The liability of the transferor is maintained in force for a period of one year counting from the date of the transfer. The transferee may not limit its responsibility.

The transferee also assumes the liability for the payment of the contributions and interests in debt to social security at the time of completion of the transfer and is responsible for the payment of any fine due to the labour authorities for non-compliance with the labour rules with respect to the employees transferred.

The transferee is obliged to observe the CBA that was in force in the undertaking or establishment while it is still in force and, at least, for a minimum period of 12 months, unless a new CBA is applicable to the transferee's employment relationships.

Prior to the transfer, the transferor and the transferee must inform the employees' representatives (e.g., the workers' committee, the trade union commissions and the trade union delegates) or, should these not exist, the employees themselves of the transfer. This information has to be made by means of a written document, with several points mentioned such as the date and reasons of the transfer, its legal, economic and social consequences and the measures regarding the employees that shall be adopted due to the transfer.

XIV OUTLOOK

Due to the significant cuts to salaries and pensions, along with increases in tax rates, investment and consumption in Portugal suffered an expected decrease throughout 2014. However, there have been some signs of improvement in the past months, particularly as regards the rate of unemployment. The state budget for 2016 continues to set out cuts to social welfare benefits and public sector pay (salaries and career progression of public employees remain frozen).

Significant reforms to the private labour law are not currently expected.

Appendix 1

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