

## Amendments to the Labour Code | Legal Effects of the Constitutional Court Decision

[New version after the rectification of the Constitucional Court published on 24 October 2013]

On 26th of September of 2013, the Constitutional Court (CC) made public the Decision 602/2003 which declares unconstitutional six articles approved by Law 23/2012, of 25 of June, that approved the Third amendment to the Portuguese Labour Code (LC).

The decision of the CC arises from a request of the members of three political parties (PCP, BE and Verdes) submitted in July 12, 2012 regarding the following schemes changed or introduced by Law 23/2012:

- Individual working-hours bank;
- Group working-hours bank;
- Compensatory rest of extra work;
- Elimination of holidays;
- Increase of vacations;
- Dismissal by suppression of the work post;
- Dismissal by unsuitability;
- Relationship between regulation sources.

Note that Law 23/2012 is in force since the 1<sup>st</sup> of August of 2012. Therefore, the decision of the CC assumes an extreme relevance due to the several situations and business decisions already consummated under the rules now declared unconstitutional.

In fact, it is already valued the possibility of contesting the dismissals, and consequent reintegration of employees, occurred since 1<sup>st</sup> of August of 2012.

As we will outline above, the CC declared the unconstitutionality of the following articles: (i) dismissal by suppression of the work post, (ii) dismissal by unsuitability, (iii) increase for vacations and (iv) compensatory rest.

### Suppression of the work post

As a consequence of the commitment assumed by the Portuguese Government in the Memorandum of Understanding of 2011, the legal regime applicable to the suppression of the work post has become less demanding by the fact that the requirements to be observed by the employer in the selection of the work post have been replaced by "*relevant criteria and non-discriminatory*" to be fixed by the employer.

For the CC such decision-making power conferred to the employer by Law 23/2012 infringes the prohibition of dismissal without just cause "*because it does not provide the necessary normative indications, regarding the criteria that should manage the decision of the employer to select the work post to suppress*".

With this decision the employer is once again subject to the observation of the criteria of seniority and professional category for the determination of the work post to suppress and also bind to the obligation to place the employee in a work post compatible with his professional category.

### Dismissal by inadaptability

The declaration of unconstitutionality concerning the amendments to the rules of dismissal by inadaptability focused on the revoke of the requirement that demanded that did not exist in the company another work post available and compatible with the professional qualification of the employee.

Likewise the arguments pointed for the declaration of unconstitutionality of the rules of dismissal by suppression of the work post, the CC decided that this inobservance of the obligation to integrate the employee in an alternative work post, constituted a breach of the prohibition of dismissal without just cause.

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### Compensatory rest

Within the framework of the rules related to the compensatory rest, the CC has declared the unconstitutionality of the provision provided in Law 23/2012, which foresees the nullity of the provisions of Collective Bargaining Agreements (CBA) and/or employment agreements concluded before 1<sup>st</sup> of August of 2012 regarding compensatory rest for extra work rendered in business day, in complementary weekly rest day or in holidays.

Note that Law 23/2012 repealed the provision that entitled the employee to a remunerated compensatory rest.

As a consequence of the above the employer should now pay the compensatory rest for extra work provided by the employee since August 1, 2012, when it is foreseen in CBA.

### Increase of vacations

Also within the scope of the applicability of the CBA, the CC has declared unconstitutional the provision of the Law 23/2012 which foresees the reduction to an amount equivalent to three days of the increase of the annual period of vacations established in CBA subsequent to December 1, 2003 and prior to August 1, 2013.

It is recalled that the increase of up to three days' vacation days in the event of no absence or of a small number of justified absences was repealed from the Portuguese LC by Law 23/2012.

Therefore, the declaration of unconstitutionality entitles the employees to the increase of the vacation period when it is foreseen in the CBA already this year.

### Relationship between sources of regulation

Finally, the CC declared the unconstitutionality of the reduction for half of the amounts provided in CBA regarding the payment of extra work and retribution of normal work rendered in a holiday or compensatory rest, if after August 1, 2014 they were not amended.



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