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Objectives

The Electronic Papers published by the Portuguese Observatory for Good Labour Practices (OPBPL) main goals are to confer the accessibility and high-speed readability of essential information and good practices in regards to work organisation, collective bargaining, human resources management, labour relations, inclusion and sustainability, corporate social responsibility, and labour market statistics.

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Collective Dismissal in Portugal – Relevant Aspects

COLLECTIVE DISMISSAL IN PORTUGAL – RELEVANT ASPECTS

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Abstract

This electronic paper aims to draw attention to the main specificities and trends in the termination of the labour relations in Portugal (with special emphasis on collective dismissal) against a backdrop of instability that calls for austerity, restrictions and cuts with direct impact on businesses and workers.

In light of the historical evolution, breadth and complexity of this topic, we strive to highlight the current requirements of Portuguese law.

The great challenge of today is to find a balance between the needs organisations encounter to respond to market pressures and customer demands, without overlooking the needs of workers.

1 | Collective Dismissal: Context

In Portugal, companies tend to rely on external services (outsourcing), use restructuring and adopt measures to reduce fixed operating costs on the grounds that they need to combat the crisis and avoid situations such as insolvency and/or total and permanent closure (with or without relocation).

However, such measures, which culminate in the termination of the labour relationship, have proved difficult to put into practice in Portugal's current business fabric that primarily consists of small and medium enterprises (SMEs). According to data released in February 2011 by GEP and MTSS¹, the Portuguese business fabric in 2008 was composed of about 97% of companies with fewer than 50 employees and it is estimated that there have been no significant changes since that time.

Typically, SMEs have limited resources, a staff with quantitative and qualitative limitations, no organisation of human resources and negligible specialised legal support.

In this context, it is SMEs that most need an alternative to revocatory accords by mutual consent that are historically the most common form of terminating the labour relationship, and usually entitle workers to significant compensation. Indeed, they need to resort to other mechanisms permitted by law (under Law n .7/2009, 12-02 which approved the Portuguese Labour Code – CT and/or the Collective Labour Regulation Instrument - IRCT may be applicable) to terminate employment contracts of surplus workers with greater cost constraints.

In fact, the substantial and procedural rigidity of Portuguese labour legislation in this matter often constitutes an obstacle to dismissal by the employer, particularly due to the excessive formalities and the justification of the termination.

Note that, in the case of unlawful dismissal (often on procedural-substantive grounds), as a rule the worker is entitled to: (i) unearned remuneration up until the final court decision; (ii) compensation for damage; and (iii) reinstatement in the same company with the same position and seniority (usually the employee chooses to substitute reinstatement with compensation that varies between 15 to 45 days of basic

¹ Dornelas, António, Antonieta Ministro, Fernando Ribeiro Lopes, José Luís Albuquerque, Maria Manuela Paixão and Nuno Costa Santos, *Emprego, Contratação Colectiva de Trabalho e de Protecção da Mobilidade Profissional em Portugal* (February 2011), Lisbon, GEP/MTSS, page. 29. (Online), <http://www.gep.msss.gov.pt/edicoes/outras/ecctpmpp.pdf> .

pay and seniority for each full year or fraction of seniority to be determined by the Court).

The employer can only oppose the reinstatement on the grounds that this would be extremely harmful, in the case of a micro-company or of an employee occupying a position on the management or board. If the Court excludes reinstatement, it determines the worker's right to receive between 30 and 60 days of basic pay for each full year or fraction of seniority (never less than six months).

This rigidity has made Portugal the most protectionist country in the OECD² (Organisation for Economic Cooperation and Development) with regards individual dismissal; not only has it been a disincentive for the celebration of open-ended contracts, but also for foreign investment³ which then goes to less protectionist countries inside and outside the OECD:

Table 1: OECD Countries – Job Security (2008 ^(a))

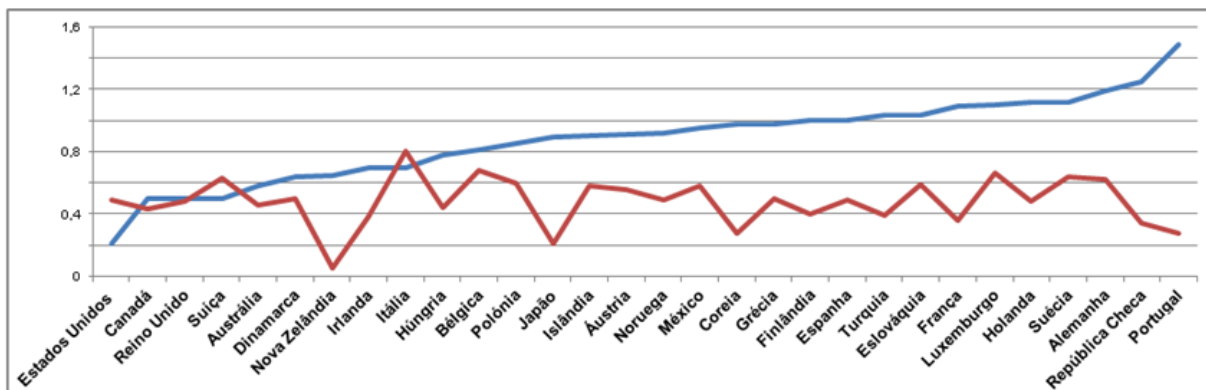
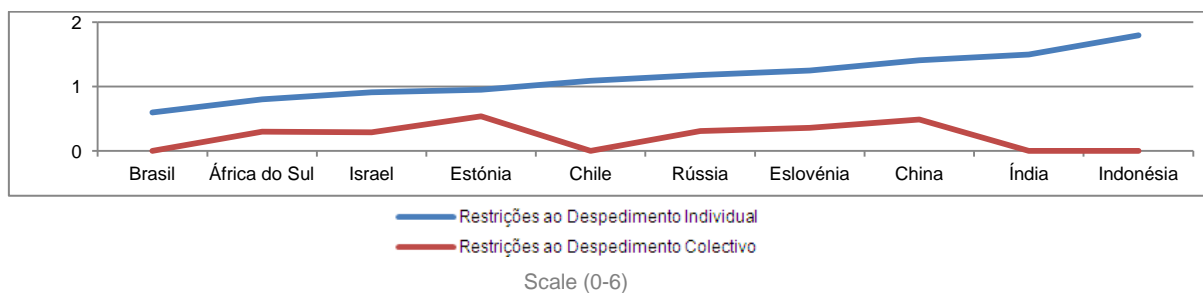


Table 2: Other Countries – Job Security (2008)



a) 2009 in the French and Portuguese cases

Tables by the Author and data made available by Danielle Venn (2009), *Legislation, collective bargaining and enforcement: Updating the OECD employment protection Indicators* - <http://www.oecd.org/dataoecd/36/9/43116624.pdf>.

² For consultation of statistical data released in 2009 on the rigidity of Employment protection inside and outside the OECD, see Danielle Venn (2009), *Legislation, collective bargaining and enforcement: Updating the OECD employment protection Indicators* – (Online) <http://www.oecd.org/dataoecd/36/9/43116624.pdf>.

³ For this purpose, simply consult this website: <http://www.doingbusiness.org/data/exploreconomies/portugal/employing-workers/>.



The rigidity of the Portuguese system reached its peak with the Law of Dismissals - LD (Decree-Law no. 372-A/75, of 16th July); unlike previous regimes, this abolished dismissal with due notice and went on to establish the general principle of the prohibition of unfair dismissals (serious disciplinary offence), and later collective dismissal. Although subsequent legislation modified this, Portugal continues to be one of the most protectionist countries.

Job security has been guaranteed under the constitution since 1976, and unfair dismissal is currently still prohibited. Indeed, the constitutionality of these emerging regimes is continually being questioned.

Recently, Portugal has had to adapt its labour legislation to the commitments made by the Portuguese Government in the Memorandum of Understanding signed by the European Union, the European Central Bank and the International Monetary Fund which grants Portugal external aid⁴.

In this context, the Government has adopted a number of measures to make labour legislation less rigid, described in more detail below.

2 | Collective Dismissal: Relevant Aspects

Currently, in addition to termination of the employment contract due to retirement, end of contract, revocatory agreement and end of trial period, the CT also allows employers to dismiss their workers through one of the following mechanisms: (i) disciplinary dismissal due to just cause; (ii) collective dismissal; (iii) dismissal due to post extinction; and (iv) dismissal due to unsuitability.

It should be noted that the three year quota system established by Decree-Law no 220/2006, of 03-09 in the version assigned by Decree-Law no 72/2010, of 18-06 (unemployment legal protection system), currently makes collective dismissals and extinction of job position possible through an agreement reached between the parties, ensuring workers the right to apply for unemployment benefits (not the case with other revocatory agreements thus making workers less receptive to them).

This is being used more frequently due to the current economic climate and the less demanding substantive and procedural requirements for collective dismissals (notably

⁴ The Memorandum of Understanding based on Council Decision 2011/344/EU, 17th May 2011, was agreed by the Portuguese Government on 11th August 2011 and subsequently altered at the beginning of September 2011; it essentially contains the general conditions of the economic policy on the European Union (EU) financial assistance to Portugal.

the flexibility in the choice of workers covered as long as objective criteria are followed). It should be noted that despite Portugal's excessive protectionism on individual dismissal, it is one of the least restrictive OECD countries in relation to collective dismissals as can be seen in Tables 1 and 2 above.

Collective dismissal is applicable when there is a need to close one or more departments or equivalent structure or to reduce the number of workers on economic, structural or technological grounds. The minimum number of workers being dismissed simultaneously or successively (two or five) in a three month period varies according to company size.

In short, when no agreement is reached, collective dismissal requires: (i) initial communication; (ii) informative and negotiating stage on the extent and effects of the collective dismissal, and (iii) the decision takes effect once the notice period has elapsed which may vary from 15 to 75 days, depending on the seniority of each employee computed on the issue date of the decision.

According to 2011 data, released in January 2012 by the Statistical Bulletin of the Office for Strategy and Planning, 641 processes of collective dismissal were concluded which resulted in the dismissal of 6 526 workers, of whom 224 agreed to accept the revocation and 173 were subject to other measures, as can be seen below:

Table 3: Concluded Processes of Collective Redundancies

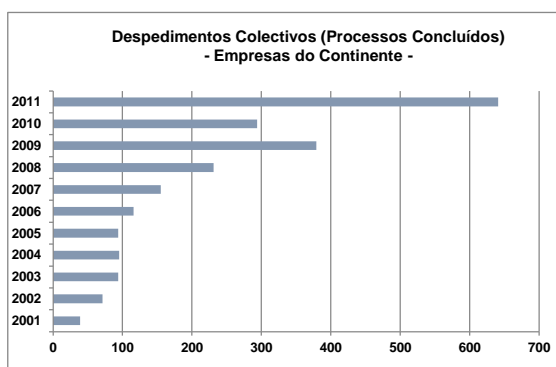


Table by the author and data released in the Statistical Bulletin of the Office for Strategy and Planning– January 2012 - <http://www.gep.msss.gov.pt/estatistica/be/bejan2012.pdf>.

In the case of collective redundancy, each worker is entitled to one month's basic pay and seniority for each full year of service (never less than three months).

This is only not applicable to employment contracts dating from 1 November, 2011; according to the new Law no 53/2011, of 14-10 (also applicable to other forms of contract termination), such employees are entitled to 20 days of basic pay and seniority for each full year of service or fraction thereof. This compensation is determined as

follow: (i) the amount considered for basic monthly pay and seniority for the employee cannot exceed 20 times the minimum wage (485€*20 in 2012); (ii) the total amount of compensation cannot exceed 12 times the worker's basic monthly pay and seniority entitlement or, when the limit defined in the previous point is applicable, to 240 times the minimum wage; (iii) the daily value of the basic pay and seniority entitlement is obtained by dividing the basic monthly pay and seniority by 30.

Similar to the above, a legal review is pending regarding the termination of employment contracts signed before November 1st 2011, since the Memorandum of Understanding requires Portugal to reduce the current compensation. Such a review is under discussion and was the subject of the Social Pact on Growth, Competitiveness and Employment, signed on January 18, 2012. Specific legislation that can regulate the creation of the labour compensation fund is also pending.

Notwithstanding the legislative changes arising, the following lesson must be remembered: «Instead of asking 'How many key people do we need to conduct our business?', the person in charge of restructuring asks: 'How can we change our way of doing business so we can use the people we have in our service effectively?' (Gomes et al, 2008 cited in Cascio, 1996, p. 5).

3 | Further reading

SITE: <http://opbpl.cies.iscte.pt>

Books:

Carvalho, Catarina de Oliveira e Gomes, Júlio Vieira (2011), *Direito do Trabalho +Crise = Crise do Direito do Trabalho?* Actas do Congresso de Direito do Trabalho, Coimbra, Coimbra Editora;

Gomes, Jorge F. et al (2008), *Manual de Gestão de Pessoas e do Capital Humano*, Lisboa, Edições Sílabo;

Neto, Abílio (2009), *Novo Código do Trabalho e Legislação Complementar – Anotados*, Lisboa, Ediforum – Edições Jurídicas, Lda.;

Ramalho, Maria do Rosário Palma (2010), *Direito do Trabalho, Parte II – Situações Laborais Individuais*, Coimbra, Almedina.



<<http://www.oecd.org/dataoecd/36/9/43116624.pdf> > accessed in Feb 13, 2012

<<http://www.doingbusiness.org/data/exploreeconomies/portugal/employing-workers/>.>
accessed on 13 Feb, 2012

<<http://www.gep.msss.gov.pt/estatistica/be/bejan2012.pdf>> accessed in Feb 13, 2012

<<http://www.gep.msss.gov.pt/edicoes/outras/ecctpmpp.pdf>> accessed in Feb 13, 2012



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