CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | EMPLOYMENT

NEWSLETTER EMPLOYMENT I November, 2014

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I EXTENSION ORDERS

Area of Activity	Legislation
Poultry Manufacturing Industries	**Order No 228/2014 D.R. No 215, Series I of 2014-11-06** Establishes the extension of the amendments to the collective bargaining agreement between *ANCAVE - Associação Nacional dos Centros de Abate e Indústrias Transformadoras de Carne de Aves* and *SETAA - Sindicato da Agricultura, Alimentação e Florestas*.
Biscuits Industry	**Order No 229/2014 D.R. No. 215, Series I of 2014-11-06** Establishes the extension of the amendments to the collective bargaining agreements between *AIBA - Associação dos Industriais de Bolachas e Afins* and *COFESINT - Confederação de Sindicatos da Indústria, Energia e Transportes* and between the former employers' association and *SINTAB - Sindicato dos Trabalhadores da Agricultura e das Indústrias de Alimentação, Bebidas e Tabacos de Portugal* and other trade unions (factory, assistance and maintenance personnel).

II EMPLOYMENT OBLIGATIONS

Holiday Close down

The employer is obliged to inform its employees until 15 December 2014, if the company or establishment will totally or partially close in 2015, for holidays on a day between a holiday falling on a Tuesday or Thursday and a weekly rest day.

Payment of the Christmas allowance

The employer is obliged to pay the Christmas allowance to its employees until 15 December 2014. Where the temporary scheme of fractioned payment of the Christmas allowance has been chosen, the employer is obliged to pay 50% of the allowance until 15 December 2014.

III CASE LAW

Judgment of the Constitutional Court No 658/2014, of 2014-10-14
Obligation to provide the place and form of consultation of disciplinary proceedings to the employee, in the written notice setting out the facts of the alleged misconduct (*nota de culpa*)

The Constitutional Court was requested to rule on the constitutionality of the interpretation of Articles 351 (1) and 382 (2) (c) of the Labour Code, regarding the dismissal notification to the employee and corresponding written notice (*nota de culpa*), *i.e.*, whether from the interpretation of the Articles aforementioned arises an obligation to the employer to notify the employee of the place and form of consultation of disciplinary proceedings.

In the opinion of the appellant, the dismissal notification to the employee (and the corresponding *nota de culpa*) should be followed by a notification concerning the form and place of the consultation of disciplinary proceedings, pursuant to the right to a fair hearing and right of defence of the employee, granted in the Constitution.

This matter has already been analysed by the Portuguese Courts, namely by the Supreme Court of Justice, which concluded that the law (at the time the *LCCT*) did not impose any obligation to notify the accused employee of the conditions and place of consultation of the disciplinary proceedings.

On the other hand, the Constitutional Court began by analysing the issue under the Portuguese doctrine, which, apparently, disagrees as to the obligation of the employer to such notification.

Even so, the Court considered that *"(…) one thing was the obligation to enable, or not interfere in the consultation of disciplinary proceedings by the accused employee and another very different thing is the obligation to notify the employee, together with the written notice (nota de culpa), the conditions and place of consultation of the disciplinary proceedings".*

It is the opinion of the Constitutional Court that, while the first obligation is capable of threatening the exercise of the right to a fair hearing and the right of defence of the employee, the same cannot be said as to the second one, due to the mandatory nature and the exhaustive character of the causes of invalidity of disciplinary proceedings.

In this sense, the Constitutional Court considered that the employer is not obliged to notify the employee accused in the context of disciplinary proceedings, together with the written notice (*nota de culpa)*, of the form and place of consultation of disciplinary proceedings, since it does not breach the employee's rights aforementioned, and

therefore, the Court dismissed the appeal and, consequently, confirmed the decision of the Court of Appeal of Lisbon.

Judgment of the Court of Appeal of Lisbon of 2014-10-08
Use of remote surveillance devices in the workplace – Disciplinary proceedings

The Court of Appeal of Lisbon was requested to rule on the application of disciplinary sanction of termination for cause, based on images obtained through a video surveillance device.

The employee concerned, during his working hours and as cashier in Lisbon Casino, was accused of stealing money from the cash register in the Automatic Machines Room (which custody was entrusted to him), for several days. The misconduct of the employee was duly recorded through the video surveillance system of the employer.

Given that the employer is a casino and is, consequently, under specific legislation (Gambling Law), the latter is obliged to install surveillance and control equipment in the gambling rooms, in order to protect people and goods.

The employee wanted the Court to declare the unlawfulness of his dismissal, since the video surveillance images used as evidence in disciplinary proceedings and in the injunction to suspend the dismissal, were, in his opinion, illegal, due to the breach of his right to privacy, and their disclosure was an abusive intrusion in his private life and, therefore, violated his image right.

The Court of Appeal of Lisbon considered that the use of the remote surveillance devices by the employer was lawful, since the latter had not only fully complied with the legislation on data protection and the Gambling Law (namely, the display of the necessary signs in the relevant places), as the use of those devices were meant to protect the safety of persons and goods.

The Court followed the general understanding of the Portuguese case law concerning the use and the disclosure of images obtained though video surveillance systems installed in the workplaces, and considered acceptable those images as evidence in the disciplinary proceedings and in the subsequent legal action, provided that the requirements arising from the legislation on data protection are fulfilled and provided, and at the same time it is concluded that the purpose of the installation of those devices was not exclusively to verify the professional performance of the employee.

Further, the Court concluded that the *"the purposes of supervision through video surveillance devices – expressly foreseen in the law – are: to dissuade the employee from adopting a conduct that does not comply with those legal prohibitions, all of which related to conducts that are the opposite of transparency that should exist in the gambling activity; and, should the dissuasion be ineffective, to enable to detect infringements carried out."*

Due to the provisions foreseen in Gambling Law, the employee that works in gambling rooms is forbidden to hold gambling chips, currently used in casinos for the gambling activity, money or conventional symbols that represent it, which the origin or use cannot be justified by the normal functioning of the game.

For this reason, the (repeated) misconduct of the employee was considered unlawful and sufficiently serious to justify the termination of the employment relation between the latter and the employer.

Therefore, the Court of Appeal of Lisbon decided to dismiss the appeal brought by the employee, concluding that disciplinary proceedings and consequently the dismissal were lawful, since the concept of termination for cause had been met.

Judgment of the Court of Appeal of Lisbon of 2014-11-05
Use of e-mail messages – Disciplinary proceedings

The Court of Appeal of Lisbon was requested to rule on the case of an employee of a company engaged in the import and trade of computer, telecommunications and office equipment and products in the area of computers and organisation, against whom disciplinary proceedings were raised, leading to the sanction of termination for cause.

The dismissal aforementioned was based on several conducts of the employee within the company, in particular through e-mail messages.

The employee wanted the Court to declare the unlawfulness of his dismissal since his employment contract was suspended on the date that the infringements were known (since in the meantime he had been appointed as director of the company), for which reason, in his opinion, the legal framework regarding employment could not be applied between the parties, in particular the employment obligations of confidentiality and loyalty and, concomitantly, the disciplinary authority of the employer.

The former employee, as director ("*administrador*"), had privileged access to information regarding the customers, market prices and corporate strategies, and was in charge of the formalisation of the company's businesses in the market. However the employee decided, together with another three employees of the employer, to establish a company with a commercial activity competing with that of his employer.

The employee, taking advantage of his functions as director ("*administrador*"), developed an activity that was parallel to and competing with the one carried out by his employer, obtaining for himself economic benefits through indirect holdings in the company with which he negotiated on behalf of the employer, through the employer's e-mail.

In this regard, the Court considered that the e-mail messages were private documents drawn up electronically, without the signature of the author, determining that their evidential value would be freely appreciated by the Court.

The Court further considered that "*the e-mail messages had not been obtained by breaking any personal password of the employee, rather they had been taken from the server of the company itself, accessible with the administrator's password and with backups that are carried out regularly and recurrently for security reasons".*

The messages exchanged between the employees and between the latter and the employer's customers were considered professional, since such messages contained professional motives in the "Subject", and they were sent and/or received from a professional e-mail during working hours and because they contained no indication of personal matters of the senders or recipients, for which reason the same were not covered by the right of privacy and confidentiality established in the law.

Finally, the Court considered that the suspension of the employment contract did not affect the disciplinary authority of the employer with regard to the breach, by the employee, of subsidiary obligations that did not depend on the actual performance of the work, with special focus on the loyalty obligation.

In this respect, the Court considered the exercise of the disciplinary authority and the consequent application of the sanction of dismissal by the employer unquestionable, since the conduct of the employee irreparably affected the trust of the employer, making the employment relation untenable.

Therefore, the Court of Appeal of Lisbon decided to dismiss the appeal brought by the employee, concluding that disciplinary proceedings and the consequently the dismissal were lawful, since the concept of termination for cause had been met.

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