LABOUR YEAR IN REVIEW

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INTRODUCTORY REMARKS

The year 2016 is marked by unproductive legislative work on labour legislation.

In spite of the concerns expressed by the Minister of Labour, Solidarity and Social Security (MTSSS) in the beginning of the year regarding key points on the employment framework, no actual changes happened during 2016. There was an expectation for changes on certain matters - such as the fixed-term employment agreements' framework and collective bargaining - which did not occur.

About 10 months after the abovementioned intentions were voiced, the almost absolute inactivity of the Government and the absence of legislation published in the official gazettes on those matters forced the Government to keep its priorities unchanged for 2017. In this scenario, on 2nd December, the MTSSS reassured the executive's commitment in battling employment instability. Therefore, it is anticipated that 2017 will be marked by changes in the notorious matters of fixed-term employment and collective bargaining. These are priority areas to the labour lawmakers that, despite the successive attempts in recent years, remain unsolved.

According to the MTSSS, only 20% of the employment agreements entered into in the last three months were concluded for an indefinite period, with our country being a record holder in fixed-term employment when compared to other European countries. Hence, combating the abusive use of fixed-term employment remains one of the key matters for 2017.

In this regard, amongst the measures in the pipeline are the thinning of the causes that justify the entering into term employment agreements and the shortening of the maximum duration of this type of contracts. In addition, according to the MTSSS, one of the alternatives to be considered towards the discouragement of fixed-term employment may be the reduction of the social security contribution borne by the employer in relation to the remunerations received by employees under a permanent employment agreement. On the other hand, the penalization of companies that resort to term employment agreements through the increase of this contributory duty is also a plan.

Collective bargaining is also a subject that has already been widely debated and discussed, although stubbornly resistant. In fact, the changes implemented throughout the years have not registered any improvement or progress. On the contrary, there has been a marked fall in collective bargaining over the last five years. Therefore, the current Government defines as one of its priorities for 2017 the unblocking of collective bargaining and its revitalisation. The only thing left to know is how the Government is planning to get there.

The MTSSS recognizes, however, that this revitalisation should not be built only by legislative changes (which should focus on stimulating and providing credibility to collective bargaining) but also (and most importantly) by the willingness of the social partners which should be focused on structural and stable understandings that may allow the flourishing of a healthy employment environment with a view to revitalize collective bargaining.

Expectations are high. But truth be told, it would be to everyone´s advantage if the legislator would focus on making the labour market a more flexible one, since it is currently maladjusted, in need of a profound reform that would adapt to the companies' current needs as well as to face the serious economic crisis we are currently experiencing, as have most European and American countries in similar situations.

However, since the 2016 legislator was not totally sterile, from a legislative point of view and also taking in consideration some relevant case-law, we considered important to synthesize in a few lines the diplomas and the court decisions of greater importance.

LEGISLATION

Decree-Law No. 254-A/2015, of 31st December 2015, which updated the minimum wage amount to € 530.00.

Decree-Law No. 10/2016, of 8th March 2016, which reinstated the transitional framework for access to the early retirement pension by beneficiaries of at least 60 years of age and 40 years of registered contributions.

Decree-Law No. 11/2016, of 8th March 2016, which approved an exceptional measure to support employment through the reduction, in 0.75% of the employer's contributions to Social Security.

Law No. 8/2016, of 1st April 2016, tenth amendment to the Portuguese Labour Code, reinstating the following bank holidays: Corpus Christi, 5th October, 1st November, and 1st December.

Executive Order No. 67/2016, of 1st April 2016, which established the regular age of access to old-age (retirement), pensions (now 66 years and 3 months) and changed the sustainability factor, calculating element of retirement and invalidity pensions in the Social Security system.

Law No. 28/2016, of 23rd August, which approved eleventh amendment to the Portuguese Labour Code, fifth amendment to the Health and Safety at Work framework, and third amendment to the framework on the practice and licensing of private placement agencies and temporary work agencies, also approving measures to fight modern types of forced labour.

Court Decisions

Ruling of the Coimbra Court of Appeals, dated 04/02/2016, process No. 2/15.2TBFIG.C1

Fixed-term employment agreement / realisation of the business environment in the contract / omission / number of employees / permanent employment agreement

In respect of the mandatory formal requirements for temporary employment agreements, the Coimbra Court of Appeals held that, where the contract is concluded on the grounds of "launching of a new activity of uncertain duration, as well as, commencement of activities of a company or establishment belonging to a company with less than 750 employee", i.e., concluded under Article 140.4.(c) of the Portuguese Employment Code, not indicating the number of employees of the company in the contractual clause that contains the justification of the fixed-term employment, leads to the conversion of the contract into a permanent employment agreement.
(Click here for the entire ruling – Portuguese version)

Ruling of the Supreme Court of Justice, dated 10/03/2016, process No. 250/13. 0TTCTB.C1

Working time / rest time / overtime work / employee's travel on rest days to and from the workplace

Sustaining the Court of Appeals' decision, the Supreme Court of Justice qualified as overtime work the "time spent travelling between Portugal and Spain during the employee's rest days, in the employer's van, in the conditions of time and place determined by the employer and linked to the performance of work".
The case was related to an international road transportation driver, whose workplace was in San Roman (Spain), place where he began his work performance. The employee would only return to Portugal on weekends, by a means of transportation that was supplied by the employer, and in conditions of time and place determined by the same.
For the purposes of qualifying as working time the time spent traveling, the Court considered the fact that in such time the employee is still or already providing work, where the employee has made himself available to the employer.
(Click here for the entire ruling – Portuguese version)

Ruling of the Supreme Court of Justice, dated 31/05/2016, process No. 4587/13.0TTLSB.L1.S1

Private use of company's vehicle and mobile phone / leading position / remuneration

Questioned on whether the private use of the company's vehicle and its fuel cap, bestowed to an employee by virtue of her managerial duties, should be qualified as remuneration, the Supreme Court held that such benefit, when given during a period where the employee did not actually perform those duties, "constitutes an act of mere tolerance of the employer, is not of a retributive nature and can cease when the employee ceases to perform these functions".

Likewise, the Court held that the fact that the employee kept using the vehicle and fuel cap during the intermediate period in which she did not exercise managerial duties "is not sufficient to conclude that she was entitled to that advantage in a previous period in which she also did not hold any leading position".

(Click here for the entire ruling – Portuguese version)

Ruling of the Lisbon Court of Appeals, dated 16/09/2016, process No. 483/15.4T8BRR.L1-4

Exemption of a working schedule/ tacit renouncement of remuneration

Sustaining the decision issued by the first instance court, the Lisbon Court of Appeals held that, under Article 265.2 of the Portuguese Employment Code, it should be understood that the "managerial and commercial" employee who, being responsible for making all payments to the company's employees, never received any amount for exemption of a working schedule, is tacitly renouncing to the special remuneration for such exemption. The Court held that there had been a tacit waiver of that special remuneration, which was legally admissible since the waiver was not subject to written form and referred to a managerial or administrative position.

(Click here for the entire ruling – Portuguese version)

Ruling of the Supreme Court of Justice, dated 17/11/2016, process No. 1032/15.0T8BRG.G1.S1

Optional holiday / Carnival Tuesday / company practice

The Supreme Court of Justice, dissenting from the decision issued by the first instance court, ruled that granting Carnival Tuesday to all its employees, without loss of remuneration, since its foundation, in 1994, until 2013 – the date from which the holiday became "optional" – is a repeated, general, uniform and, thus, binding habit. As a result, the Court held that this habit constitutes a labour practice, and cannot be unilaterally withdrawn.
(Click here for the entire ruling – Portuguese version)