THE EMPLOYMENT LAW REVIEW

Ninth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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NINTH EDITION

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PREFACE

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

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

Global diversity and inclusion initiatives remained a significant issue in 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation 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 remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. 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.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this ninth edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2018

ERIKA C COLLINS

Proskauer Rose LLP

Erika Collins is a partner in the labour and employment law department and co-head of the international labour and employment law group of Proskauer Rose, resident in the New York office. Ms Collins advises and counsels multinational public and private companies on a wide range of cross-border employment and human resources matters throughout the Americas, Europe, Africa and Asia.

Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

PROSKAUER ROSE LLP

Eleven Times Square
New York, 10036-8299
United States
Tel: +1 212 969 3555
Fax: +1 212 969 2900
ecollins@proskauer.com
www.proskauer.com

Chapter 35

PORTUGAL

Tiago Piló[1]

I INTRODUCTION

The Portuguese employment law framework is generally known for its high degree of employment protection, namely because employment 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 other forms of employment, such as fixed-term contracts, temporary agency works, independent contractors and outsourcing of services to provide for their staffing needs.

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 related to parenthood protection (Decree-Law 91/2009 of 9 April), work-related accidents and sickness (Law 98/2009 of 4 September) and health and safety at work (Law 102/2009 of 10 September). Civil servant or public employment relationships are governed by special regulation.

Judicial litigation as well as the application of administrative fines are handled by labour courts, which, in Portugal, are part of the system of ordinary courts, as courts with a specialised competence. This specialisation also led to the creation of particular 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 entity with responsibility for inspection and enforcement of compliance with the labour legislation is the Working Conditions Authority (ACT), which performs 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 related to equality and non-discrimination between women and men, and the protection of parental rights.

II YEAR IN REVIEW

Similar to the preceding years, 2017 was marked by a stable trend regarding labour developments. Although labour market challenges brought and exacerbated by the global economic crises are still a reality, the effects of the economic downturn that had a significant

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

impact in past years (which resulted in downsizing, closures, redundancy programmes and employee cost reductions) are now slowly dissipating. As proof of this progress, the unemployment rate in 2017 from the third trimester is 8.5 per cent – 0.3 per cent lower than the preceding trimester and 2 per cent lower than the third trimester of 2016.[2]

Companies are increasingly investing in the Portuguese market and employers are also making an effort to retain human capital and talent (reverting to alternative ways of managing employee costs, such as, for instance, flexible working arrangements), as a result of the government's measures to support employment and business (e.g., Ministerial Order 34/2017, Ministerial Order 131/2017 and Decree-Law 53-A/2017). Moreover, the rate of collective dismissals has dropped, which means that employment relationships are steadily becoming more stable.

III SIGNIFICANT CASES

i GPS surveillance as means of proof in disciplinary proceedings

In December 2016, the Appeal Court of Oporto ruled that the use of GPS surveillance systems as evidence is forbidden in disciplinary proceedings since it would be considered a limitation or restriction on the right to privacy (namely a restriction on the freedom of movement), protected by Article 26/1 of the Portuguese Constitution. The use of the information provided by such devices shall be treated as processing of personal data, which means it is subject to the applicable data protection framework (Articles 20 and 21 of the LC) and mandatorily notified and subsequently authorised by the National Data Protection Committee (CNPD).

ii The discharge of job duties as a form of moral harassment

In December 2016, the Appeal Court of Évora ruled that discharging an employee from his or her job duties after he or she has refused to sign a termination agreement qualifies as moral harassment. In the case in question, the employee was moved to a different office in a separate building away from his team, was not provided with the minimum conditions to perform his job duties and was forced to register his working periods, which was only mandatory for employees in lower positions.

iii 'Mystery customer' as means of proof in disciplinary proceedings

Also in December 2016, the Appeal Court of Lisbon ruled that the use of a mystery customer in order to assess the work performance of an employee – and consequently initiate a disciplinary proceeding – is an acceptable means of proof, provided the assessment exclusively relies on the work performed to the general public and the mystery customer acts as a regular customer and not as an agent provocateur.

2 Information retrieved from the Instituto Nacional de Estatística (Statistics Portugal): https://www.ine.pt.

iv Wage supplements as compensation for a working period and its incorporation into holiday and Christmas allowances

In March 2017, the Appeal Court of Guimarães ruled that any wage supplement paid as compensation for a working period would only be eligible to be incorporated into holiday and Christmas allowances provided that it was paid periodically during every month of the year (i.e., it has to be paid 11 times over the 12 months).

v Acquired rights: the carnival holiday

Two landmark rulings were issued by the Supreme Court of Justice on this issue. While in November 2016 the Supreme Court ruled that 19 years was a sufficient period for employees to acquire the right to consider carnival day as a public holiday and, therefore, a rightful day off with the corresponding payment, in March 2017 it ruled that the period can be expected to be between four and 19 years (which will be decided in another ruling).

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

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

Although not mandatory, it is increasingly common to have permanent contracts entered 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 simultaneously comply with mandatory information obligations and include clauses to facilitate the future management of the employment relationship.

Fixed-term contracts are allowed only if 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 (first-time jobseekers and long-term unemployed individuals) and the start-up of new enterprises or companies. These contracts can only be renewed up to three times and their duration is limited to:

a 18 months if it concerns an individual looking for a job for the first time;

b two years for starting a new activity of uncertain duration, starting up a new company or establishment belonging to a company with fewer than 750 employees or hiring a long-term unemployed person; and

c three years in other situations. 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 six years.

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

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 its requalification into a full-time permanent contract.

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

ii Probationary periods

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

a for term contracts (i.e., contracts that do not have a predetermined end date):
- 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; and
- 240 days for senior management and other senior staff; and

c for top management contracts: 180 days.

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

The party that unilaterally terminates the contract during the 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 a seven-day notice; if the contract has lasted more than 120 days, the employer must comply with a 15-day notice.

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 shall be registered before the social security agency. For this purpose, it is necessary to have a Portuguese VAT 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 existence and a statement containing 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 making personal income tax (IRS) withholdings. Therefore, employees hired by companies without a PE are subject to social security deductions only, and not the aforementioned withholdings.

V RESTRICTIVE COVENANTS

Portuguese law establishes a general prohibition on any clauses intended to limit freedom to work, with the exception of the non-compete clause.

5 Except in the case of top management contracts where the trial period must be expressly stipulated by the parties.

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

a the maximum time for 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 in terms of competition;

b the covenant is agreed to 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.

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 for non-compete covenants. In any case, such compensation shall have to be fair and adequate in view of the restrictions to be complied with by the former employee. The compensation shall be assessed on a case-by-case basis 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 such 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 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 limits to 12 hours a day and 60 hours a week. This is the case for the adaptability regime (where the normal working period is defined on an average basis), the bank of hours regime (where the employee can 'bank' time) and the concentrated working period regime (where the working period is concentrated in three or four days per week).

In any case, the average working time cannot exceed 48 hours (including overtime) per week, and a daily rest of at least 11 consecutive hours between two working days must be guaranteed. By means of an agreement, the employee may opt out of working-time limits and opt to receive 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 in order 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. Portuguese law also sets forth mandatory public holidays.

The LC defines night work as work performed between 10pm and 7am, although a CBA may alter this time period, which should be paid with an enhanced rate of at least 25 per cent. There are no specific limits for the number of night work hours as the general limits apply.

ii Overtime

All work performed outside normal working hours is considered overtime and can 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 can extend the annual limit up to 200 hours per year.

The minimum additional remuneration due for overtime is, on a normal working day, 25 per cent for the first hour and 37.5 per cent for the following hours, and on public holidays and weekly rest days, 50 per cent. For overtime worked on a mandatory rest day, the employee also has the right to a full day of time off. The mandatory rest day is established by the employer; in Portugal, it is usually Sunday.

Employees under an exemption from the working time limits are not entitled to overtime payments, except for work performed 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 report and companies must ensure they are duly authorised to work in Portugal. In this regard, the law (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 states with which the EU has signed a free movement of people agreement. The types of visas that allow an individual to work in Portugal are the following:

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

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

The admission (or termination of the contract) of a foreign employee must be communicated to the ACT electronically.

VIII GLOBAL POLICIES

Employers may implement internal regulations containing rules on organisation and discipline at work. Such rules can include the conditions and terms of the fringe benefits granted to

employees as well as specific policies, for example regarding the use of the company's assets, internet access, email system and mobile phones, policies regarding discrimination, sexual harassment and corruption.

Internal regulations will not enter into force unless employees are notified through postings at the employer's headquarters and work locations, and also notification to the labour authority.

Internal regulations represent the employer's exercise of its particular powers and are not incorporated into employment contracts. Internal regulations also need not be accepted by the employees. Only if the internal regulations include some of the terms and contractual conditions the employer wishes to offer the employees will it be necessary to obtain the employee's consent to those conditions. The employee adheres 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 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, in order to avoid employees' claims based on a misunderstanding of such documents' contents.

Although there are no limitations in these situations, if any document not written in Portuguese has to be presented in court, a translation of its content must be presented. In addition, all documents that have to be presented to the Portuguese authorities (and, in particular, to the ACT) must be written in Portuguese or accompanied by a Portuguese translation.

X EMPLOYEE REPRESENTATION

The right to form a works council in any company, regardless of its size, is guaranteed by the Portuguese 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, they are entitled to be informed and consulted on several matters regarding the overall organisation, activity and company's budget, working conditions and change of the share capital, as well as to control the company's management and participate in the company's 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 in a company with up to 50 employees, two may be elected;

b in a company with 51 to 200 employees, three may be elected;

c in a company with 201 to 500 employees, three to five may be elected;
d in a company with 501 to 1,000 employees, five to seven may be elected; and
e in a company with 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 their work performance for periods of varying duration, notwithstanding any other right or entitlement, including the right to receive the remuneration corresponding to the time off.

XI DATA PROTECTION

i Requirements for registration

The Personal Data Protection Law (PDPL) and the LC have several provisions concerning processing employees' personal data, but there are no specific provisions concerning processing employees' personal data within the employment relationship other than normal data processed by the company's human resources department.

This means that all situations of data processing that fall outside this limited scope may be subject to notification to the CNPD and require prior written authorisation from the employee. The notification must identify what data is being processed and for what purpose, along with the identification of any data processors to whom the information is disclosed and measures related to security and transparency of the data processing. The consent of the employee is not necessary if the data processing is considered necessary for the performance of the contract. In any case, since it is difficult to determine exactly what data is strictly necessary, it is prudent to obtain consent from the employee to process his or her data.

The CNPD can, however, exempt certain specific data processing from such notification, and it has in fact issued general exemption decisions that cover the basic processing of employees' data that is necessary for the management of the staff and for payroll purposes.

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

ii Cross-border data transfers

Any transfer of an employee's data from the employer to another entity must be authorised by the employee.

Cross-border data transfers shall be disclosed to the CNPD when registering data processing. The transfer will require the CNPD's prior approval if it is made to a country that is not an EU Member State, unless it is a country listed by the EU as guaranteeing an adequate level of protection. Additionally, onward transfers are restricted to parties that are bound by agreements setting a minimum level of protection.

iii Sensitive data

Portuguese law considers information revealing philosophical or political beliefs, political views, trade union membership, religion, privacy, racial or ethnic origin, or health or sexual life, including genetic data, as sensitive data.

Processing sensitive data is prohibited unless there is a prior approval of the data processing by the CNPD. In the employment field, there are some other kinds of data processing that are subject to prior approval, such as the use of remote surveillance mechanisms.

iv Background checks

The Portuguese Constitution contains a general right to privacy regarding personal and family life, which is reinforced by the LC. The employer cannot require an applicant or employee to provide information related to his or her private life, except when said 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. That being said, no background checks are allowed unless such information is strictly necessary because of the nature of the job and is authorised by the candidate.

XII 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 foresees 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 of 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, any kind of dismissal does not require authorisation from government authorities. If, however, it concerns a pregnant or breastfeeding employee, or an employee on parental leave, CITE must be notified and has the right to give a binding legal opinion.

In case the dismissal is not justified according to the law or if the employer does not comply with the proper proceeding, the termination of the contract can be considered null and void and, therefore, the contract remains in force, which can lead to reinstatement or compensation.

The employee has the right to challenge the dismissal in court within 60 days counted from the dismissal or six months in the case of collective dismissals. If the court considers the dismissal unlawful, the employee is entitled to receive compensation for the salary and benefits lost while the lawsuit is pending. Additionally, the employee has the right to choose

to be reinstated with all his or her former rights and guarantees or 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 by the employer if the dismissal took place in a company with 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 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 where 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

The termination of the employment contract by the 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, ether simultaneously or within a period of three months, the employment contracts of at least two employees in companies with up to 49 employees and five employees in companies with 50 or more employees. If the number of employees to be dismissed falls below these thresholds, it shall 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.

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

Likewise, 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 cases, the dismissal shall require authorisation from 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 as justified is the selection criteria used for 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 appraisal;
b worst academic or professional qualifications;
c higher salary;
d shorter length of service on the job; and
e shorter length of service for the company.

Again, in both cases, following the initiation of the mandatory proceeding, the employer must give notice of the dismissal of between 15 to 75 days, depending on the employee's seniority.

Employees dismissed within redundancy proceedings are entitled to statutory compensation. Portuguese regulations on compensation were extensively amended because of the agreements struck 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 possibility of signing 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 purposes of unemployment benefit. Regarding the formal requirements, the agreement must be in writing, two copies must be made and signed by both parties and it has to mention the date of its signature and also the date the agreement will go into effect. The agreement can be revoked by the same terms mentioned above.

XIII TRANSFER OF BUSINESS

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

A transfer of business is not 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 in 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 in force for a period of one year counting from the date of the transfer. The transferee may not limit its responsibility. The transferee also assumes liability for the payment of contributions and interest that must be paid 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 the CBA that was in force at least for a minimum period of 12 months, unless a new CBA is applicable to the transferee's employment relationships.

Prior to the transfer, the transferor and the transferee must inform the employees' representatives or, should these not exist, the employees themselves of the transfer. This information must be made by means of a written document, mentioning the date and reasons of the transfer, its legal, economic and social consequences, and the measures regarding the employees that shall be adopted owing to the transfer.

XIV OUTLOOK

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

Significant reforms to the labour law are not currently expected.

Appendix 1

ABOUT THE AUTHORS

TIAGO PILÓ

Vieira de Almeida

Tiago joined Vieira de Almeida in 2001 and is currently a managing associate of the labour practice group. 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, assisting the human resources departments of clients of the firm on a daily basis 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.

VIEIRA DE ALMEIDA

Rua Dom Luis I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
tp@vda.pt
www.vda.pt

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