PORTUGAL

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1 STATUTORY PROVISIONS

The European Directive establishing a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC) was first implemented into Portuguese law through the Labour Code, approved by Law 99/2003 of 27 August 2003 (LC), and the Labour Code Regulation, approved by Law 35/2004 of 29 July 2004 (LCR). The LC and the LCR have been revoked by the New Labour Code, approved by Law 7/2009, of 12 February 2009 (NLC), which has entered into force on 17 February 2009 and is now the diploma implementing the Directive.

The NLC contains the guarantee that all workers are to have the same opportunities and benefit from equal treatment in terms of access to employment, training, promotion, and working conditions (Article 24 no. 1). As such, neither applicants nor workers should be privileged or harmed on grounds of age (but also birth, sex, sexual orientation, marital status, disability, illness, nationality, ethnic origin, race, financial situation, religion or belief, and union membership, to name a few) (Article 24 no. 1 NLC). The employer is, therefore, prohibited from discriminating, both directly and indirectly, on the basis (*inter alia*) of age (Article 25 no. 1 NLC). For these purposes, an order or instruction which aim is to disadvantage individuals on the basis of a protected ground constitutes discrimination (Article 23 no. 2 NLC).

Nicky ten Bokum, Tom Flanagan, Roselyn Sands, and Robert von Steinau-Steinrück (eds), *Age Discrimination: Law in Europe*, pp. 271–284.

The NLC develops these rules by defining the most important concepts (such as direct and indirect discrimination) and setting out which conditions of employment and access thereto are covered by the statutory protection.

Quite apart from Council Directive 2000/78/EC, there is a constitutional foundation for this regime: the Portuguese Constitution not only sets forth a general principle of equality, applicable to all contexts (Article 13), as specifically assures that workers are not to be discriminated by virtue (again, *inter alia*) of age (Article 59 no. 1).

Specific diplomas (e.g., on disability) further the statutory protection given by the Constitution and the NLC, but these do not apply to age.

Just as Council Directive 2000/78/EC, the protection afforded by Portuguese law is not restricted to discrete age groups: all workers, regardless of their age, are covered. However, this has not prevented the legislature from implementing particular regimes whereby conditions of access to and termination of employment differ on the basis – directly or indirectly – of age. For example, workers in search of their first job may be hired under fixed-term contracts (Article 140 no. 4 *b*) NLC), whereas, as a rule, this type of contract is limited to situations where the employer faces a temporary need (Article 140 no. 1 NLC).

Likewise, social security legislation provides for several incentives for employers to hire workers of specific ages. Decree-Law 89/95 of 6 May 1995 (as amended by Decree-Law 34/96 of 18 April 1996) put in place an exemption from social security contributions during thirty-six months for the employers which hire, under contracts of employment entered into for an indefinite period of time, workers aged from 16 to 30 who have not been previously hired under that type of contract. Regulations 196-A/2001 of 10 March 2001 (as amended by Regulation 255/2002 of 12 March 2002 and Regulation 183/2007 of 9 February 2007) and 1191/2003 of 10 October 2003 contemplate government subsidies of various kinds to employers who hire young workers (as defined), as well as unemployed and long-term unemployed workers aged 45 and above. Specifically to respond to the current worldwide financial crisis, the Government enacted Regulation 130/2009 of 30 January 2009, which sets forth exceptional and temporary incentives of that kind.

The statutory rules on equal treatment and discrimination cover most types of contractual relationships, there being no qualifying period of employment for these purposes. This means that (for example) fixed-term workers and agency workers benefit from the protection arising from the law just as any employee hired for an indefinite period of time.

The rules are naturally applicable to employers seated in Portuguese territory and to Portuguese workers working herein. But save where the legislation applicable to the relationship or the contract of employment provide for more favourable regimes, the NLC applies as well to foreign workers working in Portugal (Article 7 no. 1 *l*) NLC), even if only temporarily, there being no minimum required period for the protection to operate. Just as with the LC, the question whether Portuguese anti-discrimination law applies to Portuguese workers working abroad is not clearly dealt with by the NLC, part of the doctrine arguing (under the LC) that these workers are entitled to the conditions set out in the legislation of the host country.

Under the NLC, the statutory regime on equality and non-discrimination was subject to significant amendments. Thus, among others, the concept of harassment encompasses situations unrelated to any ground of discrimination (Article 29 no. 1 NLC) and disciplinary sanctions (including dismissal) are presumed to be abusive when applied within one year counted from the claim of rights related to discrimination (Article 331 no. 2 *b*) NLC); as the law stood under the LCR, this rule was limited to sex discrimination (Article 38).

In addition, the NLC has introduced a rule whereby collective bargaining agreements can only change the legal regime on equality and discrimination to the extent the change favours the employee (Article 3 no. 3 *a*)).

2 DIRECT DISCRIMINATION

Pursuant to Article 23 no. 1 *a*) NLC, direct discrimination is deemed to occur if, by reason of a protected ground, a person is subject to less favourable treatment than another is, has been, or will be treated in a comparable situation. Although there is no definition of 'comparable situation', the concept is likely to mean the situation where the relevant workers perform equal work – that is, work in which the functions rendered to a common employer are the same or objectively alike in nature, quality, and quantity (Article 23 no. 1 *c*) NLC), or work of equal value – that is, work in which the functions rendered to a common employer are similar in terms of qualification, experience, responsibilities, physical and psychological demand, and working conditions (Article 23 no. 1 *d*) NLC).

The NLC did not take the opportunity to clarify the doubt as to whether this definition of direct discrimination correctly implements Council Directive 2000/78/EC. In fact, as with the LC, there seems to be no scope for the worker to recourse to hypothetical comparators: first of all, the statutory definition of direct discrimination lacks the Directive's reference (in Article 2 no. 2 *a*)) to the treatment that 'would' be given to another; second, the worker has the burden to prove the alleged discrimination by pointing out *the* worker or workers in relation to whom the discrimination is deemed to take place (Article 25 no. 5 NLC).

Making use of the possibility to justify direct discrimination on grounds of age contemplated by Article 6 no. 1 of Council Directive 2000/78/EC, Article 25 no. 3 NLC allows for differences of treatment based on age which are necessary and appropriate to accomplish a legitimate objective, including objectives of employment policy, labour market, and vocational training. Provisions of this kind set out in the law or a collective bargaining agreement are to be reviewed periodically (Article 25 no. 4 NLC).

The legislation does not give examples of legitimate objectives or proportionate means. It does clarify, however, that those differences of treatment may apply to aspects as diverse as the conditions under which workers are hired, the terms of access to training, the remuneration due, and the criteria to select workers to be dismissed (Articles 24 no. 2 and 25 no. 4 NLC).

In this context, the law itself establishes such differences of treatment. Thus, and for example, workers with less than 16 years of age are entitled to increased periods of rest between working days and during one working day (Articles 77 no. 1 and 78 no. 1 NLC) and may not render overtime work (Article 75 no. 1 NLC). The contract of employment of workers aged 70 and above is converted, by operation of law, into a six-month fixed-term contract, there being no maximum number of renewals or a maximum total duration (Article 348 no. 3 NLC, to be analyzed in detail below). The period during which unemployment allowance is granted differs depending on the worker's age (Article 37 no. 1 of Decree-Law 220/2006 of 3 November 2006). The last distinction – the period of allowance is superior for older workers – is particularly problematic if one takes into account that, in Portugal, 2007 data showed the rate of unemployment of workers below the age of 25 to be twice the average unemployment rate.

3 INDIRECT DISCRIMINATION

Indirect discrimination refers to the situation where an apparently neutral provision, criterion, or practice (concepts which are not defined under Portuguese law) is likely to put persons identified by a protected ground in a position of disadvantage as compared to others (Article 23 no. 1 *b*) NLC). Insofar as the disadvantage need not be 'particular' (as in Article 2 no. 2 *b*) of Council Directive 2000/78/EC), the definition in Portuguese law is presumably broader than the one used at EU level.

In general terms, the prohibition to indirectly discriminate does not apply where the provision, criterion, or practice is objectively justified by a legitimate aim and the means used to achieve it are adequate and necessary (Article 23 no. 1 *b*) NLC). As with Council Directive 2000/78/EC, it is not clear whether this test applies to indirect discrimination on grounds of age or whether Article 25 no. 3 NLC (cited above as the rule that implements Article 6 no. 1 of the Directive) is the test to be used whenever the conduct is based on age (i.e., also indirectly). The question is not purely academic, because the reference to the aim being 'objectively' justified seems to imply that the general test to justify indirect discrimination is stricter than the specific test applicable to age.

As in direct discrimination, the NLC does not provide examples of legitimate aims and proportionate means. However, the law does set out several age-related distinctions which are likely to constitute indirect discrimination on grounds of age. Workers in search of a first job, which are more likely to be young, may be hired under fixed-term contracts (Article 140 no. 4 *b*) NLC). As with workers aged 70 and above, the contract of employment of those who have retired with the social security but who remain working is converted into a six-month fixed-term contract (Article 348 nos 1 and 2 *b*) NLC); 65 being the normal retirement age under Portuguese law (Article 20 of Decree-Law 187/2007 of 10 May 2007), the rule has a particular impact on workers of that age. In individual redundancy proceedings, workers with less years of service, presumably the younger, are the ones to be made redundant in the first place (Article 368 no. 2 NLC). Severance payments and

indemnities are calculated upon the number of years of service (Articles 366 no. 1; 391 no. 1; 396 no. 1 NLC), which means younger workers are generally entitled to lower compensation. It is well known that the European Court of Justice (ECJ) tends to be more benevolent when revising the State's employment policy than with indirect discrimination by the employer; but the examples provided by the legislation itself are likely to inspire the type of provisions, criteria, or practices that employers will implement.

4 VICTIMIZATION

Pursuant to Article 27 no. 7 NLC, any act which harms the worker as a consequence of his/her refusal or submission to acts of discrimination is unlawful. The legislation does not clarify whether workers other than the one discriminated against are protected, but the definition seems to be broad enough to sustain an affirmative answer.

Because the prohibited conduct takes place in the work environment, it is likely that the general statute of limitation for credits arising out of the contract of employment, its breach or termination applies. As such, the indemnity due under the law to those who were discriminated against (Article 28 NLC) must be claimed, at the latest, within one year counted from the day subsequent to the day in which the contract of employment ended (Article 337 no. 1 NLC).

5 HARASSMENT

Harassment to applicants and workers constitutes discrimination (Article 29 no. 1 NLC).

Harassment is the unwanted conduct based on a protected ground, taken either at the time of access to employment or during the execution of the contract of employment or the vocational training, whenever such conduct has the purpose or the effect of affecting the individual's dignity or creating a frightening, hostile, demeaning, humiliating, or unsettling environment (Article 29 no. 1 NLC).

In particular, harassment encompasses unwanted conduct of a sexual nature, with either the purpose of the effect referred to above. All types of conduct – verbal, non-verbal, and physical – are included (Article 29 no. 2 NLC).

6 RECRUITMENT

Apart from the general guarantee that applicants are entitled to equal opportunities and treatment in access to employment and that the prohibition of both positive and adverse discrimination applies to applicants as well (Article 24 no. 1 NLC), Portuguese law does not rule recruitment in detail. In any case, the law clarifies that the right to equality encompasses selection criteria and the conditions

according to which workers are hired (Article 24 no. 2 *a*) NLC), as well as that harassment may take place at the time of access to employment (Article 29 no. 1 NLC).

The absence of a detailed regulation should not be read as a sign that prospective employers are free to discriminate in terms of recruitment. The above-mentioned provisions are enough to prevent an employer, for example, from advertising for workers within a certain age band where neither the relevant activity nor the context in which the activity is to be exercised makes it a genuine occupational requirement (GOR) (Article 25 no. 2 NLC). Likewise, the employer's burden to demonstrate that different working conditions are unrelated to age (Article 25 no. 5 NLC) is likely to apply to recruitment as well.

Workers are not obliged to state their age in their application documents, but most if not all CVs indicate the date of birth. In general terms, the worker is bound to disclose to the employer all aspects which are relevant for the rendering of the activity (Article 106 no. 2 NLC). There is no equivalent provision for applicants at the time of recruitment, but one might expect them to be required to disclose their age whenever the need to comply with a legal obligation is at stake: for example, under Portuguese law workers younger than 16 years old may not work during the night (Article 76 no. 1 NLC); as such, if the employer is in need of a night worker, it may legitimately check the applicant's age at the time of recruitment.

Recruitment in breach of equality rules will not entitle the applicant to be hired as penalty. Under Portuguese law, promissory contracts of employment are not subject to specific performance (Article 103 no. 3 NLC). There is no correspondent provision in terms of a discriminatory failure to recruit, but the same principle is likely to apply. As such, the remedy available to the applicant who was refused employment is limited to an indemnity (Article 28 NLC).

7 DURING THE 'LIFE' OF THE CONTRACT

The statutory protection against discrimination will be particularly relevant during the execution of the contract of employment.

Generally speaking, and save where the incentives apply for hiring workers of a specific age referred to above, employers' costs do not vary depending on the worker's age.

In particular, the legislation is concerned with preventing discrimination in terms of remuneration, although it does so mainly by means of a general rule independent from discrimination issues: also by virtue of a constitutional guarantee (Article 59 no. 1 *a*) Constitution), workers who execute work alike in quantity, nature and quality are entitled to equal remuneration (Article 270 NLC). This helps to explain why, contrarily to the legislation of other EU Member States, in Portugal the employer is not allowed to differentiate the salary to be paid by taking into account the worker's age (directly, at least; in practice, workers with more experience – who are likely to be the older ones – receive higher salaries).

Likewise, aspects such as the duration of holidays or the period of work are common to all workers. Certain collective bargaining agreements set out differences of that kind, for example, by increasing the period of annual leave of workers with a certain number of years of service or stating that the worker is entitled to keep the shift allowance that was paid for a significant period of time even where he/she will no longer work in shifts. These rules, likely to indirectly discriminate against young workers, are subject to the justification test(s) addressed above. The NLC, in particular, is concerned with differences of treatment contained in collective agreements, which are to be reviewed periodically and eliminated where the context that gave cause to them no longer applies (Article 25 no. 4). And where a provision in a collective agreement or an internal regulation sets outs working conditions which are exclusively applicable to a particular age, such provision is deemed to be replaced by the more favourable of the two, which applies henceforth to all ages (Article 26 nos 2 and 3 NLC).

Companies' pension plans and insurances tend to discriminate between fixed-term workers and those hired under contracts of employment entered into for an indefinite period of time (other than the insurance covering labour accidents, which is mandatory by law and necessarily covers all workers); this practice is questionable in itself because the law states that fixed-term workers are entitled to equal treatment (Article 146 no. 1 NLC), but issues of age are hardly relevant herein.

Despite the general principle of non-discrimination, Portuguese law contains three regimes which set out conditions of employment exclusively applicable to workers of a specific age.

Articles 318-322 NLC rule the pre-retirement (*pré-reforma*) regime. Workers aged 55 or above may agree to reduce the period of work or to suspend it altogether, until retirement age, against a monthly compensation varying between 25% and 100% of the last monthly salary. Arguably, the labour market objective behind this regime – to free job positions for younger workers – is legitimate, particularly if one considers the high unemployment rate, in the Portuguese market, of workers younger than 25. Likewise, there are reasons to sustain that the regime is proportional (i.e., adequate and necessary) as well: it depends on the worker's consent; it ensures his/her alternative means of subsistence; the reduction option allows for a gradual removal from work; and in both the reduction and the suspension options, workers may take another job.

Although affecting workers of a different category, the two other specific regimes are similar.

Under Article 348 NLC, the contract of employment of workers who have retired with the social security but remain in active service (no. 1) and of workers aged 70 and above who have not retired with the social security (no. 3) is converted, by operation of law, into a six-month fixed-term contract, automatically renewable for equal periods (no. 2 *b*)). The change impacts on those who were previously hired under a contract of employment of indefinite duration and operates regardless of the parties' will. In addition, the change is irrevocable: because there is neither a limit in terms of the number of renewals nor a maximum total duration, the contract will last, as a fixed-term relationship, for as long as the

worker remains working for the relevant employer. Employers are then free to terminate the fixed-term contract by serving a sixty-day prior notice (no. 2 *c*)).

The Portuguese legal framework on fixed-term work being quite restrictive, the differential treatment that the legislation imposes on these workers is notorious. It could also be the case that, lawfully or otherwise, the employer itself differentiates (for example) between the fringe benefits that it offers to fixed-term workers, as opposed to those hired under indefinite contracts; as such, the change dictated by the law may have impact other than at the level of the worker losing stability of employment. However, because the latter is unquestionably the most important feature of the regime, the conformity of Article 348 with Article 6 no. 1 of Council Directive 2000/78/EC will be addressed in the following section.

8 DISMISSAL

Although there is no specific provision on that regard, the statutory protection against age discrimination applies to dismissals and, in general terms, to any form of termination of the contract of employment.

Accordingly, and as a rule, causes for termination, notice periods, applicable procedures, severance payments, and indemnities do not differ depending on the worker's age. This is particularly so because, under Portuguese law, retirement is voluntary (save in the civil service); therefore, workers are not prevented from remaining in active service past a certain age.

While it is not common, workers may agree in writing to terminate their contract at a certain age (the practice is however for the parties to agree to terminate the contract on a specific date, rather than age; naturally, the two may coincide); and save where the agreement was signed before a Notary office, the period during which the worker may revoke the termination agreement is no more than seven days counted from the date of signature (Article 350 no. 4 NLC). However, this regime applying to workers of all ages, there is no different treatment on grounds of age.

What Portuguese law does have is rules on termination of employment which are likely to indirectly discriminate on grounds of age, both against young and elderly workers.

Younger workers are indirectly discriminated against where, in individual redundancy proceedings causing the extinction of part, but not all, of similar job positions, those with less years of service are the ones to be made redundant in the first place (Article 368 no. 2 NLC). Furthermore, most termination-related payments are calculated upon the worker's seniority: a collective or individual redundancy proceeding entitles the worker to a severance payment equal to one month of base remuneration and seniority premiums for each year of service (Articles 366 no. 1 and 372 NLC); the indemnity due for unlawful termination by the employer varies between fifteen and forty-five days of base remuneration and seniority premiums for each year of service (Article 391 no. 1 NLC); should the worker terminate the contract with cause, the indemnity is the same as in an unlawful termination by the employer (Article 396 no. 1 NLC).

It should be noted that the NLC added a further indirect age-related distinction that is likely to have a particular impact on younger workers. As the law stood under the LC, in the event of collective and individual redundancy proceedings the employer had to serve a sixty-day notice in advance to the proposed date of termination of the contract of employment (Articles 398 no. 1 and 401 LC); under the NLC, the notice period differs depending on the number of years the worker has been working for the company (the more the seniority, the lengthier the notice period: Article 363 no. 1). Thus, and for example, workers with less than one year of service are to be informed of the dismissal with a fifteen-day prior notice, whereas the correspondent notice for period for workers with ten or more than ten years of service is as high (comparably speaking) as seventy-five days (Article 363 no. 1 *a*) and *d*) NLC, respectively).

Older workers are indirectly discriminated against insofar as retirement constitutes a cause of expiry of the contract of employment under Portuguese law (Article 343 *c*) NLC). As such, upon retirement employers may force the worker to leave the company.

The expiry of the contract due to retirement does not operate if the employer allows the worker to remain in service after thirty days have passed since he/she became aware of the retirement; but in this case, the conversion into a fixed-term contract contemplated by Article 348 no. 1 NLC (as explained in the previous section) applies. The matter is relevant in terms of termination also, because once the conversion into a fixed-term contract operates, the employer is free to terminate the contract by serving a sixty-day prior notice (Article 348 no. 2 *c*) NLC). In this context, another difference in treatment is that the termination of the fixed-term contract will not entitle the relevant workers to compensation (Article 348 no. 2 *d*) NLC) – whereas, as a rule, workers whose fixed-term contract was made to expire receive a severance payment equal to three or two days of base remuneration and seniority premiums for each month the contract has lasted, depending on whether the contract has lasted less than six months, or six months or more, respectively (Article 344 no. 2 NLC).

But the most significant specialty in terms of termination is the rule whereby a similar regime of termination (the employer serving a sixty-day prior notice without the worker being entitled to severance payment) applies to workers who have turned 70 and did not retire with the social security (Article 348 no. 3 NLC cited above). Because these workers have not retired, not even retirement as a cause for expiry under Article 343 *c*) NLC would apply; as such, they are subject to a truly differential treatment.

The provision's policy aim is the same as the pre-retirement regime analyzed in the previous section: to free job positions for younger workers. However, one should recall that Article 348 no. 3 NLC affects workers of the age of 70 and above who have *not* retired with the social security; as such, those workers are not in receipt of retirement pension. Particularly following the ECJ's ruling in *Palacios* (Case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA* [2007] ECR I-0531), it is therefore questionable whether the Portuguese rule is consistent with Community law: for the Court, a crucial argument to uphold the Spanish regime

was that 'the relevant legislation is not based only on a specific age, but also takes account (. . .) that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life (. . .) the level of which cannot be (. . .) unreasonable' (paragraph 73).

Against this background, the similar rule that affects workers who have retired with the social security but remain working (Article 348 no. 1 NLC) is arguably compatible with EU law. It is a fact that the provision indirectly discriminates against workers aged 65 and above because that 65 is the normal retirement age under Portuguese law (Article 20 of Decree-Law 187/2007 of 10 May 2007). However, as in *Palacios*, the workers of Article 348 no. 1 NLC *are* in receipt of retirement pension (although the last proviso of the ECJ's reasoning – that the level of the pension cannot be unreasonable – is absent from Portuguese law). As such, in Article 348 no. 1 NLC the different treatment in terms of working conditions is not solely imposed on grounds of age, in such terms that the individual's personal situation seems to have been considered [as required by the ECJ in paragraph 65 of the *Mangold* decision (Case C-144/04 *Mangold v. Helm* [2005] ECR I-09981)].

Finally, it is common for employers to make distinctions in terms of severance payments which are likely to indirectly discriminate against older workers. The NLC sets out the minimum severance payment due to workers whose contract of employment terminates either by collective or individual redundancy proceedings (Articles 366 no. 1 and 372 NLC cited above); but employers are free to increase that amount. There are cases in which the employer offers more than one month of salary for each year of service but limited to a maximum cap (EUR 50,000 for example); in other cases, the factor changes depending on whether the worker receives below or above a certain monthly remuneration (e.g., 1.2 for workers who are paid more than EUR 2,000 per month and 1.3 for workers who are paid less). The last criterion in particular serves a purpose of a social nature. However, because it is likely to have a particular impact on older workers, whose salaries tend to be higher, the differential treatment is to be justified in accordance with the law.

9 RETIREMENT

As a rule, retirement in Portugal takes place at the age of 65 (Article 20 of Decree-Law 187/2007 of 10 May 2007 ['Decree-Law 187/2007']).

Workers are not necessarily entitled to retire at that age; in addition to being of that age, they must meet other requirements, such as having contributed to the social security system for a minimum period of fifteen years (Article 19 of Decree-Law 187/2007). Likewise, workers are not *obliged* to retire; retirement being voluntary under Portuguese law save for the civil service, workers have the right, but not the obligation, to retire. That is to say, despite the mechanism of Article 348 no. 1 NLC, workers not only have the right to remain working after the retirement age, they also may continue working after having retired.

Accordingly, employers may not force retirement. They may however, under Articles 343 *c*) or 348 no. 1 NLC, promote the expiry of the contract of employment of workers who have retired; and they may, under Article 348 no. 3 NLC, promote the termination of the contract of employment of workers who make use of the fact that retirement is voluntary to remain in active service after the age of 70.

There are also specific regimes whereby workers are entitled to retire before the age of 65. Thus, and for example, workers who have a minimum of 55 years of age and thirty years of contributions to the social security regime (Article 21 no. 2 of Decree-Law 187/2007) and those aged 57 who have been in long-term unemployment (Article 24 of Decree-Law 187/2007) may apply for retirement at an earlier age. That is also the case in situations where the professional activity rendered was particularly demanding or strenuous (Article 22 of Decree-Law 187/2007); pilots, for example, may retire at the age of 60 (Article 1 of Decree-Law 392/90 of 10 December 1990).

10 EXCEPTIONS

Although the effect of Article 25 no. 3 NLC (cited above as the rule that implements Article 6 no. 1 of Council Directive 2000/78/EC) is to make genuine occupational requirements (GOR) less important when age is the relevant ground, Article 25 no. 2 NLC is the rule that contemplates GOR as a typical exception to the prohibition to discriminate. Provided the objective is legitimate and the requirement proportional, the employer does not discriminate where its conduct is based on age and age, by virtue of the nature of the relevant activity or the context in which that activity will be exercised, is a justifiable and determining requirement.

Temporary measures of a legislative nature aiming to assist particular disfavoured groups do not constitute discrimination where they seek to guarantee the exercise of the rights set out in the NLC in equal circumstances and to correct a persisting situation of inequality (Article 27 NLC). Contrarily to the LC (Article 25), Article 27 of the NLC does not single out particular grounds; as such, age is clearly included in the provision.

In any case, the reference to a necessary legislative foundation seems to imply that employers are not entitled to engage in positive discrimination and/or affirmative action themselves. On the contrary, the rule is that employers are prevented from engaging in both favourable and adverse treatment on grounds of age (Article 24 no. 1 NLC).

11 SPECIAL CATEGORIES OF WORKERS

An important distinction to be made in terms of Portuguese law between categories of workers is that which separates individual service providers from those hired under contracts of employment (employment including, for these purposes, part-time workers, fixed-term workers, agency workers, and so forth).

The NLC does not apply to service providers, provided the services are truly rendered with autonomy. In any case, Article 10 NLC extends its regime on equality and non-discrimination to those who render services without subordination but in the economic dependence of the beneficiary of the activity. The provision applies as well to contracts equivalent to contracts of employment, such as those entered into with workers who work at home.

Contracts of employment which are subject to special regimes (such as housekeepers, professional sportsmen, docks' and maritime workers) are ruled by the NLC, save for aspects of the NLC which are incompatible with those contracts' particularities (Article 9 NLC). Although, generally speaking, that does not seem to be the case with the statutory protection on equality and non-discrimination, GOR will no doubt be relevant for professional sportsmen, for example.

As for individuals engaged under relationships of a different kind (such as service providers who are not economically dependent on the beneficiary of the activity), Article 13 Constitution appears to be the applicable normative framework. The rule sets out a general principle of equality, applicable in all contexts and binding upon public and private entities.

Employment relationships with the State, even if subject to Private Law, are governed by a specific diploma, rather than ruled by the NLC. In any case, Articles 13-17 of Annex I of Law 59/2008 of 11 September 2008 (furthered by Articles 4-9 of the Regulation attached thereto as Annex II) set out a regime on equality and discrimination, including age, which is quite similar to that of the NLC. Quite exceptionally, this regime applies as well to civil servants – that is, those who hold an employment relationship of public nature (Article 8 *b*) of Law 59/2008 cited above).

12 ENFORCEMENT

Under Article 24 no. 4 NLC, the employer has the obligation to disclose the worker's rights to equality and non-discrimination by posting information in an appropriate place at the company's premises. Failure to do so constitutes a light misdemeanour (Article 24 no. 5 NLC), punishable with the payment of a fine.

Article 28 NLC states that applicants and workers who have been discriminated against have the right to be indemnified, also for moral damages. The traditional way in which rights to equality and non-discrimination may be enforced is through the labour courts. The burden to prove the alleged discrimination is on the worker; the burden to prove that the differential treatment was not based on a prohibited ground encumbers the employer (Article 25 no. 5 NLC). This rule seems consistent with Article 10 no. 1 of Council Directive 2000/78/EC, because its effect is to exempt the worker from the need to prove that the unfavourable treatment was motivated by a protected ground.

However, the effect of a conduct contrary to the anti-discrimination principle may not be limited to the payment of an indemnity. For example, Portuguese law rules collective and individual redundancy proceedings to be unlawful whenever

the severance payment failed to be paid (Articles 383 *c*) and 384 *c*) NLC). It is questionable whether that is the case with a severance payment that discriminates on grounds of age (e.g., because it distinguishes between workers on the basis of the salary they receive, or the years of service they have, thus having a particular impact on older workers which the court finds unjustified).

A dismissal (any dismissal) is automatically null and void if grounded on political, belief, ethnic, or religious reasons (Articles 338 and 381 *a*) NLC; the latter actually changed the regime in force under the LC by singling this ground out as the first of the list). There is no correspondent provision for age, but the NLC included a provision whereby disciplinary sanctions (including dismissal) are presumed to be abusive when they are applied within one year counted from the claim of rights related to discrimination (Article 331 no. 2 *b*) NLC). Abusive sanctions entitle the worker to a higher indemnity (Article 331 nos 3-5 NLC).

Together with filing a lawsuit in court or in alternative thereto, workers may present a complaint to the Authority for Working Conditions (*Autoridade para as Condições do Trabalho* (ACT)). The ACT is an administrative structure operating within the Minister of Employment which investigates compliance with employment legislation. In general terms, the employer's failure to comply with the statutory protection gives rise to misdemeanour liability. The fines applicable depend on the seriousness of the relevant infraction (as qualified by law), on the company's turnover and on whether the infraction was intentional or a result of negligence. Thus, and for example, victimization is a very serious misdemeanour (Article 25 no. 8 NLC); and should the company have a business turnover equal or superior to EUR 10,000,000, the fine can be – for one single worker – as high as EUR 57,600.00 (Article 554 no. 4 *e*) NLC). It is also the case that employers who persist in a conduct qualified by law as a very serious misdemeanour, either intentionally or with gross negligence, may be subject to additional sanctions – for example, being prevented from participating in public tenders for a maximum period of two years (Article 562 no. 2 *b*) NLC). Under the LC, the correspondent sanction was limited to six months (Article 627 no. 1 *b*) LC).

As of 19 December 2006, the Minister of Justice, together with the social partners, have implemented a system of mediation in the area of employment (*Sistema de Mediação Laboral*). Workers may recourse thereto for all aspects of employment except labour accidents. Unless the parties agree to extend it, mediation may not take more than three months, and both parties are free to end it at any time. The mediation may have as an outcome the award of an indemnity.

In other cases, the employer itself has implemented grievance procedures which define the terms in which complaints are to be dealt with internally.

13 THE ROLE OF EMPLOYEE REPRESENTATIVES

Employee representatives do not have a specific role in terms of equality and non-discrimination, but their areas of activity may impact thereon. Thus, and for example, works councils have the right to issue a prior (non-binding) opinion

on measures likely to cause a decrease on the number of company's workers (Article 425 *b*) NLC); should the works council realize that workers within a particular age band are likely to be the ones to be made redundant, they have the ability to point out to that discrimination. Trade unions negotiate with the employer the severance payments that will be paid to workers who are made redundant under a collective dismissal proceeding (Article 361 no. 1 NLC) and may therefore oppose measures which discriminate on grounds of age; representatives of the Minister of Employment are usually present at those meetings (Article 362 NLC), so the argument is likely to have an impact. Trade union representatives inside the company may file a complaint with the ACT if, for example, the company has ceased the payment of a specific allowance, thus discriminating against younger workers recently hired.

In general terms, and depending on the relevant matter, employee representatives may either represent or assist workers in court, or file the lawsuits themselves (Article 5 of the Labour Procedure Code, approved by Decree-Law 480/99 of 9 November 1999).