CUATRECASAS, GONÇALVES PEREIRA

NEWSLETTER | EMPLOYMENT LAW

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I LEGISLATION

Order No. 131/2015 – D.R. no. 93/2015, Series I of 2015-05-14
Ministry of Solidarity, Employment and Social Security

Determines the scope of the collective bargaining agreement between the Associação dos Comerciantes do Porto (Association of Porto Traders) and others and CESP - Sindicato dos Trabalhadores do Comércio, Escritórios e Serviços de Portugal (Union of Commerce, Office and Service Employees of Portugal) and one other.

II CASE LAW

Judgment of the Court of Appeal of Porto of 2015-03-23
Just cause for dismissal – Unjustified absences

The Court of Appeal of Porto was called upon to decide on the lawfulness of a dismissal following alleged unjustified absences of the employee.

The employee missed several days of work, not having presented justification for two days of absence.

According to one of the company's internal rules, notice of absences must be given five days in advance when foreseeable and as soon as possible when not foreseeable. In turn, the justification would have to be accompanied by proof in writing and, in the case of absences due to illness, a medical leave certificate or doctor's note should be submitted to the employee's immediate superior by the day following their issue. In this specific case, this did not happen, which meant that the justifications were not accepted as they were produced out of time.

Following the aforementioned absences by the employee – which were not considered justified – the employee sent three letters, all addressed to the employer's human resources director: *(i)* one, accusing her of unequal treatment and persecution with disciplinary proceedings, saying that he had been used as a "guinea pig", that everything appeared to have been rehearsed in advance and that it was not difficult to work out who was the stage director; *(ii)* another, reporting her to the board of directors of the employer, accusing her of having the sole intention of harming him financially, so that he would not receive bonuses and accusing her of partiality, incorrect conduct and saying that she was anything but impartial and unbiased and, *(iii)* another, saying that the conduct of the director was not worthy of her as a legal expert, director of legal services and specialist in labour legislation.

The employer decided to open disciplinary proceedings against the employee and summoned him to be presented with a written notice of charges. The employee,

confronted with this situation, accused the referred director of partiality and incorrect conduct, claiming that the decision was "*a shabby trick*".

Given the letters sent by the employee, the Court was of the opinion that such conduct harmed the (personal and professional) image of the aforementioned director of human resources, as well as the image of the hierarchical structure and the atmosphere of respect and discipline necessary for the proper functioning of the company, such conduct constituting in itself just cause for dismissal.

Moreover, although the other attitudes of the employee concerning the episode of the presentation of a written notice of charges and the unjustified absences were not, in themselves and without the other facts, sufficient to constitute just cause, in general they aggravated the impression of the employee's behaviour.

Finally, the Court gave its opinion on the requirement to submit a medical leave certificate or doctor's note to the employee's immediate superior by the day following their issue, considering such requirement contrary to the rule of freedom of form with regard to that notification.

The rule in question, by containing a stricter requirement than that provided for in the Labour Code and in the actual Company-Level Bargaining Agreement, infringed the principle of more favourable treatment for employees, for which reason the regime to be applied for the purpose of justification of absences would necessarily have to be that set out in the Company-Level Bargaining Agreement.

Judgment of the Court of Appeal of Porto of 2015-04-12
Just cause for dismissal – Place of work

The Court of Appeal of Porto was called upon to decide on the validity of the order to transfer the place of work given by the employer to the employee according to which, from the following day, he would be transferred to another place of work, around 20 km from his residence, where his work schedule would be from 09.00 a.m. to 1.00 p.m. and from 3.00 to 9.00 p.m.

Following this, the employee immediately expressed his objection to this transfer, claiming that the law required this order to be formalised in writing and for due notice to be given. In turn, the employee also claimed that the new work schedule, with a lunch break of two hours, was in breach of Clause 16 paragraph 4 of the applicable collective bargaining agreement and, as such, he would present himself at the place where he had always worked.

Given this refusal to comply with the transfer order, the employer considered that the employee was unjustifiably absent from work and dismissed him with just cause.

The Court was of the opinion that verbal communication of the change of place of work by the employer was null due to lack of form and, as such, void, and did not have to be complied with by the employee, since the place of work was not effectively changed.

The Court understood that the employee was not unjustifiably absent from work in the days referred to, having instead legitimately disobeyed an unlawful order from his employer.

There being no unlawful conduct by the employee, the assumptions used as ground for the decision of dismissal with just cause did not exist.

Judgment of the Constitutional Court No. 227/2015 of 2015-04-28
Liability for claims arising from an employment relationship or its breakdown – Liability of a parent company headquartered outside the country

In the first instance, the Labour Court of Setúbal ruled unconstitutional the combined interpretation of the rules set out in Article 334 of the Labour Code and Article 481 paragraph 2, introduction, of the Companies Code, "*in the part in which they prevent joint liability of a company headquartered outside the country, in a relationship of reciprocal holdings, control or group with a Portuguese company, for claims arising from an employment relationship established with the Portuguese company, or its breakdown, due to breach of the principle of equality, set down in Article 13 of the Constitution*". The Public Prosecuter lodged an appeal against this decision to the Constitutional Court.

The conjugation of the Articles referred to above resulted in a duality of regimes for guaranteeing labour claims depending on whether the parent company of the Portuguese employer was headquartered in Portugal or in another country.

Thus, if the parent company was headquartered in another country, employees working for affiliate companies controlled by that company could not hold the parent company liable for claims arising from labour relationships established with their employer.

The Constitutional Court, along the same line as the Labour Court of Setúbal, understood that this interpretation, by creating two regimes, was materially unconstitutional and represented a breach of the principle of equality.

For the Court, the difference between two parent companies (one headquartered in Portugal and the other headquartered in another country), based on their individual legal status, is not sufficient to justify unequal treatment, in Portugal, of the employees of companies under Portuguese law that they control, since the work in question is provided, in both cases, by two Portuguese companies in Portugal.

As regards this dispute concerning claims arising from employment contracts of two Portuguese employees, employed by Portuguese companies, working in Portugal, the only differentiating factor was the fact that the companies they worked for were part of

economic groups, one controlled by a Portuguese company and the other controlled by a company headquartered in Germany.

If it is not interpreted in this way, we could be faced with a situation in which two companies were engaged in the same business, in precisely the same location, with Portuguese and/or foreign partners, hiring Portuguese and/or foreign employees, working in the Portuguese market and/or for export and, due to the simple fact that the headquarters of the company that controlled one of the companies were outside Portugal, the employees of both companies would not benefit from the same guarantee of their wage claims, which would be a breach of the principle of equality, since there are no any material grounds to justify such differentiation.

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