CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER I EMPLOYMENT LAW

EMPLOYMENT LAW NEWSLETTER I April, 2015

EMPLOYMENT LAW NEWSLETTER

I LEGISLATION HIGHLIGHTS

Decree-Law no. 59/2015 – D.R. no. 77/2015, Series I of 2015-04-21
Ministry of Solidarity, Employment and Social Security

Approves the new regime for the Remuneration Guarantee Fund (FGS), established in Article 336 of the Labour Code, transposing Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008, on the protection of employees in the event of the insolvency of their employer.

Under the new regime, the FGS now also covers employees who work or have habitually worked within national territory, for an employer with activities in the territories of at least two Member States, even if the employer is declared insolvent by a tribunal or competent authority of another Member State of the European Union or of the European Economic Area.

The FGS aims to ensure payment to the employees of part of claims arising from a employment contract or its termination when employers cannot pay them, due the fact that they are in a state of insolvency or in a difficult economic situation. However, based on the previous scheme, Social Security understood that the new business recovery tools (Special Revitalisation Procedure [PER] or Company Recovery System through Out-of-Court Agreements [SIREVE] were not covered by the FGS regime, which left a number of employees without protection.

Decree-Law 59/2015 now adapts the FGS regime to the Revitalise Programme (*Programa Revitalizar*), guaranteeing that claims of employees in companies assigned to revitalisation or recovery plans (PER or SIREVE) also have access to FGS.

According to the new regime, FGS ensures the payment to the employee of claims arising from employment contracts or their breach or termination, provided that:

1. The employer is declared insolvent;
2. A temporary judicial administrator is appointed by a judge by court order, in the case of PER;
3. The request submitted by IAPMEI is accepted by court order, within the framework of SIREVE.

FGS guarantees the payment of, at the most, six months of remuneration, with a monthly limit of three times the minimum wage (currently, €505.00).

The rule by which FGS ensures payment of credits outstanding in the six months prior to the commencement of legal proceedings seeking a declaration of insolvency or the submission of the PER application or extrajudicial company recovery proceedings

(SIREVE) was maintained, and the payment of the credits is now guaranteed up to one year from the day after the day on which contract of employment terminated.

Only applications submitted after it comes into effect are subject to the new FGS regime. However, the regime includes a transitory rule, according to which access to FGS is ensured for employees who have submitted applications during PER, or between 1 September 2012 and the date of entry into force of Decree-Law 59/2015 – 1 May 2015 – provided they are covered by an insolvency plan, approved by a court judgment, thus extending the scope of FGS, through re-examination of the facts of by the Court's.

II LEGISLATION

Ministerial Order no. 97-A/2015 - D.R. No. 62/2015, 1st Suppl, Series I of 2015-03-30
Presidency of the Council of Ministers and Ministry of Solidarity, Employment and Social Security

Lays down the rules applicable to cofinancing, for the European Social Fund (ESS) and by the European Regional Development Fund (ERDF), of operations in the areas of social inclusion and employment;, in the programming period 2014-2020.

Order no. 3651/2015 – D.R. no. 71/2015, Series II of 2015-04-13
Ministry of Solidarity, Employment and Social Security - Office of the State Secretary for Employment

Defines the financial contribution of IEFP, I.P., per month and by traineeship under the "Reactivar" measure.

Law no. 28/2015 – D.R. no. 72/2015, Series I of 2015-04-14
Assembly of the Republic

Establishes gender identity under the right to equality in access to employment (eighth amendment to the Labour Code, approved by Law 7/2009, of 12 February).

III CASE LAW

Judgment of the Court of Appeal of Guimarães of 2015-02-26
Accident suffered in the fulfilment of an Employment-Insertion contract

The claimant in this case was hired by the *Agrupamento de Escolas de Póvoa do Varzim* (school cluster) under a contract entitled "Emprego-Inserção", in the context of special measures for unemployed receiving unemployment benefits.

Under the contract, the Claimant undertook to provide the school cluster with socially necessary work, in the area of surveillance. The school cluster was required to pay a supplementary monthly allowance of 20% of the unemployment benefit that the Claimant continued to receive.

The Claimant brought a special lawsuit as a result of a working accident against the Insurance Company and the aforementioned school cluster, claiming that he suffered a working accident, when a board fell on his right foot, at a time when he was pursuing his duties within the school premises, which led to injuries and after-effects, as well as non-pecuniary losses.

The Insurance Company and school cluster called upon the absence of any employment relation between the Claimant and the school cluster.

The Court of Appeal of Guimarães emphasised that the Claimant was unemployed and remained unemployed, receiving only a supplementary allowance. The Court stressed, in particular, that it was based on that specific Employment programme that he was performing functions at that School, without having been directly hired by the Cluster and without the parties having agreed on any aspect related to any employment contract.

The Court considered that the beneficiary of this contract did not acquire the capacity of "employee", and there was no employment relation with the beneficiary of the work carried out. Which was why he remained entitled to unemployment benefits, to which the allowance for his activities was added.

Thus, as it cannot be concluded that there was any employment contract or equivalent between the Claimant and the cluster, or an apprenticeship situation, the Court of Appeal of Guimarães concluded that it was not a working accident and, in this respect, that it did not have jurisdiction (as a result of the matter) to judge the questions raised.

Judgment of the Court of Appeal of Porto of 2015-03-09
Just cause of termination by the employee - Non-payment of wages for more than 60 days – Pending disciplinary proceedings

The Court of Appeal of Porto was called on to give its opinion on the case of an Assistant Room Manager at a casino, who terminated his contract of employment with alleged just cause, based on the culpable failure of the employer to make timely payment of his remuneration.

The facts date back to 2011, when the employee was provisionally suspended, without loss of pay, in the context of disciplinary proceedings for dismissal, based on alleged theft.

During the disciplinary proceedings, the employer did not pay the Christmas allowance for the year 2011, the remuneration of December 2011 and the remuneration of January 2012. The employee therefore terminated his contract of employment on the grounds of culpable failure to make timely payment of remuneration.

The employer did not pay those amounts, despite having processed the wages and made the statutory deductions, considering that the employee owed him a larger amount that would be settled in the end, at the time of dismissal. In the opinion of the employer, this situation did not make the continuation of the employment contract impossible and, on receiving the termination notice, it accused the employee of failing to provide prior notice. For this reason, at the end of February 2012, it paid the remuneration for the months of December 2011, January and February 2012, the Christmas allowance for 2011, the proportional holidays and holiday allowances and Christmas allowances, setting off the respective claims.

The Court of Appeal of Porto recalled on this matter that it is up to the employer, with regard to any delay in payment of remuneration of less than 60 days, to prove that the non-payment was not its fault; with regard to the delay of 60 days (or more), the law assumes, irrebuttably, that the employer is culpable. However, for there to be just cause for termination of the employment contract, the existence of late payment of remuneration is not sufficient; just cause must lead, to the impossibility/unenforceability of the employee maintaining the employment relation.

The Court of Appeal of Porto considered that these requirements apply both in situations of rebuttable presumption of fault (delays less than 60 days) and irrebuttable presumption of fault (delays of 60 days or more). However, the delay does not automatically confer a right to termination, should the situation fall within the scope of the concept of just cause. The Court of Appeal of Porto stressed that, while the employer can make use of intermediate sanctions to censure a particular conduct, the employee whose rights have been violated does not have any alternative form of reaction other than termination (they either maintain the contract or terminate it). In this context, the care with which the just cause invoked by the employer is assessed cannot be the same as that with which the just cause invoked by the employee is assessed.

The Court concluded that the employee was entitled to payment of the 2011 Christmas allowance, which should have been paid by 15.12.2011, as well as to remuneration for the months of December 2011 and January 2012, which should have been paid up to the last day of each of these months.

The employee terminated the employment contract, and given the date on the respective letter, it was clear that the remuneration for December 2011 and January 2012 were not outstanding for 60 days or more (December remuneration was delayed 44 days and January remuneration was delayed 13 days). With regard to the 2011 Christmas allowance, as it should have been paid by 15 December 2011, the payment

was delayed on 16.12, for which reason, between that day, inclusive, and the day on which the termination was declared, were 60 (calendar) days. In other words, when the employee issued the declaration of termination, this allowance was 60 days due.

Thus, the Court of Appeal of Porto understood that, when the employee terminated the employment contract, the wages for December 2011 and January 2012 and the 2011 Christmas allowance were outstanding, the delay assumed to be culpable with regard to all these payments: regarding the wages for December and January, it was an assumption of rebuttable fault; in relation to the Christmas allowance, there was an assumption of irrebuttable fault.

Indeed, with regard to the December and January wages, the Court considered that the employer did not rebut the assumption of fault and no established could prove the culpable nature of that non-compliance. The Court was of the opinion that there were no legal grounds for the allegation that, given the existence of disciplinary proceedings and the facts alleged in those proceedings, at the end of those proceedings (with dismissal) it "accounts would be settled" and compensation would be provided. Thus, the Court of Appeal of Porto concluded that there was just cause for termination of the employment contract by the employee.

Decision of the Supreme Court of 2015-03-25
Sports employment contract - Termination without just cause

The public limited sports company of a football club sued a player requesting that the inadmissibility of any cause for termination of the sports employment contract be declared and consequently that the player be ordered to pay the sum of €2,045,080.00 for breach of the sports employment contract, arising from his termination without just cause, and also €5,000,000.00 as compensation for material and moral damages.

The case dates to June 2000, when the club and the player signed a sports employment contract to be effective between 01/08/2000 and 30/06/2005. In November 2003, the parties signed an addendum to the abovementioned contract, by means of which they increased the player's remuneration for the next seasons, having established in return for this to execute another sports employment contract until 23/06/2008.

However, at the end of 2005 summer holidays, the player failed to turn up for pre-season training, and his authorised representative informed the club that the contract that linked him to the club had expired. In the communication sent, the representative mentioned that the signature of his client had been obtained through deception, in the confusion of the addendum to the contract that terminated, and the certification of signatures had been made unlawfully, without the presence of any notary or his representative.

Both the Court of First Instance and the Court of Appeal of Lisbon relieved the player from payment of compensation for termination without just cause of his employment contract with that Club.

The Club's public limited sports company, disagreeing with these decisions, lodged an appeal to a higher court, claiming that, following the declaration of invalidity of Article 50 of the Collective Agreement entered into by the Portuguese League of Professional Football (LPFP) and the Professional Footballers' Union (SJPF), the Court of First Instance should have invited the appellant to its claim, under penalty of nullity of the Proceedings due to omission of essential procedural requirements. The appellant understood that, by means of that declaration of invalidity, there was an apparent legal and regulatory void with regard to the solution to be given to the specific case.

The Supreme Court of Justice clarified that, with regard to knowing whether, following declaration of invalidity of Article 50 of the Collective Agreement entered into by LPFP and SJPF, after this case was brought, the Court of First Instance should have invited the Club to correct the its claim, the club's argument could not be accepted.

The Supreme Court of Justice recalled that the exercise of the Judge's authority-duty to invite parties to improve pleadings has limits: it not only relates to a specific procedural moment, but it is also simply intended to correct any irregularities (shown in the pleadings), whether formal or other, namely those related to shortcomings or inaccuracies in the presentation or materialisation of facts claimed.

With regard to the request for compensation, the Supreme Court of Justice stated that compensation is calculated under the terms of the civil liability rules provided for in the Portuguese Civil Code, in other words, damages are measured using the difference between the economic situation of the injured party, on the most recent date that can be considered by the court, and the economic it would have had on that date if there had been no losses.

According to the Court, the club was bound to put forward and prove the necessary facts, in order to demonstrate that it incurred losses that justified the request for the player to be ordered to pay €2,045,080.00 due to breach of the employment contract, following the termination without just cause.

The Supreme Court of Justice considered that the Club had filed this request for compensation based exclusively on Article 50 of the Collective Agreement applicable, but without taking into account Article 27.1 of the Sports Employment Contract Law, which, despite providing that, if a contract is terminated without just cause, the athlete improperly withdraws from the contract and hence incurs civil liability for losses caused due to this breach of contract, the right to compensation is dependent on the effective existence of losses.

As the Club's request could not be upheld without the allegation and evidence of these losses, the Supreme Court of Justice decided to fully dismiss.

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
cuatrecasasportugal@cuatrecasas.com I www.cuatrecasas.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@cuatrecasas.com I www.cuatrecasas.com