

CUATRECASAS, GONÇALVES PEREIRA



NEWSLETTER | EMPLOYMENT

NEWSLETTER EMPLOYMENT | January, 2015

I Legislation Highlights	2
II Extension Orders	2
III Case Law	3

NEWSLETTER EMPLOYMENT

I LEGISLATION HIGHLIGHTS

Decree-Law No 8/2015. D.R. (Portuguese official gazette) No 9, Series I of 2015-01-14

Ministry of Solidarity, Employment and Social Security

The present Decree-Law revokes the suspension of the rules which regulated the anticipation of the entitlement age for the retirement pensions under the flexibility scheme.

In this sense, the suspension of the rules related to the anticipation of the entitlement age for retirement pensions was eliminated and, on the other hand, a transitional regime for the year of 2015 was established, during which beneficiaries who are 60 years old or more, and with, at least, 40-year contribution career, are entitled to an early retirement pension.

This Decree-Law also amends the rule on the reduction of the months of anticipation based on the length of the contribution career for the purpose of determining the global pension reduction rate. The anticipation months are reduced 4 months per year of contribution career exceeding 40 years, instead of the current scheme of reduction of 12 months per three-year period exceeding a 30 year contribution career.

After this transitional period, the scheme which was in force at the date of the suspension will be resumed, as amended by Decree-Law No 8/2015, of 14 January.

This Decree-Law entered into force on January 1, 2015.

II EXTENSION ORDERS

Area of Activity	Legislation
<p>Agriculture, animal and forest production</p>	<p>Order No 7/2015 D.R. No 6, Series I of 2015-01-09 Establishes the extension of the collective bargaining agreement and its amendments between CAP - <i>Confederação dos Agricultores de Portugal</i> and SETAA - <i>Sindicato da Agricultura, Alimentação e Florestas</i>.</p>
<p>Wool industry</p>	<p>Order No 9/2015 D.R. No 7, Series I of 2015-01-12</p>

	Establishes the extension of the amendments to the collective bargaining agreements between <i>ANIL - Associação Nacional dos Industriais de Lanifícios</i> and another association and <i>COFESINT - Confederação de Sindicatos da Indústria, Energia e Transportes</i> and between the former and <i>FETESE - Federação dos Sindicatos dos Trabalhadores Têxteis, Lanifícios, Vestuário, Calçado e Peles de Portugal</i> .
Cork Industry	Order No 10/2015 D.R. No 8, Series I of 2015-01-13 Establishes the extension of the amendment to the collective bargaining agreement between <i>APCOR - Associação Portuguesa da Cortiça</i> and <i>FEVICOM - Federação Portuguesa dos Sindicatos da Construção, Cerâmica e vidro</i> and other (factory personnel).

III CASE LAW

Judgment of the Court of Appeal of Porto of 2014-12-17 Action for the Recognition of the Existence of an Employment Contract – Withdrawal from the Claim or Agreement between the Parties

This judgment concerns the interpretation and enforcement of Law No 63/2013, of 27 August, which “established fighting mechanisms to the misuse of service agreements in subordinate work relations”, or, in other words the extinction of false “*recibos verdes*”.

The aforementioned law made a significant amendment to the Labour Procedure Code, which reinforced the powers of the *ACT (Autoridade para as Condições do Trabalho – Authority for Working Conditions)* and created a special action for the recognition of the existence of an employment contract.

This new type of action is composed by two stages: the first regards the inspection powers of the *ACT*, which involves the obligation to promote the legal procedure foreseen in the Law aforementioned, in any situation in which an apparently autonomous activity is provided, with evidences of an employment contract.

In the second stage, when the employer fails to correct the situation within ten days, the Authority must report, within five days, those facts to the services of the Public

Prosecutor, for the purposes of an action for the recognition of the existence of an employment contract.

In the case under consideration, the Public Prosecutor presented an action for the recognition of the existence of an employment contract with evidences of an employment contract.

In this type of action, the proceedings are promoted by the Public Prosecutor, while the employee is only notified, in the final court hearing, to adhere, if he or she so desires, to the facts presented by the Public Prosecutor.

This judgment focused specifically on the preliminary court hearing, in which the judge tries to bring the employer and the employee to reconcile. The Court was requested to rule on whether, in the scope of the "conciliation", it was admissible for the employer and the employee to agree, without the concurrence of the Public Prosecutor, that the relation between them was a service agreement and whether the same could be approved by the Court.

The Court of First Instance decided on this sense and acquitted the employer from the claim, bearing in mind the agreement between the latter and the "employee" and considering that the subject matter of the agreement did not amount to non-available rights.

On the other hand, the Court of Appeal decided the opposite, stating that *"the action brought by the Public Prosecutor is independent of the employer and the employee will (...). Therefore, regardless the will or consent of the employee, the Public Prosecutor must bring an action for the recognition of an employment contract – which shows that the Public Prosecutor is a part of the process and has legitimacy on it, and does not represent nor defends the employee."* Accordingly, the Court of Appeal of Porto considered that the Public Prosecutor has active *legitimacy* in this type of actions and must be considered a part in the proceedings, not as representative of the employee, but rather of the public interest foreseen in law.

Therefore, the Court decided that *"it is for this reason that we think that the employee is not entitled to withdraw the claim or to simply agree, in the absence of the Public Prosecutor, with the employer that the relation established between them is a service agreement rather than an employment agreement."*¹

¹ In this same sense, please refer to the judgment of the Court of Appeal of Porto, also of 17/12/2014, available on www.dgsi.pt. However, this understanding is not peacefully accepted by the case law, as shown by the recent decisions of the Court of Appeal of Lisbon concerning this matter (judgments of 17/12/2014, cases No 1340/14.7TTLSB.L1-4 and No 1332/14.6TTLSB.L1-4, both available on www.dgsi.pt). In fact, the Court of Appeal of Lisbon considers that the intervention of the Public Prosecutor in this type of proceedings has an secondary position as well as, if the employee expresses his or her wish to withdraw from the claim and there are reasons to

Accordingly, the Court of Appeal of Porto declared the appeal admissible, and concluded that the agreement approved by the Court of First Instance was illegal.

Judgment of the Supreme Court of Justice of 2015-01-14
Illegal reporting of accident at work – Termination for cause

The Supreme Court of Justice was requested to rule on the dismissal of an employee who deliberately signed the form reporting an accident at work, with a date, hour and place that did not match.

The employee claimed that she had suffered an accident at work on March 26 2008, when she was leaving the facilities of the employer and hit the speed gates.

The alleged accident resulted on several physical injuries, and therefore she was granted temporary partial disability of 25%.

On the other hand, the employee claimed that, according to the security equipment images, the body of the employee had not suffered any impact or oscillation and did not show any signs of having suffered any injuries. The employer also claimed that the employee, during that day, remained at the workplace without any signs of having suffered any impact.

Based on the proven facts, the Court considered that the injuries of the employee that led to the aforementioned disability had obviously not occurred on the date, time and place and in the circumstances stated in the report of the accident at work.

In this sense, the Court considered that the employee had defrauded not only the insurance company, but also the employer, *“intentionally, claiming facts that she knew did not correspond to the reality, adopting a disloyal behaviour that breaches the principle of reciprocal trust by which the employment relation should be guided, creating in the mind of the employer a constant and well-founded doubt concerning the suitability of her conduct”*.

In these terms, the Court decided that *“the behaviour of the employee was obviously serious, in particular as it could be a crime and because it is highly reprehensible, since the Claimant could not ignore the untruthfulness of the statements reported”*, and therefore considered that the concept of termination for cause had been met.

assume that such expression is conscious and free, nothing prevents the withdrawal from being approved and the right that was claimed from being declared extinct.

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
cuatrecasas@cuatrecasas.com | www.cuatrecasas.com

PORTO

Avenida da Boavista, 3265 – 5.1 | 4100-137 Porto | Portugal
Tel. (351) 22 616 6920 | Fax (351) 22 616 6949
cuatrecasasporto@cuatrecasas.com | www.cuatrecasas.com

This Newsletter was prepared by Cuatrecasas, Gonçalves Pereira & Associados, RL for information purposes only and should not be understood as a form of advertising. The information provided and the opinions herein expressed are of a general nature and should not, under any circumstances, be a replacement for adequate legal advice for the resolution of specific cases. Therefore Cuatrecasas, Gonçalves Pereira & Associados, RL is not liable for any possible damages caused by its use. The access to the information provided in this Newsletter does not imply the establishment of a lawyer-client relation or of any other sort of legal relationship. This Newsletter is complimentary and the copy or circulation of the same without previous formal authorization is prohibited. If you do not want to continue receiving this Newsletter, please send an e-mail to cuatrecasas@cuatrecasas.com.
