LUXEMBOURG

Law and Practice

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1. Introduction

1.1 Main Changes in the Past Year

On 12 July 2019, the Law of 12 July 2019 – modifying the Labour Code, the modified law of 31 July 2006 introducing the Labour Code and the modified law of 19 December 2008 reforming professional training (2008 Law) – was published in the Memorial A. The Law of 12 July 2019 incorporates into the Labour Code the provisions relating to apprenticeship contracts and the internship agreements that are provided for in the 2008 Law and makes certain clarifications and amendments regarding inter alia the duration, the trial period, the transfer and the termination of the apprenticeship contract.

The Law of 1 August 2019, complementing the Labour Code by creating a new assistance activity designed to encourage the inclusion in employment or in external reclassification of employees with disabilities, has introduced an "assistance activity for inclusion in employment" in order to regulate and promote the integration of employees with disabilities and in external reclassification in the employment market by offering assistance to suit their needs.

The Law of 4 June 2020 amending the Labour Code and introducing a regime of internships for school pupils and students regulates the terms and conditions of two types of internship agreements:

- compulsory internships performed during school/university courses in a Luxembourg or foreign educational establishment; and
- practical internships aimed at acquiring some professional experience.

The Law of 4 June 2020 also provides rules regarding internship compensation, the duration of the internship, the content of the internship agreement, the appointment of a tutor and the limitation of the number of interns in the company.

1.2 COVID-19 Crisis

To limit the spread of the COVID-19 pandemic, the Government has put in place certain restrictions, pursuant to the Grand-Ducal Regulation of 18 March 2020. On 24 March 2020, the Luxembourg parliament confirmed the state of crisis for three months (ie, until 24 June 2020).

The government also established several exceptions impacting labour law.

Temporary Measures

Short-time working force majeure COVID-19 measures were introduced. These were simplified and accelerated measures for companies applying for short-time working due to COVID-19.

Companies concerned:

- companies that had to completely or partially cease their activities following a government decision; and
- companies which remained open but which nevertheless suffered the negative impact of the coronavirus on their business operations.

Eligible persons:

- all employees having their workplace in Luxembourg, whether they were under a permanent employment contract or a fixed-term employment contract (who were fit for work and under the age of 68 and who did not receive an old-age pension, an early old-age pension or a disability pension);
- all apprentices; and
- temporary work agencies were also eligible with regard to their employees whose assignment contract was ongoing but who could no longer carry out their activity.

Employees working remotely, on sick leave or on leave for family reasons were not eligible.

During the period of short-time working, the state paid compensation of up to 80% of salaries. Reimbursement was limited to 250% of the social minimum wage for unskilled workers aged 18 or over (EUR5,354.98 on a monthly basis). This compensation could not be less than the amount of the social minimum wage for unskilled workers (EUR2,141.99). Any difference between the amount of compensation and the social minimum wage for unskilled workers was borne by the Employment Fund.

Permission to make use of the provisions concerning short-time working in the case of force majeure could only be granted for a maximum of 1,022 hours per year and per full-time working employee. For persons working on a part-time basis, the limit of 1,022 hours is pro-rata. However, the Law of 20 June 2020 on temporary derogation from certain labour law provisions in relation to the state of crisis linked to COVID-19 and modifying the Labour Code provided that hours used under the short-time working scheme between 1 January and 31 July 2020 are not computed towards the thresholds of the ordinary scheme (1,022 hours).

During the period of application of short-time working force majeure COVID-19, ie, from 18 March 2020 to 30 June 2020,

the employer had to undertake not to dismiss any employee for reasons unrelated to their person (ie, for economic reasons).

Short-time working related to the economic recovery

With the end of the state of crisis and in order to revive the economy, four new procedures for granting short-time work to companies affected by the COVID-19 crisis will be in force from 1 July to 31 December 2020:

- 1) Companies in the "HORECA", tourism and events sectors, which are considered as vulnerable sectors, may benefit from short-time working related to the economic recovery through an accelerated procedure (ie, without the need to draw up a recovery plan), and with no limitation on the number of employees entitled to it. Where there is a proven need, these companies are able to carry out economic redundancies up to a maximum limit of 25% of their employees until 31 December 2020.
- 2) Other commercial companies affected by the health crisis, other than industrial businesses and those in vulnerable sectors, have recourse to short-time working related to the economic recovery through the accelerated procedure, provided they do not make staff redundant. In this case, however, the number of employees covered by the scheme may not exceed 25% of the workforce for the months of July and August, 20% for the months of September and October, and 15% for the months of November and December.
- 3) By way of exception to points 1) and 2), businesses in vulnerable sectors making more than 25% of their workforce redundant, as well as those from all other businesses contemplating carrying out redundancies, must submit a so-called "traditional" short-time working application for structural economic difficulties. Admission to the short-time working scheme is therefore granted only if the companies draw up restructuring plans.
- 4) Industrial companies continue to benefit from the cyclical short-time working scheme provided for by the Labour Code in order to be able to respond to disruptions in international markets. Companies which use this scheme undertake not to make employees redundant for economic reasons.

Remote working

The tolerance thresholds laid down by the tax treaties applicable between Luxembourg and its neighbouring countries, in case of cross-border employees, was unbound, as from 11 March 2020 for German cross-border employees and as from 14 March 2020 for Belgian and French cross-border employees until 31 August 2020 (unless extended).

Leave for family reasons

Leave for family reasons was extended, under certain conditions, to parents who were unable to go to work because they had to babysit their children under the age of 13 years old who were quarantined or who were subject to measures of isolation, eviction or keeping children at home for compelling public health reasons decided by the competent authorities to deal with the spread of the epidemic. This extraordinary family leave was assimilated into a period of incapacity at work due to illness, with regard to the employer and social security services. Consequently, during this leave, employees were protected against dismissal, except in cases of gross misconduct.

Leave for family support

The government introduced a "family support leave" for employees and self-employed workers to enable them to look after a disabled adult or an elderly person following the closure of day-care structures or training or employment structures. Family support leave was extended until 25 November 2020.

Trial period

Trial clauses provided for in an apprenticeship contract, an employment contract of indefinite duration, a fixed-term employment contract or an assignment contract were suspended in companies directly affected by the government's closure decisions and in companies admitted to short-time working in case of force majeure COVID-19. The suspension took effect on the day of the government's decision to introduce a series of measures in the fight against COVID-19, or on the day of admission of the employee concerned to this special short-time working scheme. The suspension ended at the end of the state of crisis (24 June 2020) and the remainder of the trial period restarted the day after the end of the state of crisis (25 June 2020).

Pre-retirement compensation

The right to pre-retirement benefits was maintained, during the state of crisis, in the event of an agreement to resume a work activity with an employer active in one of the fields in which commercial and craft activities were allowed to continue, and the activities essential for the maintenance of the vital interests of the population and the country. This measure has been extended until 31 December 2020.

Health and safety

The Grand-Ducal Regulation of 17 April 2020, introducing a series of occupational health and safety measures as part of the fight against COVID-19, provided a series of specific obligations for employers and employees relating to the protection of the health and safety of employees within the particular context of the COVID-19 epidemic applicable during the state of crisis (until 24 June 2020).

Extension of judicial deadlines
The deadlines to negotiate a social plan in the context of a collective dismissal, for submission and appeal, and the three-month period for bringing an action for unfair dismissal, were suspended. The three-year limitation period to claim salaries was also suspended during the state of crisis.

Permanent Measures
- The Law of 25 May 2020 amending Article L 234–52 of the Labour Code retroactively removed the condition of hospitalisation (ie, as of 16 March 2020) for children benefiting from a special additional allowance (Article 274 of the Social Security Code). This change applied to all requests for leave for family reasons, even outside the context of the COVID-19 crisis.
- The Law of 20 June 2020 introducing (1) a temporary exemption to certain provisions relating to employment law connected to the state of crisis associated with COVID-19, and (2) a change to the Labour Code, has permanently introduced into the Labour Code sanctions for companies that have benefited from short-time working on the basis of a deliberately false declaration.

2. Terms of Employment

2.1 Status of Employee
Since the entry into force on 1 January 2009 of the Law of 13 May 2008, which introduced a single statute for all employees of the private sector, there is no longer any distinction between blue-collar and white-collar workers in the private sector; the only status is that of employee.

Among employees, one category must be distinguished: senior executives. Article L162–8(3) of the Labour Code defines senior executives as employees enjoying a level of remuneration that is higher in comparison to other employees falling under the scope of a collective bargaining agreement, or is based on a different scale. This takes into consideration the time necessary to perform their duties, whether remuneration is given in return for effective and genuine management authority, whether their tasks comprise a well-defined authority, and finally, whether they enjoy substantial independence for the purpose of the organisation of work and considerable freedom in respect of working hours.

The above-mentioned criteria are cumulative.

Qualification as a senior executive has important consequences:

- collective bargaining agreements (CBA) are in principle not applicable to senior executives (unless the CBA or only certain provisions of the CBA are applied by the employer on a voluntary basis);
- senior executives are not subject to the rules on working time, nor to the rules on weekly rest for employees when their presence is essential to ensure the functioning of the company; and
- whether or not they are indispensable to the proper functioning of the company, senior executives cannot benefit from the legislation on overtime.

2.2 Contractual Relationship
Two types of employment contracts must be distinguished:

- indefinite employment contracts are concluded for an indefinite period of time, running until termination by the parties or by effect of the law; and
- fixed-term employment contracts are concluded for a fixed-term period in respect of specific and temporary tasks which do not form part of the normal activities performed by the employer, in specific cases provided for by Article L122-1 of the Labour Code (eg, replacement of an employee temporarily absent, execution of an occasional and punctual task defined and not falling within the framework of the current activity of the company, etc).

An employment contract concluded on a permanent basis must be drawn up in writing in duplicate for each employee when the employment relationship begins.

If the parties fail to draw up a written contract or the written contract does not contain the required particulars, the contract is nevertheless valid. However, the employer will not be allowed to prove the contract's existence and its content, whereas the employee will be allowed to do so by any means of proof, irrespective of the value of the dispute.

The contract of employment may be written in one of the three official languages (Luxembourgish, French and German) or in any other language, provided that it is understood by both parties.

Any employment contract must contain the mandatory particulars detailed in Article L121–4 of the Labour Code (eg, identity of the parties, date on which the contract takes effect, the place of employment, etc). Fixed-term employment contracts must include additional clauses.

2.3 Working Hours
Full-Time Contracts
Normal full-time working hours are eight hours per day and 40 hours per week (without prejudice of CBAs, which may reduce the number of normal working hours). The maximum number

of working hours, including overtime, may in no event exceed ten hours per day and 48 hours per week.

However, if the weekly working hours are split over five days or less, the total daily working hours may be increased to nine hours, but must not exceed the normal weekly limit of the undertaking concerned.

An employer who wishes to introduce more flexibility into the organisation of its employees' working time may also choose to introduce a reference period (over which the normal working hours can be applied more flexibly) using two different tools:

- A Work Organisation Plan (*plan d'organisation du travail* or POT) – the employer determines the weekly working hours during a reference period which may not exceed four months. Before implementing such work organisation plan, the employer must consult with the staff delegation or the staff affected by the work time organisation.
- Flexible Working Hours (*horaires mobiles*) – this system allows the employee to organise their daily working hours in accordance with their personal needs and business requirements. The employer determines a flexible framework and may impose that during certain periods of time, the employees must be present. The establishment of a flexitime model must be taken within the framework of a CBA or an agreement must be entered into between the company and the staff delegation or, failing that, the employees concerned.

In both cases, working hours may not exceed ten hours a day and 48 hours a week.

Part-Time Contracts

The Labour Code defines a part-time employee as an employee who agrees with their employer, in the context of a regular activity, to work for a shorter weekly duration than the normal working time applicable in the establishment under the law or the CBA for the same period.

When an employer wishes to create a part-time position, they must first consult the staff delegation. Furthermore, where an employee has expressed a wish to work part-time, the employer must inform this employee as a priority of any suitable vacancies corresponding to their qualifications.

Part-time work may be performed under a fixed-term or a permanent contract.

The part-time contract must include all the mandatory particulars to be included in any employment contract, plus the additional details provided for in Article L123–4 of the Labour Code.

Part-time employees can work more than the daily and weekly hours stipulated in the contract, provided that:

- the weekly work schedule calculated over a four-week reference period does not exceed the duration of weekly working hours mentioned in the employment contract; and
- the effective daily and weekly working time does not exceed the standard daily and weekly working time stated in the employment contract by more than 20% (10% for young workers under 18 years of age).

Overtime

Overtime can only be performed by mutual agreement between the parties, within the limits and conditions set forth in the employment contract.

Overtime is defined as work carried out in excess of normal working hours. This usually corresponds to hours worked in excess of eight hours per day and 40 hours per week. In companies' applying a reference period, overtime corresponds to the hours worked in excess of the limits fixed by the work organisation plan or the flexitime plan.

The use of overtime is only possible:

- to prevent the loss of perishable goods or to avoid the risk of compromising the technical outcome of work;
- to perform special work (eg, inventories, balance sheets, liquidations); and/or
- to deal with situations in matters of public interest or danger at the national level.

Furthermore, the performance of overtime work is subject to a prior notification/authorisation procedure with the Inspectorate of Labour and Mines (*Inspection du Travail et des Mines* or ITM), depending on whether the staff delegation or the employees concerned have or have not consented to the performance of overtime work.

Overtime is either compensated by remunerated rest time at a rate of 1.5 per hour of overtime, or recorded on a time-savings account (*compte épargne temps*) with the same rate of increase. Overtime may only be paid if the time off in lieu is not possible due to reasons inherent to the business's organisation or if the employee leaves the company before taking their time off in lieu. In such cases, the employee is entitled to payment at their normal hourly salary increased by 40%.

2.4 Compensation

Minimum Monthly Gross Salary

Luxembourg law provides for a minimum monthly gross salary, depending on the age and professional qualifications of the employees concerned.

As at 1 January 2020, the minimum monthly gross salary was fixed as follows (index 834.76 on 1 January 2020):

- non-skilled employees: EUR2,141.99;
- skilled employees: EUR2,570.39;
- employees between 17 and 18 years old: EUR1,713.60; and
- employees between 15 and 17 years old: EUR1,606.50.

Skilled Employees

To be considered a skilled employee, the employee must:

- either have, for the profession concerned, a recognised official certificate at least equivalent to a vocational skills certificate (*certificat d'aptitude technique et professionnelle*) or a vocational diploma (*diplôme d'aptitude professionnelle*) from a Luxembourg technical secondary school;
- have a manual skills certificate (*certificat de capacité manuelle*) or a certificate of vocational ability (*certificat de capacité professionnelle*) and proof of at least two years' experience in the trade in question;
- have a preliminary technical and vocational certificate (*certificat d'initiation technique et professionnelle*) and proof of at least five years' practical experience in the trade or profession;
- in the absence of a certificate, provide proof of at least ten years' practical professional experience (if a certificate exists for the required qualification); or
- provide proof of at least six years' practical experience in a trade or profession which requires certain technical skills and where no official certificate is issued after vocational training.

Failing this, the employee is considered as non-skilled.

Thirteenth-Month Salary

There is no legal requirement to pay a 13th-month salary, a bonus or any other type of gratification, but Luxembourg case law states that if the employer has a custom and practice of paying, eg, a 13th-month salary on a regular basis (regardless of whether the amount of the 13th-month payment differs each time), the 13th month may be considered as a regular element of the employment contract. In this case, the employee would have a right to their 13th-month salary. However, most case law in Luxembourg admits that by explicitly expressing its wish not to commit itself, the employer can prevent the birth of an "acquired right". This employer's refusal may be expressed either in a general way (in a clause of the employment contract or the internal regulations) or individually (by an accompanying letter or by wording on the pay slip or bank transfer).

Wage/Salary Adjustments

The social minimum wage (SMW) may be adjusted every two years according to the evolution of the average wage level. When average wage levels rise in relation to the SMW, the government may adjust the level of the SMW to cover this difference, either partially or totally. Where the SMW is increased, employers must, where applicable, increase the wages of employees receiving the SMW to the new rate.

A particular feature in Luxembourg is the wage indexation system. All wages/salaries and pensions are regularly adapted to changes in the selling prices of consumer products.

2.5 Other Terms of Employment

Leave

After three months' uninterrupted service with the same employer, full-time employees are entitled to a statutory minimum period of vacation of 26 days per calendar year, irrespective of age. Part-time employees benefit from annual leave calculated in proportion to their weekly working schedule.

Annual leave must be approved at least one month in advance upon request from the employee. The employee may, in principle, plan their leave as they wish. Nevertheless, the employer may object to requested vacation days due to operational requirements, or due to the justified wishes of other employees (eg, in certain businesses, priority is given to employees with children). The employer cannot impose individual leave dates without the employee's approval, or force employees to take unpaid leave.

In addition to the ten statutory public holidays per year and the 26 days of annual leave, employees benefit from the following special leave (eg, maternity leave, parental leave, leave for family reasons, leave for sporting purposes, etc).

Confidentiality Clauses

Confidentiality clauses or non-disparagement obligations are common practice in Luxembourg. However, they are not subject to specific legal requirements insofar as they do not limit or infringe fundamental workers' rights (right to work or freedom of expression).

Limitation of Liability

The employee's liability towards the employer is limited to cases of gross negligence or wilful misconduct. Clauses that would increase the employee's civil liability are not valid. Even if they are rather common in practice, these clauses are null and void,

since the limitation of liability from which the employee benefits is of public order.

3. Restrictive Covenants

3.1 Non-competition Clauses

A non-compete clause is defined as a clause by which an employee agrees not to carry out, as a self-employed person, similar activities to those carried out by their former employer after the termination of the employment contract, so as not to interfere with the former employer's interests. This clause must be in writing and is considered invalid if the employee is a minor (under 18) or if the employee's annual remuneration, at the termination of the contract, does not exceed EUR56,906.18 per annum (at current index 834.76).

In addition, the non-compete clause is only enforceable if the restriction:

- applies to a specific professional sector and to similar activities to those carried out by the former employer;
- does not exceed 12 months, starting on the date of termination of the employment contract; and
- is limited to a geographical area (ie, it cannot be extended beyond Luxembourg territory), where the employee would be in a position to effectively compete with their former employer, taking into consideration the nature and range of the activities concerned.

The non-compete clause is not enforceable if the employer has abusively terminated the contract of employment with immediate effect or has terminated the contract of employment in breach of the legal requirements governing the notice period.

Employees are not legally entitled to any compensation for complying with a non-compete clause. The contract of employment may provide for pecuniary compensation paid to the employee, but such practice is unusual in Luxembourg.

The scope of application of a non-compete clause is strictly limited, as it refers to any activity, similar to those of the former employer, carried out by a former employee as a self-employed person only. The situations where former employees carry out an activity as an employee under a contract of employment with a competitor are therefore not covered by such a non-compete clause.

3.2 Non-solicitation Clauses – Enforceability/ Standards

Even if it is not specifically regulated under Luxembourg law, it is common for employment contracts to contain non-solicitation clauses to prevent an employee or former employee from soliciting the employer's current employees.

Since non-solicitation of employees covenants reflect employees' general obligation of fidelity and loyalty towards their employer, such provisions are enforceable to the extent that they do not limit employees' right to work, as provided for in the Luxembourg constitution.

It is also common for employment contracts to contain non-solicitation of customers' covenants.

Non-solicitation clauses are not specifically regulated under Luxembourg law. Nevertheless, they may not restrict the rights of the employee in respect of their constitutional right to work, and they may not circumvent the strict legal requirements for a non-competition covenant.

4. Data Privacy Law

4.1 General Overview

Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) has been fully and directly applicable in Luxembourg since 25 May 2018. The Law of 1 August 2018 on the organisation of the National Data Protection Commission and the general data protection framework completes the GDPR at the national level and repeals the relevant pre-GDPR legislation.

Any processing of personal data in the employment context must comply with GDPR provisions.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

Before considering the employment of a third-country national, the employer must declare the vacant position with the Luxembourg employment agency (*Agence pour le Développement de l'Emploi* or ADEM). The ADEM will undertake the labour market test in order to check whether the post vacancy can be filled by an individual available on the local or European labour market. Highly qualified employees will not be subject to the labour market test. However, the employer must still declare the vacant position. If the ADEM finds no suitable candidate within three weeks, the employer will obtain a certificate certifying that it may hire a person of its choice.

5.2 Registration Requirements

Prior to entering Luxembourg territory, the third-country national who contemplates residing in Luxembourg with a view to carrying out a salaried activity for more than three months must apply for authorisation to stay as a salaried worker. The application must be submitted to the Immigration Directorate of the Ministry of Foreign and European Affairs. It must indicate the third-country national's identity and exact address in their country of residence, and contain certain information/documents.

After a period of about three months, the ministry will provide its response. If the application is favourably received, the employee receives temporary authorisation to stay, valid for a period of 90 days, and may enter Luxembourg territory. During this time, the employee concerned must either:

- request a visa, if subject to visa obligation; or
- make a declaration of arrival at the municipality of the chosen place of residence and fulfil other legal requirements.

6. Collective Relations

6.1 Status/Role of Unions

There are three types of union in Luxembourg:

- unions that have national representative status (ie, active in a majority of the country's economic sectors and with at least 20% support in the elections for the bodies representing employees);
- unions that are representative in an important sector of the economy (ie, in which at least 10% of private sector employees work, plus the union must have the support of 50% in the employee body covering that sector); and
- unions that are backed by at least 50% of those covered by a specific collective agreement.

The two main union confederations are the OGB-L and LCGB. There are over 150,000 members of trade unions in Luxembourg, according to the unions' statistics.

The role of trade unions of employees is to collectively represent their members and defend their members' professional interests, while improving their members' living and working conditions.

6.2 Employee Representative Bodies

Staff Delegation

Employers who regularly employ 15 or more employees are obliged to set up a staff delegation.

The number of staff delegates to be elected by the employees every five years depends on the number of employees in the company concerned. The Labour Code provides that staff delegates are elected in a secret ballot by proportional representation.

The general mission of the staff delegation is the protection and defence of employees' interests with respect to working conditions, security of employment and social status.

Health and Safety Delegate

The Labour Code provides that, at the constituent meeting, each staff delegation has to appoint one of its members or one of the company's other employees as a staff health and safety representative, whose task is to observe and monitor the working environment. The staff delegation must inform the employer and the ITM of its appointment in writing within three days.

Equality Delegate

The staff delegation must also appoint an equality delegate from among its full or alternate members at the constituent meeting and for the duration of its term of office and must inform the employer and the ITM of its appointment in writing within three days.

The equality delegate is responsible for ensuring equal treatment between women and men with regard to access to employment, vocational training and promotion, as well as to pay and working conditions.

6.3 Collective Bargaining Agreements

A CBA is a contract relating to the working relations and conditions of employees bound to an employer by a private employment contract concluded between, on the employees' side, one or more trade unions of employees and, on the employers' side by:

- a particular company;
- one or more professional employers' organisations; or
- a group of companies/enterprises whose production, activity or profession are of the same nature, or which constitute an economic and social entity.

By using a CBA, the contractors determine a legal framework which applies uniformly either for a company, a group or a group of employers, or for a sector, branch, profession or type of activity.

Any CBA that complies with legal provisions may be declared "of general obligation" and mandatory by a grand-ducal regulation.

CBAs which are not declared of general obligation apply to a particular undertaking or group or set of employers, whereas those which have been declared of general obligation by grand-ducal regulation apply to all undertakings in a given sector, branch, profession or type of activity. There are currently 26 CBAs of general obligation in Luxembourg.

7. Termination of Employment

7.1 Grounds for Termination

Termination of a permanent contract must be based on a genuine and serious cause and supported by demonstrable and explicit facts.

Termination with a notice period must be based on:

- reasons based on the employee's aptitude or conduct (personal reasons); and/or
- reasons arising from the operating needs of the business, establishment or department (economic reasons).

There are two types of procedure which depend on whether the dismissal is based on personal/professional reasons or on economic grounds (dismissal with notice period), or based on gross misconduct (dismissal without notice period).

Dismissal With Notice Period

An employer with at least 150 employees contemplating dismissing one of their employees must, before taking any decision, convene a preliminary interview with the employee. Notice of such interview must be given in writing by registered mail or by hand delivery with acknowledgement of receipt. The letter must give an indication of the purpose of the interview and its date, time and place, and state the right of the employee to be assisted by another employee or a trade union representative. Notification of any dismissal must take place:

- no earlier than the day following the interview; and
- no more than one week later.

In the case of a dismissal with notice period, the dismissal must be served under penalty of invalidity either by registered letter or by hand delivery. In this case, the employee must acknowledge receipt of the dismissal letter on a copy which will be kept by the employer as proof of receipt. It is recommended that the employer should first send the dismissal letter by registered mail and that the employer should then inform the employee and eventually hand over a copy of the letter that has been posted.

The employer is not required to state the reasons in the dismissal letter. The employee may request communication of the reasons, although such request must be made to the employer by registered letter within one month of the date of notification of the dismissal. The employer must state their reasons in detail within one further month by registered letter. If the employer fails to provide the employee with the grounds for dismissal within the legal timeframe or fails to provide the employee with detailed grounds characterising a genuine and serious cause, the dismissal is deemed to be without cause and therefore abusive.

If the employer decides to release the employee from their work obligation during the notice period, this should be stated in the dismissal letter or in any subsequent letter.

Dismissal Without Notice Period

In the case of dismissal without notice period (ie, in the case of gross misconduct of the employee), the employer cannot base the dismissal on events that happened more than one month before the dismissal. The date from which this period is computed is the day the employer became aware of the employee's deeds. If the employer reacts more than one month after this day, the Labour Courts will decide that the deeds were not serious enough to justify such dismissal without notice period. However, if multiple deeds are raised by the employer, it can still use anterior facts in order to justify the dismissal.

If the employer is obliged to convene a preliminary interview with the employee, this could be after the one-month period.

The dismissal letter must contain the explicit and detailed reasons for the dismissal. The employee does not have to ask the employer to be informed; a precise description of the reasons must be contained in the dismissal letter. In sending the letter, the employer must respect the same precautions as in the event of a dismissal with notice period.

Collective Redundancies

Collective redundancies are redundancies carried out by an employer for one or more reasons not inherent in the person of the employees concerned, where the number of redundancies envisaged is:

- for the same 30-day period, equal to at least seven employees; and/or
- for the same 90-day period, equal to at least 15 employees.

For the calculation of these thresholds, terminations of contract initiated by the employer for one or more reasons, not inherent in the person of the employees, shall be treated as dismissals, provided that there are at least four such dismissals.

A statutory procedure regarding collective dismissals must be followed:

- The employer must comply with prior information and consultation requirements with the staff delegation.
- The employer must enter into prior negotiations with the employee representatives in order to come to an agreement relating to the establishment of a social plan. The social plan is a written agreement signed by the employer and the employee representatives, which contains the results of the negotiations. These negotiations must at least cover ways and means of:
  (a) avoiding collective redundancies or reducing the number of workers affected;
  (b) mitigating the consequences of the redundancies by recourse to social measures aimed at, inter alia, redeploying or retraining the workers made redundant; and
  (c) granting financial compensation.
- Before negotiations start, or at the very latest at the beginning of the negotiations, the employer must inform the employee representatives in writing of the proposed collective dismissal and must provide them with the following information:
  (a) reasons for the proposals;
  (b) number and description of employees affected;
  (c) number and description of employees usually employed;
  (d) period of time within which the dismissals are proposed;
  (e) method of selecting employees to be dismissed; and
  (f) proposed method of calculating the amount of any redundancy payment.
- The employer must send a written notification of the contemplated redundancies to the ADEM, as well as a copy of the notification given to the employee representatives, before the negotiations start. The Employment Administration will then forward the written notification to the ITM.
- The employer and the employee representatives must come to an agreement relating to the establishment of a social plan within 15 days of the start of negotiations.
- At this stage, if the parties have come to an agreement, they must enter into the social plan. After the signing of the social plan, the employer is entitled to notify each employee of his or her dismissal on an individual basis.
- If the parties have not come to an agreement within the 15-day time period, the minutes of the negotiations, containing the substantiated position of the parties with regard to the matters negotiated and signed by the parties, must be submitted to the Employment Administration. The parties must jointly refer the matter to the National Conciliation Office with a view to initiating a conciliation process no later than three days after the signature of the minutes. A copy of the minutes must be attached, indicating the names of the special members called to sit on the joint committee. Within two days, the president of the National Conciliation Office must appoint and convene the members of the joint committee which will be held within three days of the convening notice. The deliberations will be closed not later than 15 days after the date fixed for the first meeting. The result of the deliberations is recorded in minutes and submitted to the Employment Administration and the ITM.
- Notification of termination can be made on an individual basis after the signature of the social plan or after the conciliation process has ended. Any notification of dismissal to the employees before the signing of the minutes is null and void. Collective dismissals take effect with respect to employees at the end of a period of 75 days, notwithstanding any longer periods provided for by the legal or contractual provisions governing individual rights as regards notice. The Labour Minister may extend this period to as much as 90 days, but the 75-day period is a minimum.

7.2 Notice Periods/Severance

Notice Pay

In the case of dismissal with notice, dismissed employees are entitled to notice pay.

Notice pay is the pay relating to the period of notice, the length of which depends on the length of service of the terminated employee. The notice pay is paid in the same way as a salary, at the end of each month. The employer is required to withhold taxes and social security contributions.

Notice by the employer must be given as follows:

- less than five years' service: two months;
- between five and ten years' service: four months; and
- more than ten years' service: six months.

The notice period starts on the 15th day of the month if notification of the termination was given before the 15th of the month, and on the first day of the following month if notification was given as from the 15th day of the month.

The contract of employment effectively terminates on the expiry of the notice period and Luxembourg law does not provide for payment in lieu of notice. The employer may, however, decide to release the dismissed employee from the obligation to work during the notice period.

Severance Pay

In addition to notice, any dismissed employee is entitled to severance pay after at least five years of service with the company. The severance pay is determined on the basis of the average gross salary effectively paid to the employee over the 12 months preceding the dismissal. The sickness benefits, bonus and any recurrent payments are computed, but overtime compensation,

premiums paid on a discretionary basis and reimbursement of expenses are excluded.

Severance pay is excluded in certain cases fixed by law.

The amount of severance pay, in months of salary, depends on the employee's seniority as follows:

- at least five but under ten years of service: one month's salary;
- between ten and 15 years of service: two months' pay;
- between 15 and 20 years of service: three months' pay;
- between 20 and 25 years of service: six months' pay;
- between 25 and 30 years of service: nine months' pay; and
- more than 30 years of service: 12 months' pay.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

Gross misconduct is defined as any conduct that immediately and unequivocally makes it impossible to continue the employment relationship. This notion is purely factual and depends on the court's appreciation. Regarding the procedure and formalities associated with gross misconduct, see **7.1 Grounds for Termination**.

In the event of gross misconduct by an employee, the employer may terminate the contract without notice in the case of a contract which is concluded for an indefinite period of time, and before the end of its term in the case of a fixed-term contract.

Employees do not benefit from severance payment in the event of dismissal for gross misconduct.

7.4 Termination Agreements

It is permissible and standard in Luxembourg for parties to enter into a settlement agreement that aims at terminating a dispute or at preventing a dispute from arising.

Entering and executing a settlement agreement will result in termination of rights in relation to contestation or dispute as defined in the settlement agreement (eg, the right to claim compensation for damage as a result of termination of employment) and will have a binding and final effect.

Settlement agreements require the following conditions to be fulfilled:

- they must be documented in writing;
- there must be signs that a dispute has arisen or will arise between the parties;
- the parties must have intent to put an end to the contestations;
- the parties must make reciprocal concessions;
- the parties must give their consent freely; and
- the parties may only waive rights they are entitled to (ie, existing rights and not eventual or future rights).

7.5 Protected Employees

Sickness

Any employee is protected against any dismissal in the case of sickness and to the extent that such employee has duly informed the employer on the first day of absence and provided a medical certificate at the latest on the third day of absence. The protection lasts over a period of maximum 26 weeks in cases of uninterrupted sick leave.

Pregnancy

An employee whose pregnancy has been confirmed by a medical certificate and who has informed her employee is also protected against dismissal. This protection is valid throughout the duration of the pregnancy and for a maximum of 12 weeks following the birth. If an employee is dismissed before she informs her employer about the pregnancy, she has eight days from notification of dismissal to provide her employer with a medical certificate justifying the pregnancy. If she does so, the dismissal procedure is null and void.

Parental Leave

From the last day of the notice period for notification of parental leave and for the duration of the leave, the employer is not authorised to notify the employee of the termination of their employment contract or to convene the employee to a preliminary interview. Except in the case of dismissal without prior notice, dismissal during parental leave is null and void. The employee may request their immediate reinstatement in court.

Staff Representatives

Once an employee has announced their candidacy to serve as a staff representative, they may not be dismissed for a period of three months. Staff representatives, as well as their deputies, are protected from dismissal throughout their term of office and for a period of six months after that term has ended. Any dismissal is deemed to be null and void, unless it complies with the specific procedure enabling suspension and termination of staff representatives for gross misconduct provided by the Labour Code.

8. Employment Disputes

8.1 Wrongful Dismissal Claims

Dismissal is regarded as unfair if:

- the employer fails to provide the employee with detailed grounds as required by law;
- the dismissal is not founded on valid grounds related to the employee's aptitude or conduct, or arising from the operating needs of the business, establishment or department;
- the reasons are not real;
- the reasons are not serious enough; and/or
- the dismissed employee was legally protected against dismissal.

If the employee challenges the reasons provided by the employer in support of the dismissal, the onus is on the employer to prove not only the factual circumstances, but also their validity and seriousness.

The employee must act within three months of dismissal as follows:

- they must directly bring an action in court for unfair dismissal and claim compensation for damages; or
- they must address a written claim by registered letter to the employer within three months, claiming that the dismissal is unfair and that they reserve all their rights to claim compensation for damages. In this case, the legal timeframe to bring an action in court is extended to one further year from the date of the written claim.

The three-month period of time starts as follows:

- as of the date when the dismissal letter was sent out, if the dismissal was for gross misconduct, with immediate effect, or with notice if the employee failed to request communication of the grounds within one month following notification of the dismissal;
- as of the date when the employer provided the employee with the grounds for dismissal as requested by the employee within the legal timeframe, if the dismissal took place with notice; or
- as of the date the employer should have replied to the employee providing them with the grounds for dismissal, in the event the employee formally requested communication of the grounds but the employer never replied.

Luxembourg law does not provide for pre-determined compensation for moral or financial damages. The judges have the widest powers to assess, at their own discretion, the amount of compensation.

8.2 Anti-discrimination Issues

Under Luxembourg law, any direct or indirect discrimination on the grounds of:

- religion/belief;
- disability;
- age;
- sexual orientation;
- race; and/or
- ethnic origin

is prohibited as regards:

- conditions of access to employment, self-employment or occupation, including selection criteria and recruitment conditions, whatever the branch of work and including all levels of the professional hierarchy and promotions;
- access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of, and involvement with, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by such organisations.

The Labour Code prohibits direct or indirect discrimination based on the grounds of sex, by reference in particular to marital or family status.

The Criminal Code also prohibits any discrimination between natural persons or legal entities, or group of natural persons.

Employees are protected against any dismissal or any other adverse treatment as a reaction to a complaint or to legal proceedings aimed at forcing compliance with the principles of equal treatment and non-discrimination. Any dismissal in breach of the provisions on equal treatment is deemed null and void. The employee concerned will have the right to claim in court, as a matter of urgency, the annulment of the dismissal and their reinstatement within the business.

When a person aggrieved by non-compliance with the principles of equal treatment has evidenced before a court the facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principles of equal treatment. As regards discrimination, the employee therefore benefits from a lighter burden of proof.

Any breach can lead to conviction to prison for a minimum of eight days and a maximum of 2 years, and a fine of between EUR251 and EUR25,000. Employees have the right to bring a claim about alleged discrimination before the Labour Court. In a case of sexual harassment, the employee may terminate his/

her employment contract without notice and has the right to take judicial action against the employer to claim compensation for damages.

9. Dispute Resolution

9.1 Judicial Procedures

The Labour Court has jurisdiction over individual disputes between employers and employees arising from contracts of employment, apprenticeship contracts, or complementary pension schemes, and any disputes arising even after the termination of a contract.

The action is brought by way of a written brief indicating the name, profession and domicile of the parties, as well as the purpose of the action and a brief account of the points in dispute.

The court summons the parties to a hearing to examine the case, after which it pronounces judgment. The Labour Court usually orders compensation for damages as a result of unfair dismissal but may order the reinstatement of the employee at the employee's request, if continuation of the contract is still possible.

Either party may file an appeal against the judgment before the Labour Court of Appeal within 40 days of being notified of the judgment. The Appeal Court will then pronounce a judgment on appeal.

Furthermore, the case may be referred to the Supreme Court but this may only be on questions of law.

Summary proceedings may be filed with the president of the Labour Court where the judge may grant an interim order. Either party may file an appeal against the order within a period of 15 days from the notification of the order to the parties.

Under Luxembourg law, there are no general provisions for class actions in the formal sense of this term. Therefore, even if cases involve similar legal and factual issues, they will usually be subject to separate proceedings and will lead to multiple judgments which are only binding on the individual parties involved in the case.

As an exception, in lawsuits based on discrimination or violation of collective bargaining agreements, trade unions and certain accredited associations may introduce actions before the Labour Courts for any direct and indirect damage.

The appearance of the parties before the Labour Court is never compulsory, but when the defendant does not appear, the Labour Court may render a judgment by default, without the defendant being able to express their opinion.

If, without legitimate cause, the plaintiff does not appear, the defendant may request a judgment on the merits that will be adversarial, except for the judge's power to refer the case to a later hearing.

If none of the parties appears, the judge may, ex officio, strike the case by a decision not subject to appeal after a final notice addressed to the parties or their representative.

The parties are not obliged to be represented by a lawyer before the Labour Court. They may appear in person or be assisted or represented by:

- a lawyer;
- their spouse or partner;
- their relatives or allies in direct line;
- their parents or collateral relatives up to and including the third degree (parents, grandparents, great grandparents, son/daughter, grandchild, great grandchild, brother, sister, uncle, aunt, nephew or niece); or
- persons exclusively attached to their personal service or their company.

All representatives must have a proxy, except the lawyer.

9.2 Alternative Dispute Resolution

Arbitration is not possible in labour law since the jurisdiction of the Labour Court is of public order.

9.3 Awarding Attorney's Fees

As a general rule, the legal costs (*frais et dépens*) are borne by the losing party and the prevailing party may be awarded a procedure indemnity (*indemnité de procédure*) by the court to cover the lawyer's fees. The awarded amount is discretionarily assessed by the court and never covers the actual lawyer's fees.

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Bonn Steichen & Partners is an independent full-service law firm based in Luxembourg that is committed to providing quality legal services to its domestic and international clients in all aspects of Luxembourg business law. Its multilingual lawyers work side by side with clients to help them reach their objectives and to support them with tailor-made legal advice, creating in the process professional relationships based on mutual trust and respect. The team at BSP has developed particular expertise in banking and finance, capital markets, corporate law, dispute resolution, employment law, investment funds, intellectual property, private wealth, real estate and tax. In these practice areas, as in others, the lawyers' know-how, and ability to work in cross-practice teams and to adapt swiftly to new laws and regulations have enabled them to provide their clients with the timely and integrated legal assistance vital to the success of each client's business.

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