

## OPINION ARTICLE ANALYSIS AND NEWS

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### Developing an Effective Approach to Employment Law in Portugal for Multinational Companies

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## Introduction

### Understanding the Current Employment Law Environment

Recently, Portugal has seen an increase in individual and collective redundancies resulting from pre-planned internal restructurings, or as a consequence of Portugal's severe economic recession. A deep EU-wide recession, combined with low domestic consumer and business confidence, has had a chilling effect on investment spending and exports.

The Portuguese system has a long, heavily pro-employee history. The nation's constitution guarantees employment security, prohibits dismissals without justification (Article 53), and guarantees the right to work (Article 58). As recently as twenty years ago, the labor force was dependent on the state machine; government was one of the largest employers in the nation. The system was devoid of meritocracy: dismissal was unlawful; promotions were automatic; regular salary increases were a given; and civil servants claimed their positions for life. Even now, about 15 percent of the national workforce is still employed under this system; however, ongoing privatization of state-controlled firms and liberalization of key economic sectors (finance and telecommunications) are resulting in a slow, steady modernization of the workforce.

These reforms are under way on a macro level, but the individual relationship between employer and employee remains fundamentally contractual. When an employer and employee enter into an employment contract, both parties know that a complex mix of statute and case law will apply to the contract. Within this environment, termination of employees—as a result of redundancy or performance—is challenging.

### *Considerations for Multinational Companies*

Given that a significant percentage of employment law cases in Portugal involve multinational companies, it is prudent for those companies to seek legal counsel to avoid legal pitfalls. One of the most challenging issues for a multinational company is documenting and substantiating an employee dismissal. The labor culture in Portugal is highly litigious, and employees who are dismissed frequently challenge the dismissal. The risks and costs of reinstating such an employee (if ordered to do so by the court) cannot be overstated. The situation is further complicated by the practical fact that the human resources personnel and in-house counsel of a company based outside of Portugal are often accustomed to more flexible employment laws in their home jurisdictions. Under the Portuguese system, a considerable amount of time must be spent in putting together watertight grounds for dismissal to minimize challenges or create a position of advantage for negotiation of a settlement agreement.

## Termination of Employment Contracts

Portuguese employment law prescribes carefully the manner in which an employer can terminate an employment contract. There are numerous options available to the employer, but the costs to implement the options can be high because, in most cases, the employer faces a large settlement payment to avoid a lengthy court process.

### **Mutual Consent**

A contract may be terminated by mutual consent if both parties agree and sign an agreement. In practice, this can be difficult to achieve without the employer paying a premium because the mutual consent is considered a voluntary termination.

Under the law, the employee will not be entitled to social security unemployment benefits, so most employees are unlikely to agree to such a termination. Where the contract is terminated by mutual consent, Portuguese employment law does not provide for a minimum premium amount and does not stipulate any criteria to determine such a premium. It specifies only that where any compensation is agreed upon, it should at least compensate employees for all claims due up to the termination date. The statutory minimum compensation on an individual or collective redundancy is one month's base salary plus diuturnities<sup>1</sup> for each year of service. Accordingly—and this needs to be judged on a case-by-case basis—where no other termination or dismissal grounds exist we often advise clients to pay a premium to reach an amicable settlement of anywhere between one-and-one-half and two months' salary rather than the legal minimum of one month, although the latter more often than not will be the starting point to open negotiations.

### **Employee-initiated**

To terminate an employment contract voluntarily, the employee must provide thirty days notice or sixty days notice if the contract has been in force for more than two years. If there is just cause—for example, breach of contract by the employer—the employee may terminate the agreement immediately.

The law considers that there is just cause for termination by the employee where the employer:

- Fails with fault to punctually pay remuneration which is due
- Infringes with fault the legal or conventional rights of the employee
- Sets an abusive sanction
- Fails with fault to ensure safety and health conditions at work

<sup>1</sup> Legal annual amount payable for each year or part of a year of service with the employer.

- Damages with fault serious economic interests of the employee
- Harms the physical or moral integrity, freedom, honor, or dignity of the employee

Further, the following situations are also deemed to constitute just cause for the contract termination by the employee:

- The need to comply with a legal duty that is incompatible with the contract's continuation
- Substantial and long-lasting modifications to the working conditions in the lawful exercise of the employer's powers

## Retirement or Permanent Disability

### **Pre-retirement**

Pre-retirement arises where the employer and an employee aged 55 or older agree on a reduction or suspension of the work performed, during which the latter is entitled to receive a monthly remuneration, referred to as pre-retirement ("pré-reforma"). This agreement must be executed in writing, and the initial amount to be paid as pre-retirement may not be higher than the employee's remuneration at the agreement date, nor less than 25 percent of this amount. It is important to highlight that the pre-retired employee is allowed to perform other remunerated activity.

### **Pre-retirement terminates:**

- When the employee retires at the legal retirement age
- When the employee returns to the full performance of his functions, under an agreement with the employer
- With the termination of the employment contract

### **Retirement**

In the absence of an agreement to the contrary, employment contracts expire on the employee's retirement, either at the legal retirement age or on the basis of a disability. An employee is considered to have a disability when the social security authority formally verifies and recognizes this.

Where an employee continues to work for a period exceeding thirty days from the moment when both parties become aware of the right to retirement arising at the legal retirement age, the employment contract question is deemed to be a term contract.

### **Non-renewal of a Fixed-term Agreement**

If the employer decides not to renew a contract with a fixed term, it must provide written notice to the employee

at least eight days in advance of the expiration of the term. If the employer does not provide notice, the contract is renewed automatically for the same term as the original contract. The employer need not provide reasons for the non-renewal, and assuming all formalities and notice periods are correctly complied with, the employee is not in a position to challenge this.

## Redundancy-based Dismissal of an Individual

An employer may dismiss an individual employee on grounds of redundancy for economic, technological, or structural reasons. For example, decreases in the company's core business activities, an organizational restructuring, or shutdown are justifiable reasons for dismissal. The law requires prior notification both to the targeted employee and works council and/or trade union representatives within the company, either of whom may oppose the dismissal by submitting reasoned objections in writing to the company prior to a final decision. Justifiable grounds for disputing a dismissal include that the reasons for the dismissal submitted by the employer were not objectively substantiated or did not show the need to eliminate the work post in question or that all legal formalities relating to notice periods and the compensation due were not properly complied with.

If the redundancy is determined to be unlawful, the employer is required to:

- Indemnify the employee for all economic and non-economic losses
- Reinstatement the employee in his former position, without prejudice to his position or length of service

Instead of reinstatement, the employee may opt for compensation, decided by the court, and which is usually between fifteen and forty-five days of agreed salary and length-of-service awards for each full year or fraction of a year's service, taking into account the salary and the degree of illegality. The court should take into account the period of time between the date of the redundancy and the final and non-appealed decision. This compensation cannot be less than three months of agreed base salary and length-of-service awards.

If the opposition to the reinstatement is accepted, the compensation is calculated between thirty and sixty days. The compensation may not be less than six months' agreed salary and length-of-services awards.

## Collective Redundancy of Employees

Collective redundancy is defined as the dismissal of at least two employees in a company with an employee population of up to fifty employees, or five employees in a company of more than fifty employees. As with

individual redundancies dismissal must be on the grounds of economic, technological or structural reasons and prior notice must be given to both the targeted employees and the trade union representatives. However, in a collective redundancy dismissal, the terms of the dismissals must be negotiated and will be assisted by governmental representatives for employment affairs. The government representatives oversee negotiations and resolve disputes between the company and the employees and works council and/or trade union representatives, and help the parties agree on the redundancy terms and compensation for the targeted employees. The government agency that provides these representatives is the *Direcção-Geral do Emprego e das Relações de Trabalho* (Directorate-General for Employment and Working Relations), which is inserted within the structure of the Ministry of Social Security and Labour.

## Employee Maladjustment due to Technology

If an employee does not perform well because of technological modifications by the company, he or she can be dismissed. However, the company must have provided vocational training to prepare the employee for the change, set an adjustment period to enable the employee to settle into the new role, and offered a compatible post before termination can be considered. The introduction of new technologies or operating methods with which the employee is unfamiliar and which require specialized training, rather than standard vocational training.

## Just Cause Dismissal

Just cause dismissal occurs when the employee's behavior seriously hinders, or renders impossible, the continuation of the employment relationship as specified by detailed provisions of Article 9 of the Labor Code. Article 9 includes a long, non-exhaustive list of situations that warrant just cause dismissal. The decision to dismiss an employee may be challenged before an employment court, where the employee may seek the precautionary suspension of the decision or its annulment. When the decision is annulled by the court, the employee is entitled to opt for reinstatement with retroactive wages from the date of the unfair dismissal, or compensation.

Employers are prohibited from terminating an employee by simply giving notice and paying a statutory compensation amount. As a practical matter, employees who opt for reinstatement create an awkward situation for the employer if it neither wants to retain nor has a position for the individual. We inevitably counsel employers to make large payouts to settle terminations under these circumstances because of the risk for continued, and more serious, legal problems.

Some important points about just cause dismissal:

- Just cause occurs where the employee's behavior seriously hinders or renders impossible the continuation of the employment relationship.
- The dismissal can take place only upon completion of disciplinary out-of-court proceedings. This consists of the employer sending a written "note of blame" (*nota de culpa*) to the employee within a strict time limit of sixty days of knowledge of the offending conduct.<sup>2</sup>
- The employee has a right of response in writing within at least ten working days. The Works Council, if any, must be heard before a final decision is made by the employer.

## Examples of Just Cause Dismissal Conduct

Reasons that are considered fair grounds for dismissal are expressly set out in the Portuguese Labour Code and include:<sup>3</sup>

- Disobeying legitimate orders and instructions given by superiors
- Violating the rights of other employees of the company
- Provoking repeated conflicts with other employees
- Repeated disinterest in complying, diligently, with the obligations inherent to exercising the position in question
- Damaging the serious interests of the company
- False declarations relating to justifying absences from work
- Non-justified absences from work that result directly in damage or grave risks to the company or, independently of any damage or risk, when the number of non-justified absences reaches, in each calendar year, five consecutive or ten non-consecutive absences
- Intentional failure to observe health and safety rules at work
- Practicing, at work, physical violence, injury or other offenses punished by law against other employees, members of management, et al.
- Kidnapping and in general crimes against the freedom of the above-mentioned persons
- Not complying with or opposing compliance with court or administrative authority decisions
- Abnormal reductions in productivity

## Opposition by the Employee/Compensation

- The decision to dismiss an employee may be challenged before an employment court, where the

employee may seek the suspension of the decision by way of injunction and its annulment.

- When the decision is annulled by the court, the employee is entitled to be indemnified for all economic and non-economic losses<sup>4</sup> and to receive all of the salary he would be due in normal circumstances and to ask for his reinstatement to the company.
- In the cases of a micro-enterprise (fewer than twenty-five employees) and senior management positions, the employer can oppose the reinstatement if it can demonstrate that the return of the employee would be seriously prejudicial and disturb the company's activities. If the opposition to the reinstatement is accepted, the compensation due to the employee is calculated, at the court's discretion, between thirty and sixty days per year worked. The compensation may not be less than six months' agreed salary and length-of-service awards.
- Instead of reinstatement, the employee may opt for compensation, decided by the court, which is usually between fifteen and forty-five days of agreed salary and length-of-service awards for each full year or fraction of a year's service, taking into account the salary and the degree of illegality of the dismissal.

When the final decision is made by the employer dismissing the employee, he will not be entitled to receive any compensation (unless the decision is annulled by the court, as mentioned above), but he will be entitled to receive any sums due for holidays and holiday subsidies already due and falling due—in other words, holidays due but not yet taken, proportional holiday pay, and holiday and Christmas subsidies to the date and year of terminating the contract. Furthermore, notwithstanding the dismissal with just cause, the employee will also be entitled to receive other contractual company bonuses and amounts due to him (e.g., performance bonuses), which need to be calculated by the company.

## Recent Amendments and Updates to Portuguese Employment Law

The Portuguese Labour Code (PLC) of 2004 underwent extensive reform, which resulted in new legislation in 2009 (Law N<sup>o</sup> 7/2009, effective February 17, 2009). While the amendments were extensive, the practical impact of those amendments, especially as related to the concerns and requirements of multinational companies, was not as far-reaching as hoped. However, many amendments have a material impact on the relationship between a multinational company and its Portuguese employees.

### *Overview of the Amendments and Updates*

<sup>2</sup> Note also that any disciplinary action is time-barred one year after the occurrence of the offense.

<sup>3</sup> Please note that the instances of misconduct must be serious, since there are lesser forms of reprehension, such as warnings, loss of pay, and suspension from work, rather than outright dismissal.

<sup>4</sup> Including damages for pain and suffering and damage to reputation if established.

Generally, the driving forces of the reform are to provide labor law with more flexibility and efficiency, simplify procedures, foster companies' competitiveness, and safeguard a level of protection for employees. For example, two new categories of labor contracts provide legal models capable of framing and providing solutions for new and important labor-economic realities. Another important change is the alterations to the Service Commission regime, which provides companies with a valuable instrument for hiring persons for senior positions because its provisions are not subject to the general regime on contract termination.

Finally, simplification of the disciplinary proceedings and exclusion of mandatory evidence-taking procedures ease the employer's responsibilities, eliminate unnecessary acts and duplication of evidence, and accelerate the disciplinary proceedings. The employer is able to terminate the employment contract sooner and save costs as a result.

## Impact on Companies

The expectation for the new legislation is that the flexibility and simplification will provide companies with a wider set of solutions related to employment. However, the reforms were not far-reaching enough to tackle some of the traditional problems, e.g., the overprotection of employees that is integral to Portuguese labor laws. In a climate that demands enhanced competitiveness and investment, lingering cultural and legal traditions still need to be resolved. The most troubling of these is the court's power to reinstate an employee to his or her original (or equivalent) position if the dismissal is deemed unlawful. This right needs to be abolished and replaced with the court's right to order higher or punitive compensation in a manner consistent with other jurisdictions.

## Strategies for Client Compliance

We advise multinationals to be proactive in their disciplinary and general compliance policies and to keep accurate personnel records to assist in substantiating grounds for dismissal when necessary. In addition, when hiring new senior executives, it is prudent to place the employees on Service Commission agreements immediately because this is the only type of contract that can be terminated by giving notice and paying a severance amount. The employee cannot challenge the dismissal if all formalities are completed properly.

Other proven strategies for helping clients comply with Portuguese employment law include monitoring of changes in legislation, regular seminars and workshops with clients, and review of internal policies, contracts, and practices to ensure that the employer is compliant. Direct and regular communication between legal counsel and the human resources and compliance leaders at the client company is necessary for any of these strategies to be successful.

## Relevant Amendments and Updates

### New Employment Contract Categories:

The amendments introduced two new categories of employment contract—the employment contract for a very short period of time (article 142<sup>o</sup>), and the employment contract for discontinuous work (articles 157<sup>o</sup> to 160<sup>o</sup>). The changes are expected to allow employers greater flexibility on the types of contracts available and in retaining staff for short periods.

### **Broadened Scope for Service Commission Regime (161<sup>o</sup> to 164<sup>o</sup>):**

Under the previous Labor Code, it was possible to use Service Commission agreements for managing directors, support personnel, and secretarial positions connected with those positions, as well as other functions (provided for under Collective Labor Regulation Instrument), which implied a special relationship based on trust. The new code permits this type of contract to be used for all senior executive positions, even if they do not have managing powers, provided these positions depend directly on the board of directors, general-director, or equivalent. This contract type, when applied as soon as an employee enters the employer's service, enables the employer to terminate the contract at any time as long as written advance notice and compensation are provided.

This amendment is an important aspect of advising foreign multinationals when hiring new senior executives. The individuals should be placed immediately on service commission agreements to ensure more flexibility on termination. If all the formalities are observed, such as notice and compensation, this dismissal cannot be challenged. A service commission agreement requires thirty days' prior notice for an agreement that is in force for less than two years and sixty days' notice if the agreement has been in force for more than two years. A severance amount equal to one month's salary for each full year of service is also required for contracts of more than two years.

**Fixed-term and Temporary Contracts:** Fixed-term contracts with express expiry date (139<sup>o</sup> to 149<sup>o</sup>) now require a maximum period of three years for the contract to be in force, versus six years under the previous code. Temporary contracts without an express expiry (139<sup>o</sup> to 149<sup>o</sup>) may not exceed 6 years.

**Working Hours Bank (Banco de Horas) (208<sup>o</sup>):** A bankable hours system has been introduced, but it is subject to very limited terms. This mechanism can only be adopted through a Collective Labor Regulation Instrument and not through an individual agreement with an employee. This amendment allows for the normal working period to be increased by up to four daily hours, and can reach a total of sixty weekly hours. However, an increase in hours cannot exceed 200 hours annually. It means that normal working periods do not need to be observed; an employee could, for example, work fewer

days a week but longer hours in given days. It provides flexibility of working schedules and increased working periods that are compensated by rest at other times and so can be useful for seasonal work or in industries where volume of work fluctuates for other reasons.

#### **Condensed Working Schedules (Horário Concentrado) (209º):**

This regime increases the normal daily working period by up to twelve hours through a Collective Labor Regulation Instrument or through an agreement between the employer and employee. This option makes it possible to concentrate the work week into four consecutive days, or even three where a Collective Labor Regulation Instrument provides for it.

#### **Expiry of contractual clauses on geographical and functional mobility (120º and 194º):**

Contractual clauses on geographical and functional mobility expire after two years without being activated by the employer. If after two years an employer does not require the employee to move work location (geographic) or change functions, this clause expires and is no longer valid and would need to be renegotiated if the employer wished to rely on it.

#### **Exclusion of Mandatory Evidence-taking/Simplification of Disciplinary Proceedings (351º to 358º):**

Prior to the 2009 code reform, evidence-taking procedures requested by the employee within the framework of disciplinary procedures were mandatory, unless the employer was able to substantiate that the employee was simply attempting to delay the review. If the employer failed to collect evidence, or if it omitted evidence-taking procedures and the court determined that the omission was unjustified, the dismissal could be declared unlawful, and the employee would have the right to reinstatement. The new labor law removes mandatory evidence-taking procedures, and the employer is entitled to decide whether it will undertake the evidence-taking procedures requested by the employee in his reply to the disciplinary notice (*nota de culpa*). Exceptions to this provision include employees who are pregnant, have recently given birth, or are breastfeeding. Once this provision is enacted by secondary legislation (expected later in 2009),<sup>5</sup> it will represent a marked improvement in the employer's ability to dismiss an employee for disciplinary reasons.

Under the previous law, evidence-taking represented delay and front loading of legal costs for employers because procedure operated as a form of inquiry into the

<sup>5</sup> The legal provision that allows employers to not proceed with the evidence-taking procedure cannot be exercised yet, as it will come into force only when the legislation that amends the Code of Labor Procedure comes into force.

employee's conduct that was undertaken by lawyers. The process required gathering of evidence by interviewing the employee (and potentially others employees), building a documented file, allowing the employee to seek further information on the complaints against him or her, and a right of response. The onerous procedure had to be completed before dismissing the employee and, if not conducted properly or if procedural irregularities existed, constituted grounds for an employee challenge to dismissal and the risk of reinstatement of the employee. Under the new legislation, the employee will be entitled to compensation amounting to half the value of that available from an unlawful dismissal.<sup>6</sup>

#### **Time Limit to Challenge Dismissal in Court (387º):**

The new law reduces the time limit for an employee to challenge his or her dismissal in court to sixty days, a significant reduction from the prior time limit of one year. This is a positive change because it provides certainty to companies; previously, the company had to wait a year before ascertaining whether an employee was going to challenge his dismissal. This required companies to make operational changes for an employee who was likely to file a complaint. Under the new law, the employer knows within sixty days whether the employee will contest a dismissal, which results in less disruption to the company's business.

#### **Collective Redundancy (359º to 366º):**

Time limits for notification about redundancy have changed. The information and negotiation stage with the employees' representatives has been reduced from ten to five days; the time limit to issue a final decision on the collective redundancy has been reduced from twenty to fifteen days; and advance notice time limits are set proportionally according to the employees' seniority and can range from fifteen to seventy-five days. The practical effect of this change is that it has reduced the time needed to plan, implement, and complete a collective redundancy procedure.

#### **Agencies Responsible for Employment Law Enforcement:**

*Ministry of Labor and Social Solidarity (Ministério do Trabalho e da Solidariedade Social)*

A central service of this ministry is DGERT (*Direcção Geral do Emprego e das Relações de Trabalho*), which is responsible for supporting the development of policies relating to employment, training, and professional accreditation; professional relations, including work and safety conditions, health, and welfare at work; and promotion and monitoring of collective bargaining, as well as preventing collective bargaining disputes.

<sup>6</sup> This rule is also not yet in force and is awaiting legislation that amends the Code for Labor Procedure to come into force.

## *ACT (Autoridade para as Condições do Trabalho)*

In 2006, ACT assumed the authority, rights, and obligations previously held by the Inspectorate General for Employment and the Institute for Security, Health, and Safety at Work. ACT is charged with promoting the improvement of working conditions through the supervision of compliance with the labor legislation and the quality of private labor relations; promotion of policies that prevent professional risks; and the monitoring of compliance with legislation on safety and health at work in all economic sectors and in the services and entities of the local and central state administration. The agency's specific duties include:

- Promoting the development, dissemination, and application of scientific and technical expertise relating to safety and health at work, which includes specialized training in safety and health at work and supporting employers' organizations and trade union efforts to provide training for their representatives
- Development of policies for safety and health at work and ensuring the execution, in accordance with the objectives defined, of action plans relating to safety and health at work
- Ensuring that the procedures for administrative offenses are appropriate and organizing the individual records of each employer
- Managing the system for prevention of professional risks, aimed at ensuring the right to health and safety at work
- Coordinating the procedure for training and accreditation of upper-level technicians and technicians for safety and health at work, including the potential management of community funds for this purpose
- Conducting national representation before international employment agencies and courts
- Issuing professional licenses in accordance with the law and being responsible for industrial licensing, as well as work performed by foreigners that are assigned to it by law
- Preventing and fighting against child labor, alongside the different governmental departments
- Cooperating with other entities of the public administration with a view to complying entirely with the labor provisions under the terms of community law, as well as ILO (International Labor Organization) Conventions ratified by Portugal
- Suggesting the appropriate measures in case of lack or inadequacy of legal provisions and collecting and analyzing information and preparing regular reports concerning the operation and efficiency of ACT

## *Commission for Equality at Work and Employment (Comissão para a Igualdade no Trabalho e no Emprego)*

The Commission's responsibilities include cooperating with ACT to enforce legislation on equality and non-discrimination at work and in professional training. It checks compliance of job offer advertisements to ensure that they clearly state that discrimination on the grounds of gender related to access to any job and to any

working position is prohibited; receives complaints and issues opinions with regard to equality and non-discrimination between the genders at work; and promotes studies and research, including best practices for conciliation of professional activity and family familiar life and preparation and execution of the National plan for Equality. Generally, the plan has two major areas of intervention:

- **Structural Measures:** More precisely aimed at the public management, the measures bind and involve all the ministries. For this purpose there will be set up, in each ministry, representative teams of the different organic units that will be responsible for spreading/disclosing the issue of equality, at medium and long term, and that will ensure the implementation of the plan. (This is deemed to be an ambitious objective and a stimulating challenge.)
- **Measures by major areas of intervention:** The task is huge and is not confined to the state—on the contrary. Not denying its driving force, requires a straight cooperation with all the social agents: citizens and companies, non-governmental organizations and other associations, and civil society organizations, social partners, etc. Four major areas of intervention are pointed out:
  - Professional activity and familiar life
  - Education, training, and information
  - Citizenship and social inclusion
  - Cooperation with the countries of CPLP (Community of Portuguese Speaking Countries)

Source: **Presidência do Conselho de Ministros, Gabinete do Ministro da Presidência, Press Note, see Government Official Web site. Interaction with Agencies and Compliance**

We advise clients on internal policies relating to equality, health and safety, and general working conditions and ensure that clients are briefed on changes in legislation and the enforcement approach adopted by the various agencies. Combining this information with regular reviews helps us ensure that the company is compliant and adopting best practices—two factors that put the company in an advantageous light should a dispute arise.

Occasionally, despite the best efforts of all parties, a client will receive an agency notification regarding employment law violations. We conduct a detailed debriefing with the client to ascertain the reason for non-compliance, the specific offense committed, and the risk and cost-benefit associated with complying and paying potential penalties. Our goal is to help our client remain compliant through best practices and internal policies that will help prevent breaches.

## Employer/Employee Dispute Resolution

In general, governments focus on protecting the public interest by regulating improper workplace conduct and practices. Under Portuguese law, resolution of labor conflicts can be settled in the labor court or tribunals or through arbitration, conciliation, or mediation. Employers, for economic and resource efficiency reasons, are increasingly subjecting disputes to mediation rather than having these resolved through employment tribunals.

The significant volume of employment law cases, as well as the costs and delays associated with the state courts, has led to a concerted effort by both private parties and the Portuguese government to promote mediation for resolving employment disputes. In May 2006, the Employment Mediation System (EMS) Protocol was signed by the Portuguese State Justice Department, a number of entities representing private industry sectors, and the General Union of Employees. Judicial statistics in Portugal demonstrate that approximately 60 percent of employment court proceedings result in a settlement. In response, the government has set a clear objective to promote EMS, increase the use of mediation, and reduce the number of labor disputes in the court system by at least 30 percent.

### **Independent Mediation Centers**

The main objective of the EMS is to help employers and employees resolve labor-related disputes quickly, effectively, and less expensively and promote mediation as the tool to achieve this. Until now, it had not been used extensively in employment disputes in Portugal. The EMS covers all employment-related disputes, excluding, for example, matters such as accidents in the work place. On the whole, the EMS cannot settle disputes concerning rights that are not assignable and disputes arising from accidents in the work place or professional illnesses.<sup>7</sup>

The first EMS centers opened in Lisbon and Portugal at the end of 2006. These independent mediation centers are intended to promote the early identification of disputes so that amicable settlements can be reached. In addition, while it is not the mediator's core function, it can help to have a neutral third party hear the employment grievance. Even if a settlement cannot be reached, early discussion or evaluation may make the parties more realistic about their expectations and may help determine whether there is a productive future for the relationship.

### **EMS Mediation Programs**

<sup>7</sup> See "O patrocínio dos trabalhadores pelo MP e o novo Regulamento das Custas Processuais." Article published by the Office of the Public Prosecutor of the Republic (*Procuradoria Geral da República*)—Lisbon, 2009..

A successful mediation program must induce both participation and settlement. In addition, the existence of actual and perceived fairness is important in any mediation program, as are adequate information, assistance, voluntary participation, neutrality, confidentiality, and enforceability. The EMS program was intended to be developed according to these principles of fairness, and its main features include:

- Consensual referral of a dispute to EMS by both the employer and the employee
- Selection by the Justice Department of a mediator from an approved list held by the department
- Scheduling of the mediation sessions with a view to reaching an amicable settlement
- A goal to reach agreement within three months of the mediator's appointment (the period may be extended if the parties agree)
- The ability of either party to withdraw at any time and refer the dispute to a court for determination
- Nominal costs, in theory borne equally
- If the parties reach an amicable agreement it is recorded in writing, signed by the parties and the mediator, and confirmed by a justice of the peace (*juizado de paz*), whose authority is equivalent to, and enforceable as, a judgment of a first instance court.

The confirmation of the agreement by a justice of the peace is significant because the mediation decision is binding on all parties. In other words, if the decision is breached or there is non-compliance, the innocent party may apply for enforcement through the judicial courts.

### **Impediments to Mediation**

Evidence has shown that Portugal, like many other jurisdictions, suffers from two practical difficulties that impede the widespread application of employment mediation. First, low-wage employees are at an immediate disadvantage because they have neither the time nor the money to pursue a court case; second, the traditional litigation system is choked with ex-employees seeking compensation instead of employees who are seeking to redress complaints while continuing in their employment. Mediation focuses on the relationship of the parties, rather than on legal arguments. Parties wishing to preserve an employment relationship, which is likely to be destroyed or damaged by litigation, will opt for mediation. Even when mediation does not end in a settlement, it has the chance to further the communication between the parties because it brings the parties together.

The EMS may not resolve all difficulties that employees and employers currently face, and some time will be needed before any discernable results can be analyzed. EMS is intended to be a step toward facilitating agreements; the degree of its success will depend on the quality of the mediators and the willingness of both employees and employers to participate in what is still quite a novel dispute resolution mechanism in Portugal.

## Emerging Employment Law Trends

### *Changes Affecting Public Service Employees*

The Portuguese Civil Service will continue to undergo a radical overhaul. The adoption of a general employment contract regime abandons the separate and “pure” public service regime that previously applied to the civil service. This decision was based largely on the general consensus that greater human resource (HR) flexibility would be achieved through the use of employment contracts. While the implementation of employment contracts did not ultimately achieve the desired flexibility in HR management, it did nonetheless assist in overcoming limitations and obstacles to entry into the public service that had existed since 1984—the so-called freezing of admissions—as well as establishing different forms of remuneration that were higher, in general, than those previously set for civil servants.

These reforms are being overseen by a government-appointed think tank, which recently published general recommendations and a draft plan for reform. Between 2005 and 2006, legislative measures introduced to the social security system that applied to civil servants were an attempt to bridge the gap between private- and public-sector employees. Additional legislation was introduced to establish specific methods to rationalize resources and personnel—for example, a measure that permitted suspension of civil servants on a reduced salary.

### **Public Service Contracts and Terminations**

The reform also dictates how new public service employees are provided with contracts. New public service employees are placed within the employment contract regime. The so-called pure public service regime will continue to exist for those exercising sovereign functions or powers of authority, but there is the possibility that these employees could also fall within the employment contract regime. In practice, a dual system with differentiated areas of application has been created: where the public service regime applies, employment contract measures are excluded.

Other government proposals currently under discussion also provide for flexible options for terminating public service and restructuring civil service career plans, introducing new rules on remuneration that establish variable amounts based on the quality and quantity of services provided, employee duties, disciplinary procedures, and collective contract negotiation in the civil service. Collective contracts are particularly important for the development and control of the public service employment system, but employees must be properly represented before it will be possible to establish adequate and fair employment conditions.

## Effects of Economic and Political Trends

Those reforms already introduced, and those being contemplated for the Portuguese public service, will result in a new approach to the employment market in Portugal. The government and local authorities are among the most substantial employer units, and the legal framework applicable to their staffs has not received the due consideration it warrants. Over time, the government and other collective public entities will act as ordinary employers as a consequence of the ever-increasing alignment between the civil service and private-sector employment regimes.

The adoption of the employment contract regime, the harmonization of the social security rules for all employees, and the measures intended to motivate and make senior public executives and high-ranking officials more accountable mean that Portugal is well on its way to a much-needed and urgent public service reform program. The results may be somewhat unpredictable if this reform is not accompanied by a change in the public employer’s attitude and behavior and, in particular, its understanding and response to ordinary employment realities.

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