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Employment

Law and Practice – Portugal

Contributed by
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Soares da Silva & Associados, RL

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Law and Practice

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Morais Leitão, Galvão Teles, Soares da Silva & Associados, RL has a team fully dedicated to labour and social security, a total of 13 counsels. The primary office is based in Lisbon, with other offices in Oporto, Funchal, Angola, Mozambique and Macau. Both in a consultancy capacity and in litigation before labour courts, the firm assists a vast number of companies, including many multinationals, in all areas pertaining to labour relations. In line with recent economic developments, it has been providing advice to a number of clients involved in personnel rationalisation processes, namely by participating in the non-contentious and contentious phases of collective lay-offs and redundancies. The firm's close involvement in the labour law aspects of M&A and outsourcings should also be underlined.

Author

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1. Terms of Employment

1.1 Contractual relationship

Portuguese law defines contracts of employment as agreements whereby one individual undertakes to work for another against the payment of remuneration, within the beneficiary's organisation and subject to its authority. There is a presumption in the law that a contract of employment is in place whenever one (or more than one) of the following features are present: the activity is rendered in a place belonging to, or indicated by, the beneficiary; the work tools and equipment belong to the beneficiary; the work provider complies with a timetable set by the beneficiary; a guaranteed amount is paid to the provider with a certain periodicity; the provider exercises management functions within the company's organisation. The burden to prove otherwise – ie to prove that no contract of employment is in place – lies with the presumed employer.

As a rule, contracts of employment do not need to be entered into in writing. Contracts of employment that need to be entered into in writing include the following:

- contracts with foreign employees (excluding nationals of EU or EEA countries or of countries ensuring equal treatment for Portuguese nationals in terms of access to work);
- fixed- and unfixed-term contracts;
- part-time work contracts;
- intermittent work contracts (those contemplating periods of inactivity);
- contracts entered into under the *comissão de serviço* regime (for management positions or those requiring particular trust);
- contracts entered into with several employers;
- remote work contracts; and
- temporary agency work contracts.

Certain types of commitment are also to be entered into in writing, the most important being:

- post-contract non-competition commitments; and
- employees' commitments to remain in service in return for the employer having incurred significant expenses with an employee's training.

Despite the rule that contracts of employment are not required to take written form, information on terms and conditions of employment must be communicated in writing within 60 days of the beginning of employment (or until the date of termination, if earlier than 60 days). In practical terms, most employers choose to enter into the contract of employment in writing, as this is an admissible way in which to provide the required written information.

Terms and conditions of employment that either appear in the written contract of employment or are provided to the employee in writing include, at least, the following:

- employer's name, group relationship and head office;
- place or places of work, if the workplace is not fixed or there is no predominant workplace;
- employee's job position or a brief description of the relevant functions;
- date on which the contract is entered into and date of beginning of employment;
- if applicable, the contract's term;

- duration of annual leave or criteria to determine it;
- notice periods applicable to both employer and employee, or criteria to determine them;
- remuneration's amount and periodicity;
- normal daily and weekly periods of work, with reference to situations where they are determined on average;
- the work accident insurance policy number and the insurance company;
- the applicable collective bargaining agreement, if any; and
- identification of the Work Compensation Fund (*Fundo de Compensação do Trabalho*) (or equivalent mechanism) and the Work Compensation Guarantee Fund (*Fundo de Garantia de Compensação do Trabalho*).

Contracts with foreign employees (as defined) should include, in addition:

- a reference to the residence visa, permanence prorogation or residence permit enabling the employee to work in Portugal (the relevant documents are be annexed to the contract);
- employer's activity;
- mode of payment of remuneration; and
- identity and address of the beneficiary in the event of the employee's death as a result of an accident at work or a work-related illness.

1.2 Compensation and work hours

Minimum wage and overtime regulations

As of 1 January 2017, the minimum monthly wage is EUR557.00. This amount is inclusive of payments in kind (subject to maximum limits), commissions on sales, production premiums or bonuses that form part of remuneration and is to be adjusted for trainees (20% reduction) and employees with a reduced work capacity in excess of 10% (up to a 50% reduction). Part-time workers are to be paid in proportion to the period of work they render.

Where the employment relationship is governed by a collective bargaining agreement, it is common for this agreement to set forth minimum wages higher than the minimum wage contemplated in the law, the minimum wage of the collective agreement prevailing over the one in the law.

Overtime work corresponds to work rendered outside the timetable. Typically, for employees exempted from a timetable, overtime work corresponds to work rendered during the weekly days of rest and bank holidays.

The rendering of overtime work is an obligation of the employee but certain types of employees are exempted from such obligation: pregnant women; employees with a child younger than 12 months; for as long as breastfeeding lasts, if necessary for the mother's or the child's health; employees who are handicapped or have a chronic disease; minors and students, in both cases with certain exceptions.

However, the employer can only request the employee to render overtime work whenever one of two grounds are present: the need to respond to a temporary increase in work which does not warrant the hiring of another employee; or in force majeure cases and situations where overtime work is indispensable to prevent or repair serious damage to the company or its viability.

Due to its nature, overtime work of the second kind is not subject to maximum limits (provided the employee does not work, on average, more than 48 hours of work – all kinds of work – each week). Contrarily, overtime work aiming to respond to increases in work is subject to a certain limit of hours per day and year, which depend on a number of factors: the relevant day where overtime is rendered (working day or otherwise), the number of company employees and the applicable collective bargaining agreement.

Typically, in a company with 50+ employees, employees can be asked to render up to 150 hours of overtime work per year, limited to two hours on a working day and the daily period of work on rest days and bank holidays. The daily limits are the same for companies with less than 50 employees but the annual limit is extended to 175 hours. Collective bargaining agreements may increase the annual limit (for both types of company) up to 200 hours. Part-time workers may render up to 80 hours of overtime work per year (or the number of hours correspondent to the proportion between the worker's average period of work and that of a comparable full-time employee, if superior to 80 hours), the parties being free to increase the annual limit to 130 hours. Collective bargaining agreements may also increase the annual limit of overtime work of part-time workers up to 200 hours.

Overtime work is to be paid with a remuneration increase, normally set in collective bargaining agreements. Where the increase is to be found in the law, currently it corresponds to the following:

- on working days: 25% in the first hour and 37.5% thereafter;
- on rest days and bank holidays: 50%.

Overtime work on the mandatory day of rest (usually Sunday) entitles the employee to one day of compensatory rest, to be taken in one of the subsequent three working days. Collective bargaining agreements may also rule compensatory rests.

Limitations on hours

As a rule, the maximum daily period of work amounts to eight hours and the maximum weekly period of work to 40

hours. The period of work of employees who work exclusively on the other employees' days of rest can be extended by up to four hours. A collective bargaining agreement, which takes precedence over the law, may decrease the number of admissible working hours.

Depending on the type of exemption from timetable (there are three kinds), employees working in that regime are not subject to the maximum periods of work and (as a rule) are paid a special allowance in compensation therefor.

The law also contemplates time-banking systems, whereby periods of more work (ie work in excess of the daily and weekly limits) can be compensated with periods of less work or other forms of compensation (eg increase in pay or additional days of annual leave). The periods of more work, however, are subject to maximum limits, which generally speaking differ depending on the source of the time-banking system: if a collective bargaining agreement, the increase can go up to four hours per day, in a total of 60 hours of work per week; if an individual agreement, the increase can go up to two hours per day and 50 hours per week. Other limitations apply: in the time-banking system called *adaptabilidade*, the employee cannot be asked to work more than an average of 50 hours in two consecutive months; in the time-banking system called *banco de horas*, the number of working hours in excess of the daily and weekly periods of work are limited to 150 each year, a collective bargaining agreement being allowed to increase it to 200 hours per year. In compliance with Article 6 (b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, concerning certain aspects of the organisation of working time, all forms of time-banking systems are to respect the 48-hour weekly limit of work on average, including overtime work.

As of 2009, the parties – individually or in collective bargaining agreements – are also free to increase the daily periods of work so as to concentrate work on four (individual agreement) or three (collective agreements) days per week.

Executive Compensation
There are industries in which the compensation for executive personnel is subject to regulatory requirements and limitations, such as credit institutions and insurance undertakings, for example. These are two very extensively regulated activities, both through Portuguese law and regulations and guidelines issued by national regulatory authorities, as well as through European legislation and guidelines issued by EBA and EIOPA.

Portuguese banking law, for example, provides that each credit institution must have a specific compensation policy for board members, specifically dealing, among other topics, with criteria for defining variable remuneration and the evaluation of performance, as well as limits to the respective grant in case the solvency of the company does not allow it. Similar rules exist for insurance undertakings.

The legal limitations and requirements on compensation of board members of credit institutions, as well as insurance undertakings, aim at preventing the unconscious acceptance of risks for the company (in order to increase chances of profitability and consequently of higher variable remuneration), preventing conflicts of interests and ensuring that the compensation schemes do not jeopardise the company's present and future solvency. Furthermore, such compensation schemes should be designed in a way that aligns the interests of the executive members of the board of directors with the interests of the company, and that is why a part of the variable remuneration should be paid in securities issued by the company.

Finally, both the banking and the insurance activities are subject to intensive disclosure duties with regard not only to their compensation policies but also to the amounts effectively paid to the members of the board of directors of the relevant companies (which must be included in their publicly disclosed annual accounts).

1.3 Other terms of employment
During the contract of employment, employees are subject to confidentiality requirements.

Post-contract confidentiality has no specific foundation in the law, so employers are advised to enter into a written agreement to that effect. In any case, even those who are of the opinion that the duty of confidentiality ends at the time of termination of the contract concede that a certain duty of secrecy derives from good faith and the prohibition of unfair competition, employees being likewise prevented from disclosing facts which may harm the employer's good name or credibility. The courts agree with this understanding.

Employee representatives (Works Council, trade union representatives) may be subject to particular requirements in terms of confidentiality, should confidentiality be expressly requested from them at the time information is provided.

There are no particular provisions in Portuguese law in terms of non-disparagement, but one is likely to be able to derive it from the general principle of good faith, particularly whilst the contract of employment is in force.

Portuguese law contemplates several absences for parental- or family-related reasons, including:

- leave in situations of clinical risk during pregnancy;
- release from work to attend pre-birth medical appointments, as often as needed for the mother and up to three appointments for the father;

- leave in the event of abortion, between 14 and 30 days;
- parental leave, which, if shared between the parents, can go up to 180 days; there are mandatory periods of leave for both the mother (six weeks after the birth) and the father (15 working days in the 30 days subsequent to birth, five of which immediately after birth);
- release from work to attend pre-adoption meetings;
- leave in situations of adoption, the duration of which is similar to that of parental leave;
- release from work to breastfeed or feed the child, in the first case restricted to the mother and without limitation in time and in the second case for both parents during the child's first year of life;
- justified absences to assist a child in the event of illness or accident, up to 30 days per year if the child is less than 12 years old (or for as long as he/she stays in the hospital) and 15 days thereafter; the 30-day limit does not apply to parents of children aged less than 12 who are handicapped or suffer from chronic illness;
- up to 30 consecutive justified absences following the birth of a grandchild who lives with the employee and is the child of a teenager younger than 16 years old; in these cases, the grandparent may also replace the parents in providing the assistance referred to in the previous point;
- different forms of supplementary parental leave in the event of a child aged less than six, including a three-month period of leave, part-time work for 12 months or a combination of the two;
- leave to assist a child of up to two years (three years as of the third child), to be taken by one of the parents or shared between them;
- leave to assist a child that is handicapped or suffering from chronic illness, up to six months, renewable up to four years;
- reduction of the normal period of work by five hours per week, or other special working conditions, to assist a child under the age of one who is handicapped or suffers from chronic illness;
- part-time work for those with a child younger than 12, renewable for up to two, three or four years depending on the relevant situation;
- flexible timetable for those with a child younger than 12, consisting of flexible periods (within a certain interval) to start and end the day of work;
- justified absences to assist a spouse or family member living with the employee in the event of illness or accident of up to 15 days per year (30 if the relative is handicapped or suffers from chronic illness); and
- justified absence of up to four hours each trimester to attend meetings at the school of minors.

Other reasons for absence include:

- 15 days' leave at the time of marriage;
- two or five days' leave in the event of death of a spouse or family member;
- employee's illness, accident or compliance with a legal obligation (eg to attend a court hearing);
- students' needs (including, depending on the circumstances of the relevant case and up to certain limits, entitlement to be released from work to attend classes, be absent at the time of exams and take a ten-working-day period of leave without pay each year);
- an employee being a member of an employee representative structure;
- an employee running for public office; and
- absences otherwise authorised or approved by the employer.

Collective bargaining agreements can only rule on justified absences of employee representatives.

The annual leave (vacation) contemplated in the law amounts to 22 working days per year and two working days for each month of duration of the contract during the year of hire, in the latter case up to 20 days. Certain collective bargaining agreements – for example, in the banking sector – increase the duration of the annual leave, normally to no more than 25 working days. Other collective bargaining agreements – for example, in the metal sector – increase the duration of the annual leave – up to three more days – in view of the employee's assiduity.

2. Employee Representation/Unions

2.1 Representatives

There is no particular provision in the law entitling employees to bring representatives to meetings, so employers have a degree of discretion in that respect. What the law does contemplate are situations where the employee representatives participate in meetings with the employer in representation of (instead of) the employees; this is the case, for example, in the information and negotiation phases of collective dismissals.

2.2 Unions

In several areas, including redundancies, Portuguese law gives precedence to Works Council over unions. The scope of employers' obligations in terms of information and consultation is also wider in relation to the Works Council. The tendency, however, is for Works Council to be incorporated in large companies only. In addition, unions are the only employee representatives which can negotiate collective bargaining agreements.

Business sectors where unions are active include, for example, transports, banking, insurance and the public sector.

2.3 Union elections/representation

Employment law rules the election of members of Works Council, as these are directly appointed by the employees, but not union representatives. Union representatives at company level (*delegados sindicais*) are appointed by the union in accordance with the respective by-laws.

Union representatives at company level:

- have the right to information and consultation in several areas, including redundancies and measures likely to impact on work organisation or contracts of employment in a significant way (although their prior opinion is not binding);
- participate in disciplinary procedures aiming at dismissal if the relevant employee is a union representative, by issuing a prior opinion (again, not binding);
- participate in redundancy procedures in the absence of a Works Council;
- are entitled to hold meetings with the employees in the company premises (if during working hours, up to 15 hours per year, without loss of pay);
- must be given a designated room in the company premises; and
- may post and distribute information.

Union representatives at company level or who are members of the union's management bodies have the right to engage in union-related tasks up to a certain number of hours per month (depending on the structure of which they form part), without loss of pay, as well as to take justified absences in excess of such periods without pay. The number of union representatives who benefit from these rights depends on the number of company employees.

3. Restrictive Covenants

3.1 Noncompetition clauses

Whilst the contract of employment is in force, the employee is expressly forbidden by law to compete with the employer, either on his own or on behalf of third parties.

The courts tend to be strict in applying the prohibition to compete whilst the contract of employment is being executed: no effective competitive activity or effective damages are required, the mere possibility of one or the other being sufficient to find a breach of the duty of loyalty.

The legal framework in terms of post-contract non-competition commitments is restrictive. Provisions of this kind depend on the employee's consent and need to be entered into in writing, notably at the time of beginning of employment or at the time of termination.

Lawful post-contract non-competition covenants are limited to situations where the post-contract activity is likely to cause damage to the employer. It is important for the relevant agreement to be reasonable and as accurate as possible, describing the restricted activity and its geographical scope.

In addition, covenants of this kind are subject to a maximum duration: two years counted from the date of termination, extended to three years if the relevant employee carried out an activity requiring a special relationship of trust or had access to particularly sensitive information from a competition point of view.

During the contract of employment, no independent consideration is required in return for the employee's duty not to compete with the employer.

Contrarily, according to the law the employee is entitled to compensation during the period of post-contractual inactivity, which can be reduced whenever the employer incurred in significant costs with the employee's training. The law gives no criteria as to what constitutes adequate compensation, except for the reference afforded by situations where employees have been unlawfully dismissed or resigned with cause; in these cases, an employer who wishes to rely on the non-competition commitment is under obligation to "increase" (so says the law) the amount of compensation to the amount of base remuneration paid to the employee at the time of termination (to be deducted from earnings of the employee that result from professional activity initiated after the dismissal). Based on this reference it is fair to say that, in other cases, adequate compensation can be lower than the employee's basic pay at the time of termination.

With this framework in mind, employers are advised to pay specific compensation during the non-competition period, rather than to consider that the remuneration paid during the contract of employment or the compensation agreed at the time of termination is inclusive of the specific compensation due in return for the employee's commitment not to compete once the contract is over.

3.2 Nonsolicitation of employees provisions

Provisions whereby employers agree not to hire each other's existing or former employees or to indemnify in case they do are null and void. Despite the fact that the law refers to agreements only, the same principle is likely to invalidate unilateral commitments of this kind. Likewise, in our view the legal prohibition comprises situations where (as is normally the case) the obligation not to solicit forms part of post-contract non-competition agreements, despite the fact that, in that context, strictly speaking the employee making the commitment is not an employer (but in practical terms, he/she is acting like one).

Non-solicitation of employees provisions may also be considered an agreement between competitors restrictive of competition under EU and Portuguese competition law, in which case they could expose the employers to potentially serious sanctions and other negative consequences.

3.3 Nonsolicitation of customers provisions

As with non-solicitation of employees, provisions aimed at restricting access to customers of the employer normally form part of post-contract non-competition commitments, so they ought to be assessed with reference to the legal framework – including its requirements and limits – described above. A non-solicitation commitment which exceeds the period of time allowed by employment law for the post-contract non-competition obligation (two or three years, depending) could also raise concerns under EU and Portuguese competition law, to be evaluated on a case-by-case basis.

4. Data Privacy Laws

4.1 General overview

Portuguese law contains several provisions aiming to safeguard employees' right to privacy.

Files and accesses of the employer to process personal data of candidates to employment and employees are subject to the general legal framework in terms of data protection (to be found, for the moment, in Law No 67/98, of 26 October 1998, rectified by Declaration of Rectification no. 22/98, of 28 November 1998 and amended by Law No 103/2015, of 24 August 2015, which implements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995). Accordingly, both the candidate and the employee are entitled to control their respective personal data, to be aware of its content and purposes and to demand its rectification and update.

Employers may only require information about the candidate's and the employee's private life where such data is strictly necessary and relevant to assess their aptitude to execute the contract of employment. The standard for requesting information on matters of health and pregnancy is higher, as the need for this must arise from particular demands due to the nature of the activity to be undertaken. Both types of request must be grounded and made in writing; information about matters of health and pregnancy is to be provided to a doctor, who can only communicate to the employer if the candidate or employee is, or fails to be, capable of carrying out the relevant activity.

Other than as a result of a legal obligation, employers may only request candidates and employees to undergo medical tests and exams where such tests and exams aim to protect their safety, or that of third parties, or whenever particular demands arising from the nature of the activity so require. As before, the request must be grounded and presented in writing and the doctor can only disclose to the employer if the candidate or employee is able to work. In no circumstance can the candidate or employee be asked to take or present a pregnancy test.

The employer may only process biometric data of the employee after notifying the local data protection authority (*Comissão Nacional de Protecção de Dados*). The notification is to be accompanied by a prior opinion of the Works Council, where one exists. The treatment of biometric data is only allowed if the data are necessary, adequate and proportional to the required purposes. They are to be kept for the period of time needed to achieve the purposes of the treatment and ought to be destroyed as soon as the employee moves to another workplace or the contract of employment ends.

Means of remote surveillance can only be used by the employer when they aim to protect people and goods or in the event of particular demands arising from the nature of the activity. In no circumstance can they be used to control the employee's performance. The regime for notifying the local data protection authority about the use of remote surveillance is similar to that relating to the processing of biometric data. In addition, signs must be posted in the workplace informing employees about the existence and purposes of equipment of that kind.

Finally, employees are expressly entitled to confidentiality in terms of information they access or correspondence they exchange, namely by means of emails. The guarantee of confidentiality does not prevent the employer from establishing rules governing the use, by the employees, of the company's means of communication; this being said, it is common understanding that a certain degree of private use is to be allowed. The framework applicable to the control and monitoring, by the employer, of the employee's private use of company equipment derives, for the most part, from guidelines issued by the local data protection authority in (in its last update) 2013.

5. Foreign Workers

5.1 Limitations on use of foreign workers

Existing limitations on the use of foreign workers do not apply to nationals of the EU, EEA, countries with which the EU has concluded an agreement providing for the free movement of persons, those residing in Portugal as refugees or beneficiaries of subsidiary or temporary protection or persons who are members of the family of the above-mentioned citizens or members of the family of Portuguese citizens.

Employees of other countries should obtain a residence visa (*visto de residência*) with the Portuguese embassy or consulate of their place of residence prior to entering Portugal. In possession of the visa, the foreign employee is entitled to stay in Portugal for four months (renewable up to 90 days, if a permanence prorogation (*prorrogação de permanência*) is requested and granted in the meantime) and request, before the competent authorities, the residence permit (*autorização de residência*) enabling him/her to render subordinated work in Portugal.

The process for obtaining the residence visa and permit is complex and lengthy, its duration being difficult to predict, so employers are advised to plan the arrival of foreign employees in Portugal with sufficient time in advance.

5.2 Registration requirements

Employees who are exempted from the need to obtain a residence visa and permit are also subject to registration requirements. For example, citizens of EU countries intending to stay in Portugal for more than three months have 30 days counted from the term of those three months to register with the competent authorities.

6. Grounds for Termination

6.1 Is cause required

As a rule, Portuguese law prevents employers from terminating contracts of employment at will, ie, without cause. The main exceptions to this rule are the following:

- terminating the contract of employment during the probation (trial) period;
- causing fixed- or unfixed-term contracts of employment to expire at the end of the term;
- terminating a contract of employment entered into under the *comissão de serviço* regime (as defined); and
- causing the contract of employment of an employee who has retired, or turned 70 years old (plus six months) without retiring, to expire.

Other than these, in order to terminate the contract of employment the employer must have cause, ie, one of the reasons for termination as defined by the law must be present (collective bargaining agreements are prevented from ruling on matters of cause for termination). Main causes for termination can be divided between:

- objective causes for termination: those arising from company-related reasons, such as redundancy procedures (collective dismissal and dismissal based on the extinction of job positions, the applicability of one or the other lying in the number of company employees and the number of employees to be made redundant) and expiry in result of the company's windup and liquidation or total and definitive shutdown;
- subjective reasons for termination: for employee-related reasons, such as dismissal on disciplinary grounds and termination based on the employee's retirement for age or disability.

The standard of cause depends on the type of cause. Dismissal for disciplinary reasons requires the employer to show that the employee is guilty of committing a serious infraction, which makes it immediately and objectively impossible to maintain the contract of employment. Contrarily, in situations of redundancy the courts – although less so in recent years – tend not to challenge the employer's business decision not to pursue the activity, the control being rather focused on the compliance with procedural requirements and on dismissals which, at the pretence of redundancy, have other motivation (discrimination on a protected ground or for parental-related reasons, for example).

Contrarily, employees are free to terminate the contract at all times, no cause being required on their part. They are however expected, in most cases, to put an end to the contract of employment by observing a prior notice, the duration of which depends on the type of contract and the period of service. Where they had committed in writing to remain in service – up to three years – in return for the employer meeting the expenses associated with their professional training, release from such obligation requires them to return the amount of the expenses to the employer.

6.2 Layoffs

An employer can only impose layoffs (ie the temporary reduction of the periods of work or suspension of contracts of employment in response to periods of crisis) after completing the detailed and complex procedure set forth in the law.

The procedure starts with the employer communicating to the employee representatives (Works Council or, in the absence thereof, the trade union representatives at company level), in writing, the intention to reduce the periods of work or suspend contracts of employment, together with:

- the economic, financial or technical grounds of the intended measure;
- a chart organising the employees by company departments;
- the criteria for selecting the employees to be affected by the measure;
- the number and professional categories of the relevant employees;
- the period of time during which the measure will be in force; and
- if applicable, areas where the relevant employees will be given training during the period of reduction or suspension.

The technical documentation grounding the company crisis is to be made available as well. In the absence of employee representatives, all this information is to be provided to a representative committee incorporated, at the time, by the employees involved in the temporary measures.

Following a period of negotiation with the employee representatives (as explained: Works Council or trade union representatives at company-level or the committee incorporated by the employees), the employer must inform each employee, also in writing, which measure will apply to his contract of employment, showing the ground for the measure and the dates of beginning and end. On the same date, additional information – consisting of copies of the minutes of the meetings and a chart summarising various data about the employees, including the concrete measure applied to each – is to be sent to the authorities and the employee representatives.

Additionally, the employer is under the obligation to inform the employee representatives (or the employees themselves, if none exist), on a quarterly basis, about the evolution of the reasons given to resource to the reduction or suspension measures.

7. Procedures for Implementing Terminations

7.1 Internal and appeal procedures

Except where the parties agreed differently in writing, termination during the probation period by either of the parties is not subject to a specific procedure.

Other than this, most causes for termination by the employer require the previous compliance with the relevant procedure set out in the law, many of which are complex, lengthy and to be conducted (at least partially) in writing. They vary significantly, so we summarise herein the procedure applicable to some of the most frequent causes for termination.

Disciplinary dismissal starts with the employer presenting to the employee a written description of what he/she is accused of, together with the express disclosure of the intention to dismiss him/her. A copy of these documents is to be sent to the Works Council and to the relevant trade union, in the latter case only where the employee to be dismissed is a representative of the trade union. The employee has ten working days (or a longer period set out in collective bargaining agreements, as is sometimes the case) to present his or her defence in writing and request probative diligences (eg presenting documents or appointing witnesses to be heard). Except in situations where these diligences are irrelevant or aimed at delaying the procedure, the employer is under the obligation to conduct them. Following completion of the probative diligences required by the employee, a copy of the disciplinary file is to be sent to the above-mentioned employee representative structures, in order for them to issue a non-binding prior opinion. The procedure ends with the employer notifying the employee of the dismissal decision in writing, which decision needs to be grounded and consider all relevant circumstances of the case, including the employee's defence and the employee representatives' opinion. For companies with fewer than ten employees, this procedure is significantly less complex.

The procedure applicable to collective dismissals comprises three different phases: information, negotiation and decision. The procedure starts with the employer notifying the employee representatives (as described before: Works Council; in the absence thereof, the trade union representatives at company-level; if neither exists, a committee incorporated by the employees to that effect), in writing, of the intention to conduct a collective dismissal. This initial communication is to be complemented by written information on several aspects:

- the commercial, structural or technological motives for the dismissal;
- a chart organising the employees by company department;
- the criteria to select the employees to be made redundant;
- the number of employees to dismiss and respective professional categories;
- period of time for concluding the dismissal;
- method of calculation of the compensation to be paid, without prejudice to the minimum compensation set forth in the law.

Negotiation takes place by means of meetings between the employer and the relevant employee representatives, with the participation of governmental authorities. The purpose of such meetings is to provide additional information required by the employee representatives, agree on potential alternatives to the dismissal (eg reduction of the periods of work, early retirement, pre-retirement) and negotiate the compensation to be paid. At the end of the proceeding, the employer notifies each employee, in writing, of the decision to dismiss him/her, mentioning its motives, the compensation and further credits to be paid (including amount and mode of payment) and the date of termination. Specific information is to be sent, at this stage, to the authorities and the employee representatives: copies of the minutes of the meetings and a chart summarising various data about the employees, including the concrete measure applied to each.

The employer is not allowed to decide freely on the dismissal – either individual or collective – of pregnant women, women within 120 days following birth, women who are breastfeeding or parents during parental leave: the procedure is to be conducted up to a certain stage (generally speaking,

up to the point where the dismissal decision would follow), after which the employer is under the obligation to send the file over to the local authority in matters of equality (*Comissão para a Igualdade no Trabalho e no Emprego*), for it to issue a prior opinion on the merits of the dismissal. Where such authority, based on the finding of discrimination, rules against dismissal, the employer must file a lawsuit asking for the court's authorisation to dismiss the relevant employee. Failure to meet this procedure invalidates the dismissal.

The procedure to cause the expiry of fixed- and unfixed-term contracts of employment is significantly less complex, as the employer may put them to an end by means of a written communication sent to the relevant employee with the required prior notice (see below). The termination of the contract is also to be communicated to the Works Council and the trade union with which the relevant employee is affiliated; likewise, the reason for failing to renew the fixed-term contract of employment must be disclosed to the local authority in matters of equality, whenever the relevant employee is in one of the situations mentioned: pregnant; during the 120 days following birth; breastfeeding the infant.

Finally, where the employee has been absent for ten consecutive working days without stating the reason for the absence, or whenever it becomes apparent that he/she will not resume work (for example, because he/she started to work elsewhere in coinciding timetables), the employer may send a registered letter with acknowledgement of receipt to the employee's last known address invoking the termination of the contract based on the employee having abandoned work. In the first situation, the employee is entitled to prove a compelling reason for not having communicated the absence during the above-mentioned period.

Other than the resort to the labour courts to challenge the lawfulness of the dismissal, internal appeal procedures are not common and derive, for the most part, from collective bargaining agreements.

Generally speaking, termination by the employee – with or without cause – is to be communicated in writing. In the first case, the communication whereby the employee resigns has to provide a brief description of the facts sustaining the cause and must be issued within the 30 days subsequent to the employee becoming aware of it (special provisions apply whenever the cause for termination results from the employer failing to promptly pay the remuneration). In both cases, the employer may request that the employee present a communication with his/her signature certified in the presence of a notary, thus preventing him/her from revoking the termination within seven days and resuming the contract of employment.

8. Notice Periods/Severance

8.1 Required notice periods

Should the contract of employment terminate for disciplinary reasons, no notice period applies: the contract ends as soon as the employee receives (or should have received) the dismissal decision.

Most other reasons for termination by the employer require them to give prior notice. We summarise herein some examples (all notice periods mentioned correspond to consecutive days):

- termination of open-ended contracts of employment during the probation period: seven or 15 days, depending on whether the probation period lasted more than 60 or 120 days, respectively;
- expiry of fixed-term contracts of employment: 15 days prior to the end of the initial term or renewal in force;
- expiry of unfixed-term contracts of employment: seven, 15 or 30 days, depending on whether the contract lasted up to six months, up to two years or for more than two years;
- termination of a contract of employment entered into under the *comissão de serviço* regime: 30 or 60 days, depending on whether the contract lasted up to two years or for more than two years (the parties are free to agree differently, increasing the period of notice in either the contract of employment or a collective bargaining agreement);
- collective dismissal or dismissal based on the extinction of job positions: 15 days for employees with less than one year of service; 30 days for employees with one or more than one year of service, up to five years; 60 days for employees with five or more than five years of service, up to ten years; 75 days for employees with more than ten years of service; or
- expiry of contracts of employment of employees who have retired or turned 70 years old without retiring: 60 days prior to the end of the initial term or renewal in force (contracts of employment with this type of employees convert into a six-month, fixed-term contract of employment by operation of law, no limits applying in terms of maximum duration and number of renewals).

Where the employee terminates the contract with allegation of cause, the termination is immediately effective, no prior notice being due. The same applies to the employee putting an end to the contract during the probation period, whatever its length, unless the parties agreed differently at the time of hiring.

Contrarily, if an employee wishes to leave without cause, he/she is bound to give notice, as follows:

- open-ended contracts of employment: 30 or 60 days, depending on whether the contract lasted up to two years or for more than two years (collective bargaining agreements

and individual contracts of employment may increase this period up to a maximum of six months, in the event of employees occupying management or supervision positions or carrying out functions of representation or responsibility);
- expiry of fixed-term contracts of employment: eight days prior to the end of the initial term or renewal in force;
- fixed- or unfixed-term contracts of employment: 15 or 30 days (at any time), depending on whether the contract lasted for less than six months or for six months or more;
- termination of a contract of employment entered into under the *comissão de serviço* regime: same notice as the employer.

Should the employee fail to give the notice period due, the contract ends at the intended time but the employee is under the obligation to pay to the employer an indemnity equal to the base remuneration and seniority premiums (*diuturnidades*) correspondent to the period of notice that was not observed, without prejudice for other damages arising from the early termination.

8.2 Required severance

Again with the exception of dismissal on disciplinary grounds, in most causes of termination the employer is under an obligation to pay severance (or compensation, in Portuguese *compensação*, to distinguish it from situations of unlawful termination where the employer can be called to pay indemnity (*indemnização*)).

Generally speaking, for employees hired as of 1 October 2013 compensation amounts to 12 days of base remuneration and seniority premiums (*diuturnidades*) for each complete year of service; fractions of years of service are to be compensated on a pro rata basis. For these purposes, the employee's base remuneration and seniority premiums cannot exceed 20 times the minimum pay (currently, EUR11,140.00) and total compensation cannot exceed 12 times the employee's base remuneration and seniority premiums (or 240 times the minimum pay, ie EUR133,680.00, where the previous limit – 20 times the minimum pay – was applied).

Minimum compensation due under Portuguese law has steadily decreased over the past years (up to 31 October 2011, compensation equalled one month of base remuneration and seniority premiums for each year of service, in the minimum of three months of base remuneration and seniority premiums). Accordingly, a complex system of compensation is now in place for employees hired prior to 1 October 2013, whereby different periods of service entitle the employee to different compensation or no compensation at all. Roughly speaking, periods of service until 31 October 2012 entitle the employee to compensation of one month of base remuneration and seniority premiums for each year of service, subsequently reduced to 20 days for the period of work from 1 November 2012 to 30 September 2013 and, as of 1 October 2013, 18 days when it comes to the first three years of service (only where, on 1 October 2013, the employee had not yet completed three years of service) and 12 days from that moment onwards.

Compensation in relation to the period of service as of 1 November 2012 is subject to the above-mentioned limits in terms of the maximum amount of remuneration to be considered. In addition, employees whose compensation (calculated in accordance with the previous rules) is equal or superior to 12 times the employee's base remuneration and seniority premiums or 240 times the minimum pay face the possibility of certain periods of service failing to entitle them to compensation at the time of termination.

Particular rules apply to the compensation due in the event of fixed- or unfixed-term contracts of employment expiring at the end of the term by decision of the employer. In the case of a fixed-term contract of employment, compensation equals 18 days of base remuneration and seniority premiums for each complete year of service. In the case of unfixed-term contracts of employment, compensation equals 18 days of base remuneration and seniority premiums for each complete year of service, in the first three years of work, and 12 days from that point on (unfixed-term contracts of employment can last for six years). The remaining legal rules (for example in terms of the maximum relevant base remuneration and seniority premiums used to calculate the compensation) apply.

The expiry of contracts of employment of employees who have retired or turned 70 years old without having retired does not entitle the employee to compensation.

9. Termination Agreements

9.1 Obtaining releases

Employers who enter into written termination agreements and pay global compensation benefit from the legal presumption that all amounts due to the employee at the time of, or as a result of, termination, have been included in the global compensation. The employee, however, can prove otherwise. Therefore, employers are advised to enter into termination agreements where the employee expressly states that, with the payment of the global compensation, nothing else is due to him/her.

9.2 Enforceable releases

Enforceable releases depend on the employee being paid a global compensation (and preferably, stating that no other payment is due).

Termination agreements, necessarily entered into in writing, have a mandatory content: they ought to mention the

date of signature and the date on which they become effective. Other than this, the parties are free to agree on additional terms, within the limits of the law (for this reason, it is common for termination agreements to be the framework where the parties agree on post-contract non-competition and non-solicitation covenants).

10. Employment Disputes

10.1 Employment Discrimination Claims

The list of protected grounds under Portuguese anti-discrimination law is not exhaustive and includes the following:

- ancestry;
- age;
- sex;
- sexual orientation;
- gender identity;
- marital status;
- family and economic situation;
- degree of education;
- origin or social condition;
- genetic heritage;
- reduced work capacity, disability and chronic disease;
- nationality, ethnic origin and race;
- territory of origin;
- language;
- religion, political beliefs or ideology; and
- trade union membership.

10.2 Contractual, Wrongful Dismissal Claims

The employee may challenge all forms of dismissal. The type of lawsuit and deadline to initiate it depend on the type of dismissal.

Lawsuits challenging the lawfulness of collective dismissals are of a special kind and must be brought by the employee within six months of termination. Lawsuits aimed at having the disciplinary dismissal and the dismissal based on the extinction of the job position invalidated follow a special procedure and must be initiated within 60 days of the date the dismissal was communicated or the contract of employment ended, if later. Other causes for termination of the contract, such as termination during the probation period or expiry of fixed- or unfixed-term contracts of employment, which in the view of the employee constitute wrongful dismissal, are to be challenged in accordance with the common procedural form, within one year from termination.

10.3 Retaliation/Whistleblower Claims

There is no general, comprehensive framework in Portuguese law (employment law or otherwise) on whistle-blower claims. Legal provisions on the subject are rather found in specific contexts, such as the fight against corruption and in the banking and financial sector.

Employees who blow the whistle on corruption-related infractions may not be put to disadvantage in any way, including by dismissal or forced transfer. Any disciplinary sanction applied within the year following the disclosure is presumed abusive. The relevant employees are entitled to remain anonymous until an accusation is made; to transfer voluntarily to another workplace; and to benefit (with the necessary adaptations) from witness protection measures.

Since 2012, banks and other financial institutions have been under a legal obligation to implement specific, independent and autonomous mechanisms adequate to the disclosure of irregularities. Such mechanisms are to guarantee the confidentiality of the revelations made and the protection of the personal data of those involved (whistle-blower and person denounced). Except if the disclosure is clearly and deliberately unfounded, the disclosure itself does not legitimate disciplinary, civil or criminal action against the whistle-blower.

Large companies, or companies belonging to group companies, often have internal codes of conduct in place ruling how to report wrongdoings and affording protection to whistle-blowers. According to guidelines issued by the local data protection authority (*Comissão Nacional de Protecção de Dados*) in 2009, the treatment of personal data in this context is subject to prior authorisation.

Complaints to authorities and regulators are specifically addressed in the banking and financial sector.

The protection afforded is similar to that of internal complaints: the protection of the personal data of both the whistle-blower and the person denounced is guaranteed; confidentiality about the identity of the whistle-blower is ensured up to the moment its revelation is necessary to safeguard the rights of those involved in the accusation; and the disclosure may not be used to initiate disciplinary, civil or criminal action against the whistle-blower, except if clearly and deliberately unfounded.

Pursuant to the law, whistle-blowers are entitled to remain anonymous, at least for a certain period of time (until the accusation, in the field of corruption; up-to-date knowledge about their identity is necessary to ensure the rights of the accused, in the banking and financial sector).

11. Dispute Resolution

11.1 Judicial procedures

The labour courts are courts specialised in labour matters. At appeal level, both the Courts of Appeal (*Tribunal da Relação*)

and the Supreme Court of Justice have a section – called the Social Section (*Secção Social*) – that is specialised in labour claims.

Claims are normally brought before the first instance labour courts (currently totalling 44 around the country). Depending on the issue at stake, the value of the lawsuit (expressed in euros) and the number of times a claim has failed in the previous instances, one or two levels of appeal may apply. Lawsuits challenging dismissals or in the context of workplace accidents, for example, allow for at least one degree of appeal. In certain circumstances, the ruling of the Constitutional Court may be requested.

Class action claims are not specifically contemplated in the employment field; under Portuguese law, this type of claim is designed to prevent, put an end to or sanction infractions in the areas of public health, environment, quality of life, consumers, cultural heritage and the public domain.

11.2 Alternative dispute resolution

There is no labour arbitration procedure in Portuguese law, although one is provided for in the general arbitration law. The current status is that labour conflicts may be entrusted to voluntary arbitration, provided they do not concern unavailable rights (ie rights of which the employee cannot dispose, as those related to workplace accidents) and are not necessarily to be dealt with by a judicial court (as with the lawfulness of individual or collective dismissal) or mandatory arbitration (as in certain cases of conflicts regarding the conclusion and revision of collective bargaining agreements or strikes in public sector companies). Judgments enacted by the arbitration court are as enforceable as a judicial decision.

Effective as of 19 December 2006, employment mediation in Portugal is the result of an agreement between the Ministry of Justice and the social partners. All kinds of labour conflicts may be solved by mediation, except for workplace accidents and unavailable rights (eg lawfulness of the dismissal and decrease in pay). The agreement reached at mediation level has the same degree of enforceability as any other agreement, notably those concluded in court.

Mediation is most commonly used as a way to resolve disputes arising from the conclusion or revision of a collective bargaining agreement. Agreements reached therein take the form of a collective bargaining agreement, and are enforceable as such.

The parties may also resort to mediation in the context of a judicial procedure. The agreement reached as a result is to be sent to court and the parties may request that the court confirm its validity, in which case it is enforceable as a judicial decision.

11.3 Damages or other relief

There are no particular provisions in employment law in terms of indemnities awarded to employees or candidates who were the victims of discrimination, but for the general principle that indemnity is due in those cases, for both pecuniary and moral damages.

Specific provisions do exist where the employee was dismissed as a result of discrimination.

Under Portuguese law, an employee who has been unlawfully dismissed is free to opt between reinstatement and being paid an indemnity. Should the employee choose to be paid the indemnity, its amount varies between 15 and 45 days of base remuneration and seniority premiums for each complete year of service or fraction thereof, with a minimum of three months' pay, to be determined by the court in view (inter alia) of the particularities of the case. Certain types of employees are entitled to a higher indemnity: in the case of pregnant women, women within the 120 days following birth, women who are breastfeeding, parents during parental leave or employee representatives (eg members of the Works Council or trade union representatives at company level), indemnity is increased to 30 to 60 days of base remuneration and seniority premiums for each complete year of service or fraction thereof, with a minimum of six months.

In this context, a sign of the increasing awareness of the legislator of the issue of discrimination is that the indemnity for unlawful dismissal – the above-mentioned 15 to 45 days or 30 to 60 days – is to be defined by the court in accordance with a pre-defined order, whereby the law itself lists the grounds for the dismissal to be declared unlawful. And whereas, until the 2009 Labour Code, the dismissal being due to political, ideological, ethnical or religious reasons (even if on the pretext of another reason) was the second legal ground for a dismissal to be ruled unlawful, as of the 2009 Code the dismissal being motivated by one of those reasons is the first legal ground for it to be considered against the law.

Employees who are successful in filing an injunction to suspend the effects of dismissal continue to receive remuneration while the dismissal's validity is being assessed by the court.

Should the dismissal be declared unlawful, employees are entitled to the loss of pay between the date of the dismissal and the date of the (final) court's decision, to be deducted from earnings of the employee as a result of professional activities made possible because of the dismissal and from the amount of unemployment allowance received in the meantime (the latter is, in any case, to be handed by the employer to the social security services). Where the employee chose

reinstatement, salaries will continue to be due past the judicial decision declaring the dismissal unlawful.

Upon the employee's request, employers who fail to comply with the obligation to reinstate the employee unlawfully dismissed may be made to pay a fine for each day reinstatement is delayed. Interest at a special rate (5%, whereas the normal interest rate due to individuals is 4%) shall also apply. However, half of that penalty is due to the State.

An employee may be indemnified for moral (non-pecuniary) damages suffered as a result of discrimination. Applicable across the board, this possibility is expressly contemplated in the law in the event of unlawful dismissal. Indemnities of this kind are not particularly common in the employment arena, both in terms of the frequency with which they are awarded and the amount determined by the court, although more so in recent years.

Punitive damages are not admissible under Portuguese law.

The prevailing party can be awarded attorney's fees, limited to 50% of the amount that both parties paid (in total) as judicial fees (*taxas de justiça*).

As explained, an employee who has been unlawfully dismissed is free to opt between reinstatement and being paid an indemnity.

Where the relevant employee occupied a management position or worked for an employer with fewer than ten employees, the employer may oppose reinstatement by presenting a grounded request to the court. Should the court grant the request, the employee is forced to take the indemnity but its amount – normally set, as referred to above, between 15 and 45 days, with a minimum of three months' pay – increases to 30 to 60 days of base remuneration and seniority premiums for each complete year of service or fraction thereof, with a minimum of six months of base remuneration and seniority premiums.

No opposition to reinstatement is allowed whenever the employee unlawfully dismissed a pregnant woman, women within the 120 days following birth, women who are breast-feeding or parents during parental leave.

11.4 Attorney's fees

A prevailing employer can be awarded attorney's fees in the same terms as a prevailing employee: limited to 50% of the amount that both parties paid as judicial fees. Where the employee benefits from free legal assistance due to his or her precarious financial situation, attorney's fees due to the prevailing employer will be an encumbrance of the State.

12. Extraterritorial Application of Law

12.1 Application of domestic law outside the country

Pursuant to the law, an employee hired by an employer set up in Portugal who is seconded to work abroad is entitled to the working conditions set forth in the legislation or collective regulation of the host country, without prejudice to a more favourable regime set out in the law applicable to the contract or in the contract of employment itself. In these circumstances, ie, should Portuguese law be the governing law, domestic courts are bound to apply it outside the country.

Domestic law will also apply outside Portugal within the framework of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I), notably its Articles 8 (Individual employment contracts) and 9 (Overriding mandatory provisions).

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