THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Sixth Edition

Editor
Carson Burnham

THE LAWREVIEWS

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PREFACE

It is my honour and great pleasure to have been selected as editor of this year's *Labour and Employment Disputes Review*. Our distinguished contributors continue to show us a variety of perspectives as we consider how best to advise our clients seeking a global approach to employment concerns.

While the pandemic continues to influence all aspects of the employment relationship, we are seeing structural changes beyond any that could have been predicted in a pre-pandemic era. Employers are learning to accept the reality that employee expectations for flexible work arrangements have changed, and accommodating these expectations has become critical to maintaining employee engagement and retention. We also notice a shift in the power structure of the relationship, where employers no longer have a settled expectation regarding the willingness of employees to devote their full lives to work. With the advent of 'soft quitting' and employees' persistent intentions to work remotely from the location of their choosing, employers are having to thoroughly rethink their long-established methods of attracting and retaining top talent.

These shifts in the workplace are reflected in the increase in employment disputes noted throughout this Review, and particularly disputes in the arenas of bullying and moral harassment, whistle-blowing, and the right to disconnect from work that have been particularly noted throughout these chapters.

We also see trends resulting from employers' attempts to adjust to shifts in employee expectations. On the one hand, employment disputes arising from remote working relationships have increased, such as those concerning whether and to what extent an employer must pay for employees' expenses incurred to facilitate the employee's ability to work. On the other hand, we note a marked increase in employers' attempts to circumvent the strict requirements of the employment relationship altogether, such as by engaging independent contractors and leased workers or by using fixed-term contracts to limit exposure to employee-favourable legislation or collective bargaining agreement terms designed to protect employees' right to continued employment on favourable terms.

As trends in employment disputes continue to influence adjustments in legislation to accommodate new realities in the working relationship, we look forward with interest to continued developments in the years to come.

Carson Burnham
Ogletree, Deakins, Nash, Smoak & Stewart, PC
Boston
July 2023

Chapter 10

PORTUGAL

André Pestana Nascimento and Susana Bradford Ferreira[1]

I INTRODUCTION

Employment relationships in Portugal are extensively regulated by the statutory law and regulations that constitute the Labour Code[2] and its complementary legislation on labour and employment matters.

Collective bargaining agreements also play an important part in the Portuguese labour regime. These instruments can even bind an employer that did not sign or is not a member of the employers' organisation that concluded the agreement, if the government decides to extend its provisions to a certain field of business. In addition, employment agreements remain a relevant source of labour law.

In general, employees in Portugal enjoy a comparatively high level of protection, with a special emphasis given to the constitutional principle of stability of the employment relationship. Portuguese law does not recognise the concept whereby the employer terminates the employment simply by giving notice, except in cases of the employment agreement being terminated within the trial period or the expiry of fixed-term employment agreements. Thus, dismissals without cause are forbidden and shall be deemed null and void.

There are several government agencies whose competence includes, or that are connected with the enforcement of, employment law. The two most important regulatory entities are the Directorate-General for Employment and Labour Relations and the supervisory Working Conditions Authority, with the latter having powers to conduct inspections and sanction breaches of employment and labour law.

Individual disputes between employers and employees arising from an employment agreement fall under the jurisdiction of the labour courts, incorporated in the public legal system. Alternative dispute resolution mechanisms, such as arbitration, are irrelevant and hardly enforceable. However, conciliation within judicial lawsuits, before a judge or a prosecutor from the Public Attorney's Office, is mandatory in nearly all types of employment dispute and is of paramount importance in employment litigation.

As happens in civil court litigation, employment litigation covers three levels of jurisdiction:

a first instance courts (often specialising in labour and employment matters);
b courts of appeal; and
c the Supreme Court.

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1 André Pestana Nascimento is a partner and Susana Bradford Ferreira is an associate at Uría Menéndez – Proença de Carvalho.

2 Law No. 7/2009 of 12 February 2009.

Access to superior instances, however, depends on the value of the lawsuit.

Legal provisions governing dispute resolution on employment matters are mainly set out in the Labour Procedural Code (LPC), dated 9 November 1999 and amended seven times since then, the most significant reforms being in 2009 and in 2019. However, the LPC is not as extensive regarding procedural provisions as the Portuguese Civil Procedural Code, which is the base framework for all litigation. Where the LPC does not provide a specific rule, the civil litigation provisions will apply, meaning that any reform of civil procedural rules will have a direct effect on labour and employment litigation. The Portuguese framework for employment dispute resolution mechanisms has, for several years, faced a slight incompatibility with the default civil procedural rules, as a result of the approval of a new Civil Procedural Code in 2013. The new Civil Procedural Code introduced a few significant changes to proceedings, but the much-needed harmonisation of the LPC only occurred in 2019.

The LPC sets out an extensive list of 'special proceedings' (as opposed to common proceedings), which are often considered urgent procedures and, consequently, have a significant impact on the rules for determining procedural deadlines (particularly as they are not suspended during judicial holidays), and which benefit from shorter judicial deadlines. Considering that the main problem that generally arises in dispute resolution is the length of proceedings, labour and employment procedures are, as a rule, faster than civil procedures, particularly because of the urgent nature of most of the lawsuits.

II PROCEDURE

The Portuguese framework for resolving disputes in employment matters provides for two types of procedures: the common and the specific.

The common procedure basically follows civil litigation rules, with a few minor differences. Where an employee is seeking to obtain outstanding payment from an employer or challenge the validity of the term of an employment agreement or a verbal dismissal, an initial claim must be filed with the labour court with territorial jurisdiction over the dispute – as a rule, the court of the defendant's place of residence. The counterparty will then be notified of the claim and the court will schedule a conciliatory hearing. If conciliation fails, the court will immediately notify the defendant (at the hearing) to present, within 10 days, its written statement of defence, in which all arguments against the claim should be laid out. Both the claim and the statement of defence must be articulated. Having analysed both the claim and the statement of defence, the court will either schedule another hearing – the preliminary hearing – with a view to the conciliation of the parties and a discussion of any procedural irregularities (e.g., the parties' capacity, legitimacy and representation, the court's jurisdiction) or, if the matter can be easily resolved and the facts are clearly and comprehensibly laid down in the claim and in the statement of defence, simply issue a preliminary order clearing the process of all irregularities and identifying the main issue of the dispute and the facts to be proven in the trial. Finally, a trial hearing will be scheduled.

The trial hearing will mainly focus on the production of evidence of the facts, notably witness hearings. When all evidence has been offered and the trial is to be concluded, the parties are invited to present their final allegations and legal conclusions.

There are also a considerable number of specific procedures that cannot be summed up in one basic set of proceedings. These specific procedures often include the intervention of the Public Attorney's Office as a mediator in the first stage of the process.

In some specific procedures, such as the procedure for challenging a written dismissal, the parties' position is actually inverted: the employee files a very simple written application form with the court and the employer is notified to present a justification for the dismissal and explain to the court why the dismissal proceeding brought against that employee was conducted regularly and lawfully; to which, in turn, the employee will present their statement of defence. This means that although the lawsuit was filed by the employee, they will actually be a defendant in the process.

One thing almost all labour litigation proceedings have in common is the various attempts to conciliate the parties, from the point when the claim has been filed all the way to the beginning of the trial hearing. Judicial conciliation is an important part of labour and employment litigation and judges tend to be quite persistent when trying to reach that goal in the successive hearings that take place throughout the process. Some judges may prove to be more interventionist than others, offering the parties their views on the legal aspects of the claims and arguments, to make the parties reach a settlement.

III TYPES OF EMPLOYMENT DISPUTES

Employment litigation comprises all disputes that may arise, albeit not exclusively, from:

a employment relationships, or relationships initiated with a view to the conclusion of employment agreements;
b work-related accidents and occupational diseases;
c contracts that are assimilated by law into an employment agreement;
d annulment or interpretation of collective bargaining agreement provisions;
e civil disputes related to strike proceedings; and
f disputes arising from the constitution of trade unions and their relationship with unionised workers.

The most common types of disputes in Portugal include unfair dismissal, damages for outstanding payment arising from the employment relationship, breach of contract and work-related accidents.

Unfair dismissal disputes may arise not only from individual or collective redundancy procedures and dismissals with cause, but also from unlawful expiry of fixed-term employment agreements that should actually be deemed to be open-ended employment agreements.

In cases of individual or collective redundancy, or cases of dismissal with cause, if an employee wishes to challenge their dismissal, the LPC sets out a specific type of procedure to be followed: the special procedure for challenging the regularity and lawfulness of a dismissal. This procedure is considered urgent, which means that it is not suspended during judicial holidays[3] and is expected to be concluded within one year (although it can, and often does, take longer). The court will ascertain and rule on the validity of the dismissal (i.e., whether the proper legal proceedings were followed and whether there was an actual cause, be it objective (e.g., redundancy) or subjective (e.g., disciplinary), for the dismissal).

In cases where a fixed-term employment agreement was terminated upon expiry, the employee may claim before the court that their fixed-term employment agreement was invalid,

3 There are three periods of judicial holidays in Portugal: (1) between 22 December and 3 January (inclusive); (2) between Palm Sunday and Easter Monday (inclusive); and (3) between 16 July and 31 August (inclusive).

and for a number of reasons (e.g., because the employer had no valid temporary need that would legally warrant a fixed-term employment agreement). Hence, the employee may claim that their employment agreement should be deemed an open-ended or permanent agreement and, as a result, should not have been terminated by expiry. For this type of dispute, the case will follow a common procedure, as described in Section II. In these cases, the court will have a preliminary query to resolve concerning the validity of the fixed-term employment.

When an employee is claiming unfair dismissal, it is common for him or her also to petition for damages for outstanding payment arising from the employment relationship, such as working overtime, professional training hours or seniority allowances. When these payments are being claimed separately (i.e., not in connection with a claim for unfair dismissal), the case should follow the common procedure rules.

Common claims made by employers are related to breaches of contract, notably non-compete or confidentiality clauses. These disputes will also fall under the common procedure rules.

Disputes concerning work-related accidents play a leading part in labour litigation. Official data from the Ministry of Justice shows that, in 2022 alone, 37,226 of the 47,481 cases filed in first instance labour courts were work-related accident claims.[4] The reason for this substantial percentage of cases is not that employees, employers and insurance companies are particularly litigious in these matters, but simply that all serious work-related accidents, including those that result in the employee's death, must be notified to the court and will automatically give rise to a special procedure provided for in the LPC. The first phase of this type of procedure is carried out by the public prosecutor's office, with the employer, the insurance company and the injured employee, or their beneficiaries, being called for a conciliatory hearing, at which a detailed description of the amounts the injured employee or their beneficiaries are entitled to receive for the employee's incapacity or death will be laid down. The large majority of work-related accident cases will be concluded and closed in that same conciliatory hearing, with only a few residual cases giving rise to a full judgment before a labour court (namely, when the insurance company or the employer takes the view that the accident was not work-related).

With that being said, preliminary injunction proceedings still have a fairly small role within labour litigation, representing less than 1 per cent of the overall number of cases filed with first instance labour courts.

IV YEAR IN REVIEW

The beginning of 2022 was absorbed by news about the new teleworking legal framework that was enacted in December 2021. However, the spotlight was quickly stolen by announcements of the Portuguese government in respect of another extensive reform of the employment legislation.

As anticipated, 2022 was a transitional year for companies that were adapting to the new working environment stemming from the pandemic or were looking for more efficient ways to make up for the losses registered during those years. Several restructuring and downsizing procedures started at the end of 2021 and throughout 2022, particularly in the banking, telecommunications and IT sectors. These restructuring procedures took over the

4 Data available at https://estatisticas.justica.gov.pt/sites/siej/pt-pt/Paginas/Movimento-de-processos-nos-tribunais-judiciais-de-1-instancia-Novo-mapa.aspx.

government's agenda and also played an important role in the above-mentioned reform of the Labour Code. Nevertheless, the potential litigation outcome of those procedures is not yet known, as the Portuguese judicial system is still marked by a considerable backlog, enhanced by several civil servant strikes that took place during 2022.

In June 2022, the Whistleblowing Act,[5] which implemented the EU Directive on Whistleblowing, entered into force, setting out several new obligations for companies regarding the protection of whistleblowers and creation of internal reporting lines. It is expected that this change may lead to an increase in disciplinary proceedings in the coming years and, consequently, an increase in employment litigation.

Finally, although the announced reform of the employment legislation did not particularly target employment procedural rules, some amendments to the Employment and Social Security Infractions Act were enacted.[6]

The following is a brief overview of the amendments to the Labour Code and ancillary legislation and relevant case law that were issued in the past 18 months.

i Changes to the Labour Code

In February 2023, and further to what had been promised in the beginning of 2022, the Portuguese government announced a series of employment-related measures aimed at dignifying employment relations and tackling precarious work conditions. This bill is the 'Agenda for Dignified Work and Valuing Young People in the Labour Market' (the Agenda for Dignified Work).[7] It is reflected in Law No. 13/2023, of 3 April 2023, and covers legislative changes over approximately 10 areas:

a temporary agency work;
b combating false self-employment and unjustified recourse to non-permanent forms of work;
c digital platforms and algorithms;
d collective bargaining agreements;
e reconciliation between work and personal life;
f combating undeclared work;
g protection of young student workers and interns;
h strengthening the powers of the Working Conditions Authority and simplifying the infractions proceedings;
i public procurement and public incentives; and
j protection of informal caregivers.

The most commented and contested changes include:

a providing for the nullity of full waivers and discharges given by employees, even if upon or after termination of their employment agreements (unless the waiver is given within the scope of a judicial settlement);

5 Law No. 93/2021 of 20 December 2021.

6 Law No. 107/2009 of 14 September 2009.

7 The official government presentation, in Portuguese, is available at https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=%3d%3d BQAAAB%2bLCAAAAAAABAAzNDI2MgUAmp2vnQUAAAA%3d.

b prohibiting employers from outsourcing activities if in the 12 preceding months employees carrying out the same activities that are being externalised were made redundant; and

c applying collective bargaining agreements to independent contractors and external providers.

Even though the dust is still settling on these recently approved changes, we would expect litigation to increase in the coming years, notably due to the following:

a impossibility of employees to give valid discharges and waivers upon termination of their employment agreements, unless they are included in a judicial settlement;

b false self-employment situations; and

c outsourcing of activities.

ii Changes to labour and employment disputes legislation

The Agenda for Dignified Work did not specifically target the LPC, but it included some minor changes to this Code, as well as a reinforcement of the powers of the Working Conditions Authority in some areas (such as the fight against false self-employment situations) and a simplification of the labour infractions proceedings. The following changes are important to highlight:

a the Working Conditions Authority's Statutes[8] now extend the entity's power so that it can intervene whenever it becomes aware that a dismissal may be in breach of the legal requirements provided for in the Labour Code, notifying the employer to regularise the situation. If, further to this notification, the employer does not regularise the situation, the Working Conditions Authority should notify the Public Attorney's office to file an injunction to suspend the dismissal;

b in line with the above, the LPC was also amended so as to include the possibility of the Public Attorney's office filing an injunction to suspend a dismissal; and

c apart from the above, the Labour Infractions Act was amended so as to promote an administrative simplification of the labour infractions proceedings, which now admit, for instance, simplified electronic signatures for most of the acts (except for the final decision to apply a fine) and notifications through e-mail, thus finally modernising a procedure that was still very traditional and bureaucratic.

iii Case law

As a rule, decisions of the higher courts have a limited impact on employment dispute resolutions because of the absence of a precedent rule. However, there are two exceptions:

a decisions of the Supreme Court of Justice that are taken within a specific appeal to unify jurisprudence; and

b decisions of the Constitutional Court with mandatory general force.

Despite the absence of a precedent rule, decisions of the higher courts often serve as guidelines in those areas where there is no relevant employment regulation or where the law is ambiguous enough to leave the ultimate interpretation to the courts. This is the case of the rulings highlighted below, all taken in 2022 by the Portuguese Supreme Court of Justice.

8 Decree-Law No. 102/2000 of 2 June 2000.

Full waiver and discharge of labour credits

On 7 September 2022, the Supreme Court of Justice[9] gave a decision regarding the validity of a full waiver and discharge given by the employee upon expiry of her fixed-term employment agreement.

Contradicting the decisions of the first instance court and of the Court of Appeals, the Supreme Court of Justice ruled on the invalidity of the discharge and waiver statements executed by the employee, by considering that they were excessively broad (as they merely referred to all and any labour credits) and were given without any sort of offset payment. The Supreme Court of Justice further elaborated that the validity of these waivers should be contingent upon the employee's prior knowledge of the specific rights or credits being waived, particularly those arising from a potential unlawful dismissal (these are typically unknown to non-legal professionals).

This decision of the highest Portuguese Court is relevant, notably as it may be understood to contrast with the legislative amendments to the Labour Code that entered into force on 1 May 2023, under which all discharges and waiver of claims are deemed null (unless they are given within the scope of a judicial settlement), regardless of whether the employee was paid a specific amount upon termination of his or her employment. Accordingly, lawmakers actually went beyond the high courts' ruling, which admitted the validity of waivers upon termination of the employment agreement whenever:

a the waiver included a detailed specification of the rights or credits (or both) that the employees were waiving; and

b they were given in consideration for a payment made by the employer.

Compensation for post-contractual non-competition obligations linked to an incentive plan

Another ruling worth mentioning is the one issued by the Supreme Court of Justice on 2 November 2022,[10] concerning the possibility of linking the compensation due for a post-contractual non-competition obligation to the employee's participation in a long-term incentive plan (LTIP) in force at the company.

By way of context, under Portuguese law, post-contractual non-competition covenants are only valid and enforceable if:

a the non-compete obligation is agreed in writing;

b the restrictive period does not exceed two years (or three years if employees perform an activity that entails a special trustworthy relationship or have access to sensitive information on competition matters); and

c employees are paid an adequate compensation for the non-compete obligation.

Despite compensation being an essential requirement of the validity of a post-contractual non-competition obligation, the law does not set forth any minimum or maximum amounts, criteria for the calculation of the compensation, or any specificities as to the timing of its payments (e.g., whether it can be paid during the employment relationship, after termination, as a one-off payment or paid in several instalments).

9 Case No. 16670/17.8T8PRT.P1.S1; the ruling by the Supreme Court of Justice is available, in Portuguese, at www.dgsi.pt.

10 Case No. 2214/21.0T8LSB.L1.S1; the ruling by the Supreme Court of Justice is available, in Portuguese, at www.dgsi.pt.

In this case, the claimant (an employee) and the defendant (his employer) had entered into an employment agreement that included a post-contractual non-competition obligation of the employee for a period of 12 months immediately following termination, in exchange for compensation corresponding to the employee's participation in the LTIP in force at the company.

The LTIP specifically detailed that the acquisition or vesting of the total value of the incentive would occur gradually: on 31 December each calendar year, 20 per cent of the total incentive amount would be vested, provided that the employee remained employed by the company on that date; the full amount of the incentive would only be vested at the end of the fifth year. Accordingly, in the event of termination before the end of the fifth year, the employee would only be entitled to receive the corresponding value of the incentive amount that had already been vested.

After termination of the employment agreement only one year after the hiring date, the employee filed a lawsuit against the company, claiming that the company should be obliged to pay him the full potential LTIP incentive as compensation for the agreed non-competition obligation (and not just the 20 per cent that the company had transferred to him), arguing that the condition whereby the employee needed to stay at the company's service for five years in order to receive the full amount was not expressly established in the non-competition covenant but only in the LTIP. This case led to three different decisions of the Portuguese courts:

a the first instance court considered that the LTIP was an integral part of the employment agreement and that, therefore, by recognising LTIP participation as sufficient compensation for the non-competition obligation, the employee agreed to be subject to the LTIP rules also for such purposes (including the condition of remaining with the company for five years in order to receive the amount in full);

b further to the employee's appeal, the Court of Appeal of Lisbon ruled that the compensation for the non-compete could not be subject to the condition of the employee remaining employed nor to the deferred vesting of the LTIP incentive, as it would make the payment and amount of the compensation entirely dependent on the company's discretion. As a result, the Court of Appeal of Lisbon recognised the employee's right to receive the full amount of the LTIP as compensation for the non-compete (specifically stating also that the amount of the LTIP incentive that was vested in the first year only corresponded to 8 per cent of the employee's annual remuneration, which is to be considered inadequate and disproportionate); and

c following the company's appeal of the second instance ruling, the Supreme Court of Justice upheld the decision of the first instance court, ruling that the employee had accepted the risk of receiving nothing from LTIP participation when he agreed with the company to link compensation for the non-compete to the LTIP. The Supreme Court of Justice further stressed that the facts proven in the trial were not enough to hint that the compensation paid by the company to the employee (i.e., the 20 per cent of the full LTIP incentive) was insufficient, inadequate or disproportionate to the restraint of trade obligation he had undertaken.

Redundancy procedure and legal assumption of acceptance of the dismissal by the employee

Another ruling worth noting is the one given by the Supreme Court of Justice on 10 December 2022,[11] concerning a redundancy procedure that ended with the dismissal of an employee.

This ruling specifically covered the provisions of Article 366(4) and (5) of the Labour Code, which state that, following a redundancy procedure, it is assumed that the employee accepts the dismissal when he or she receives from the employer the full compensation provided for by law (Paragraph 4) and that such assumption may be rebutted if, simultaneously, the employee returns or makes available, in any manner, the full compensation paid by the employer (Paragraph 5). For several years, the word 'simultaneously' has been understood by legal scholars and rulings of the higher courts to mean 'immediately', in the sense that the employee had to immediately return the compensation received to the employer so as set aside the legal assumption that he or she accepted the dismissal.

In this case, the employee only returned the compensation almost one month after receiving it, while simultaneously filing a lawsuit against the company to challenge his dismissal.

The Supreme Court of Justice, on analysing the word 'simultaneously' included in the legal provision, concluded that it should mean that the employee must return the compensation at the same time he or she files the adequate lawsuit to challenge the dismissal, which may be 60 days for individual redundancies or six months for collective dismissals.

Accumulation of duties as employee and director of a limited liability company by quotas

On 27 February 2023, the Court of Appeal of Oporto[12] ruled on the potential conflict of interests arising from the accumulation, in one single person, of a labour and corporate bond (as an employee and director of the company).

In this case, an individual had been hired by a company as an employee in 1998 and acquired a share of the company while simultaneously being appointed director in 2003. In 2019, he sold his share in the company, resigned from his position as director and claimed to be entitled to resume his previous employment position (even though he was on sick leave at the time of resignation) and to receive labour credits from the company for his employment throughout the years.

The claimant sustained that the provisions of Article 398 of the Portuguese Companies Code, applicable only to limited liability companies by shares (*sociedades anónimas*) should also apply to his case, even if the company was a limited liability company by quotas (*sociedade por quotas*), by analogy. Further to the application of said provision, his contract would have been suspended in 2003 when he was appointed director and would have been reactivated in 2019, when the directorship bond terminated as a result of his resignation.

In its decision, the Court of Appeal of Oporto addressed the compatibility between the duties of an employee and a director in private limited liability companies by quotas, concluding that Article 398 of the Commercial Companies Code should not directly apply,

11 Case No. 1333/20.5T8LRA.C1.S1; the ruling by the Supreme Court of Justice is available, in Portuguese, at www.dgsi.pt.

12 Case No. 2529/21.8T8MTS.P1; the ruling of the Court of Appeal of Oporto is available, in Portuguese, at www.dgsi.pt.

not even by analogy, to this type of commercial company, as in these companies, the practical reality allows the accumulation of duties as employee and director or managing partner, provided that there is evidence of legal subordination as an employee, which was not proven.

The Court of Appeal stressed that it was proven that the claimant himself gave orders, instructions and guidelines to the remaining employees, processed salaries, scheduled employees' holidays, contacted third parties and entered into agreements on behalf of the company, acting as if he was the real employer. Therefore, the Court concluded that the claimant effectively began to carry out the duties of a director, making it impossible to reconcile these duties with those of an employee, due to confusion, pursuant to Article 868 of the Civil Code, which determined the termination of the employment relationship by expiry. Accordingly, the employee's claim was dismissed and the Court ruled that the employment agreement terminated upon his appointment as director and no labour credits were recognised.

Justified absences following the death of a relative

Finally, we highlight the ruling issued by the Supreme Court of Justice on 17 May 2023[13] that concluded that, where a clause of a collective bargaining agreement for the metal sector determined that an employee was entitled to be absent from work for X 'consecutive days' following the death of a relative, the expression should be understood as making reference to calendar days and not working days.

In its ruling, the Supreme Court of Justice added, with particular emphasis, that an interpretation different from the one determined by the court would determine a clear discrimination between employees covered by the collective bargaining agreement, insofar as it would benefit those who take their weekly rest days on weekends (in comparison with those who take their weekly rest days on business days) or those who only work part-time or concentrated hours (in comparison with those who work five or six days per week).

Although this judicial decision was taken in respect of a clause of a collective bargaining agreement, its conclusions are relevant to the extent that the Labour Code provides for the same wording with regard to justified absences following the death of a relative. The Working Conditions Authority issued a Legal Opinion in 2018, under which, in this Authority's opinion, these absences should be understood as making reference to the employee's days of work (in the sense that weekends and holidays would not count for the maximum limit of these justified absences).

V OUTLOOK AND CONCLUSIONS

As the Portuguese government has just introduced an extensive legislative reform of the Labour Code and has recently amended it, additional significant legislation is not expected to be produced in the next year. Overall, the next 12 months are expected to be a period for the dust of recent legislative changes to settle and to view how employment litigation and labour courts will react to the new legislative measures.

13 Case No. 11379/21.0T8PRT.P1.S1; the ruling of the Supreme Court of Justice is available, in Portuguese, at https://files.dre.pt/1s/2023/05/09500/0001000021.pdf.

On the one hand, legal practitioners have already raised concerns that the now approved nullity of full waiver and discharges is likely to increase employment litigation, as employers will not be keen to pay enhanced termination payments as an offset of a full discharge, and employees will be less discouraged to litigate.

On the other hand, changes concerning digital platform workers that entered into force in May 2023 have already resulted in lawsuits brought by couriers in Oporto claiming that their relationship should be deemed an employment one.

Finally, workforce reductions and restructuring procedures are still expected to play a part in the coming months, as the market is clearly still recovering from the pandemic and adapting to new ways of working. Moreover, there are still legislative changes that ought to be regulated, such as the means and terms under which companies are supposed to apply collective bargaining agreements to independent contractors, and how the Working Conditions Authority is to act on its new reinforced powers on these matters.

Appendix 1

ABOUT THE AUTHORS

ANDRÉ PESTANA NASCIMENTO

Uría Menéndez – Proença de Carvalho

André Pestana Nascimento joined Uría Menéndez in 2003 and has been a member of the firm's labour practice group since 2005. He focuses his practice on all matters relating to employment law, employment litigation, collective bargaining agreements, data protection, and pensions and social security law.

André has vast experience in restructuring procedures and has been called on to lead several downsizing procedures (namely, collective dismissals and individual terminations), and to advise clients in relation to transactions aimed at the acquisition of undertakings or businesses (e.g., transfers of going concerns, mergers and spin-offs). He regularly advises and represents clients in administrative procedures and all other legal proceedings of an employment nature, as well as on all day-to-day labour-related matters.

André holds a postgraduate degree in employment and social security law from the University of Lisbon and a postgraduate degree in sports law from the Catholic University of Portugal in Lisbon.

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Susana Bradford Ferreira joined Uría Menéndez – Proença de Carvalho's labour practice group in 2017. Her practice is focused on matters relating to employment law, social security and employment litigation.

Susana ensures daily monitoring and the provision of advice to companies on all aspects of employment-related matters of a general and strategic nature, particularly in the drafting of relevant documentation in labour issues, the elaboration of legal opinions, the provision of follow-up advice and instruction regarding disciplinary procedures, and advice on labour misconduct matters and judicial proceedings related to employment and labour disputes. She also advises on restructuring procedures, downsizing procedures and acquisition of undertakings or businesses.

Susana holds a master's degree in forensic law from the Catholic University of Portugal in Lisbon and a postgraduate degree in business and employment law from the University of Lisbon. Before joining the firm, she collaborated as a research assistant in the publication of books and other academic papers in the field of tax litigation and arbitration.

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