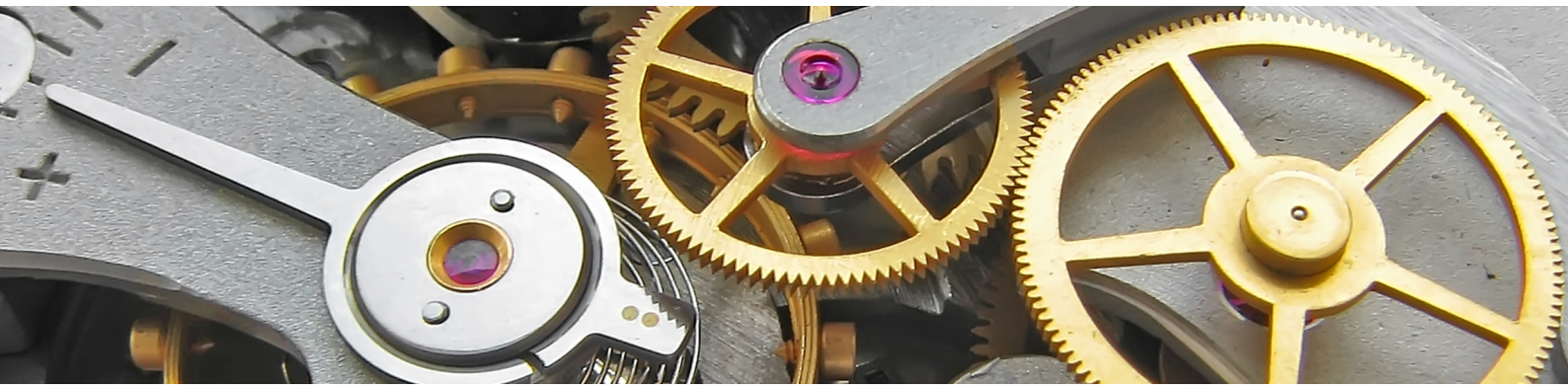

Newsletter

Termination of employment by reason of redundancy and redundancy selection criteria (elimination of position)

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Following the publication of the Constitutional Court (CC) ruling no. 602/2013, last 13 February, the Portuguese Government submitted to Parliament the Sixth Amendment to the Labour Code Bill 207/XII.

1. Framework

Seeking to comply with the obligations assumed under the Memorandum of Understanding on Specific Economic Policy Conditionality, signed on 17 May 2011, the Labour Reform executed through Act 23/2012, of 25 July, regarding the elimination of position procedure, replaced the statutory criteria for selection of the position to be made redundant in the event of a plurality of positions with identical functional content, with relevant and non discriminatory criteria to be determined by the employer. As regards the requirements for termination of employment by reason of redundancy, the referred statute released the employer from the obligation of offering the employee an alternative position that is available in the company and compatible with his professional category.

However, when petitioned to review this regime, the CC issued a generally binding declaration of unconstitutionality on the grounds of breach of the rule against dismissals without good cause, laid down in article 53 of the Portuguese Constitution.

The submitted Bill, therefore, intends to comply with the undertakings made at the European level, in light of the CC Judgment no. 602/2013.

2. Selection criteria

With this new amendment to the Portuguese Labour Code, the employer will have to follow the order of criteria set out below:

a) Worst performance review, based on parameters already known by the employee;

b) Lowest academic and professional qualifications;

c) Employment relationship with the highest cost for the company;

d) Least experience in the role;

e) Least seniority in the company.

This amendment averts the perverse consequence of the "last in first out" rule linked to the single criterion of seniority and is a welcome proposal of the Bill.

Nevertheless, the chosen criteria raise some questions.

Firstly, the relevant moment or period of the "performance review" by the employer is not defined by the Bill.

Secondly, instead of using the concepts of academic and professional qualifications, the lawmaker could have used the definition of professional qualifications provided in Act 9/2009, of 4 March, which is directly connected with the access to and practice of professional activities. Professional qualifications are "proven by evidence of formal qualifications, a statement or certificate of competence issued by a competent authority in the home member state and/or professional experience".

Thirdly, the higher cost criterion can also raise some questions regarding its application. For example, in the case of two employees holding a position with identical functional content, should their overall remuneration, their basic salary and seniority payments or also extra pay pegged to performance (for example, overtime, night shift or shift work differentials) be considered? What about the cases in which a different collective bargaining agreement is applicable to the employees concerned?

Fourthly, the lawmaker decided to use the concept "experience in the role". The "role" refers to the activities or tasks linked to a certain position. However, there is still the need of determining and assessing the concept of "experience". We believe that it must not be confused with permanence in a certain role as in this case the lawmaker should have used the concept of seniority.

Would the aim be to refer the ability or the suitability of the employee for the discharge of the duties considering the work or tasks previously performed by him?

The proposed scheme is closer to the guidelines established in the CC Ruling. Nevertheless, some uncertainties can still be removed in the Bill's passage through Parliament.

In any case and despite some uncertainty, this new mandatory order of criteria for selection of employees may make performance review systems a very significant instrument in the management and restructuring of human resources in business organisations.

3. Alternative work plan obligation

The Bill also recovers the inexistence of a position compatible with the professional category of the worker made redundant as a requirement for termination of employment with good cause.

On this point we can understand the Bill, considering the grounds given in the CC ruling and the experience of other European countries.

4. Final note

This draft law will now be submitted to public scrutiny before being discussed and voted on by the Parliament.

In this case, the participation of works councils or their coordinating committees, as well as the participation of trade unions, employers associations as well as of the Standing Committee for Social Dialogue.

Given the particular sensitivity on this subject and the applicable legislative procedure, at the moment it is difficult to estimate a date for the entering into force of the amendments outlined in the Bill in hand.

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