

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | EMPLOYMENT

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NEWSLETTER EMPLOYMENT

I LEGISLATION HIGHLIGHTS

Resolution of the Council of Ministers No 43/2014. D.R. (Portuguese official gazette) No. 122, Series I of 2014-06-27

Resolution No. 43/2014, of 27 July, amending Resolution No. 90/2012 of the Council of Ministers of 31 October, which sets out the minimum, necessary and cumulative criteria to be complied with in the procedure of issuing extension orders, was published in the *Diário da República* (Portuguese official gazette).

This amendment seeks to stimulate collective bargaining by means of redefining the criteria for the issuing of extension orders, which take into account the representativeness of micro, small and medium-sized companies.

Therefore, Resolution No. 43/2014, of 27 July adds a new alternative criterion for the issuing of extension orders:

1. The employer that is a party to the collective bargaining agreement must employ at least 50% of employees of the business sector, in the geographical, personal and professional scope intended,

OR

2. At least 30% of its associates must consist, either directly or through a represented structure, of micro, small or medium-sized companies.

This amendment to Resolution No. 90/2012 by Resolution No. 43/2014 took effect on 28 June 2014.

II LEGISLATION

Order No. 149-A/2014. D.R. (Portuguese official gazette) No. 141, Series I of 2014-07-24

Ministry of Solidarity, Employment and Social Security

Establishing the *Medida Estímulo Emprego*, a measure to stimulate the employment. This Order was specifically addressed in the *Legal Flash* of 25 July and shall be subject of in-depth analysis in the next Newsletter.

Order No 149-B/2014. D.R. (Portuguese official gazette) No 141, Series I of 2014-07-24

Ministry of Solidarity, Employment and Social Security

Introducing changes to *Medida Estágios Emprego* (public funded internship regulation). This Order was specifically addressed in the *Legal Flash* of 25 July and shall be subject of in-depth analysis in the next Newsletter.

Decree No. 20/2014. D.R. (Portuguese official gazette) No. 138, Series I of 2014-07-21

Ministry of Foreign Affairs

Approving the Agreement for the Application of the Multilateral Ibero-American Convention on Social Security, signed in Madrid, on 19 March 2013.

III CASE LAW

Judgment of the Court of Appeal of Lisbon of 2014-07-09

Effects of the situation of retirement in the employment contract

The Court of Appeal of Lisbon was requested to analyse the case of a security guard, a retired civil servant, whose employment contract was terminated on the initiative of the company where he worked based on his previously acquired pensioner status. The employee brought an action seeking the declaration of the unlawfulness of the dismissal and therefore requesting that the employer be ordered to pay compensation *in lieu* of reinstatement, as well as compensation for moral damages and the payment of interim salaries.

The employee alleged that the firm knew of his retirement situation on the date he was hired, then 54 years old, and that his dismissal would therefore amount to a wrongful dismissal.

The company, a public limited liability company engaged in the provision of private security services, objected to the action, sustaining, in brief, that it had only become aware of his retirement situation while the contract was in force. In light of this, the company claimed that the contract had expired within the legal term.

The issue reached the second instance after the company had been discharged by the Court of first instance, and the Court of Appeal of Lisbon started by reminding that the fact that an employee reaches retirement does not prevent him or her from continuing to work at the service of the same employer, however the employee's continuation at the service 30 days after the acknowledgment of the retirement status by both parties to the contract, causes the contract to have an event of termination and to be subject, *mutatis mutandis*, to the provisions of fixed-term contracts.

However, the Court considered that the situation was more doubtful in this case, since the employee reached retirement at the service of an employer and it was only then that he entered into an employment contract with another employer. In this connection, the Court of Appeal of Lisbon considered that the conversion of an employment contract into a fixed-term contract after retirement or after the age of 70, provided for in Article 348 of the Labour Code, only applies to the employees that remain employed by the same employer, which was not the case in this action.

With regard to the nature of the relation established with the employees already retired at the time of hiring, the Court of Appeal of Lisbon reminded that retirement pensions can be compounded with income from employment, and that nothing precludes the possible hiring of these employees and that their relation remains subject, with no exceptions or restrictions, to the general principles of hiring. However, when the employee reaches 70 years of age and the contract has still not expired, the same becomes a fixed-term employment contract.

However, the Court of Appeal of Lisbon stated that, as pointed out by a part of the doctrine, this understanding brings about a certain inequality in companies, since in the same company there may be employees who, because they have turned 70 at the service of the company see their contracts become fixed-term contracts by virtue of the law, while others who, for instance, were already 70 when they were hired, may be hired for an unlimited period of time. However, the Court of Appeal of Lisbon considered this inequality to be a consequence of the fact that the legal provision is absolutely mandatory, without any real public interest so paramount as to justify it.

The Court of Appeal of Lisbon considered that nothing precludes the employee who has achieved the retirement status at the service of an employer from being subsequently hired under a permanent contract by another company. It considered irrelevant the fact that the company had only become aware of his retirement status after the hiring and that the company itself was responsible for its lack of acknowledgement, as it could have inquired the employee or the National Pensions Centre on this matter, if the same was, indeed, a decisive factor of the willingness to execute the contract.

Accordingly, the Court of Appeal of Lisbon declared that the termination of the employment contract amounted to a wrongful dismissal and, consequently, ordered the employer to pay the employee compensation *in lieu* of reinstatement as well as the interim salaries.

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