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NEWSLETTER I EMPLOYMENT LAW

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EMPLOYMENT LAW NEWSLETTER I AUGUST, 2017

I LEGISLATION HIGHLIGHTS

Law no.73/2017 - Diário da República no. 157/2017, Series I, 16 August 2017
Strengthening the legal framework for preventing harassment

This law was highlighted in the Legal Flash issued on 16 August 2017.

II EXTENSION ORDERS

Area of Activity	Order
Electrical and Electronics Sector	**Order no. 222/2017 - Diário da República no. 140/2017, Series I 21-07-2017** Establishes the extension of the amendments to the collective bargaining agreement between Portuguese Association of Electrical and Electronics Sector Companies and FETESE – Industry and Services Trade Unions Federation and others.
Chemical and Pharmaceutical Products	**Order no. 223/2017 - Diário da República no. 140/2017, Series I, 21-07-2017** Establishes the extension of the collective bargaining agreement between GROQUIFAR – Chemical and Pharmaceutical Products Wholesalers' Association and the Industry, Energy and Transports Trade Unions Federation – COFESINT and another, and between the same employers' association and the Workers and Services, Trade, Catering and Tourism Technicians Trade Union – SITESE (pharmaceutical products).

Chemical and Pharmaceutical Products	**Order no. 225/2017 - Diário da República no. 141/2017, Series I, 24-07-2017** Establishes the extension of the amendments to the collective bargaining agreement between GROQUIFAR – Chemical and Pharmaceutical Products Wholesalers' Association and FIEQUIMETAL, the Inter-trade Union Federation of Metalwork, Chemical, Electrical, Pharmaceutical, Pulp, Paper, Graphics, Printing, Energy and Mining Industries (pest control).
Foodstuffs	**Order no. 226/2017 - Diário da República no. 141/2017, Series I, 24-07-2017** Establishes the extension of the amendments to the collective bargaining agreement between ADIPA, the Foodstuffs Distributors' Association and the Workers and Services, Trade, Catering and Tourism Technicians Trade Union – SITESE (foodstuffs retail section).
Trade, Industry and Services	**Order no. 229/2017 - Diário da República no. 142/2017, Series I, 25-07- 2017** Establishes the extension of the amendments to the collective bargaining agreement between ACISB, the Bragança Trade, Industry and Services Association and another and the Portuguese Trade, Office and Services Trade Union Federation – FEPCES.
Importers/Wholesalers and Retailers of Pharmaceutical Products	**Order no. 230/2017 - Diário da República no. 142/2017, Series I, 25-07-2017**

	Establishes the extension of the amendments to the collective bargaining agreement between NORQUIFAR – National Association of Importers/Wholesalers and Retailers of Chemical and Pharmaceutical Products and the Industry, Energy and Transports Trade Unions Federation – COFESINT and another, and between the same employers' association and Portuguese Trade, Office and Services Trade Union Federation – FEPCES and another (chemical products).

III NATIONAL CASE-LAW

Ruling by the Constitutional Court no.324/2017, of 22 June 2017
Simple breach of procedural formalities of dismissal through procedural errors - Compensation

The matter referred to the Constitutional Court in this case concerned unconstitutionality, on the grounds of violating the principles of proportionality and equality enshrined in the rule of Article 389, (2) of the Labour Code, according to which, simple breach of procedural formalities through procedural error is subject to liability to pay compensation amounting to half of the sum payable for unlawful dismissal, in other words, ranging from 7.5 to 22.5 days of basic remuneration plus seniority payments for each full or part year of service.

Pursuant to the Labour Code, "either the employer himself or his appointed investigator must gather the evidence requested in the reply to the Notice of Misconduct, unless he considers this to be a delaying tactic or irrelevant, which he must justify in writing."

The Constitutional Court stated that "a distinction must be drawn between the various kinds of procedural infringements in the disciplinary proceedings which precede a lawful dismissal: they include the most serious or nullifying as defined in article 382 (2) of the Labour Code, which render the proceedings themselves null and void and the subsequent dismissal unlawful, with the effects foreseen in article 389 (1) of the said code; serious irregularities because they infringe the employee's defence rights and which correspond to the unjustified failure to gather evidence as requested in the reply to the Notice of Misconduct and which despite amounting to an administrative infringement (art. 356 (1) and (7) do not render the dismissal unlawful but make the employer liable to pay compensation to the employee (art. 389 (2)); those which comprise administrative infringements only (see for example, the infringement foreseen in art. 356 (5) and (7); and simple breaches of procedural formalities."

This case concerns an irregularity which, despite infringing the employee's defence rights, does not invalidate the disciplinary proceedings and as a result, does not render the dismissal unlawful. The irregularity entails the failure to provide a written justification for rejecting the request in the reply to the Notice of Misconduct to gather evidence, based on considering the request to be an obvious delaying tactic or irrelevant. Whether such a request is pointless or not for the given line of defence can only be judged on the basis of a written argument.

The Constitutional Court upheld the Supreme Court of Justice's ruling, having considered that the arrangements set out in Article 389 (2) of the Labour Code fall within the scope of the legislator's prerogative for the purpose of attaining a legitimate goal and are neither unreasonable nor do they breach the principle of equality, given that "these arrangements help to emphasize the right to procedural defence and to offset the dismissed employee having to bring court proceedings in order to establish that, despite the infringement of his defence rights, his right to job security does not prevail for reasons which can be attributed to him – this is the objective meaning of the judicial review of the lawfulness of dismissal," since such aims cannot be achieved by simpler means, "and when establishing the consequences 'of a simple breach of procedural formalities in disciplinary proceedings [...] the lawmaker drew a clear distinction between the former and those of an unlawful dismissal'" in view of the fact that the entitlement to compensation amounts to half of the sum payable to an unlawfully dismissed employee and does not include remuneration corresponding to the period between dismissal and final judgement.

Furthermore, such compensation may be modified on a case-by-case basis, according to the severity; depth; number, and effects of the infringement of defence rights, between a minimum and a maximum of 7.5 to 22.5 days of basic remuneration plus seniority payments for each full or part year of service.

The equality principle claim was also dismissed on the grounds that "in the context of employment disciplinary proceedings, the employer and the defendant employee are not on an equal footing (…) With specific regard to procedural defence rights – which is the matter in hand – only the employer can infringe them; the employee can merely choose whether to exercise them or not."

The Constitutional Court therefore ruled that "the provisions of article 389 (2), of the Labour Code, adopted in Act no.7/2009, of 12 February and as amended by Act no.23/2012 of 25 June, whereby a simple infringement of procedural formalities in dismissal proceedings is subject to liability to pay compensation equalling half of the sum payable for unlawful dismissal, calculated pursuant to article 391 (1) of the same law, are not deemed unconstitutional."

Ruling by the Évora Court of Appeal, 8 June 2017
Grounds for Fixed-term contract

The employee brought proceedings against the employer for unlawful dismissal, alleging that he had entered into a fixed-term employment contract for a period of six months, which was replaced by another six-month contract some three weeks later, with different starting and finishing dates, according to the employer's convenience.

He also alleged that in the meantime he had received a letter from his employer informing him of the termination of his contract on the grounds of supervening unsuitability for the position. The employee expressed his disagreement with the decision and a further letter was sent to him, referring to his failure to meet targets (which according to the employee had never been set).

In addition to the dismissal being unlawful, the employee also considered that his contract should be a deemed permanent, since it did not contain the grounds for being of fixed-term, pursuant to statutory requirements.

The employer justified the fixed-term nature by seasonal fluctuations in paint sales and that the respective termination had been agreed with the employee how understood the employer's disappointment with his performance, with there not being any entitlement to compensation.

The Court of First Instance ruled partly in favour of the plaintiff, declaring the term set out in the employment contract to be null and void and considering it to be a permanent contract and an unlawful dismissal.

The employer lodged an appeal on various issues to the Évora Court of Appeal, in particular the validity of the fixed-term set in the employment contract.

The justification for a fixed-term contract concerned the need to "meet the First Party temporary needs arising from the structural fluctuations during the course of the year in the paints and varnishes market.
2 – Hence, and for the purposes of the aforementioned, the employee hereby engaged will contribute to the sale of paints and varnishes, demand for which is expected to increase, corresponding to an expected increase in the number of customers during the spring and summer seasons."

Three weeks later, the parties signed a new document with the heading "Fixed-Term Employment Contract" with identical contents, except for the period of validity, which was stipulated as beginning on 21 July 2014 and ending in January 2015.

The Labour Code establishes that a fixed-term employment contract can only be entered into to meet a company's temporary needs and for the period which is strictly necessary to meet

such a need. It also stipulates that a company's temporary need is specifically defined as seasonal activities or when an annual production cycle fluctuates in accordance with the structural characteristics of the respective market, including the supply of raw materials.

Furthermore, the Labour Code also sets out that an employment contract must at the very least stipulate the term and the respective justification and that such justification must include a specific reference to the underlying causes and establish a link between the justification given and the term.

Nevertheless, in this case, the Court of Appeal concurred with the Court of First Instance, that the justification given was not precise enough to enable the link between the justification and the term to be clearly ascertained.

According to the Court of Appeal, "the contract in hand was entered into on 21 July 2014, a month after the beginning of summer. Hence, giving an increase in the number of clients during spring as a justification makes no sense. As the contract lasts for six months, it would terminate in January, in other words, it would run for four months during autumn and winter. There are no factual grounds for the employer's justification and his reference to spring and summer does not tie in objectively with the calendar."

The Court therefore ruled the establishment of a term in the contract to be null and void and that it had become a permanent contract between the employer and employee, since the justification given "does not provide sufficient arguments for establishing a term and furthermore, spring had already ended a month before the contract was signed, meaning that it would be in force during the autumn and one month of winter, contrary to the grounds given.".

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