THE EMPLOYMENT LAW REVIEW

Thirteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For each of the past 12 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, 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 25 years, and I can say this holds especially true today, as the past 13 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 13th 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.

Speaking of changes, we have now been living with the covid-19 pandemic for more than two years. In 2020, we entered a new world controlled and dictated by a novel coronavirus, one that spread at a rapid pace and required immense government intervention. The ways in which governments responded (or failed to respond) shed light on how different cultures and societies view, balance and respect government regulation, protection of workers and employee privacy. Employment practitioners around the globe have been thinking about and anticipating the future of work for a decade. But with the onslaught of covid-19, the future of work was foisted upon us. Covid-19 has expedited the next decade of technological advancement and employer–employee relations, causing entire industries and workplaces to change in real time and not over the course of years.

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2021, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

The other general interest, cross-border chapters have all been updated. The #MeToo movement continues to affect global workforces. 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.

The chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. The covid-19 pandemic initially caused significant challenges to mergers and acquisitions (M&A). Deal activity slowed substantially in 2020, negotiations crumbled and closings were delayed. Although uncertainty remains about when merger and acquisition activity will return to pre-pandemic levels, it appears that businesses and financial sponsors once again have begun to pursue transactions. Parties already have begun to re-engage on transactions previously put on hold and potential sellers appear willing to consider offers that provide a full valuation. The content of due diligence may change because the security of supply chains, possible crisis-related special termination rights in key contracts and other issues that were considered low-risk in times of economic growth now may become more important. 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 2021 for multinational employers across the globe. 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. Particularly in the time of covid-19 and remote working, 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 the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 38 jurisdictions around the world.

Covid-19 aside, in 2022, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on 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.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing from the first year. 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 Faegre Drinker associates, Katherine Gordon, Caroline Guensberg, Charlotte Marshall and Kerry Zaroogian, and my law partners, Alex Denny, Nicole Truso and Jill Zender, for their invaluable efforts in bringing this 13th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2022

Chapter 34

PORTUGAL

Tiago Piló and Helena Manoel Viana[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). 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). There are special regulations in respect of employment relationships within the civil service and the public sector.

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 2021 was challenging in all areas of the law but above all for labour law.

The pandemic has extensively changed the way we work and relate in the workplace and accelerated the implementation of changes that otherwise would have remained unchanged. Remote working and hybrid and flexible working models have had the greatest effects on the employment landscape.

1 Tiago Piló is an of counsel and Helena Manoel Viana is an associate at Vieira de Almeida.

In this context, and notwithstanding the fact that teleworking was already regulated in the LC, it is foreseen that several amendments to the legislation on this matter shall be approved and will come into force, subject to promulgation by the President of the Republic. Changes include the following:

a extending the instances in which teleworking can be used without the need for an agreement between the employer and the employee;

b clarifying that the employer is responsible for providing the employee with the equipment necessary to perform their work remotely;

c clarifying that the employer shall compensate for all additional expenses incurred by the employee as a result of the use of the equipment in carrying out their work, including increased energy costs, as well as the cost of maintaining such equipment;

d clarifying that teleworkers are entitled to, at least, the same remuneration as they would earn in a face-to-face set-up (although is not yet certain whether this includes meal allowances, for example); and

e establishing employees' right to privacy, by prohibiting the capture and use of images, sound, writing, browse history or other means of control that may affect employees' right to privacy.

Most importantly, these changes to the LC are expected to finally foresee the right of the employee to disconnect, albeit placing the burden on the employer, who has a duty to refrain from contacting employees during the rest period, except in situations of *force majeure*.

This new legislation goes even further and foresees that any less favourable treatment given to employees, namely regarding working conditions and career progress, because they exercise the right to disconnect, constitutes discriminatory action.

III SIGNIFICANT CASES

i Trial period for people seeking their first job

In July 2021, the Constitutional Court declared the unconstitutionality, with mandatory general force, of the rule contained in Article 112, No. 1, Paragraph b)(iii), of the LC, in the wording introduced by Law No. 93/2019, in the part that refers to the increase from 90 days to 180 days of the trial period for people who are looking for their first job, when applicable to employees who have previously been hired, on a fixed-term basis, for a period equal to or exceeding 90 days, by another employer.

ii Joint liability for labour credits of a company with its head office outside Portugal

The Constitutional Court declared, again in July 2021, the unconstitutionality, with mandatory general force, of the combined interpretation of Article 334 of the LC and of Article 481, No. 2 of the Company Code, in the part that such interpretation prevents the joint and several liability of company that has its headquarters outside the national territory, in a reciprocal participation, dominating or group relationship with a Portuguese company, for debts owed by the latter arising from an employment contract, its breach or termination.

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 contracts for senior management.[2]

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 have 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.[3]

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; and
- 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 the long-term unemployed (more than 24 months);
- 240 days for senior management and other senior staff; and

c for senior management contracts: 180 days.

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

3 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.[4]

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.

4 Except in the case of senior 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 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. The compensation may be reduced if the employer incurred significant expense in respect of the employee's vocational training.

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 period 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 qualifies as overtime and may be performed only when there are specific reasons (such as when the employer has to cope with a temporary increase of work, in cases of *force majeure* or when it is essential to prevent or repair serious damage to the company or its viability) 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 for 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 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 is granted the same rights and is subject to the same obligations as any Portuguese employee; however, the contract must be in writing and incorporate copies of the documents that confirm compliance with the legal obligations of the foreign employee in terms of entering and residing in Portugal.

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:

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 of a foreign employee 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, remote working, 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 its employees, it will be necessary to obtain employees' consent to those conditions. The employees must adhere to those clauses unless they object in writing within 21 days of the date their contract starts, or when they are 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 the 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 period of parental leave of 120 or 150 consecutive days, which they may share after the birth.[5]

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, consecutively 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 at 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 a 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 in respect of medically assisted procreation, prenatal appointments, and urgent and indispensable assistance in the event of illness or accident to a child under 12 years old or, regardless of the age, to a child with a 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 12 years old or, irrespective of their age, children who are disabled, chronically ill or have an oncological disease, have the right to a flexible work schedule. Provided that the functions of working parents with children under three years old allow it, they also have the right to work from home.

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

5 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, drawn up in both Portuguese and their native language, to avoid claims by employees 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 also 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 translation into Portuguese.

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, for the purpose of safeguarding employees' interests. Consequently, works councils are entitled to be informed and consulted on several matters regarding a company's overall organisation, activities and budget, working conditions and changes to 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 members;
b between 51 and 200 employees: three members;
c between 201 and 500 employees: between three and five members;
d between 501 and 1,000 employees: between five and seven members; and
a more than 1,000 employees: between seven and 11 members.

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[6] (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 data 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 data 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 the data 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 control of access 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.

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.

6 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.

As regards cross-border data transfers (i.e., data transfers to a country outside the European Economic Area), 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 data controller or processor may transfer personal data to a third country or an international organisation only if the data 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 that reveals 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 in question.

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 (1) dismissal based on unlawful conduct of the employee, (2) redundancies or dismissals resulting from the elimination of jobs and (3) dismissal for failure to adapt.

Regarding dismissal based on unlawful conduct by the employee, the concept of just cause is of significant 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; these proceedings are 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 has fewer than 10 employees 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' 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 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 with 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 seniority.

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 dismissal. Any 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 transferred automatically 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 there not be any, 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, of which the main points are:

a the employee may object, in writing, 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

Employment law is under scrutiny from different perspectives.

As most of the government's support to companies that has been in place during the pandemic is coming to an end, many companies are now facing economic challenges, meaning that companies will need to adjust and ensure that their future business model is right-sized, which may lead to restructuring processes.

In addition, and despite some changes in the legislation, and the vast progress that the pandemic brought, a lot of matters remain to be (better) regulated, such as the work provided through digital platforms (platform workers) and digital nomads, among others. Moreover, companies now must ensure that their policies and procedures are up to date and reflect future ways of working.

The government had announced its intention to implement further amendments to the existing LC up to the end of 2021 to cover such topics. However, these amendments have been postponed indefinitely owing to the government's failure to approve the 2022 state budget and the subsequent dissolution of parliament.

Appendix 1

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Tiago Piló joined Vieira de Almeida in 2001 and is currently an of counsel in the labour practice. In this capacity he has been actively working in the areas of employment and labour law, employment and labour litigation, public employment, 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 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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