CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | EMPLOYMENT

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I LEGISLATION

Law No. 35/2014. *D.R.* (Portuguese official gazette) No. 117, Series I of 2014-06-20
Parliament

The *Lei Geral do Trabalho em Funções Públicas* (general law on public service work) has been approved and will come into force on 1 August.

II CASE LAW

Judgment of the Court of Appeal of Coimbra of 2014-05-15
Effects of the declaration of unconstitutionality of numbers 2 and 4 of Article 368 of the Labour Code of 2009 on an individual dismissal linked to the extinction of the work position carried out in accordance with the said provisions

The Court of Appeal of Coimbra was requested to rule on the case of an employee dismissed due to the extinction of his work position in March 2013, in accordance with the criteria set out in numbers 2 and 4 of Article 368 of the Labour Code, which were in the meantime declared unconstitutional by the Constitutional Court in judgment No. 602/2013, of 20 September.

The employee considered that the declaration of unconstitutionality with general binding force produced retroactive and re-enacting effects, causing the act of his dismissal to disappear from the legal system, and thus sustained his right to be reinstated in the company, effective from the day of dismissal. Accessorily, the employee also sought a declaration of unlawfulness in respect of his dismissal linked to the extinction of the work position, on account of the same being based on provisions held unconstitutional.

The employee also alleged that he had failed to challenge the dismissal within the 60-day period because he considered he had been regularly dismissed, in accordance with the provisions of the Labour Code then in force. However, due to the declaration of unconstitutionality, he thought that the time limit to bring the action should be considered reopened.

In reply to the question of whether the declaration of unconstitutionality of Numbers 2 and 4 of Article 368 of the Labour Code, as amended by Law No. 23/2012, of 25 June, automatically entailed the disappearance of the act of dismissal of the employee carried out while those provisions where in force, the Court of Appeal of Coimbra replied in the affirmative.

The Court reminded that, as a rule, the declaration of unconstitutionality with general binding force has retroactive effects, that is, once a provision is declared unconstitutional, it is prohibited to apply such provision to any situation or relation potentially or actually falling within its scope.

The Court of Appeal of Coimbra continued clarifying that the judgment of the Constitutional Court was of a declaratory nature, that is, it declared those provisions to be null and void from the effective date of the same, and that it should be considered as if the same had never been a part of the legal system. In this way, as the provision is null and void from the outset, not only the effects directly brought about by such provision (resulting in the re-enactment of the rule repealed by it), but also the legal acts carried out in accordance with the same were null and void.

The court therefore concluded that the dismissal was invalid, and that it should be considered as if the same had never taken place. In this way, the employment relation in question remained untouched, and the company should therefore reinstate the employee effective from the date on which he was dismissed.

To the question of whether the dismissal of the employee could be assessed, in terms of its lawfulness, in light of Article 368(2) and (4) of the Labour Code, as amended by Law No. 23/2012, of 25 April, maintaining the dismissal in case those legal provision had been complied with, the Court of Appeal of Coimbra replied negatively.

Indeed, according to the Portuguese legal system, the rule is that the acts must be assessed in light of the law that is in force at the time they are carried out. Consequently, decisions of dismissal must be judicially assessed by reference to the law that was in force on the date of those decisions.

The Court of Appeal considered that the question was to be replied to negatively because an affirmative reply would bring about two "*legally unsustainable*" consequences: *i)* the application of the provision to a situation occurred after its expiry; and *ii)* the subsistence in the legal system, until the date of the declaration of unconstitutionality, of a dismissal that must be deemed as non-existent on account of its being based on a legal framework also retroactively non-existent.
The Court of Appeal of Coimbra referred that this understanding was also to be adopted for reasons of legal security and trust in the legal system.

As for the question of whether the dismissal of the employee could be qualified as unlawful, namely for the purpose of the recognition of the so called "interim salaries", the court replied negatively, considering that the invalidity of the dismissal does not arise from the declaration of unlawfulness on grounds of any of the causes set out in Articles 381 or 384 of the Labour Code, but rather from the non-existence of the legal framework based on which the same was declared. Consequently, it considered that the employee could not be recognised as being entitled to the "interim salaries", since such

right only arises from a situation of unlawfulness of the dismissal, which did not occur in this case.

Finally, the Court of Appeal of Coimbra ruled on whether the fact that the limitation period within which the employee could challenge the dismissal (60 days) had expired, could preclude the disappearance of the act of dismissal and the effects arising therefrom.

The court considered that the expiry of the said 60-day period did not prevent the effects of the declaration of unconstitutionality with general binding force of the provisions on which the dismissal was based, from being extended to the dismissal of the employee.

Judgment of the Court of Appeal of Évora of 2014-05-08
Termination of the employment contract with just cause – Privacy

The Court of Appeal of Évora examined an application for the recognition of just cause for the termination of an employment contract of a sales manager who considered his rights and guarantees had been violated by the employer in a deliberate, culpable and continued manner.

The employee claimed, in brief, that GPS equipment had been fitted in the vehicle provided to him for full use; that the keys to the warehouse where he worked had been replaced without new keys being provided to him; and, finally, that his functions had been emptied, by withdrawing the holiday scheduling, stock control, order making and processing functions.

The employer defended itself, claiming that the right to terminate the contract had expired in relation to some of the facts set forth in the employee's communication, as well as the fact that, before terminating the contract, the employee had failed to warn the employer of the consequences of the behaviours adopted by it, in breach of the principle of good faith in the performance of the employment contract.

With regard to the expiry of the right to terminate the contract, the Court of Appeal of Évora emphasised the fact that the higher courts have ruled that the limitation period runs from the date on which the behaviour of the employer becomes so grave that maintaining the employment relation becomes impossible. Considering the type of situations relied on by the employee, the court considered that the same did not correspond to instantaneous facts but rather to continued facts.

With regard to the just cause for termination, the Court of Appeal of Évora first analysed the fitting of GPS equipment on the vehicle provided to the plaintiff for full use.

The court considered that the power of direction, which includes the power to supervise and control the activity, is limited to the actual activity of the employee, being unacceptable the extension of such control to the private life of the employee without his authorisation. It should be noted that the court considered that it was irrelevant that the same equipment had been also fitted on the vehicles of other employees, concluding that the employer had violated the employee's right to privacy with fault.

With regard to the replacement of the keys to the warehouse without the employee being provided new keys, the court considered that the decision did not violate any employment or personal right of the employee, since the same continued to have access to his work station during the hours in which the employer considered he had to have access to the same, and concluded there was no violation of any rights or guarantees of the employee.

The court reached the same conclusion with regard to the alleged withdrawal of functions: the behaviours did not show any violation of the rights or guarantees of the employee. For that purpose, the court analysed the set of functions of the employee, which it considered to be wide, considering that, although certain functions had been withdrawn, these functions were not part of the essential functions of a sales manager, and also that no supervisory powers had been withdrawn or diminished.

After finishing the analysis of each fact relied on by the employee to claim the existence of just cause, the Court of Appeal of Évora considered that only the violation consisting of the fitting of the GPS equipment on the vehicle remained (while it had not been proved that the employer had even controlled the employee during his time off), which, in itself, did not make it impossible to maintain the employment relation, for which reason it declared that there were no grounds for the termination of the contract with just cause.

Judgment of the Court of Justice of the European Union of 2014-03-18
Grant of maternity leave to women who have recently given birth through a surrogacy arrangement

In a reference for a preliminary ruling, the Grand Chamber of the Court of the European Union ruled on the interpretation of Articles 1(1), Article 2(c), Article 8(1) and Article 11(2)(b) of Council Directive 92/85/EEC of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant employees and employees who have recently given birth or are breastfeeding, as well as of Articles 2(1)(a) and (b) and 2(c) and Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, on the implementation of the principle of equal treatment of men and women in matters of employment and occupation.

This reference was submitted in connection with a dispute between an employee – a mother who had had a child through a surrogacy arrangement – and her employer, a

National Health Service foundation -, concerning the refusal to grant her paid leave following the birth of the child. Indeed, this employee had never been pregnant nor had her egg been involved in the fertilisation, but merely the sperm provided by her partner.

The employer has policies applicable to leaves and maternity and adoption payments equivalent to the statutory provisions on paid leave. Those schemes did not provide for leave and pay for commissioning mothers in cases of surrogacy. The employer also established a special leave policy, which did not include surrogacy.

Despite the fact that she was not present at the birth, the employee started breastfeeding the child an hour after delivery and for three months thereafter, with full and permanent parental responsibility for the child being granted to the employee and her partner.

The court reminded that maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy, and secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.

The court considered that the Directive is meant to protect the health of the child's mother in the specially vulnerable situation arising from pregnancy; there follows that the granting of maternity leave pursuant to Article 8 of the Directive presupposes that the employee entitled to such leave has actually been pregnant and has given birth to a child.

In these circumstances, a employee who as a commissioning mother has had a child through a surrogacy arrangement, does not fall within the scope of Article 8 of the Directive, even where she breastfeeds or may breastfeed the child following the birth. Consequently, it considered that Member States are not required to grant such a employee a right to maternity leave pursuant to that article, merely having the faculty to do so.

The court also considered that there was nothing in the court files to establish that the refusal of leave at issue put female employees at a particular disadvantage compared with male employees, and therefore concluded that the refusal to provide maternity leave to a commissioning mother does not constitute direct or indirect discrimination on grounds of sex, within the meaning of Article 2(1)(a) and (b) of Directive 2006/54.

CONTACT

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS, RL
Sociedade de Advogados de Responsabilidade Limitada

LISBOA
Praça Marquês de Pombal, 2 (e 1-8º) I 1250-160 Lisboa I Portugal
Tel. (351) 21 355 3800 I Fax (351) 21 353 2362
cuatrecasas@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com

PORTO
Avenida da Boavista, 3265-7º I 4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com