

Individual dismissals across Europe

Portugal

1. Introduction

In Portugal, protection against dismissal comes from the Portuguese Constitution (art. 53.^o *et seq.*) (**Constitution**) and the Portuguese Labour Code (art. 397.^o *et seq.*) (**Labour Code**).

As a general principle an employer is not allowed to terminate an employee without “fair cause”.

2. Trial periods

In employment contracts for indefinite period, trial periods shall have the following duration:

- Ninety (90) days for the majority of workers
- One hundred and eighty (180) days for employees who occupy positions of complex technical nature, high degree of responsibility or which require special qualifications, as well as those that carry out duties depending on trust
- Two hundred and forty (240) days for senior management and company officers.

The duration of the trial period may be reduced by a collective bargaining agreement or written agreement by the parties to the employment relationship.

During the trial period either party may unilaterally terminate the employment contract in general without:

- Prior notice, unless the trial period lasts more than sixty (60) days and in which case the employer must give seven (7) days prior notice
- Need to invoke fair cause
- Rights to compensation, unless otherwise agreed to in writing.

The maximum trial period for a fixed-term contract is thirty (30) days (if the contract is for six (6) months or more) or fifteen (15) days (if the contract is for less than six (6) months).

3. Reasons for dismissal

In general an employer is not allowed to terminate an employee without a “fair cause”, nor is it allowed to fire an employee due to poor performance, unless there is an abnormal reduction in the employee’s productivity and the necessary disciplinary procedure has been followed.

Fair cause is generally constituted by intentional behaviour or acts of the employee that due to their seriousness make it immediately and practically impossible to continue the employment relationship.

The following types of behaviour or acts of an employee shall constitute fair cause for dismissal:

- Illegitimate disobedience to the orders given by the employee’s superiors
- Breach of rights and guarantees of other employees
- Repeated disinterest in performing, with the required level of care, the duties inherent to the position or workstation
- False statements regarding the justification of absences
- Abnormal reduction of employee’s productivity.

In cases like the above, the employer is entitled to terminate the employment contract without the payment of any indemnification or compensation.

In addition, the employer is entitled to terminate an employment contract where the employee is unsuitable for the position. Unsuitability may occur in the following situations:

- Continued reduction of productivity or quality of work
- Recurring failures on the equipment allocated to the work position or used by the employee
- Employee’s work endangers their own health and safety or that of the other employees or third parties.

Unsuitability for the position may also occur in the case of complex technical or managerial positions, if the employee fails to achieve the

agreed objectives of the position and the failure is related to the employee's performance, provided that the maintenance of the labour relationship is also practically impossible.

It should be noted that in cases of a dismissal due to job termination (i.e. cases where the requirements for a collective dismissal exist but the threshold is not exceeded – refer to paragraph 6.3) factors such as seniority in the same work position, length of service in the professional category as well as the length of service in the company, are legal criteria that must be followed in order to determine which employees are to be made redundant.

4. Additional protections

Certain categories of employees benefit from particular legislative protection. If these individuals are dismissed, their dismissal is presumed to be without fair cause.

The main protected categories are:

- Pregnant employees as of the date the employer is informed of the pregnancy and up to one (1) year after the child's birth. If there are grounds for fair dismissal the Commission for Equality (CITE) must be previously consulted
- Candidates to the bodies of union associations, as well as employees who are or have been members of such bodies within the last three (3) years.

5. Dismissing an employee

5.1 Procedure

Dismissal due to fair cause must be preceded by a formal disciplinary process whereby the employer must provide written notice of the reasons for dismissal to the employee (notice of offence) and the employee must be given the opportunity to respond to the stated reasons.

Once this process has been concluded, and it has been presented to the workers committee or union (refer to paragraph 6.2), the employer has thirty (30) days to issue notice of its decision, otherwise the right to dismiss will expire. A decision to dismiss an employee should be in writing and should set out the reasons for the dismissal. The dismissal statement becomes effective as soon as the employee receives it.

Upon termination of the employment contract, the employer must deliver a labour certificate to the employee, indicating the date of commencement of work, the date of termination, as well as the position or positions occupied in the undertaking. In addition, the employer must deliver to the employee other documents designed for official use, including those required by social security law.

5.2 Duration of the notice period

As a general principle, Portuguese law does not provide for any notice period for dismissal.

However, in the case of unsuitability for the position (see paragraph 3 above), the employer must observe a minimum notice period of sixty (60) days. The same applies in the cases of collective dismissals and job termination.

5.3 Treatment during the notice period

During their notice period, employees are entitled to use the equivalent of two (2) days per week of paid leave to search for alternative work. The employee may choose to divide this period for all or some of the weekdays.

5.4 Payment in lieu of notice

The employer may not pay in lieu of notice, even in the cases of collective dismissals or dismissal due to unsuitability.

5.5 Dismissal without notice

Gross misconduct (as referred in item 3 above) entitles an employer to terminate the contract without notice (as long as the legal procedure is complied with – refer to paragraph 5.1).

6. Other requirements

6.1 Permissions

No permissions are required in the case of individual dismissals.

6.2 Notification and consultation obligations

In cases of dismissal due to fair case and once the disciplinary procedure has been followed, the process is presented to the workers' committee and, if the employee is a union representative, to the respective union. These bodies may, within five (5) business days,

submit their opinion on the proposed dismissal. The opinion provided is not binding to the employer.

6.3 *Collective dismissals*

Collective redundancy is understood as the termination of employment contracts by the employer simultaneously or successively over a three (3) month period, affecting at least two (2) or five (5) employees (depending on whether it takes place in a micro or small undertaking, or a medium or large undertaking) and whenever such termination is due to the closing of one or various sectors or equivalent structures or a reduction of personnel due to market, structural or technological reasons.

Number of employees to be dismissed	Size of the organisation
At least 2	Micro (employs a maximum of 10 employees) or small undertaking (employs more than 10 and up to 50 employees)
At least 5	Medium (employs more than 50 and up to 200 employees) or large undertaking (employs more than 200 employees)

7. **Claims for unfair or unlawful dismissal**

7.1 *Making a claim*

The employee may file a claim for unfair dismissal on a Labour Court within one (1) year as of the date of dismissal. This delay is reduced to six (6) months in case of collective dismissal.

7.2 *What if the employee resigned?*

In the following cases, an employee is entitled to terminate their contract of employment immediately:

- Failure on the part of the employer to pay salary on time
- Deliberate breach of the employee's legal or contractual guarantees
- Application of abusive disciplinary sanctions

- Deliberate failure to provide health, safety and hygiene conditions at work
- Deliberate damage to significant property interest of the employee
- Substantial and permanent change in the working conditions.

Termination based on the above grounds entitles the employee to compensation for all material and moral damages suffered, which should correspond to compensation of between 15 and 45 days' basic salary and seniority allowance for each full year of service. Compensation can never be less than the equivalent of 3 months' basic salary.

7.3 Possible remedies

Any type of dismissal (notably dismissal due to fair cause) is unlawful when:

- It has not been preceded by the respective procedure
- It is based on political, ideological, ethnical or religious reasons, even if other reasons have also been invoked
- The reasons invoked to justify the dismissal are considered invalid.

If the dismissal is declared unlawful, the employer may be ordered to:

- Indemnify the employee for all damages (monetary and non-monetary) caused
- Reinstatement the employee in his/her former position.

The employee is also entitled to receive the remuneration s/he ceased to receive from the date of dismissal until the final decision of the court.

In most cases, the employee can choose to receive compensation rather than be reinstated. Compensation is between fifteen (15) to forty-five (45) days of basic salary and seniority allowances for each full year of service, taking into account the level of salary and the degree of unlawfulness. Compensation cannot be less than equivalent of three (3) months' pay.

In cases of micro-undertakings or employees who occupy management or director positions, the employer can oppose to the reinstatement if it demonstrates that the return of the employee would be severely detrimental and upsetting to the company's activity. If the court decides in favour of the employer, compensation will be settled between thirty (30) and sixty (60) days of basic salary and seniority allowances for each full year of service (with a minimum of six (6) months' pay).

8. Use of settlement and waiver agreements

The right to sue is considered an inalienable right when the employment contract is in force. According to Portuguese jurisprudence after the dismissal takes place, the parties are free to agree that the employee will not sue the employer.

Inês Reis

May 2006

ilr@ppradv.com

With special thanks to the following contributors:
Bruno Soeiro Barbosa