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Employment Law

Newsletter | Portugal

December 2019

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I. Laboratory

The least that we can say is that 2019 was a dynamic year for Portuguese labor law.

Throughout the year, several laws were published that affect the legal framework of labor relations, particularly the long-awaited amendments to the Labor Code.

And, icing on the cake, in Ruling 774/2019, published on December 17, 2019, the Constitutional Court declared, with general binding force, the unconstitutionality of the rule of the Companies Code under which an employment contract entered into less than a year previously is terminated when the employee under that contract is appointed director of the employer company or of another company with which it has a control or group relationship.

This decision comes as no surprise, as the Constitutional Court had already dealt with this issue as far back as 1996 (Ruling 1018/1996), and then again in 2011 (Ruling 626/2011) and 2019 (Ruling 53/2019), always asserting that this rule is unconstitutional.

These three declarations of unconstitutionality resulted in the rule being removed from the Companies Code.

Consequently, employment contracts entered into less than one year previously with employees who are elected to the board of directors of public limited companies (*sociedade anónima*) are not extinguished but are suspended, applying the rule established in the second part of article 398(2) of the Companies Code.

However, we must remember (i) the rule of *ex lege* suspension of employment contracts is only foreseen for public limited companies (*sociedade anónima*) and is not necessarily applicable to other companies (e.g., private limited companies, *sociedade por quotas*); and (ii) during their term of office, the conclusion of contracts between directors and the company or companies with which they are in a control or group relationship is very limited. Particularly, the director cannot enter into an employment contract that is intended to take effect at the end of his or her term of office.

We look forward to seeing what 2020 will bring that will impact on labor relations.

For now, to whet our appetite, we have the Whistleblower Directive, which this newsletter will also address. Although the deadline to transpose this directive into Portuguese law is the end of 2021, companies should start preparing for the obligations that will arise from its implementation.

Maria da Glória Leitão,
Partner, Department of Employment Law

II. National legislation

Decree-Law no. 166/2019 - Diário da República no. 210/2019, Series I, of October 31, 2019
Establishes the legal regime governing seafarers' professional activity

This decree-law establishes the new legal regime governing seafarers' professional activity, including the rules relating to maritime registration, medical fitness, training, certification, recruitment and crewing of vessels.

The decree-law covers seafarers who carry out their activities on board ships or commercial, fishing, local traffic and auxiliary vessels, tugs, research vessels, or offshore drilling platforms flying the Portuguese flag. However, the new regime does not apply to some ships or vessels, including:

i) naval ships or auxiliary units and other ships owned or operated by the Portuguese State, assigned solely to governmental services of a non-commercial nature;

ii) vessels operating exclusively in non-maritime inland waters;

iii) pleasure crafts not engaged in trade;

iv) wooden ships of traditional or primitive construction; or

v) vessels in the service of the Security Forces for their missions.

Under the decree-law, persons entitled to perform as crew members, on board a ship or a vessel, duties corresponding to the categories that they hold or other duties provided by law, are considered seafarers.

This decree-law entered into force on January 1, 2020.

However, this regime will not apply to ships or vessels registered in the Madeira International Shipping Register, which continue to be covered by the special regime enacted by Decree-Law No. 96/89 of March 28.

III. European legislation

Directive (EU) 2019/1937 of the European Parliament and of the Council of October 23, 2019
On the protection of persons who report breaches of European Union Law

Directive (EU) 2019/1937 establishes minimum rules common to the Member States, ensuring a high level of protection for persons who report breaches of European Union law.

This directive covers all whistleblowers who work in the public or private sector who have obtained, in a professional context, information on violations of European Union law, be they employees, independent workers, volunteers, or trainees.

Member States must ensure that channels are in place through which employees may submit their complaint securely, be they internal to the company ("internal reporting channels") or promoted by public authorities ("external reporting channels"). Implementing these channels requires that several obligations of transparency, impartiality and diligence be fulfilled when handling complaints.

Public disclosures of breaches of European Union law must also be protected, provided they represent an imminent or manifest danger for the public interest, or the appropriate authorities cannot resolve the reported breach satisfactorily.

Cumulatively, Member States must implement the necessary measures to prohibit acts of retaliation against whistleblowers (e.g., their dismissal or threat of dismissal). They must do this troughout the disclosure of procedures and available means of recourse against these acts, as well as by establishing legal aid and advice mechanisms.

Member States may also provide financial assistance and other types of support (e.g., psychological support) in legal proceedings involving whistleblowers, in that capacity.

Under Directive (EU) 2019/1937, and to ensure adequate protection against acts of retaliation, whistleblowers' liability for disclosing information on breaches of European Union law must be excluded (except for possible criminal liability).

On the other hand, in judicial or other proceedings relating to a whistleblower's losses, it must be presumed that all losses constitute an act of retaliation, provided the whistleblower is able to demonstrate that he or she submitted a complaint or made a public disclosure of a breach of European Union law.

Member States must provide effective, proportionate and dissuasive sanctions for those who (i) prevent complaints; (ii) carry out acts of retaliation against protected persons; (iii) file vexatious proceedings against them; or (iii) violate the duty to keep whistleblowers' identities confidential.

Directive (EU) 2019/1937 entered into force on December 16, 2019, and Member States must transpose it into national law by December 17, 2021.

IV. Extension orders

Area of Activity	Legislation
Health	**Order 401/2019 - Diário da República no. 235/2019, Series I, December 6, 2019** Establishes the extension of the amendments of the company agreement between "Serviço de Utilização Comum dos Hospitais" (SUCH) and FESAHT – Federation of Agriculture, Food, Beverage, Hotel and Tourism Trade Unions and others.
Mining industry	**Order 402/2019 - Diário da República no. 235/2019, Series I, December 6, 2019** Establishes the extension of the company agreement between SOMINCOR – Sociedade Mineira de Neves-Corvo, S.A., and the Mining Industry Workers Union.
Chemical industry	**Order 403/2019 - Diário da República no. 235/2019, Series I, December 6, 2019** Establishes the extension of the amendments of the collective bargaining agreement between "APQuímica – Associação Portuguesa da Química, Petroquímica e Refinação" and others, and COFESINT – Federation of Industry, Energy and Transport Trade Unions and others.

V. National case law

Ruling of the Constitutional Court of December 17, 2019

Declares the unconstitutionality, with general binding force, with effect from the publication of the ruling, of the rule established in article 398(2) of the Companies Code, under which an employment contract entered into less than one year previously is terminated when the employee under that contract is appointed director of the employer company. It was declared unconstitutional because it breached the provisions of articles 55(d) and 57(2)(a) of the Constitution of the Portuguese Republic, in the wording in force at the time the rule was edited.

The Constitutional Court was called to decide whether the rule established in article 398(2) of the Companies Code complies with the Constitution of the Portuguese Republic. Specifically, what was at issue was the part of the rule under which an employment contract entered into less than one year previously is terminated when the employee under that contract is appointed director of the employer company or of another company with which it has a control or group relationship .

The Constitutional Court had already considered that this rule is unconstitutional in three cases. It considered that the rule qualifies as labor law under the rules established in articles 55(d) and 57(2)(a) of the Constitution of the Portuguese Republic, in the wording on the date the rule at issue was edited, thus implying there should be a hearing of the organizations representing employees in the respective legislative procedure, which was not observed.

Starting by presenting historical notes on the rule in question, the court clarified that its basis is to be found in the legislator's option in providing a *principle of incompatibility* between the duties of the director and of the employee, typically justified based on the following:

i. In the structural impossibility of performing overlapping duties, if the standing of subordination inherent in the employee's condition cannot be reconciled with the position of director, who identifies with the position of employer;
ii. The need to ensure the independence of the directors, preventing potential conflicts of interest;
iii. The preservation of the legal model of governance of public limited companies, which grants the board of directors (not the employees) competence to take the key decisions of the company, applying to its members a principle of free dismissal, distinct from the requirement of just cause to dismiss an employee.

Therefore, the legislator decided to promote the termination of employment contracts entered into less than a year previously when the employee is appointed director of the employer company or of another company with which it has a control or group relationship.

The contracts are terminated – and not suspended (which occurs when they were concluded more than a year previously) – because the rule assumes that the conclusion of an employment contract on a date close to the appointment as director always constitutes fraudulent conduct by the director to safeguard his or her future professional position at the company's expense.

However, can such a solution be qualified as labor law? The case law of the court has identified two matters that may fall within the framework of this notion: i) the one that deals with the fundamental rights of the employees; and ii) the legal status of the employees.

Following this understanding, the Constitutional Court held that the solution in question, as established in article 398(2) of the Companies Code, is undeniably labor law, under which employees' representative organizations are entitled to take part in the procedure leading to its creation. This is so for two reasons:

i) In the expectation of a cause for termination of the employment contract, the question is connected with the very right to job security, which is a *fundamental right of employees* under article 53 of the Constitution of the Portuguese Republic.
ii) Governing the matter of terminating employment contracts is undeniably governing the *status of employees*.

The legislative procedure that gave rise to the solution in question should have respected the employees' representative organizations right of participation. Although having no definitive decision-making power, these organizations have the right to express their opinion when drafting labor legislation, potentially influencing the decision of the legislative bodies.

To determine whether that right was observed, the court had previously interpreted the absence of any mention of the participation of these organizations in the preamble of the legislation as evidence that the right was not observed.

As the preamble of the Companies Code contains no reference to any consultation of the employees' representative organizations, it is up to the author of the rule to set the presumption aside. Consequently, the court notified the prime minister, who did not state that the organizations had taken part. Consequently, the court concluded that this constitutional obligation was not fulfilled.

In short, for violating this constitutionally imposed measure, the court ruled that the precept established in article 398(2) of the Companies Code is unconstitutional.

Despite this understanding, the court did not ignore the fact that the virtue of an appraisal of this procedural flaw is questionable when a significant period has already elapsed since the date the unconstitutional rule was published. However, in light of the current legal system, the

court argued that the mere passing of years without the question being raised does not prevent its task as guardian of the Constitution, nor does it diminish its declaration, with general binding force, that the rule is unconstitutional.

However, the court concluded that this ruling only takes effect from the date it was published (i.e., from December 17, 2019).

Ruling of the Court of Appeal of Porto of September 9, 2019

The conduct of the employee of an educational institution who, following an altercation with a co-worker and her superior, and in the presence of children, grabbed a knife and tried to slit her wrist, upsetting employees and scaring the children who needed to be calmed down, constitutes just cause for dismissal.

In addition to providing cleaning services at the educational institution's facilities, on Wednesday, the employee provided help in the cafeteria, where she peeled the fruit of the children of the first and second grades.

Arriving at the cafeteria late, the task of peeling the fruit was taken over by a colleague. Considering that the task was her responsibility, the employee fetched a knife and a bowl to peel the fruit, accusing her colleague that the task was not hers.

On perceiving the loud conversation, another colleague, as well as the superior of the employee, asked her to speak more quietly and not to talk like that in front of the children. Unhappy with the rebuke, the employee turned her back on her superior, went to the counter where the fruit was peeled, picked up a knife and with it tried to cut her wrist, when she was pushed aside by a colleague who took the knife from her hand.

The whole situation caused a huge uproar, creating panic among the children, who required the attention of other employees to settle down.

Following the episode, disciplinary proceedings were started against the employee, concluding in the decision to dismiss her for just cause. Unable to accept this, the employee challenged the dismissal, considering it unlawful.

The Court of First Instance considered the sanction of dismissal as excessive, because it was an isolated act of the employee, who had been in the service of the educational institution for more than 17 years.

The employer appealed to the Court of Appeal of Porto, which considered that, by causing unnecessary confrontation with her colleague and by ignoring her superior, the employee violated the duties of respect, civility and obedience in the matter of work discipline, which, in itself, would warrant disciplinary action.

However, having tried to cut herself, the employee caused panic among her colleagues and the children who were present. According to the court, this conduct was incomprehensible, unreasonable, disproportionate and unacceptable, not only because it was capable of upsetting the mental and emotional balance of the children, but also for damaging the image of the institution, to which parents entrust the care of their children.

For these reasons, the Court of Appeal decided that the employee's conduct was so serious that it determined the total loss of trust by the employer, meaning there is just cause for dismissal.

Ruling of the Supreme Court of Justice of September 11, 2019

The concept of mobbing does not include the fact that the employer's new management, by reorganizing the services in order to be aware of the reality of the establishment, removes from the employee's functions the total authority that the previous management had delegated to her

The employee was responsible for managing the entire activity of the establishment. However, with the new management, she was informed that she would no longer exercise the powers at issue to the same extent, the management having opted to take over several of the duties previously delegated to her.

Dissatisfied with the loss of powers and feeling that she was increasingly set aside from her responsibilities, the employee informed the company that she was terminating the contract, citing just cause. Understanding that she was entitled to several labor credits that she had not been paid, a compensation for seniority, and a payment of compensation for pain and suffering, the employee invoked, in the courts, that the conduct of the new management constituted moral harassment.

The Court of First Instance considered that there was just cause for termination, the employee being entitled to the compensation she was claiming. Disagreeing, the company appealed to the Court of Appeal of Porto.

Appraising the case, the Court of Appeal held that the intention of the new management – seeking as much knowledge as possible of what was going on at the establishment – was a legitimate right, which would not prevent the continuation of the employee's employment relationship. The Court of Appeal considered that no moral harassment had taken place. Therefore, the employee was not entitled to terminate the contract with just cause or to claim any compensation.

Disagreeing with this new ruling, it was the employee's turn to file an appeal, this time to the Supreme Court of Justice.

The Supreme Court explained that the acts that constitute mobbing are, in most cases, those in which the employer intends to create for the employee a painful and unbearable work environment, leading the employee to resign or leave his or her job.

For the court, the dispute in question involved appraising two crucial facts: the first was the award to the employee, by delegation, of full authority over the establishment; the second, the removal of that authority, when the new management took office.

Facing the facts and their motivation, the court held that all actions and conduct of the new management lie within the company's management and organizational powers. The employer is the holder of management power, which the employee must obey. Therefore, the employer may establish the terms under which the work is provided. This is what the employer did when it decided to withdraw certain functions previously assigned to the employee. Therefore, the court did not consider that this action had illicit or ethically reprehensible end purposes.

Instead, the court held that no persecutory attitude or demeaning vexatious conduct or conduct violating the employee's dignity can be considered to have taken place, regardless of whether the employee agrees with the reorganization of the company or whether it caused her stress. The employer was merely exercising its hierarchical, managerial and organizational power, meaning no form of harassment was carried out.

To conclude, the Supreme Court of Justice held that the employee had no just cause to terminate her employment contract.

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