NEW CRITERIA FOR REDUNDANCY - PBBR

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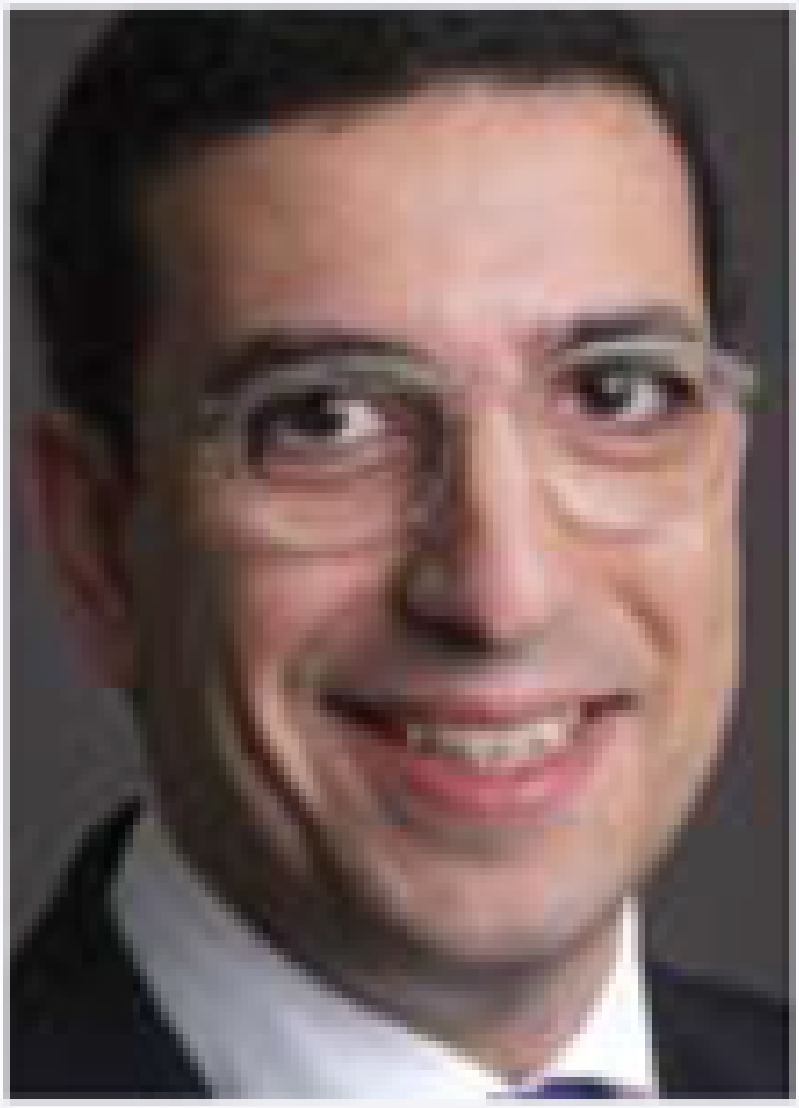

Category: Employment

A new legal framework applicable to employees' selection criteria with regard to individual redundancy and maladjustment procedures came into force on 1 June, 2014. Law no. 27/2014 is a consequence of the Constitutional Court's Ruling no. 602/2013 which considered some of the 2012 amendments to the Labour Code in breach of the Portuguese Constitution, in particular the previous legal framework concerning employees' selection. The main modification brought by the

new legal regime is the reintroduction of a list of criteria that must be used by the employer when selecting employees. The previous legal regime gave the employer broad latitude when defining the criteria to be used for employees' selection – though such criteria had to be relevant and non-discriminatory.

Now, the new law expressly states the relevant and non-discriminatory selection criteria to be followed when there is more than one position in the company with an equivalent job description that needs to be cut.

The criteria are:

a) worst performance assessment (with parameters previously known to the employee);
b) lower academic and professional qualifications;
c) higher burden on the maintenance of the employment relationship;
d) lower experience in the position;
e) lower length of service in the company.

The use of the above criteria is successive, meaning that when selecting one of two employees, the employer cannot use, for example, the lower seniority as the main and principal criterion.

On the one hand, the new legal regime was generally welcomed by companies since it provided them with new selection criteria to use.

On the other hand, unions and employees considered the new amendment a step backward with regard to the legal framework in force until 2012. For these sectors, the key issue is the performance assessment, which, according to their view, will open the door to unrestricted dismissals.

In addition, and when considering the stability of the legal regime, employers and law practitioners also feel some uncertainty regarding an eventual new compliance request before the Constitutional Court. In fact, the last few years were fertile with regard to requests by the left-wing parties for constitutional evaluation of labour law amendments carried out by the Portuguese government. Important changes of labour law were voted down by the Constitutional Court, leading employers to be extremely cautious when considering performing internal restructurings.

Practitioners relied on successive law amendments that, ultimately, did not have the expected effect due to the decisions of the Constitutional Court.

The use of the new criteria will not be exempt from practical difficulties on its implementation. In fact, and taking into consideration the performance assessment, Portuguese companies (excluding a large number of multinationals established in Portugal) normally do not have such type of procedures – this limits the practical implementation of the new regulation. In addition, one cannot ignore that the law did not present any guidance on the objectiveness of this criterion. Merely the employee´s previous knowledge of the performance parameters is legally sufficient and apparently the law ignores situations where employees do not agree with the assessment made or where the assessment is conducted in a biased manner.

If we also consider the "higher burden" criterion, one can anticipate discussions around the issue of when the expression "burden" could have been easily replaced by the word "cost".

In any case, we consider that this law change is generally positive. Employers have new objective criteria to assess which individual will be made redundant, thus allowing more flexibility in terms of termination of employment.

Furthermore, employees will not be totally unprotected, since companies will be forced to provide

an in-depth justification of the reasons for selection, especially when using the performance assessment criteria.

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