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Employment 2022

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Luxembourg: Law & Practice

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LUXEMBOURG

Law and Practice

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1. Introduction

1.1 Main Changes in the Past Year

Covid-19

On 11 March 2022, the law of 17 July 2020 on measures to combat the Covid-19 pandemic was amended in order to lift all COVID-19 restrictions in the workplace, except in hospitals, retirement homes and care homes.

Enhanced Participation Rights in Teleworking Matters

The law of 1 April 2022 has enshrined in the Labour Code that heads of company are now obliged to inform and to consult the staff delegation about the introduction or amendment of a company-wide teleworking arrangement. In companies employing fewer than 150 employees, the staff delegation must be informed and consulted. In companies employing more than 150 employees, a mutual agreement between the employer and the staff delegation must be achieved.

Draft Law on the Protection of Whistle-Blowers

On 10 January 2022, Luxembourg's government issued a draft law transposing the EU Directive 2019/1937 on the protection of persons reporting on breaches of Union law. The draft law aims at protecting employees against retaliation when they report acts or omissions that are unlawful or contrary to the object or purpose of directly applicable provisions of national or European law, if such acts or omissions result in a disturbance of the public interest.

Draft Law on Moral Harassment

On 21 July 2021, Luxembourg's government issued a draft law aimed at introducing provisions into the Labour Code to protect employees against moral harassment at the workplace. Currently, moral harassment is not regulated by the Labour Code but instead by a convention on harassment and violence at work signed between the social partners and declared generally binding on all employers by the Grand Ducal Regulation.

Draft law on the right to disconnect

On 28 September 2021, Luxembourg's government introduced a draft law aiming to legislate on the right of employees to disconnect after their working hours. If the draft bill is enacted, companies will have to set up a specific regime allowing the exercise of the right to disconnect – notably by laying down practical arrangements for disconnection and raising employees' awareness on this subject.

2. Terms of Employment

2.1 Status of Employee

The law of 13 May 2008 abolished the distinction between blue-collar workers (*ouvriers*) and white-collar workers (*employés privés*) by introducing a single status applicable to all private sector workers, as of 1 January 2009.

Currently, the only known difference between private sector employees is that between employees and senior executives (*cadres supérieurs*).

To qualify as a senior executive, four cumulative criteria must be met – namely, the employee shall:

- receive a significantly higher salary than ordinary employees;
- have real and effective management authority (or the nature of the tasks must entail a well-defined authority);
- enjoy a high degree of independence in the organisation of work; and
- enjoy freedom of working hours and, in particular, the absence of constraints on working hours.

Senior executives are not subject to the provisions of collective bargaining agreements (unless otherwise expressly mentioned) and do not benefit from overtime pay. However, employees benefit from overtime pay and are subject to the provisions of collective bargaining agreements.

2.2 Contractual Relationship

An employee can be hired by way of either a permanent or a fixed-term employment agreement, which may be full-time or part-time.

Permanent Contracts

In principle, a permanent employment contract is for an indefinite duration, meaning that a term has not been agreed by the parties. Permanent employment contracts must be drawn up in writing in duplicate when the employee enters into service (at the latest) and shall contain at least:

- the identity of the parties entering into the contract (names, addresses);
- the effective date of entry into service of the employee;
- the place of work;
- the nature of the work carried out and, where applicable, a description of the role and tasks assigned to the employee at the time of hiring;
- the employee's daily or weekly working hours;
- the normal working times;
- the basic salary, as well as any additional financial benefits;
- the duration of paid annual leave;
- the duration of the notice period;
- the duration of the trial period, if applicable;
- reference to collective bargaining agreements, if applicable;
- information about a supplementary pension scheme, the optional or compulsory nature of such scheme and personal contributions, if applicable; and
- any additional clauses, if these are favourable to the employee.

Fixed-Term Contracts

Fixed-term contracts can only be used in exceptional circumstances for the execution of a specific and temporary task. Examples of such situations include:

- replacing an employee who is absent due to sick leave, maternity leave, etc;
- in the case of specific and temporary work due to a temporary and exceptional increase in business activity;
- in the case of business start-ups or expansion; or
- occasional and one-off tasks that fall outside of the ordinary activities of the company.

In addition to the mandatory formalities and clauses required for any employment contract, fixed-term employment contracts must also state the specific tasks for which the contract has been concluded and the reason justifying its fixed term, as well as the following information:

- its expiry date, where the contract has a precise duration;
- its minimum duration, where the contract does not state an expiry date;
- where the contract has been concluded to replace an absent employee, this employee's name; and
- where relevant, a clause relating to the contract's renewal.

On the final point, it is important to note that if the possibility of renewing the fixed-term contract is not expressly stated in the written employment contract, the fixed-term contract cannot be renewed unless the parties sign an amendment to the contract.

2.3 Working Hours

In principle, the Labour Code states that employee's normal working time should not exceed eight hours per day and 40 hours per week. An applicable collective bargaining agreement may provide for lower limits.

Flexibility of Working Time

The employer may determine a reference period during which employees may work beyond the above-mentioned limits, without this qualifying as overtime, by implementing:

- either a working hours plan (*plan d'organisation du travail* or POT); or
- flexible working hours (*règlement d'horaire mobile*).

In any case, working time cannot exceed ten hours per day or 48 hours per week.

Part-Time Contracts

Part-time contracts must be in writing and contain the following terms:

- normal weekly working hours agreed between the two parties;
- distribution of the normal working hours over the days of the week;
- conditions under which the employee may work overtime and limits on overtime, if applicable; and
- details of any hours-averaging scheme, if applicable.

Overtime Regulations

Overtime work means any work performed – at the employer's request or permission – beyond the daily and weekly limits of normal working hours, as set either by law or by the parties to the employment contract (if these limits are lower).

In principle, the number of hours of overtime may not exceed two hours per day. The working time of an employee, including overtime, may in no case exceed ten hours per day and 48 hours per week.

The use of overtime is limited to the following exceptional cases:

- to prevent the loss of perishable materials or to avoid compromising the technical result of the work;
- to enable special work to be carried out, such as the drawing up of inventories or balance sheets, deadlines, settlements and closing of accounts;
- in exceptional cases which are necessary to the public interest and in case of events presenting a national danger;
- work undertaken to deal with an accident that has occurred or is imminent;
- emergency work to be carried out on machinery and equipment or work required by force majeure, but only to the extent necessary to avoid serious interference with the normal operation of the establishment.

In the first three cases, the provision of overtime is subject to prior notification or authorisation by the Labour Inspectorate (*Inspection du Travail et des Mines*).

Overtime must be compensated by paid time off, at the rate of one hour plus half-an-hour of paid time off for each hour of overtime worked. Alternatively, the overtime may be credited at the same rate to a time-saving account, the terms of which may be laid down in the applicable collective agreement or any other agreement between the social partners concluded at the appropriate level.

If an employee working on a full-time basis refuses to work overtime, this may constitute a ground for dismissal (unlike employees working on a part-time basis).

2.4 Compensation

In principle, the salary is freely determined by both parties at the time of signing the employment contract.

Minimum Social Wage

Nevertheless, every employer must respect the minimum social wage applicable according to the employee's qualification. As of 1 April 2022, the applicable minimum social wage for an unskilled employee is EUR2,313.38 gross. For a qualified employee, this amount is increased by 20%. For a teenage worker, this amount is reduced by 20–25%.

Indexation of Wages

The minimum social wage may be adjusted in line with changes in the average level of earnings, if the law so provides. In such a case, the employer must increase the wages of employees receiving the social minimum wage to adjust it to the new rate.

All wages (including the minimum wage) are also subject to automatic and mandatory indexation. When the consumer price index rises or falls by 2.5% in the previous six months, wages are in principle adjusted by the same percentage. The consumer price index is published monthly by the National Institute for Statistics and Economic Studies (STATEC). The employer must, if necessary, increase the wages of all employees by 2.5%.

13th-Month Pay or Bonus

In principle, private sector employers are not obliged to pay their employees a 13th-month pay or a bonus, unless this is expressly provided for by an employment contract, collective bargaining agreement or company agreement.

Additionally, if the bonus payment results from a constant practice, employees can invoke the existence of an acquired right. To qualify as a constant practice, the bonus must be:

- general (ie, granted to all employees or to specific categories of employees);
- regular (ie, periodicity of the payments); and
- fixed (ie, the amount or the calculation method must be the same).

However, if the employment contract provides that any bonus payment is made on a discretionary basis, employees cannot invoke an acquired right.

2.5 Other Terms of Employment

Annual Paid Leave

All employees, including apprentices, are entitled to paid annual leave – regardless of their type of contract. Each employee is entitled to at least 26 working days of paid leave per year. The employer must continue to pay the employee during the period of paid annual leave.

Maternity Leave

Maternity leave is granted to women mainly to protect their health during and after the pregnancy, as well as that of their child. In order to benefit from maternity leave, a pregnant woman must inform her employer by submitting a medical certificate attesting pregnancy and the expected date of delivery.

Maternity leave is divided into two phases:

- prenatal leave, which begins eight weeks before the expected date of delivery and will be extended if the birth occurs after the expected date of delivery;
- postnatal leave, which lasts 12 weeks after the actual date of delivery.

Employees whose pregnancy has been confirmed by a medical practitioner are protected against dismissal with notice for the duration of

the pregnancy and for a period of 12 weeks after the birth. A pregnant employee may, however, be dismissed with immediate effect for serious misconduct.

Parental Leave

Each parent is entitled to six months of parental leave for each of their children after the birth or the adoption of a child. Parental leave is not transferable between the two parents.

To benefit from parental leave, the employee must have been affiliated with the Luxembourg social security system for at least 12 months without interruption.

The parent can request:

- either the first parental leave, which must be taken by one of the parents immediately after the maternity or adoption leave; or
- the second parental leave, which must be taken before the child's sixth birthday or, in the case of adoption, before the child's 12th birthday.

During the period of parental leave, the employment contract is suspended, either fully (full-time parental leave) or partially (part-time parental leave). The employer does not pay any salary, or only pays the salary corresponding to the part-time work. For the rest of the time, the employee receives a replacement income, which depends on the average of their current salary. The lower limit is currently EUR2,313.38 for full-time leave, with the upper limit being EUR3,855.63.

The employee has special protection against dismissal; however, this does not cover dismissal with immediate effect. Length of service continues to accrue, but the employee does not accrue holiday rights.

During the period of parental leave, the employer is obliged to keep the employee's position and to reinstate them. If this is not possible, the employee must be offered a similar job corresponding to his or her qualifications. In any case, the salary must remain equivalent.

Adoption Leave

When adopting one or more children under 12 years old, one of the spouses may benefit from a 12-week adoption leave to take care of the child(ren).

Special Leave

For certain events in an employee's private life, labour law provides for additional special leaves, namely:

- paternity leave (birth of a child) – two to ten days;
- adoption of a child under 16 years old, for the parent who does not take the adoption leave – two to ten days;
- death of an employee's second-degree relative (ie, grandparents, grandchildren, brother or sister) or of their spouse or partner – one day;
- marriage of a child – one day;
- house-moving – two days;
- death of a minor child – five days;
- death of a spouse or partner – three days;
- death of a first-degree relative (father, mother or child) or of their spouse or partner – three days;
- marriage – three days;
- declaration of civil partnership (PACS) – one day.

Special leaves are exhaustively listed by the Labour Code. However, some collective bargaining agreements grant employees other leaves for personal reasons or permissions for being away from the office – for example, to visit a doctor or

to carry out administrative procedures (eg, judicial summons).

These extraordinary leaves must be taken at the time of the event and cannot be carried over.

Confidentiality Clause
The employer may insert a confidentiality clause in the employment contract and thus oblige the employee, both during the employment relationship and after its termination, to confidentiality. Such a clause is only valid if it is proportionate and drafted in a limited and precise manner.

Non-disparagement Requirements
The obligation not to disparage arises from the obligation to perform an employment contract in good faith. Disparagement of the employer is likely to constitute serious misconduct and justify the dismissal of the employee.

Employee's Liability
The principle is that the employer bears the risks caused by the company's activity. Employees can only be held liable towards their employer if they have committed an intentional fault or a gross negligence.

3. Restrictive Covenants

3.1 Non-competition Clauses
A non-compete clause is defined by the Labour Code as a clause in which the employee agrees to refrain from running a competing personal business, the activities of which are similar to those performed by the former employer, as an individual entrepreneur, for a period of time following their departure from the company.

In order to be valid, a non-compete clause must comply with the following conditions:

- it must be in writing, otherwise it shall be void;
- the employee must be at least 18 years old when signing the agreement, otherwise the clause will be deemed unwritten; and
- on the date the employment contract is terminated, the employee's annual remuneration must be at least EUR59,786.39 gross (at current index 877.01), otherwise the clause will be deemed unwritten.

Furthermore, the scope of the non-compete clause must be limited as follows:

- the clause must only prohibit the employee from operating a competing personal business as an individual entrepreneur, as opposed to salaried activities;
- the clause must refer to a professional sector and professional activities that are similar to those performed by the former employer;
- the clause must be limited to a 12-month period, starting from the date on which the employment contract ended;
- the clause must be limited geographically to those localities where the employee can be a real competitor to their former employer, taking into account the nature of the business and its radius of action – ie, it cannot extend beyond the territory of Luxembourg.

Recent case law has ruled that extended non-compete clauses may be valid, provided that appropriate financial compensation is provided and that the clause is not manifestly excessive. In addition, the employer has to demonstrate the existence of an interest to be protected and that justifies an extended non-compete clause, such as outflow of know-how, diversion of customers, etc.

The judge has the power to assess in concreto the enforceability of a non-compete clause and to reduce its scope in case it is disproportionate.

The non-compete clause is not enforceable if the employer has wrongly terminated the employment contract with immediate effect or if, upon termination, the employee has not been granted the legal notice period.

3.2 Non-solicitation Clauses – Enforceability/Standards

The inclusion of a non-solicitation clause in an employment contract is common practice, although this type of clause is not regulated by the Labour Code.

A non-solicitation clause may be defined as a clause in which an employee agrees to refrain, for a specific time following their departure from the company, from soliciting or inducing the company's customers to terminate their professional relationship with the company or its employees to leave the company.

Unlike non-compete clauses, the validity of non-solicitation clauses is not subject to compliance with specific conditions. Non-solicitation clauses are generally enforceable as long as they are reasonable (ie, not disproportionate, ambiguous or overly broad) and comply with general principles of civil law. Non-solicitation obligations, for example, shall not be perpetual and shall therefore be limited in time (although the Labour Code does not provide for a maximum time limit).

If a judge were to decide that a non-solicitation clause is disproportionate or ambiguous, they could either set aside the clause in its entirety or simply sever its parts.

4. Data Privacy Law

4.1 General Overview

The European Union Regulation No 2016/679 (the GDPR) is applicable in Luxembourg and complemented by the law of 1 August 2018. The GDPR provisions and principles also apply to employment relationships.

Data processing can only occur in compliance with the following principles:

- lawfulness, fairness and transparency;
- purpose limitation;
- data minimisation;
- accuracy;
- storage limitation;
- security; and
- accountability.

The legal grounds for processing are:

- consent (in principle not applicable to employee's data processing);
- execution of a contract;
- legal obligation;
- legitimate interest;
- public task; and
- vital interests.

The Luxembourg Data Protection Authority (*Commission Nationale pour la Protection des Données* or CNPD) and the European Data Protection Board (EDPB) issue recommendations and opinions regarding data processing, whereas the Court of Justice of the European Union (CJUE) provides interpretation of the GDPR.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

EU Citizens

Citizens of EU and European Economic Area countries, as well as Switzerland, have the right to work and reside in Luxembourg without any work permit.

Third-Country Nationals
Third-country nationals must apply for a temporary authorisation to stay before entering Luxembourg and must then apply for a residence permit for salaried workers after their arrival.

Prior to recruiting a third-country national, employers must make a declaration of a vacant position to the Luxembourg employment agency (*Agence pour le Développement de l'Emploi* or ADEM), so that the employment agency can check whether the open position can be filled by a registered job-seeker. If the employer has not been presented with a suitable candidate within three weeks, they can then request a certificate from the employment agency that will allow them to recruit a third-country national.

Residence permits are issued for one year for a specific sector and profession. The permit is renewable. After the first renewal, the permit is renewable for a maximum duration of three years, during which it is extended to cover any profession and sector. After five years of lawful and uninterrupted stay in the territory of Luxembourg, third-country nationals may submit an application for a long-term residence permit.

With respect to highly qualified workers, the employer must still make a declaration of a vacant position to the employment agency, but the employment agency will not perform the labour market test. Highly qualified workers receive a renewable European Blue Card permit, which is valid for four years or for the duration of the employment contract plus three months, if shorter.

British Citizens
Following the United Kingdom's withdrawal from the EU, and the end of the transition period on 31 December 2020, British citizens must now follow the same procedure that applies to third-country nationals. This means that they must hold a residence permit to stay and work in Luxembourg, unless they have residency rights under the Withdrawal Agreement signed between the UK and the EU.

5.2 Registration Requirements

EU Citizens
Citizens of the EU or countries of the European Economic Area (as well as Switzerland) who wish to stay more than 90 days in Luxembourg must make a declaration of arrival within eight days of arriving in Luxembourg at the administration of the commune where they intend to establish residence.

They must also register at their commune of residence within three months of arriving in Luxembourg.

Third-Country Nationals
Third-country nationals must follow the following steps:

- before entering the country, apply for a temporary authorisation to stay from the Immigration Directorate of the Ministry of Foreign and European Affairs or from a Luxembourg diplomatic or consular representation;
- if a visa is required, apply for a visa from the country of origin/residence;
- after entering Luxembourg territory, make a declaration of arrival within three days of arrival at the administration of the commune where they intend to establish residence;
- undergo a medical examination by a doctor established in Luxembourg and a tuberculosis screening by the Health and Social Welfare League (*Ligue Medico-Sociale*); and
- submit an application for a residence permit within three months of entry into Luxembourg.

6. Collective Relations

6.1 Status/Role of Unions

Role of Unions

The purpose of unions is to collectively represent and defend the professional interests of their members, in addition to improving their living and working conditions.

In order to fulfil this mission, the unions initiate social dialogue with the employers; in case of deep disagreement, they can call for strikes. They are involved in negotiations of collective bargaining agreements which they are entitled to sign.

Unions must be independent from employers. This independence is reflected by an organisational autonomy and financial self-sufficiency.

Unions take part in the legislative process by drafting legal opinions.

Status of Unions

Unions don't have a legal personality except where organised in a non-profit organisation (*Association sans but Lucratif* or ASBL). Without legal personality, they are not entitled to bring legal actions for their members.

6.2 Employee Representative Bodies

In Luxembourg, the employee delegation (*delegation du personnel*) is the major organisation representing employees.

It becomes mandatory when a company – irrespective of its activity or legal form – has 15 employees or more (specific rules govern the counting of part-time employees). Employers of the public sector are subject to the same obligation if they employ workers to whom the Labour Code provisions apply.

Members of the employee delegation (ie, representatives) are elected by the employees and the number of staff representatives varies depending on the number of employees within the company. The type of electoral system also differs depending on the number of employees:

- for companies with less than 99 employees – majority vote; and
- for companies with 100 employees and more – proportional vote.

The staff delegation is informed on topics such as health and security risks and implemented protective measures, absenteeism, economic and financial situation of the company, including its current and future activities, evolution of its structure, salaries and investments, etc.

The staff delegation is consulted with regard to:

- improvement of employees' working conditions and social situation;
- preparation or modification of internal regulations;
- professional training;
- work protection and accident prevention;
- complementary pension schemes; and
- working time.

6.3 Collective Bargaining Agreements

Collective bargaining agreements are negotiated between unions and one or more employers or employers' organisations. They establish a legal framework that will apply uniformly to all categories of employee (excluding senior executives, unless indicated otherwise) in the sector of activity concerned.

The law distinguishes between two types of collective bargaining agreements:

- ordinary collective bargaining agreements – either the employer has negotiated and

signed an agreement with a union, or the company is a member of an organisation that represents it and has negotiated on its behalf; and
- collective bargaining agreements declared to be generally binding – agreements may be declared by a Grand-Ducal Regulation to be generally binding on all employers and employees of a specific sector or profession, which must be clearly defined in such regulation.

Collective bargaining agreements define the working conditions that apply to employees, including at least:

- conditions of employment and dismissal;
- working hours, overtime, daily and weekly rest periods;
- holidays;
- applicable leave schemes including annual leave; and
- remuneration system.

Any collective agreement must necessarily provide for:

- increase of salary for night work, which may not be less than 15% of pay;
- additional pay for arduous, dangerous and unhealthy work;
- the procedures for applying the principle of equal pay for men and women, for combating sexual and moral harassment, as well as the disciplinary sanctions;
- the arrangements for continuous learning opportunities for employees absent owing to a career break.

Once the collective bargaining agreement comes into force, it is valid for at least six months and a maximum of three years. It can be renegotiated and renewed.

7. Termination of Employment

7.1 Grounds for Termination

Termination of employment agreements must always be motivated and the reasons for dismissal must be precise, real and serious.

The termination must always be notified - either by registered letter with an acknowledgment of receipt or by delivering the letter in person to the employee, who must acknowledge receipt of it on the duplicate of the letter.

If the company employs at least 150 employees, the employer will first have to summon the employee to a preliminary interview.

Dismissal with Notice

A dismissal with notice may be based either on reasons inherent to the employee's person (eg, behavioural problems or insufficient performance) or on reasons non-inherent to the employee's person (ie, the company's operational requirements).

In the context of a dismissal with notice, the reasons for dismissal are not provided by the employer in the letter of dismissal. The employer will nevertheless have to explain in writing the reasons for dismissal, if the employee asks them to do so. This must take place in the month following notification of the dismissal. In such case, the employer has one month following the employee's receipt of the registered letter of dismissal to send the precise, real and serious reasons for dismissal to the employee by another registered letter with an acknowledgment of receipt. The reasons for dismissal must be described in a very precise manner.

Regarding dismissals for reasons non-inherent to the employee's person, the employer must also notify the termination to the *comité de conjuncture* if the company employs more than 15

people (by filling in a form known as a *notification des licenciements pour des raisons non inhérentes à la personne du salarié*).

Dismissal with Immediate Effect
A dismissal with immediate effect for serious misconduct may only be based on reasons inherent to the employee's person.

The employer shall dismiss the employee within one month of the date on which the employer became aware of the serious misconduct. In case of sick leave, this one-month deadline is suspended.

The employer must indicate the grounds for dismissal directly in the dismissal letter.

Collective Redundancies
Regarding collective redundancies, a specific procedure applies when an employer wishes to dismiss at least seven employees in a 30-day period or 15 employees in a 90-day period for reasons non-inherent to the employees' person. This procedure has four main steps, which can be described as follows:

- informing the ADEM and staff representatives (or employees themselves when the company regularly employs less than 15 employees);
- negotiating a social plan;
- executing said social plan; and
- where applicable, requesting the tax exemption of voluntary severance or dismissal allowances.

7.2 Notice Periods/Severance

Notice Periods
Only employment contracts of an indefinite duration can be terminated with notice. Fixed-term employment contracts can only be terminated before their term with immediate effect for serious misconduct.

The duration of the notice period depends on the employee's length of service at the time the dismissal is notified. If the length of service is:

- fewer than five years, the notice period is two months;
- between five and ten years, the notice period is four months; or
- ten years or more, the notice period is six months.

The duration of the notice period must be indicated in the dismissal letter. The notice period can only start:

- on the 15th of the month, if the dismissal was notified between the 1st and the 14th of the same month; or
- on the 1st of the next month following the dismissal, if the dismissal was notified between the 15th and the last day of the month.

The employer can ask the employee not to work during the notice period but will have to pay the employee's salary during this period.

Severance Pay (Indemnité de Depart)
At the end of the notice period, if the employee's length of service exceeds five years within the company, the employer must pay the employee a severance indemnity on top of the notice period. The amount depends on the employee's length of service:

- between five and nine years, one month's salary;
- between ten and 14 years, two months' salary;
- between 15 and 19 years, three months' salary;
- between 20 and 24 years, six months' salary;
- between 25 and 29 years, nine months' salary; and
- 30 years or more, 12 months' salary.

However, if the firm has fewer than 20 employees, the employer can chose to replace the severance pay with an extended notice period. In such case, the severance pay is not due.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

A dismissal with immediate effect is limited to cases where the employee has committed an act of serious misconduct that renders the employment relationship definitively and immediately impossible (eg, unjustified absence, serious insults towards other employees or physical aggression). The employee is not entitled to any notice period or severance pay.

With respect to the procedure to be followed, please see **7.1 Grounds for Termination**.

7.4 Termination Agreements

Termination agreements are permissible for both permanent and fixed-term employment agreements at any stage of the contract. To be enforceable, such a termination agreement must be drawn up in writing, in duplicate, and signed by both the employer and the employee.

In such cases, the employee loses their right to severance and unemployment compensation. However, the employee is entitled to:

- a pro-rated 13th-month pay, if applicable;
- any other benefits of the contract that are part of the salary; and
- an indemnity for accrued but untaken holidays.

7.5 Protected Employees

Certain categories of employees deserve special protection against dismissal. The main categories of protected employees are staff representatives and employees who are on sick leave, maternity leave or parental leave. There is currently no uniform scheme, and each category of protected employees benefits from its own rules. Therefore, all protected employees are not protected against the same kind of dismissals.

Staff representatives are protected from both dismissal with notice and dismissal with immediate effect, from the day their mandate starts and for six months following the end of their mandate. If a staff representative is nevertheless dismissed, they can take legal action for either:

- wrongful dismissal within three months of the dismissal, to request damages for the material and non-pecuniary loss suffered; or
- for nullity of the dismissal within one month of the dismissal, to return to their previous position within the company.

The employee can also request damages for the non-pecuniary prejudice.

Despite this strong protection, employers are not completely powerless in the event of serious misconduct and can still initiate a procedure to terminate the employment contract. This procedure starts with the lay-off (*mise à pied*) of the employee, which must be motivated with sufficient precision, followed by a request to terminate the employment contract submitted to the labour court.

If the serious misconduct is proven, the judge will pronounce the termination of the employment contract. On the other hand, if the employer fails to prove the serious misconduct then the employee will return to work and will be able to seek damages.

Candidates for the elections of staff delegates are also protected against dismissal from the date they present their candidacy and during a period of three months.

8. Employment Disputes

8.1 Wrongful Dismissal Claims

Grounds for a Wrongful Dismissal Claim

Wrongful dismissal is defined as a dismissal that is contrary to the law or not based on real and serious grounds relating to the employee's ability or conduct or to the needs of the company's operation. The cases in which dismissal may be declared wrongful are very broad because such a classification is made based on an assessment of each particular situation.

By way of example, where the employer has not provided the reasons in the form and within the time period (one month from the request) required by law, it is irrefutably presumed that the dismissal is wrongful. It is settled case law that insufficiently precise motivation is equivalent to a lack of motivation and, as such, the dismissal will be declared wrongful. In addition, the dismissal will be declared wrongful if the employer fails to prove the reality of the reasons for the dismissal, or if the reasons for dismissal are not sufficiently serious.

Procedure for a Wrongful Dismissal Claim

Employees claiming wrongful dismissal must bring an action before the labour courts within three months of being notified of the dismissal, or of receiving the employer's reasons for the dismissal. However, if within the same time limit the employee instead sends a written letter to their employer disputing the reasons for the dismissal, a new period of one year for bringing a legal action before the labour court will begin to run from the date of the written objection.

The employer has the burden of proving the real and serious nature of the reasons for dismissal.

Consequences of a Wrongful Dismissal

Wrongful dismissal is resolved in damages. Thus, when the court concludes that the dismissal was wrongful, it will order the employer to pay damages to the employee to compensate for the moral and material prejudice suffered.

In order to calculate the material damage suffered, the court sets a reference period, which corresponds to the time that it should have taken the employee to find a new job. Several criteria are taken into account, such as the employee's age, experience, qualifications, and sector of employment.

The court also takes into account the efforts made by the employee to find a new job. If the employee has been unable to find a new job despite significant effort, the damages awarded will likely be increased. Conversely, if the employee does not make sufficient effort, the damages would be reduced accordingly. The court is, however, less demanding with regard to employees close to retirement.

If the employee receives unemployment benefits, the amount of such unemployment benefits shall be deducted from the material prejudice. Similarly, any salary received from a new job during the reference period would be deducted.

8.2 Anti-discrimination Issues

Grounds for Anti-discrimination Claims

Direct and indirect discrimination are prohibited on grounds of sex, family situation, marital status, religion or beliefs, sexual orientation, disability, age, race or ethnicity and nationality.

The law defines direct discrimination as a situation in which a person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of one of the above criteria.

Indirect discrimination occurs when an apparently neutral provision, criterion or practice is liable to place certain categories of people at a

particular disadvantage, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Any clause in an employment contract, collective bargaining agreement or policy that breaches the legal principle of equal treatment is null and void.

The Burden of Proof

The employee's legal action is simplified by the fact that the burden of proof is lightened. The employee has to provide evidence that makes it possible to presume the existence of direct or indirect discrimination. It is then up to the opposing party (generally the employer) to prove that no discrimination has been committed.

Applicable Relief and Damages to the Victim of Discrimination

Only in the case of gender-based pay discrimination – ie, where men or women are disadvantaged in terms of pay – does the law provide that as a sanction the employer must increase the pay of the disadvantaged group to the level of the advantaged group.

For all other cases of discrimination, the only sanction provided for by the law is the nullity of the illicit clause or decision taken by the employer.

In the case of past discrimination, the employee may claim damages from the employer for the financial loss suffered as a result of being disadvantaged. In addition, an indemnity may be paid to compensate the non-pecuniary damage suffered by the employee who has suffered psychologically as a result of being treated differently because of a personal characteristic.

9. Dispute Resolution

9.1 Judicial Procedures

Labour Courts

Labour courts have exclusive jurisdiction in all disputes between employers and employees arising out of employment contracts, apprenticeship contracts and supplementary pension schemes.

In total, there are three labour courts: one in Luxembourg City, one in Esch-sur-Alzette and one in Diekirch. Their jurisdiction is determined by the employee's place of work (either at the time of the legal action or when the employment contract was terminated). When the employee works in a territory under two jurisdictions, it is the jurisdiction of the main place of work that is competent. When the employee works throughout the territory of the Grand-Duchy of Luxembourg, it is the Labour Court of Luxembourg City that has jurisdiction.

Bringing a Legal Action Before the Labour Court

An action is brought before the labour court by means of a written application (*requête*) that must be filed with the court registry, with as many copies as there are parties involved. The application must specify at least the surnames, first names, job titles and domicile of the parties, as well as the subject of the application and a statement of the facts.

The parties do not necessarily need to be represented by a lawyer before the labour court. They may also appear in person or be assisted or represented by:

- their spouse or partner;
- their relatives or allies in direct line;
- their parents or collateral relatives up to and including the third degree; or

- their employees (persons exclusively attached to their personal service or to their company).

If a party chooses to be represented by a person other than a lawyer, this representative must give the court a proxy.

The parties are summoned to a hearing by the labour court and the case is pleaded orally. A judgment is then rendered.

Lodging an Appeal

An appeal before the Court of Appeal of Luxembourg may be lodged within 40 days from the notification of the judgment. The proceedings are made in writing, meaning that the parties must be represented by an attorney-at-law and will exchange written briefs with their legal arguments. After the exchange of the briefs, the parties are summoned to a hearing where the case is pleaded orally. The Court of Appeal then renders a decision within a few weeks.

Class Actions

Class-action claims are not available in Luxembourg. However, there are two specific cases in which unions or certain accredited associations may act against the employer to defend collective interests.

- Unions that are parties to a collective bargaining agreement can exercise all actions arising out of that agreement in favour of one of their members.
- In matters of discrimination, unions and certain accredited associations can exercise before the courts the rights granted to a victim of discrimination where said discrimination directly or indirectly harms the interests they are representing.

9.2 Alternative Dispute Resolution

Neither the Labour Code nor the New Code of Civil Procedure (*Nouveau Code de Procédure Civile* or NCPC) contain an explicit prohibition of arbitration clauses in employment agreements. Article 1224 of the NCPC states that parties may enter into arbitration agreements regarding "the rights of which they have free disposal". Such rights are traditionally seen to include all rights derived from a contract.

However, in a seminal case in 1962 the Court of Appeal held that arbitration clauses are void in employment agreements, as any dispute resulting from an employment agreement was of the exclusive jurisdiction of the labour courts (Court of Appeal, 31 October 1962, *Pasicrisie* 19, page 28). This is an application of a more general principle of Luxembourg law developed in later cases, according to which contracts that are regulated by the legislator in order to protect a "weaker" party cannot be submitted to arbitration.

Following criticism of this solution, the Court of Appeal has taken a more liberal stance in recent years. One such example was the decision of 9 February 2000 (*Pasicrisie* 31, page 301) concerning a residential lease agreement, in which the tenant was protected as the weaker party by the law. The court held that, although arbitration clauses could not be included in such contracts, the parties were at liberty to enter into an arbitration agreement once the dispute had arisen. This solution was justified by the fact that the protected "weaker" party was unable to dispose of its rights before the event (ie, when their rights were theoretical) but could dispose of them once they came into existence. The solution also seems to be applicable to employment agreements.

To summarise, Luxembourg law does not currently allow for arbitration clauses in employment contracts. If such a clause is included in an employment contract, it will be void and thus unenforceable.

By contrast, the parties could in theory enter into an enforceable arbitration agreement once a dispute has arisen (eg, after a dismissal), even though such an agreement would be highly unusual in practice.

Finally, it should be noted that there is a draft bill of law, currently being debated in the Luxembourg Parliament, that aims to reform arbitration law. In its current state, the bill clarifies to what extent, should the reform occur, the NCPC will explicitly prohibit arbitration regarding employment agreements, even for arbitration agreements entered into after the dispute has arisen.

9.3 Awarding Attorney's Fees

Under Luxembourg law, the principle is that each party shall bear their own legal fees. However, on demand, the judge may grant a procedural indemnity (*indemnité de procédure*) to the prevailing party if the judge considers that it would be manifestly unfair to leave the costs not included in the "costs and expenses" (*frais et dépens*) to the prevailing party. This procedural indemnity is generally symbolic and only covers a small portion of the attorney's fees.

With respect to costs and expenses (ie, external costs such as bailiff costs), they are generally borne by the losing party.

Loyens & Loeff has an employment team that is part of a fully integrated (tax and legal) firm. It has extensive national and international experience in the fields of individual and collective employment law, pensions, social security, and compensation and benefits, including litigation and multi-jurisdiction settlements. The employment practice group works (inter)nationally with an intensified focus on the Benelux region and Switzerland, pooling all the top employment experts from Loyens & Loeff in Luxembourg, the Netherlands, Belgium and Switzerland (the firm's home countries). With a total of around 50 experts, Loyens & Loeff probably has the largest employment team in Benelux and Switzerland, and offers its clients pragmatic, tailored solutions to both complex (inter)national employment issues and day-to-day business issues.

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