THE EMPLOYMENT LAW REVIEW

Eleventh Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For the past decade, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. When updating the book each of the past 10 years, I reread the Preface that I wrote for the first edition 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. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 11 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 11th 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 this publication grow and develop to satisfy its initial purpose: 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.

This 11th edition also holds a special place in my heart because it is the first that I have prepared as a shareholder of Epstein Becker & Green, PC (EBG). I joined EBG at this time in part because, in 2019, EBG established an alliance with Deloitte Legal to provide clients with comprehensive and global services relating to employment law and workforce management. The alliance brings together Deloitte Legal's global reach and the strength of its multidisciplinary business approach with EBG's United States labour and employment attorneys and workforce management experience to form a global delivery model. Through this alliance, EBG and Deloitte Legal offer comprehensive employment law and workforce management services to clients. I firmly believe that this alliance is the 'wave of the future', to be able to offer clients integrated professional services, and this notion parallels the mission and purpose of this text.

In 2020 and looking into the future, global employers face growing market complexities, from legislative changes and compliance, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, negotiating collective bargaining arrangements or responding to increasing public attention around harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources

professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

Our most recent general interest chapter still focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, and 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 2019 in nations across the globe, and one of our general interest chapters discusses this. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. 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 final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. 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 five general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 44 jurisdictions around the world. A special thank you to the legal practitioners across the

globe who have contributed to this volume for the first time, including Sedrak Asatryan, Janna Simonyan and Mary Serobyan (Armenia), Stefan Kühteubl and Martin Brandauer (Austria), Ignacio García, Fernando Villalobos and Soledad Cuevas (Chile), Tingting He (China), Jan Procházka and Iva Bilinská (Czech Republic), Véronique Child and Eric Guillemet (France), Guy Castegnaro, Ariane Claverie and Christophe Domingos (Luxembourg), Jack Yow (Malyasia), Charlotte Parkhill and James Warren (New Zealand), Petra Smolnikar, Romana Ulčar and Tjaša Marinček (Slovenia), Fernando Bazán López, Antonio Morales Veríssimo de Mira, Paloma Gómez López-Pintor and Andrea Sánchez Rojas (Spain) and Caron Gosling (United Kingdom). This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my associates, Ryan H Hutzler and Anastasia Regne, for their invaluable efforts in bringing this 11th edition to fruition.

Erika C Collins
Epstein Becker & Green
New York
February 2020

Chapter 36

PORTUGAL

Tiago Piló[1]

I INTRODUCTION

The Portuguese employment law framework is generally known for its high degree of employment protection, mainly because dismissal at will is forbidden by the Portuguese Constitution and the general understanding of an employment relationship is that it is long-term. However, in practice, employees face labour market segmentation because employers, despite accepting a certain degree of risk, tend to use alternative forms of employment to provide for their staffing needs, such as fixed-term contracts, temporary agency work, independent contractors and outsourcing of services.

Most of the relevant regulations are consolidated in the Labour Code (LC) (Law 7/2009 of 12 February). In addition to the LC, several other laws regulate important issues, such as those relating to parenthood protection (Decree-Law 91/2009 of 9 April), occupational accidents and sickness (Law 98/2009 of 4 September), and occupational health and safety (Law 102/2009 of 10 September). Civil servant or public employment relationships are governed by special regulations.

Judicial litigation and the application of administrative fines are handled by labour courts, which are part of the system of ordinary courts, as courts with a specialised competence. This specialisation led to the creation of specific labour divisions within the higher courts: the social divisions of the appeal courts and the social division of the Supreme Court of Justice.

The main authority responsible for inspecting and enforcing the labour legislation is the Working Conditions Authority (ACT), which undertakes the duties of the Labour Inspectorate. Social security matters are handled by the Social Security Institute under the supervision of the Ministry of Employment and Social Solidarity. Another relevant public agency is the Commission for Equality in Labour and Employment (CITE), which focuses on matters relating to equality and non-discrimination between women and men, and the protection of parental rights.

II YEAR IN REVIEW

The year 2019 was marked by three major amendments to the labour framework. At the beginning of the year, a law was approved to introduce a system of employment quotas for people with disabilities, with a degree of disability of 60 per cent or more. In February,

1 Tiago Piló is a managing associate at Vieira de Almeida. The author would like to thank Rita Rocha, a junior associate at Vieira de Almeida, for her assistance with this chapter.

new measures came into force to promote equal pay for women and men for equal work or to promote equal pay for men and women. One of the most iconic measures was a report published in June 2019 that identified an overall gender pay gap of 14 per cent.

In the latter part of the year, a major overhaul of the Labour Code was enacted – the 15th since the Labour Code was introduced in 2009. These amendments resulted from a government initiative, backed by the left-wing majority in parliament, undoubtedly with a view to repealing some of the austerity measures introduced during the Troika years.

Apart from the aforementioned, 2019 was marked by a continuing stability in labour developments. The significant effects of the economic downturn during the past few years (including downsizing, closures, redundancy programmes and employee cost reductions) are now a thing of the past. As proof of this progress, the unemployment rate in the third quarter of 2019 was 6.5 per cent, which is below the average in the European Union but above the Eurozone average.[2]

Companies are increasingly investing in the Portuguese market and employers are making an effort to retain human capital and talent (reverting to alternative ways of managing employee costs, such as flexible working arrangements), as a result of the government's measures to support employment and business. Moreover, the rate of collective dismissals has dropped, which means that employment relationships are becoming more stable.

III SIGNIFICANT CASES

i Company cars qualify as salary

In March 2019, the Supreme Court of Justice ruled that company cars used for business and private purposes could qualify as salary and, as such, would benefit from the law's full protection, namely preventing companies from taking away the cars without providing the proper compensation.

ii Using CCTV tapes in disciplinary action against employees

In a landmark ruling in January 2019, the Oporto Court of Appeals confirmed that, under certain circumstances, CCTV recordings could be used in disciplinary action as a justifiable means of proof against an employee. According to this ruling, the integration of the employee into a business organisation entails restrictions on the freedom and exercise of fundamental rights, which may lead to a conflict between the employee's fundamental right to privacy and the employer's right to pursue its business objectives.

iii Appointment to board of directors does not terminate employment relationship

The Constitutional Court decided, for the third time, to confirm its previous judgments in which it ruled as unconstitutional the provision of the Commercial Companies Code, in the part that determines the termination of the employment contract of an employee of a public limited liability company who is appointed as a director within a year of being hired.

2 Information retrieved from Statistics Portugal: https://www.ine.pt.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Permanent employment contracts follow the general rule that applies to civil contracts: no written document is required, and the employment relationship may be proven by any means. The following types of contracts, however, must be in writing: fixed-term, part-time, home-based; and certain top management contracts.[3]

Although not mandatory, it is increasingly common for permanent contracts to be in writing, as this makes it easier to determine the agreed terms and conditions. Furthermore, the employer may take advantage in executing written contracts to comply simultaneously with mandatory information obligations and include clauses to facilitate the future management of the employment relationship.

Fixed-term contracts are limited to those situations where it is necessary to provide for temporary staffing needs or for reasons of state employment policies, such as to promote the hiring of certain categories of employees (individuals unemployed for more than 24 months) and the start-up of new enterprises or companies that employ fewer than 250 employees. These contracts may be renewed up to three times and their overall duration (including renewals, if any) is limited to two years.

Parties are entitled to amend or change the contract, unless it is expressly forbidden by law.[4]

Contracts for an unfixed term are more commonly used whenever the duration of the staffing need is uncertain (e.g., replacing a sick employee) and may not exceed four years.

The minimum duration for a contract of very short length is 35 days. This type of contract may be used in any industry, as long as there is an exceptional increase in activity to warrant it.

Contracts for temporary work are limited to a maximum of six renewals, except when they are executed to replace an employee who is absent because of illness or accident, or is on parental leave.

ii Probationary periods

Probationary periods in employment contracts are allowed for the following durations:

a for term contracts:
- 15 days when the duration is less than six months; or
- 30 days when the duration is six months or more.

b for permanent contracts:
- 90 days for most employees;
- 180 days for employees performing services of a highly complex technical nature, or requiring a high level of responsibility or a high degree of trust or for people looking for their first job or long-term unemployed (individuals unemployed for more than 24 months); or
- 240 days for senior management and other senior staff; or

c for top management contracts: 180 days.

3 Failure to comply with the obligation to enter into a written contract, whenever it is mandatory, does not render the contract as invalid but may lead to it becoming a full-time permanent contract.

4 For instance, as a rule, an employer is not allowed to reduce an employee's salary unilaterally or to demote an employee, even with his or her consent.

The duration of the probationary period set by the law cannot be increased, but it may be reduced or eliminated, by either collective or individual agreement, in writing.[5]

The party that unilaterally terminates a contract during a probationary period is under no obligation to justify the decision or to pay any compensation. However, if the contract has lasted more than 60 days, the employer must comply with the requirement to provide seven days' notice; if the contract has lasted more than 120 days, the employer must comply with a 15-day notice period.

iii Establishing a presence

Any foreign company without any form of representation in Portugal or any permanent establishment (PE) within Portuguese territory aiming to enter into an employment contract to be executed in Portugal must be registered with the social security agency. For this purpose, it is necessary to have a Portuguese valued added tax number, which must be requested from the National Registry of Companies by means of the submission of a signed form accompanied by a certificate of legal standing and a statement confirming the reasons for the request. It is also necessary to have a designated representative for social security purposes, which can be one of the employees hired by the company.

For specific time-limited projects, a foreign company may also hire employees through a temporary agency or another third party without having to register in the Portuguese social security system.

The lack of the incorporation of a PE prevents the foreign company from withholding personal income tax. Therefore, employees hired by companies without a PE are subject to social security deductions only, and not any withholdings.

V RESTRICTIVE COVENANTS

There is a general prohibition on any clauses intended to limit a person's freedom to work, with the exception of the non-compete clause.

As a general rule, post-contractual non-compete covenants are not enforceable in Portugal. However, according to the LC, these covenants are enforceable provided all the following requirements are met:

a the maximum time for the limitation does not exceed two years after the termination of the employment agreement, or three years if the nature of the activity implies a special relationship of trust, or if the employee has access to particularly sensitive information relating to competition;

b the covenant is executed in writing (either in the employment contract or in the termination agreement);

c the activity that is being limited may in fact cause damage to the former employer; and

d the former employee is paid compensation for agreeing to the non-compete covenant, which means that gardening leave (whereby the employee is not paid any amount) cannot be enforced throughout the non-compete period.

5 Except in the case of top management contracts, when the probationary period must be expressly stipulated by the parties.

In terms of geography, there are no mandatory limitations, although restrictions may result either from the business requirements of the employer or from the scope of limitations agreed upon in the non-compete covenant.

There are no specific provisions to regulate the amount of compensation to be paid under non-compete covenants. In any case, the compensation must be fair and adequate in view of the restrictions to be complied with by the former employee. The compensation must be assessed case by case and may be lower than the employee's last monthly salary. Recent case law has held that non-compete covenants are enforceable provided that the compensation is agreed beforehand or, at the very least, both parties have agreed on the formula to be used to calculate the compensation.

VI WAGES

i Working time

The legal limit is a maximum of eight working hours a day up to a maximum of 40 hours per week. A collective bargaining agreement (CBA) may, nonetheless, establish different maximum hours of work per day as long as the legal maximum number of hours worked per week is not exceeded. Special flexible working schemes may also be established in certain circumstances and may allow an extension of the normal working times up to 12 hours a day and 60 hours a week. This is the case for the adaptability regime (in which the normal working period is stated as an average), the group bank of hours regime (in which the flexible working time arrangement has to be agreed by 65 per cent of the relevant employees) and the concentrated working period regime (in which the working period is concentrated into three or four days per week).

In any case, the average working time cannot exceed an average of 48 hours (including overtime) per week, and a daily rest of at least 11 consecutive hours between two consecutive working days must be guaranteed. By means of an agreement, the employee may opt out of working-time limits and choose to receive an extra salary instead. If the employee is in a management role, he or she has the option of waiving the right to receive extra salary.

The working day must include a rest period of at least one hour so as to avoid employees working for more than five consecutive hours, but it cannot exceed two hours.

As a rule, employees take two days off per week, although only one is mandatory according to the LC. The law also sets forth mandatory public holidays.

The LC defines night work as work performed between 10pm and 7am (although a CBA may amend these times), for which the employee is paid his or her normal salary plus 25 per cent. There are no specific limits for the number of night work hours as the general limits apply.

ii Overtime

All work performed outside normal working hours is considered overtime and may only be performed when there are specific reasons and within a certain limit, which is principally a maximum of 150 or 175 hours per year, depending on the company's size, and two hours per working day. A CBA may extend the annual limit to 200 hours per year.

The minimum additional salary due for overtime is, on a normal working day, 25 per cent for the first hour and 37.5 per cent any subsequent hours, and 50 per cent on public

holidays and weekly rest days. For overtime worked on a mandatory rest day, the employee is also entitled to a full day off. The mandatory rest day is established by the employer, and it is usually Sunday.

Employees under an exemption from the working time limits are not entitled to overtime payments, except for work on weekly rest days and public holidays.

VII FOREIGN WORKERS

A foreign employee authorised to work in Portugal has exactly the same rights and is subject to the same obligations as any Portuguese employee.

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, and the company does not have to support any additional taxes or local benefits in relation to them.

Companies are under no obligation to keep a separate register of foreign workers. Nevertheless, these workers are identified separately in the company's annual social report and companies must ensure they are duly authorised to work in Portugal. In this regard, Law 23/2007 of 4 July requires foreign workers to apply for a visa. This requirement will not be necessary if the worker is an EU national or a citizen of a country with which the European Union has signed an agreement on the free movement of people.

The types of visas that allow an individual to work in Portugal are the following:

a a temporary stay visa, which allows entry for accomplishing a professional assignment either dependently or independently, and whose duration does not exceed, as a rule, one year; and

b a residence visa, which allows entry in order to apply for a residence permit. A residence visa is valid for two entries and enables its holder to remain for four months.

The hiring or termination of a contract with a foreign employee must be notified to the ACT electronically.

VIII GLOBAL POLICIES

Employers may implement internal regulations covering rules on organisation and discipline at work. These rules can include the conditions and terms of the fringe benefits granted to employees, as well as specific policies, for example regarding use of the company's assets, internet access, email system and mobile phones, and policies regarding discrimination, sexual harassment and corruption.

Internal regulations will not enter into force unless employees are notified via postings at the employer's headquarters and work locations, and the labour authority is notified. They represent the employer's exercise of its particular powers and, while they are not incorporated into employment contracts, employees must comply with them. If the internal regulations include some of the terms and contractual conditions the employer wishes to offer the employees, it will be necessary to obtain the employee's consent to those conditions. The employee must adhere to those clauses unless he or she objects in writing within 21 days of the date the contract starts, or when he or she is notified of the regulations if this occurs later.

IX PARENTAL LEAVE

Maternity and paternity are eminent social values; therefore employees have the right to receive the protection they are due from their employer and the state in respect of exercising parenthood.

Parental leave comprises the following arrangements:

a initial parental leave;

b initial parental leave exclusive to the mother;

c initial parental leave required to be taken by the father because of the mother's incapacity; and

d parental leave exclusive to the father.

Working mothers and fathers are entitled, by virtue of the birth of a child, to an initial parental leave of 120 or 150 consecutive days, which they may share after the birth.[6]

An expectant mother can take up to 30 days of leave before the birth, and it is mandatory for a mother to take six weeks of leave after her child's birth.

It is mandatory for a father to take leave for 20 working days, consecutive or at intervals, within the six weeks following the birth, five of which are to be taken consecutively and immediately after the child's birth.

If childbirth occurs up to 33 weeks' gestation, initial paternity leave is increased to 30 days, and if the mother requires hospitalisation, paternity leave is extended to cover the whole period of hospitalisation.

Initial paternity leave is also increased to 30 days if the child is hospitalised immediately after the recommended post-partum hospitalisation period.

Parents of children with disability, chronic illness or oncological disease benefit from childcare leave, which may be extended to apply for up to six years, subject to the necessary medical certificates.

The LC also sets forth several forms of parental leave of absence: assessment for adoption, appointments related to medically assisted procreation, prenatal appointments, and urgent and indispensable assistance in the event of illness or accident to a child under 12 or, regardless of the age, to a child with disability, chronic illness or oncological disease, up to 30 days a year.

Employees who are pregnant, have recently given birth or are breastfeeding have the right to be excused from working overtime or other flexible working time arrangements.

Furthermore, working parents with children under the age of 12 or, irrespective of their age, children who are disabled, chronically ill or have an oncological disease, have the right to a flexible work schedule.

Finally, all kinds of discrimination (such as wage discrimination, career progression) towards employees exercising their maternity and paternity rights is forbidden.

6 In the case of the adoption of a child under 15 years of age, the candidate has the right to the same amount of parental leave.

X TRANSLATION

Portugal does not have any legislation regulating the language that must be adopted for contracts and other related documents. The only requirement is that the language used shall be one that both parties understand. However, it is advisable for employers to make employees sign employment documents, including contracts, both in Portuguese and their native language, to avoid employees' claims based on a misunderstanding of the contents of employment documents.

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 contents must be presented. In addition, all documents that have to be presented to the Portuguese authorities (in particular to the ACT) must be written in Portuguese or accompanied by a Portuguese translation.

XI EMPLOYEE REPRESENTATION

The right to form a works council in any company, regardless of its size, is guaranteed by the Constitution. The initiative to do so lies wholly with the employees, which means that employers are under no obligation to implement this form of representation.

The role of a works council is advisory, aimed at safeguarding employees' interests. Consequently, works councils are entitled to be informed and consulted on several matters regarding the company's overall organisation, activities and budget, working conditions and changes to the share capital, as well as to control the company's management and participate in any restructuring process.

The employer must allow the works council to meet on its premises, either outside or during working hours (in the latter instance, for up to 15 hours annually), provided the employee representatives give 48 hours' notice.

Works councils may be appointed for a maximum of four years. The members of the works council are elected from lists presented by the employees, by secret and direct vote, according to the principle of proportional representation.

The number of members of the works council depends on the company's size:

a up to 50 employees, two may be elected;
b between 51 and 200 employees, three may be elected;
c between 201 and 500 employees, three to five may be elected;
d between 501 and 1,000 employees, five to seven may be elected; and
e more than 1,000 employees, seven to 11 may be elected.

Employees are also entitled to be members of a union and to exercise their rights within the company. Unions have an important role, which includes the negotiation and execution of CBAs, the provision of economic and social services to their affiliates and participation in the labour legislation creation process, among other matters.

Union representatives may be elected for a maximum of four years. They have the right to hold meetings at the company, to present information directly to the employees on the company's premises and to request information regarding specific legally established situations.

All employee representatives have special protection in matters such as change of workplace, disciplinary proceedings and dismissals. Another important privilege for employee

representatives is the right to time off or 'hours credit', which is the right to interrupt the performance of their work for periods of varying duration, notwithstanding any other right or entitlement, including the right to receive the remuneration corresponding to the time off.

XII DATA PROTECTION

i Requirements for registration

The LC has several provisions concerning the processing of employees' personal data, but there are no specific provisions concerning the processing of employees' personal data within the employment relationship other than normal data processed by the company's human resources department.

This means that all instances of data processing shall comply with both the General Data Protection Regulation[7] (GDPR) and the Portuguese Data Protection Law (Law 58/2019 of 8 August). In particular, the processing of data shall be lawful only if and to the extent that at least one of the lawfulness conditions set forth in the GDPR applies, namely:

a if the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

b if the processing is necessary for the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into a contract;

c if the processing is necessary for compliance with a legal obligation to which the controller (employer) is subject; or

d if the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (employer).

In the context of labour relations, the Portuguese Data Protection Law establishes that the employee's consent is not a lawful condition for the processing of his or her personal data if the processing results in a legal or economic advantage for the employee or if the processing is necessary for the performance of the contract. The Portuguese Data Protection Law further foresees that recorded images and other personal data of employees recorded through video systems or other technological means of remote surveillance may be used only in the context of criminal proceedings and for the purpose of establishing disciplinary liability (insofar as they are used in the context of criminal proceedings). The processing of the biometric data of employees is also limited, and may be legitimately processed only for two purposes: attendance control and access control to the employer's premises.

In addition to the lawfulness conditions for processing data, the employer must also comply with other rules contained in both the GDPR and the Portuguese Data Protection Law, including the need to provide employees with information on the terms of the processing of data, the obligation to ensure that data is adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed, and the obligation to implement adequate organisational and security measures to protect the data.

7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

In some situations, considering the type of data processing, the employer is required to carry out a Data Protection Impact Assessment before the processing of data takes place – in this context, the Portuguese Data Protection Authority may be consulted.

ii Cross-border data transfers

Any transfer of an employee's data from the employer to another entity shall be lawful only if and to the extent that at least one of the lawfulness conditions set forth in the GDPR applies.

As regards cross-border data transfers (i.e., data transfers to a non-EEA country), data transfer rules foreseen in the GDPR must be complied with. A transfer of personal data to a third country or an international organisation may take place if the European Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. The transfer shall not require any specific authorisation. In the absence of an adequacy decision by the Commission, a controller or processor may transfer personal data to a third country or an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available In particular, entities must ensure that adequate safeguards are in place, including, but not limited to, the adoption of standard contractual clauses approved by the Commission, the adoption of binding corporate rules, or the adoption of an approved code of conduct or certification scheme.

iii Sensitive data

Both the GDPR and the Portuguese Data Protection Law consider information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation as special categories of data. The processing of these special categories of data is prohibited, except when one of the exemptions foreseen in the GDPR applies. This would be the case if the processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the employer or of the employee in the field of employment, and social security and social protection law, insofar as it is authorised by EU or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject.

In this situation, special safeguards and security measures must be implemented, taking account of the nature of the data at stake.

iv Background checks

The Constitution contains a general right to privacy regarding personal and family life, which is confirmed by the LC. An employer may not demand that an applicant or employee provide information relating to his or her private life, except when the information is strictly necessary and relevant to evaluate the person's aptitude for the performance of employment, and the respective motivation is provided in writing. However, no background checks are allowed unless the information is strictly necessary because of the nature of the job and is authorised by the candidate or the employee.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

Although employment relationships in Portugal are still characterised by an almost permanent bond between the employer and the employee, the employer may, under certain circumstances, terminate the contract with just cause. The concept of just cause includes not only disciplinary dismissal but also other forms of dismissal, provided that they are justified according to the law. Currently, the LC regulates the following: dismissal based on unlawful conduct of the employee, redundancies or dismissals resulting from the elimination of jobs, and dismissal for failure to adapt.

Regarding dismissal based on unlawful conduct by the employee, the concept of just cause is of particular importance as it implies the impossibility, in practice, of continuing the employment relationship owing to the seriousness of the employee's misconduct. When dismissed with disciplinary cause, the employee is not entitled to any notice or compensation, but he or she will be entitled to standard credits that are payable upon termination regardless of the reason (prorated 13th and 14th monthly payments, unused annual leave, etc.).

Any kind of dismissal requires the previous implementation of a consultation proceeding extensively regulated by law. The works council should be involved in the procedure and has the right to give a written opinion, but this will not prevent the dismissal. As a rule, no form of dismissal requires authorisation from government authorities. If, however, it concerns a pregnant or breastfeeding employee, or an employee on parental leave, the CITE must be consulted and has the right to provide for a binding opinion.

The employee has the right to challenge the dismissal in court within 60 days of the dismissal, or six months in the case of collective dismissals. If the court rules the dismissal to be unlawful, the employee is entitled to receive compensation for salary and benefits lost while the lawsuit was pending. Additionally, the employee is entitled to be reinstated with all his or her former rights and guarantees or, instead, may choose to receive compensation to be set by the court depending on the specifics of the case (between 15 and 45 days' basic pay and seniority allowances for each year of service, with a minimum limit of three months' pay). The reinstatement can be avoided if the company employs fewer than 10 individuals or if the dismissed employee is a senior manager. In this case, provided the court agrees that the return of the employee would be disruptive to the company's business, the compensation shall be set by the court, according to the specifics of the case (between 30 and 60 days of basic pay and seniority allowances for each year of service, with a minimum limit of six months' pay).

Settlement agreements for termination of the employment contract are quite common and must be executed in writing. Termination agreements for which the employee's signature has not been duly notarised may be revoked by the employee by means of a written communication sent to the employer up to seven days after the execution of the agreement.

ii Redundancies

Termination of an employment contract by an employer for business reasons can be in the form of collective dismissal or individual redundancy. A dismissal will be considered collective whenever the employer terminates, either simultaneously or over three months, the employment contracts of at least two employees (in companies with up to 49 employees) or five employees (in companies with 50 or more employee). If the number of employees to be dismissed falls below these thresholds, it will be considered an individual redundancy.

In both cases, the dismissal must be justified by business-related reasons, namely closing down one or more departments of the company or by the elimination of jobs or work positions owing to economic, market, technological or structural reasons.

When collective dismissals are mandatory, the employer must first enter into consultations with the employees' representatives and the Ministry of Labour with a view to reaching an agreement in relation to matters such as the possibility of avoiding redundancies or reducing the number of employees to be made redundant.

Similarly, individual redundancy also requires the previous implementation of a consultation proceeding involving the employee to be dismissed and the employee's representatives (if any). The ACT will participate in the proceeding if the employee so requires.

In both situations, the dismissal shall require authorisation from the CITE if it involves a pregnant or breastfeeding employee, or an employee on parental leave.

An important factor for the evaluation of whether the dismissals are considered justified is the criteria used to select the employees to be made redundant. Within a collective dismissal, the employer is free to set the criteria provided they are non-discriminatory and relevant to the needs of the business. Conversely, with an individual redundancy, the criteria are preset by the law whenever there are two or more employees in a comparable situation in terms of job scope within the same team or department. These criteria are as follows:

a worst performance review;
b worst academic or professional qualifications;
c higher salary;
d shorter length of service in the current post; and
e shorter length of service for the company.

Again, in both cases, the employee is entitled to a notice period of between 15 and 75 days, depending on his or her seniority.

Employees dismissed within redundancy proceedings are entitled to statutory compensation. Portuguese regulations on compensation were extensively amended because of the agreements reached between the Portuguese government and the European Commission, the International Monetary Fund and the European Central Bank for its financial bailout. Under the new regulations, compensation for dismissal varies between 12 and 30 days of salary depending on the employee's start date and the length of service.

The parties also have the option of executing a termination agreement at any time, which eliminates the need to justify the dismissal. Only if the agreement is an alternative to redundancy is it necessary to notify the social security system of the reasons for termination for the purposes of unemployment benefit. Regarding the formal requirements, the agreement must be in writing, two copies must be made and signed by both parties. It must also include the date on which it is signed and the date the agreement will go into effect. The agreement can be revoked by the same terms mentioned above.

XIV TRANSFER OF BUSINESS

Regarding the transfer of business, the LC transposed the EU Acquired Rights Directive (Directive 2001/23/EC of 12 March).

A transfer of business is not a cause for termination. A dismissal based solely on the employer's transfer of business would be deemed unlawful. The underlying principle is that the

employment agreements are transferred by way of law to the transferor under the same terms and conditions. In these cases, employment contracts will be automatically transferred to the transferee with the exact terms and conditions in force at the moment the transfer occurs.

The transferor and 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 for two years following the transfer. The transferee may not limit its responsibility. The transferee also assumes liability for payment of contributions and interest to the social security system at the time of completion of the transfer, and is responsible for the payment of any fines to the labour authorities for non-compliance with the labour rules. The transferee is obliged to observe a CBA that has been in force for a minimum 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 or, should these not exist, the employees themselves of the transfer. This information must be made by means of a written document, including the date of, and reasons for, the transfer, its legal, economic and social consequences, and the measures regarding the employees that shall be adopted as a result of the transfer.

An extensive amendment to the Portuguese transfer regulations was enacted in mid 2018. The main amendments were that:

a the employee may object to the transfer whenever it may be seriously detrimental to his or her labour status;

b under the same circumstances, the employee may resign with cause and claim compensation from the transferor; and

c the relevant contract must be shared with the transferring employees and their representatives.

XV OUTLOOK

Although the Portuguese economy is still recovering from the financial crisis, there are optimistic signs that employment relationships and unemployment rates will improve, mainly because of increased investment and the government's measures to support employment and business.

The general election held in October 2019 resulted in a new socialist government without a parliamentary majority. Although no formal agreement was struck with the political parties that backed the previous government under the same prime minister, the consensus is that they will act as silent partners of the new government, and further introduce some amendments to repeal the recent austerity measures.

Appendix 1

ABOUT THE AUTHORS

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Tiago Piló joined Vieira de Almeida in 2001 and is currently a managing associate of the labour practice. In this capacity he has been actively working in the areas of employment and labour law, public employment, employment and labour litigation, collective bargaining agreements and social security law. He also assists the human resources departments of clients of the firm every day in the organisation and restructuring of their respective workforces. Tiago is admitted to the Portuguese Bar Association, specialising in labour law. He is also a member of the European Employment Lawyers Association.

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