CUATRECASAS

NEWSLETTER I EMPLOYMENT LAW

CONTENTS

EMPLOYMENT LAW NEWSLETTER I JULY, 2017

EMPLOYMENT LAW NEWSLETTER

I LEGISLATION HIGHLIGHTS

Law no. 54/2017 – *Diário da República* (Portuguese Official Gazette) no. 135/2017, Series I, 14-07-2017

Legal arrangements for sportsmen and women's employment contracts, sports training contracts and agent or broker's contracts.

Order no. 210/2017 - *Diário da República* (Portuguese Official Gazette) no. 135/2017, Series I, 14-07-2017

Establishes the revaluation coefficients to be applied to remunerations which serve as a benchmark for calculating pensions drawn for the first time in 2017.

Law no. 55/2017 - Diário da República (Portuguese Official Gazette) no. 136/2017, Series I, 17-07-2017

Extends the scope of the special action for recognising the existence of an employment contract and the procedural mechanisms for fighting the concealment of employment relationships.

The latter was the subject of a Legal Flash on July 17, 2017.

II EXTENSION ORDERS

Area of Activity	Order
Importers/Stockists and Retailers of Pharmaceutical Products	**Order no. 218/2017 - *Diário da República* no. 139/2017, Series I, 20-07-2017** Establishes the extension of the amendments to the collective bargaining agreement between NORQUIFAR – National Association of Importers/Stockists and Retailers of Chemical and Pharmaceutical Products and COFESINT - Federation of Industry, Energy and Transport Trade Unions, and another (pharmaceutical products)

Hotel and Catering	**Order no. 219/2017 - *Diário da República* no. 139/2017, Series I, 20-07-2017** Establishes the extension of the collective bargaining agreement between the Portuguese Association of Hotel, Catering and Similar (AHRESP) and the Service, Commerce, Catering and Tourism Trade Union - SITESE (canteens, staff canteens and meal manufacturers).

III NATIONAL CASE-LAW

Ruling by the Porto Court of Appeal, of June 26, 2017
Fixed-term and indefinite duration employment contracts – Concurrent contracts

The employee brought proceedings against her employer, in which she alleged that her employment contract, which had been entered into verbally in October 2005 with her previous employer, had been transferred to her current employer, by dint of an alleged transfer of undertaking in late 2014.

The employee also alleged that her employer had sent her a letter in March 2015 opposing to the renewal of her employment contract, due in April 2015, which in the employee's view comprised unlawful dismissal, since her employment contract did not have a fixed term. Hence, she filed for unlawful dismissal.

The employee alleged that only through receipt of the said letter opposing to the contract renewal was she informed that her contract was, after all, a fixed-term contract, since when she had signed the document submitted to her by her employer in January 2015, she had assumed that it was in line with their agreement and was, thus, a contract of indefinite duration, in keeping with the contract she had entered into with her previous employer.

The Court of First Instance ruled that neither transfer of undertaking nor that the employee had believed her employment contract to be of indefinite duration had been proved and that the contract had been entered into for a period of three months. It ruled partially in favour of the plaintiff since that, as the grounds for signing a fixed term contract was the launch of a new business activity, pursuant to the Labour Code the minimum term for such a contract had to be six months. As a result, the contract signed by the two parties was valid, but had to be considered as having been entered into for a period of six months.

The appeal lodged by the employee called on the Court of Appeal to rule on a number of points, including the nature and form for terminating the employment contract.

The Court of Appeal considered the grounds for signing a fixed-term employment contract as valid, with the amendment of six months' duration, upholding the Court of First Instance's decision. The appeal hinged on the fact that the employee had begun working for her new employer on January 17, 2015, but the fixed-term contract had only been signed on January 23, 2015.

The employee alleged, that in view of having started her work duties on January 17, 2015, an employment contract of indefinite duration had been in force from that date onwards and that signing a fixed-term employment contract was thus unlawful, equating to *"a violation of principles enshrined in the right to work and employee freedom and the ensuing right to information."*

The Court of Appeal, in keeping with case-law from the Supreme Court of Justice, ruled that two employment contracts between the parties had been in force: one of indefinite duration had entered into force on January 17, 2015 and another with fixed-term duration, had commenced on January 23, 2015. Therefore, *"two employment contracts, one of indefinite duration and another of fixed-term duration had existed during the same period of time. Since the two arrangements are incompatible and having excluded any possibility of their co-existing, we are led to conclude that the more recent of them terminated the earlier one, rescinded it and became the document regulating the rights and duties agreed to by the parties."*

The Court of Appeal therefore ruled that *"with 2 employment contracts in force with the same defendant, the earlier one of indefinite duration and a more recent one with a fixed-term, one has to conclude that the latter terminated the former and rescinded it,"* hence, *"should the plaintiff claim compensation instead of reinstatement, such a request would be incompatible with fixed-term employment, the termination of which was communicated to her within the legal timeframe."*

Ruling by the Évora Court of Appeal, of June 28, 2017
Expiry of collective bargaining agreement – Effects

The employee brought proceedings against her employer, seeking a ruling obliging him to pay her differences in salary, on the grounds that she had signed an employment contract encompassed by the collective bargaining agreement (CBA hereunder) signed by the AEEP – Association of Private and Cooperative Education Establishments and FENPROF – National Teachers' Federation and others.

She further alleged that teaching staff's working hours are 35 hours per week, comprising 22 teaching hours and 13 non-teaching hours and that the employer had not respected the teaching component of this work model. As a result, the timetables were drawn up without taking this activity into account and the employee had worked overtime, for which she was

now claiming the payment. In addition, she alleged that her employer had not paid her a part of remuneration owing, nor other benefits, payment of which she was also claiming.

The employer challenged the proceedings, alleging that the CBA had expired on May 13, 2015 and that the new legal arrangements repealed the work model of teaching hours set out in the said CBA. Hence, the employee's only working time limit was the 35-hour weekly limit and no longer the 22-hour teaching limit. Therefore, she had not worked overtime and had been paid the remuneration owing for work performed.

The Court of First Instance ruled partially in favour of the plaintiff, with the employer having lodged an appeal with the Évora Court of Appeal, calling on it to rule on a number of points, including whether or not additional remuneration was owing for teaching hours that went beyond 22 hours per week, in view of the expiry of the applicable CBA.

Whilst there was no dispute concerning the applicability of the CBA to the employment relationship and that the said CBA has expired on May 13, 2015, pursuant to the Labour Code until a new agreement enters into force or a decision is reached in arbitration, the terms agreed by the parties remain in force or, in their absence, the effects already produced on employment contracts by the agreement, regarding remuneration; professional category; working times and the social benefits that the expired agreement afforded to employees. Remaining matters would then fall under the aegis of the general arrangements contained in the Labour Code.

In the case under review, the parties expressly agreed when they signed the employment contract that the employee would have a 35-hour working week, with a teaching component of 22 hours and a non-teaching component of 13 hours. Thus, *"the parties included the CBA provisions on normal working time and the distinction between teaching and non-teaching components in the contract, thereby adopting them as their own, regardless of whether the said agreement was being applied to the employment relationship."*

Accordingly, this agreement still stands regardless of the said CBA's expiry, on the basis of the contractual provisions. With this reasoning, the Court of Appeal upheld the First Instance's ruling.

CUATRECASAS

CONTACTS

CUATRECASAS, GONÇALVES PEREIRA & ASSOCIADOS
SOCIEDADE DE ADVOGADOS, SP, RL
Sociedade Profissional 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