

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | EMPLOYMENT

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NEWSLETTER EMPLOYMENT

I LEGISLATION

**Regulation No. 390-A/2013. D.R. (Portuguese official gazette) No. 198, Supplement, Series II of 2013-10-14
Work Compensation Fund**

Management Regulation of the Work Compensation Fund.*

**Regulation No. 390-B/2013. D.R. (Portuguese official gazette) No. 198, Supplement, Series II of 2013-10-14
Work Compensation Fund**

Management Regulation of the Work Compensation Guarantee Fund, pursuant to article 22(e) of Law No. 70/2013 of 30 August.*

**Regulatory Decree No. 6/2013. D.R. (Portuguese official gazette) No. 199, Series I of 2013-10-15
Ministry of Solidarity, Employment and Social Security**

Amending for the third time Regulatory Decree No. 1-A/2011 of 3 January, which regulates the *Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social* (Code of Social Security Welfare System Contributions Scheme), on the procedures to adopt and their consequences with regard to the deadlines for compliance with contribution obligations, as related to self-employed persons, laying down the framework of the update of the self-employed persons' data as well as the effects of the contribution rate.

**Order No. 13263/2013. D.R. (Portuguese official gazette) No. 201, Series II of 2013-10-17
Ministry of Solidarity, Employment and Social Security – Minister's Office**

Approving the new version of the unemployment declaration form, created as a result of the amendments to the legal framework of unemployment protection.

* *The Management Regulations in question were addressed in our Legal Flash of 14 October 2013.*

II CASE LAW

Judgment of the Constitutional Court No. 602/2013 of 2013-09-26 Assessment of the constitutionality of the legal provisions of the Labour Code and of Law No. 23/2012 of 25 June

In this case, the Constitutional Court was requested to assess the constitutionality of certain legal provisions laid down in the Labour Code ("LC"), as amended by Law No. 23/2012 of 25 June, as well as of the legal rules contained in Law No. 23/2012 of 25 June itself.

The Court held unconstitutional Article 7(2) of Law 23/2012 of 25 June, which declared null and void the provisions of collective bargaining instruments ("CBI") existing before 1 August 2012 that established time off *in lieu* of overtime work on a working day, on a complementary weekly rest day or on a national holiday, as well as paragraph 3 of the same Article – which reduced the annual leave period increase laid down in CBIs after 1 December 2003 and prior to 1 August 2012 – on grounds of infringement of Article 56(3) and (4) and of Article 18(2) of the Portuguese Constitution ("PC").

Article 7(5) of Law No. 23/2012 of 25 June, which halved the value of the increase for overtime work (and remuneration of normal work performed on a holiday or complementary rest day at that same value) established in the provisions of the CBIs not amended between 1 August 2012 and 1 August 2014, was held unconstitutional on grounds of the infringement of Article 56(3) and (4) and of Article 18(2) of the PC.

Certain provisions relating to the dismissal due to redundancy of job position and to the unsuitability of the employee were also held unconstitutional on grounds of infringement of the principle of prohibition of unfair dismissal set out in Article 53 of the PC.

With regard to the dismissal due to redundancy of job position, the provision held unconstitutional was the one providing that, where in an equivalent section or structure there are various jobs with a similar functional content, the employer can determine the job position to be terminated by applying relevant and non discriminatory criteria in light of the purposes underlying the redundancy of job position.

On the other hand, the Court also held unconstitutional the provision eliminating the rule whereby the impossibility to maintain the work relation, required that there be no job compatible with the category of the employee whose job position is to be terminated.

With regard to the dismissal linked to the unsuitability of the employee, the Constitutional Court held unconstitutional the part of Article 9(2) of Law No. 23/2012 of 25 June that repealed Article 375(1)(d) of the LC, that is the part that dispensed with the requirement of the existence of a job available and compatible with the professional qualifications of the employee.

Judgment of the Supreme Court of Justice of 2000-09-26
Extra-contractual civil liability of the State for unlawful legislative acts

Although this judgment is dated 26 September 2000, it is justified to include it in this Newsletter considering its actuality (and similarity of situations that could arise) *vis-à-vis* the decision of the Constitutional Court, set out in judgment No. 602/2013.

Indeed, in this judgment, the Supreme Court of Justice was requested to rule on the possibility of a company being compensated by the State for applying a provision that was subsequently declared unconstitutional.

The question related to the part of article 398(2) of *Código das Sociedades Comerciais* (Companies Code) setting out that where a person is appointed director of a company with which that person concluded an employment contract less than a year before, the employment contract terminates.

Based on extensive doctrine, the Court highlighted that the civil liability of the State for the legislative activity (in particular for unlawful legislative acts) is admissible whenever the requirements of civil liability are met.

The Constitutional Court observed that in a situation in which an employee was deprived of a right on account of a law – and could not impose such right on the employer, inasmuch as the latter was “protected” by the law – and that law was later held unconstitutional, there is an unlawful act that breaches a legitimate interest and the right to employment.

As for the requirement of culpability, the Court considered that the lack of diligence of the legislative body was demonstrated throughout the entire legislative process and that therefore the State was at fault, in the form of serious negligence.

As a result of the unlawful culpable fact, the company was ordered to compensate the employee on account of its conduct being considered an unfair dismissal, which constitutes a damage to the company.

Finally, the Court considered that the compliance of the law (later held unconstitutional) by the company reflects the normal and natural consequence of the fact of such law taking effect, and that therefore it could be said that the conduct of the legislator was adequate cause of the damage.

According to the Supreme Court of Justice, “*There was nothing that could warn the employer of this unconstitutionality. The addressee of the provision merely applied (...) – since a private entity cannot be required to verify the constitutionality of such provision – the law, the validity of which the company, as any normal citizen, trusted*”.

Accordingly, going through the requirements of civil liability, the Court confirmed the occurrence of civil liability and consequently the obligation of the State to compensate the company in question for the damages caused through its unlawful legislative acts.

CONTACT

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL

Sociedade de Advogados de Responsabilidade Limitada

LISBOA

Praça Marquês de Pombal, 2 (e 1-8º) | 1250-160 Lisboa | Portugal

Tel. (351) 21 355 3800 | Fax (351) 21 353 2362

lisboa@cuatrecasasgoncalvespereira.com | www.cuatrecasasgoncalvespereira.com

PORTO

Avenida da Boavista, 3265-7º | 4100-137 Porto | Portugal

Tel. (351) 22 616 6920 | Fax (351) 22 616 6949

porto@cuatrecasasgoncalvespereira.com | www.cuatrecasasgoncalvespereira.com

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