CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER I EMPLOYMENT

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I LEGISLATION HIGHLIGHTS

Law No 82-B/2014. D.R. n.º 252, Supplement, Series I of 2014-12-31 Parliament

Approved the 2015 State Budget and amended several legislation in the area of labour and social security law, among which the following should be highlighted:

Increase of the amount due as unemployment and as activity termination subsidies:

The daily amount due as unemployment and as activity termination subsidies may be increased in 10%, in the following situations:

- When, in the same household, both spouses or unmarried partners (*União de facto*) are holders of the unemployment or the activity termination subsidies and have children or other dependent;
- When, in a single parent household, the only relative is holder of the unemployment and/or the activity termination subsidies and does not receive a maintenance claim declared or approved by Court.

Amendment to the Social Security Welfare Contributions Code (Código dos Regimes Contributivos do Sistema Previdencial de Segurança Social)

The monthly amount granted to the employee as "public and collective transportation vouchers" by the employer is now a basis for contributions, in accordance with the Personal Income Tax Code (*Código do IRS*), i.e., in case the assignment is not universal.

Temporary reduction of the contribution rate as exceptional measure to the employment support

Amends the Decree-Law no. 154/2014, of October 20 which created an exceptional measure to the employment support, through a temporary reduction of the contribution rate due by the employer during November of 2014 and January of 2016 (including the amount due under the holiday and Christmas allowances).

The assignment of this reduction is now extended to the employees that have an employment contract, without interruption, started before September of 2014, without prejudice of the other requirements that remain applicable.

Fractioned payment of the Christmas and Holiday allowances

The temporary scheme of fractioned payment of the Christmas and holiday allowances foreseen for 2013 is now extended until 31 December 2015.

(This amendment has been included in the Employment Legal Flash of 02-01-2015)

II LEGISLATION

Order No 266/2014. *D.R*. (Portuguese official gazette) No 243, Series I of 2014-12-17

Ministry of Finance and of Solidarity, Employment and Social Security

Establishes the value of the revaluation coefficients to be applied in the update of the recorded remunerations on which disability and retirement pensions are calculated (granted during 2014).

Order No 277/2014. *D.R*. (Portuguese official gazette) No 249, Series I of 2014-12-26

Ministry of Finance and of Solidarity, Employment and Social Security

Establishes the retirement age for the access to the retirement pension under the general social security scheme in 2016, which is now 66 years and 2 months. Further determines the sustainability factor applied to:

The legal amount of retirement pensions granted in 2015, to beneficiaries who access the retirement pension before turning 66.	**0.8698**
The regulatory amount of disability and total disability pensions granted for a period of 20 years or less, converted into retirement pensions in 2015	**0.9383**

Decree (*Despacho*) No. 15654/2014 D.R. 250, Series II of 2014-12-29
Ministry of Finance and of Solidarity, Employment and Social Security

Approves the application forms of the unemployment allowances and the unemployment statement (for self-employed persons as well as to members of statutory bodies of legal persons).

Order No. 268-A/2014 D.R. 252, Series I of 2014-12-31
Ministry of Finance and of Solidarity, Employment and Social Security

Update the standards of the minimum pensions of the general regime for 2015.

III CASE LAW

Judgment of the Court of Justice of the European Union (Fourth Chamber), 18 December 2014 – Case C-354/13
Discrimination based on obesity

The Court of Justice was requested to rule two preliminary rulings raised by a dispute between a Danish employee and his employer, regarding the lawfulness of his dismissal, allegedly based on obesity.

The employee worked for 15 (fifteen) years for Billund Kommune (employer), as a daycare assistant.

During his employment contract, the employee was considered obese under the definition of the World Health Organisation (WHO).

However, due to the reduced number of children in the nursery, the employer decided to terminate his employment contract, but did not state the reasons why this particular employee, and not any of the other employees, was chosen to be dismissed.

The first preliminary ruling was related to the possibility of the European Union law to foresee a general principle of non discrimination based on obesity, as such, regarding employment and occupation.

In this sense, the Court considered that none of the provisions of the Treaties and of the secondary legislation of the European Union in the area of employment and occupation provided a general principle of non-discrimination based on obesity. Moreover, the Directive on equal treatment in employment (Directive 2000/78/EC) exhaustively lists the various forms of prohibited discrimination, which does not include obesity.

On the other hand, the second preliminary ruling was related to the possibility of obesity being considered a "disability", within the meaning of the Directive, i.e., "*…a limitation which results, in particular, from long-term physical, mental or psychological disabilities, which in interaction with various barriers may prevent the full and effective participation in the professional life, comparing to other employees*".

The Court considered that if, "*in certain circumstances, the obesity of the employee results on a limitation, in particular, from physical, mental or psychological disabilities, which in interaction with various barriers may prevent the full and effective participation in the professional life, comparing to other employees and if such limitation is a long-term one, obesity can be considered a "disability" within the scope of the Directive 2000/78"*.

Such would be the case, in particular, if the obesity of the employee prevented his full and effective participation in professional life due to the reduced mobility and

pathologies that prevent him from carrying out his work or causing discomfort when carrying out his professional activity.

In this sense, the Court considered that the national court (the court that submitted the preliminary rulings) was responsible to decide whether the employee's obesity framed in the concept of "disability", for the purposes of establishing whether his dismissal was lawful or not.

Judgment of the Constitutional Court No 366/2014, Case No 1176 13
Special proceeding to challenge the regularity and lawfulness of the dismissal vs common proceeding

The Constitutional Court was requested to rule on the constitutionality of Article 387(2) of the Labour Code, regarding the legal form to challenge an individual dismissal due to the extinction of job position.

The employee considered that the literal terms of the law (*"the employee may oppose the dismissal"),* should be interpreted as meaning *"that the employee can only oppose the dismissal judicially as regulated in the adjective law"*, without imposing an obligation, granting the employee the possibility to resort to any of the alternative procedural means.

On the other hand, the employer considered that there had been a procedural error, since the suitable procedure to challenge the individual dismissal due to the extinction of job position is the special proceeding to challenge the regularity and lawfulness of the dismissal (*acção especial de impugnação judicial da regularidade e ilicitude do despedimento*) rather than the common proceeding. This argument was rejected by the employee, since such interpretation would go against the principles of equality and access to the law, foreseen in the Constitution.

The Court considered that the special proceeding to challenge the regularity and lawfulness of the dismissal, specially established for this type of dismissals, did not breach the principles aforementioned, in particular, the time limit to challenge the dismissal.

In the opinion of the Constitutional Court, the time limit to challenge the dismissal (60 days) was not disproportionate to the exercise of the right, and was justified in general terms by reasons of certainty and legal security, *"and, in the specific case of challenging a dismissal, by the "expectations of the employer not to have a dismissal challenged in Court beyond a certain time limit, thus being duly able to manage the staff*" (Judgment No 140/94).

In this sense, the Constitutional Court considered that the part of Article 387(2) of the Labour Code whereby an individual dismissal notified in writing to the employee can only be challenged by submitting application claim within 60 days, is not unconstitutional, and

does not breach the principles aforementioned and therefore decided not to uphold the appeal.

Judgment of the Supreme Court of Justice of 2014-10-08
Suspension of the employment contract and corresponding rights of the employee

The Supreme Court of Justice was requested to examine the termination for cause invoked by the employee justified on the failure to timely pay his remuneration and the breach of his right to actual occupation.

The employee carried out his activity in Spain, and was given the work instruments necessary to perform his duties (namely a car, computer, mobile phone, cards and all the promotional material of the company).

Due to a serious road accident, the employee was on sick leave for a period of 3 years and 7 months, at the end of which the Social Security informed him that he did not meet the conditions for permanent disability enabling him to obtain a disability pension.

In this sense, the employee informed the employer that he had been refused the disability pension, considering that he had been certified to be medically fit for all legal purposes and requesting instructions and work instruments to continue his duties.

This being said, in accordance with the applicable legislation, the employer scheduled three medical appointments with the Occupational Health Physician, to investigate and establish his physical and mental ability to perform his duties, which were cancelled by the employee without any justification.

Subsequently, the employee notified his employer of the termination for cause, based on the failure to pay the remuneration during the months in which the said occupational health medical examinations had been scheduled.

Following the judgments by the Courts whose decisions had been appealed against, the Supreme Court of Justice considered that the reasons invoked by the employee to terminate the employment contract for cause could not be upheld, since "*as there had been no termination of the suspension of the employment contract due to the failure of the Claimant to tender an effective performance, it is to be concluded that there was no resumption of the Defendant's obligation to pay him his remuneration, and therefore, nothing is due to him on such account*".

The Court considered that the simple communication of the employee, following the end of his sick leave granted by the Social Security, did not correspond to an actual termination of the impediment that determined the suspension of the employment contract, nor did it correspond to a "*discharge for employment purposes, whether*

formally or substantially, given the absence of unequivocal medical certification of that fact …".

Therefore, the Supreme Court of Justice decided to dismiss the appeal and to uphold the judgment appealed against.

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 – 5.1 I 4100-137 Porto I Portugal
Tel. (351) 22 616 6920 I Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasasgoncalvespereira.com I www.cuatrecasasgoncalvespereira.com