CUATRECASAS, GONÇALVES PEREIRA

**NEWSLETTER** I EMPLOYMENT LAW

## CONTENTS

EMPLOYMENT LAW NEWSLETTER I OCTOBER, 2016

## EMPLOYMENT NEWSLETTER

### I HIGHLIGHT

*Decision of the National Commission for Data Protection no. 923/2016*

This Decision concerns whether or not paralegals and enforcement agents have lawful access to the pay slips of employees who are parties to civil legal proceedings. The National Commission for Data Protection (NCDP) issued an opinion whereby it concluded that the attachment of salaries does not require knowing all the personal data contained on a pay slip. In fact, in addition to information concerning the salary, the pay slip may also contain other information which is not relevant to calculate the amount that can be attached (for example, information regarding trade union membership).

Whereas the information contained on pay slips is connected to the concept of employees' private life, which is protected by law and under the Constitution, the NCDP concluded that such information benefits from the enhanced legal protection granted to sensitive data, which means that access to such information requires legal authorization.

Since there is no legal authorization for such access, the NCPD concluded that access to the information contained on the pay slip which is unnecessary for this particular procedure (in other words, to any information other than the gross and net salary and attachments thereof) constitutes an infringement of the Personal Data Protection Act.

The NCDP therefore ruled that employers must not provide the pay slips of employees who are parties to civil legal proceedings to paralegals and enforcement agents.

### II EXTENSION ORDERS

| Area of Activity | Order |
|---|---|
| **Wholesale trade of pharmaceutical and/or veterinary products** | **Order no. 269/2016 - *Diário da República* no. 198/2016, Series I of 2016-10-14**<br><br>Establishes the extension of the working conditions arising from the amendments to the Collective Bargaining Agreement entered into by the Association of Wholesalers of Chemical and Pharmaceutical Products – GROQUIFAR – and the Confederation of Industry, Energy and Transport Trade Unions – COFESINT and by the same employers' association and the Workers and Service Technicians Trade Union – SITESE. |

| | |
|---|---|
| **Preparation of food products** | **Order no. 270/2016 - *Diário da República* no. 198/2016, Series I of 2016-10-14**<br><br>Establishes the extension of the working conditions arising from the amendments to the Collective Bargaining Agreement entered into by the Portuguese Association of Manufacturers of Casings and Similar Products – ITA and the Federation of Farming, Food, Beverages, Hospitality and Tourism Trade Unions - FESAHT. |
| **Shipping Agents** | **Order no. 271/2016 - *Diário da República* no. 198/2016, Series I of 2016-10-14**<br><br>Establishes the extension of the working conditions arising from the amendments to the Collective Bargaining Agreement entered into by the Portuguese Association of Shipping Agents – AANP – and the Merchant Navy, Travel Agency, Forwarding Agents and Fisheries Employees Trade Union – SIMAMEVIP. |
| **Health services (private hospitalization sector)** | **Order no. 272/2016 - *Diário da República* no. 198/2016, Series I of 2016-10-14**<br><br>Establishes the extension of the working conditions arising from the amendments to the Collective Bargaining Agreement entered into by the Portuguese Association of Private Hospitalization – APHP – and the Federation of Farming, Food, Beverages, Hospitality and Tourism Trade Unions – FESAHT. |

## III CASE LAW

*Ruling of the Supreme Court of Justice, 7th of July 2016*
*Nullity of ruling – Failure to rule – Challenging the factual basis – Investigative proceedings – Disciplinary proceedings – Jurisdiction of the Supreme Court of Justice*

This ruling analyzes the lawfulness of the dismissal of an employee, question which has been brought before the Supreme Court of Justice, *inter alia*, due to the alleged expiration of the

disciplinary proceedings.

In the case under analysis, the employer's Board of Directors had decided, on the 10th of May 2013, disciplinary proceedings to be brought against the employee and his immediate preventive suspension. It was only on the 6th of September 2013 that an investigation report was drafted, with the Notice of Misconduct attached to it. It was sent to the employee by registered post with recorded deliver, postmarked on the 16th of September 2013. The employee received the said documents two days after their dispatch.

The Court of First Instance found the dismissal unlawful due to the expiration of the disciplinary proceedings. The employer filed an appeal, requesting the investigative proceedings allegedly conducted (as testimonial evidence that had not been documented in writing) to be included in the case file as established facts, in order to demonstrate that prior investigations had been conducted for the purpose of drafting the Notice of Misconduct. The Guimarães Court of Appeal, however, has ruled that, by dint of the applicable Collective Bargaining Agreement (CBA), all investigative proceedings undertaken within the scope of disciplinary proceedings had to be documented in writing and initialed, as otherwise they could not be accepted as evidence in Court.

The matter was referred to the Supreme Court of Justice, which has ruled that the law does not require all the proceedings undertaken within the scope of disciplinary proceedings to be documented in writing (in particular, such documentation is not required for testimonial evidence produced for the purpose of investigating within a disciplinary proceeding). Furthermore, since this matter cannot be subsumed into any of the exceptions to the mandatory termination of employment contracts regime, the interpretation of the CBA provision was found inadmissible, for it prevents proceedings not documented in writing from being considered by the Court.

The Supreme Court of Justice has concluded that the employer could justify the delay in drawing up the Notice of Misconduct on the basis of witness accounts, thereby demonstrating that the exception invoked by the employee was not relevant to the case. Nevertheless, in this particular case, the employer could not prove the facts through the investigative proceedings undertaken, since he had not claimed those facts in a timely manner.

*Ruling by the Évora Court of Appeal, 7th of September 2016*
*Contract for the use of temporary employment – Admissibility*

In the case under review, the Évora Court of Appeal had to decide whether or not there were legal grounds for entering into a temporary work contract. The situation underlying this case was the one of an employee that had been recruited by a temporary-work agency (TWA) on a contract of indefinite duration, in order to be assigned to a User Company (UC), whose area of activity was to assemble modules, manufacture, distribute and market components for the car industry. The UC conducted near 80% of its business with a single client, whose activity was seasonal in nature. On two occasions, the TWA informed the employee that the employment contract had terminated, and on both occasions the employee was re-recruited to be re-assigned to the same UC.

The UC justified the use of temporary work with the need to temporarily replace an employee who was on sick leave as a result of a work accident, having resorted to temporary work on further two occasions. The grounds for the first of these occasions were the same as for the first usage (replacing an employee), whilst the second was based on the allegation of market fluctuations and disruptions in the car industry, affecting the core business of the UC's main client, thus causing its workload to vary.

According to the Court, declaring the UC's activity to be variable corresponds to the general risk underlying any business activity (and, in this particular case, stems from the risk accepted by the UC in broadly developing its business model on the basis of its main client's orders). Hence, it does not constitute sufficient grounds for resorting to temporary work, since it "*is not a question of the company having a specific temporary need, but rather it comprises a sort of "job grant" in which the employees would be kept or not, depending on the production needs*". In fact, if such grounds were to be considered valid for using temporary work, this would be tantamount to shifting the inherent risk of the business activity undertaken by the UC on to its employees.

The Court has therefore found the contracts for the use of temporary work under analysis to be null and void and ruled that, as a result, there was a permanent employment contract between the employee and the UC.

*Ruling by the Constitutional Court no. 510/2016, 21st of September 2016*

This ruling analyzed the decision taken by the Labor Court of Braga (LCB) to withdraw the enforcement of the regulation set out in Article 564 (2) of the Labor Code (LC), on the grounds of unconstitutionality. The Court of First Instance's decision was based on the breach of the constitutional principles of independence and separation of powers, since the aforementioned Article 564 (2) granted jurisdiction to the Authority for Working Conditions (AWC) not only to impose penalties, but also to sentence the employer to the payment of the amounts foreseen in such penalties. According to the LCB, sentencing to such payment would be an exclusive competence of the judicial function, having the Court ruled the above-mentioned article to be unconstitutional.

In its analysis of the aforementioned constitutional principles, the Constitutional Court ruled that they do not prevent «parajurisdictional powers» from being granted to administrative bodies, as the AWC. Such entities may, therefore, perform acts which are equivalent in substance to those of the judicial function, providing that they pursue a relevant public interest, which is protected by the Constitution and is granted by law to the administrative body in question.

Since Article 564 (2) refers to labor credits protected by administrative regulations and the law provides for the administrative authorities to take effective action in order to guarantee the enforcement of labor rights, the Constitutional Court decided that, when an infringement is the result of a breach of legal obligations, the enforcement of the corresponding administrative proceedings should also be considered a matter of public interest. Therefore, the Court has concluded that it was within the AWC's jurisdiction the competence to order the payment of outstanding amounts.

Hence, the Constitutional Court has ruled that the provision under analysis is not unconstitutional.

## CONTACTS

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