

# CUATRECASAS, GONÇALVES PEREIRA



## NEWSLETTER | EMPLOYMENT LAW

### CONTENTS

EMPLOYMENT LAW NEWSLETTER | SEPTEMBER, 2016

I EXTENSION ORDERS	<b>2</b>
<hr/>	
II NATIONAL CASE-LAW	<b>2</b>
<hr/>	
III EUROPEAN CASE-LAW	<b>3</b>
<hr/>	

**EMPLOYMENT NEWSLETTER**

I EXTENSION ORDERS

Area of Activity	Order
<p><b>Driving Schools</b></p>	<p><b>Order no. 237/2016 – D.R. no. 166/2016, Series I of 2016-08-30</b>                      Establishes the extension of the working conditions set out in the collective bargaining agreement between the Portuguese Association of Driving Schools - APEC - and the Workers and Service Technicians Trade Union - SITESE, and amendments thereto.</p>

II NATIONAL CASE-LAW

*Ruling by the Guimarães Court of Appeal of 16-06-2016  
 Practice – Statutory Holidays*

This ruling considers the lawfulness of an employer's decision to cease granting a day of statutory holiday to employees on Shrove Tuesday and St. John's Day, after having initiated this practice without any loss of remuneration, twenty years hence. The Guimarães Court of Appeal (GCA) upheld the decision taken by the Court of First Instance, whereby granting a day of statutory holiday to employees was tantamount to a labor practice, which had become binding, as "it displays the features of universality, since it was applied to all employees without distinction; fixity, since it remained unchanged over many years, and consistency, since, as has been proven, it was adopted throughout a twenty-year period".

The GCA, therefore, ruled that the employer could not unilaterally withdraw a concession, which, by dint of its definition as a practice, had become binding.

*Ruling by the Supreme Court of Justice of 14-07-2016  
 Employment Contract – Termination by the employee – Lawful grounds for termination – Termination - Declaration*

In the case under review, the Supreme Court of Justice ("SCJ") was requested to rule on the lawful termination of an employment contract by the employee. In short, the Court ruled that merely referring to a specific subparagraph of Article 394 (2) of the Labor Code as the applicable provision does not provide a sufficient legal basis for termination of contract. Instead, specific facts that may be subsumed under one of the said subparagraphs must be indicated.

In this particular case, the employee terminated the contract on the grounds of non-payment of overtime work, in addition to non-compliance with the legal provisions governing the

employee's working hours and rest periods. The question arose as to whether this justification met the legal requirement of "a summary of the underlying facts".

The SCJ ruled that the employee's justification merely comprised allusions to general concepts and in particular to the legal characterization of a form of work foreseen in law, which not having been substantiated through references to time and place, could not be considered sufficient grounds for termination of contract. Hence, the employee had not met the requirements of due process to lawfully terminate his employment contract, thereby becoming civilly liable before the employer.

*Ruling by the Porto Court of Appeal of 07-07-2016*

*Accident at Work – Disqualification of the accident - Gross negligence – Assessment of predictability*

The ruling in question analyses the employer's exemption from liability on the grounds of disqualification of the accident at work. According to the law, when the accident solely occurs by dint of the victim's gross negligence, there is disqualification of the accident. In this particular case, the question arose as to whether the law encompasses the employee who suffers an accident at work while performing his tasks without complying with the rules laid down by the employer.

According to the Porto Court of Appeal (PCA), the mere fact that the employer has issued rules does not automatically disqualify an accident, even if the employee does not comply with such rules. On the contrary, effective understanding of the rules, or at least, evidence that the employee did not face any obstacles to understanding them, in view of his level of education and access to information, must be provided, in addition to demonstrating that it was his failure to comply with the rules that led to the accident.

The Court found that a case falls under article 14 (1) (b) of Law no. 98/2009, of 4<sup>th</sup> of September, when it can be evidenced that the victim was grossly negligent and that such negligence was the sole cause of the accident. "A slight fault such as carelessness, distraction or lack of caution is not sufficient grounds [to disqualify the accident]; instead behavior must be shown to have been reckless or devoid of a basic sense of care" concluded the Court.

III EUROPEAN CASE-LAW

*Ruling by the European Court of Justice in Case C-16/15 of 14-09-2016*

*Maria Elena Pérez López vs. Servicio Madrileño de Salud (Madrid Regional Health Authority)*

M.E. Pérez López was recruited to work as a nurse at the University Hospital of Madrid for the period from 5<sup>th</sup> of February to 31<sup>st</sup> of July 2009, having signed a fixed-term contract on the grounds of "temporary and extraordinary needs in the hospital". The said contract was successively renewed seven times, meaning that the employee worked consecutively as a nurse in the said hospital between February 2009 and June 2013, when she was informed of the decision not to renew her employment contract again.

In the employee's opinion, the contract she had signed with the Hospital was not a true fixed-term contract, since the grounds given for using this type of contract were unlawful – rather

than being a merely temporary need of the Hospital, it was a permanent need. The employee took legal action to have the fixed-term contract declared null and void before the Madrid Administrative Court no.4. For its part, the Court referred the matter to the ECJ, requesting a ruling on whether Spanish legislation which allows the successive renewal of fixed-term contracts in the healthcare sector infringes the framework agreement on fixed-term work, under which the Member States must introduce measures to prevent abuse arising from the use of successive fixed-term employment contracts.

According to the ECJ, the successive renewals of this employee's fixed-term contract were not based on temporary needs of the hospital. Conversely, there is a structural deficit of health professionals throughout the healthcare sector in the Madrid region.

Since Spanish legislation does not provide for limits on the number of renewals of fixed-term contracts, the insecure situation of employees is perpetuated by allowing the use of fixed-term contracts in order to cover permanent needs.

Accordingly, the Court found that Spanish legislation on this matter infringes the framework agreement on fixed-term contracts.

## CUATRECASAS. GONÇALVES PEREIRA

### CONTACTS

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  
cuatrecasasportugal@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 expressed herein 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. Access to the information provided in this Newsletter does not imply the formation of a lawyer-client relationship or of any other sort of legal relationship. This Newsletter is published free of charge and may not be copied or distributed without formal prior consent. If you do not wish to continue receiving this Newsletter, please send an e-mail to [cuatrecasasportugal@cuatrecasas.com](mailto:cuatrecasasportugal@cuatrecasas.com).*

---