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EMPLOYMENT LAW NEWSLETTER I OCTOBER, 2017

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I LEGISLATION

Decree-law no. 126-B/2017 - Diário da República no. 193/2017, 1st Supplement, Series I, October 6, 2017

Establishing special arrangements for early entitlement to an old-age retirement pension for beneficiaries of the general social security system and integrated social protection systems who have contributed for a very long period.

This decree-law establishes new rules for early retirement without any reduction to the amount of the pension for (i) employees with at least 48 years of contributions; or (ii) employees with at least 46 years of contributions and who began paying in at or under the age of 14.

Hence, beneficiaries of the general social security system and integrated system who meet these conditions can claim their old-age retirement pension early, without any reductions to the amount of their pensions.

This decree-law also establishes new rules for counting the minimum contributory period required for claiming a pension (guarantee period) and for counting contributions to which differentiated accrual rates will be applied (calculated on the basis of pensionable service and salary).

Periods of contributions in other social protection systems will be taken into account for:

- Minimum pensionable service for claiming a pension;
- Calculating the amount of the pension and any applicable reductions or increases;
- Requirements for being entitled to an old-age retirement pension before reaching the statutory age of retirement or with a bonus;
- Requirements for being entitled to an old-age retirement pension before reaching the statutory age of retirement if in involuntarily long-term unemployment.

The Decree-law also stipulates that the sustainability factor (which is a reduction in the amount of the pension) shall no longer be applied to disability allowances when they are converted into old-age retirement pensions, and that disability allowances automatically become old-age retirement pensions in the month following that in which the beneficiary reaches the statutory age of retirement.

Furthermore, neither the sustainability factor nor reductions for early retirement will be applied to the pensions of beneficiaries who are:

- at least 60 years of age and have at least 48 calendar years of pensionable service;
at least 60 years of age; have at least 46 calendar years of pensionable service, and started paying social security or public-sector social security contributions at or before the age of fourteen.

This decree-law came into effect on October 1, 2017.

II EXTENSION ORDERS

<table>
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<th>Area of Activity</th>
<th>Order</th>
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Establishes the extension of the amendments to the collective bargaining agreement between the Lisbon Municipality Meat Traders' Association and other employers' associations and the Trade Union of Meat Trade and Industry Workers of Southern Portugal. |
| Driving Schools                              | Order no. 296/2017 - Diário da República no. 191/2017, Series I, October 3, 2017  
Establishes the extension of the amendments to the collective bargaining agreement between APEC – the Portuguese Driving Schools Association and SITESE - Services, Trade, Catering and Tourism Workers and Technicians Trade Union. |
| Western Region Trade, Industry and Services | Order no. 297/2017 - Diário da República no. 195/2017, Series I, October 10, 2017  
Establishes the extension of the amendments to the collective bargaining agreements between ACIRO – Western Region Trade, Industry and Services Association and CESP – the Portuguese Trade Union of Trade, Offices and Services Workers and between the same employers' |
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<th>Industry</th>
<th>Order Details</th>
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<td><strong>Biscuits and similar products sector</strong></td>
<td><strong>Order no. 299/2017 - Diário da República no. 198/2017, Series I, October 13, 2017</strong> Establishes the extension of the amendments to the collective bargaining agreement between AIBA – Association of Biscuit and similar product manufacturers and FESAHT - the Federation of Farming, Food, Beverages, Hospitality and Tourism Trade Unions (factory, ancillary and maintenance staff).</td>
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<td><strong>Laundry, Tailoring, Shoe repairs and Key-cutting</strong></td>
<td><strong>Order no. 300/2017 - Diário da República no. 198/2017, Series I, October 13, 2017</strong> Establishes the extension of the amendments to the collective bargaining agreement between ANASEL – National Association of Laundry, Tailoring, Shoe repairs and Key-cutting Companies and SITESE - Services, Trade, Catering and Tourism Workers and Technicians Trade Union.</td>
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<td><strong>Foodstuffs Trade and Industry</strong></td>
<td><strong>Order no. 306/2017 - Diário da República no. 200/2017, Series I, October 17, 2017</strong> Establishes the extension of the amendments to the collective bargaining agreement between ANCIPA – National Association of Foodstuffs Trade and Industry and SITESE - Services, Trade, Catering and Tourism Workers and Technicians Trade Union (fruit confectionery and preserves – clerical staff).</td>
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III NATIONAL CASE-LAW

Ruling by the Guimarães Court of Appeal, July 11, 2017
Irreducibility of Remuneration – Night work and Shift-work allowance

The employee brought proceedings against the employer, claiming that the court should recognize that the customary and repeated payment of a shift-work allowance equivalent to 25% of basic remuneration and night work equivalent to 75% thereof, between, at least, January 1, 1994 and April 30, 2009 was remunerative in nature and thus find the employer’s reduction of these components unlawful.

To this end, he alleged that there was an explicit agreement regarding wage conditions, which specifically mentioned the amounts payable for shift-work allowance and remuneration for each hour of night work.

Moreover, he alleged that a unilateral cut in remuneration occurred in September 2012, whereby the shift-work allowance was reduced from 25% to 10% of basic remuneration and the night work hourly supplement was reduced from 75% to 50%.

The employer countered that the employee's salary had not been cut, in view of the fact that he had worked a regular shift for three years and that when he returned to continuous shift working, a new scale for shift-work allowance and night work was already in force, having been approved on February 1, 2009.

The Court of First Instance dismissed the entire case, since it found that no cut in remuneration had occurred, rather the employee’s working conditions had changed, having moved from a regular shift not involving night work to continuous and rotating shift work, thus involving the particular hardship of night work and irregular working hours.
The employee rejected the decision and lodged an appeal to the Guimarães Court of Appeal, which was called to rule on several issues, including the irreducibility of remuneration.

The Labour Code provides that remuneration is the payment to which an employee is entitled under the terms of contract and the rules applicable thereto, and that such remuneration comprises basic remuneration and other regular payments made directly or indirectly in cash or in kind.

Pursuant to the principle of the irreducibility of remuneration, employers are prohibited from reducing remuneration, except under the circumstances foreseen in the Labour Code or through a collective bargaining agreement.

The Guimarães Court of Appeal found that this principle only applies to remuneration in the narrow sense and does not encompass components relating to greater effort or hardship in the workplace or specific circumstances in which work is performed (for example, a derogation from working time limits), or extra work (which occurs when work is provided beyond normal working hours) or performing work in more demanding conditions (such as in shift work or night work), nor performance or attendance-related pay, payment of which is not guaranteed in advance.

The Court therefore found that even though such additional payments fall within the scope of the concept of remuneration, they are not encompassed by the principle of irreducibility of remuneration. As a result, they are only payable whilst the circumstances that justify them last and can be withdrawn by the employer when the specific situation that led to such payments discontinues.

Accordingly, the Court ruled that, on the basis of the facts, the employer’s actions did not constitute a breach of the principle of irreducibility of remuneration.

*Ruling by the Supreme Court of Justice, June 1, 2017*

*Equal work equal pay – Discrimination and Burden of Proof*

The employee brought proceedings against the employer, claiming a violation of the principle of equal treatment and the prohibition of discrimination, in the category of the secondary principle of “equal pay for equal work”, and that, accordingly, the employer be sentenced to pay him the differences in salary between his earnings and those of other colleagues at the same grade (4), in addition to the corresponding interest for late payment.

The employee alleged that he had been performing the duties of a grade 4 team leader since March 3, 2010, following an internal vacancy announcement, and that his employer had never paid him the remuneration corresponding to this category, as opposed to the practice observed towards his colleagues performing the same duties.
The employer countered that the applicable Company-level Agreement, which the employee had acceded to individually, did not include minimum monthly remunerations for senior and middle management for the various levels of hierarchy and that, when the internal vacancy was announced, the said Agreement was already in force.

Notwithstanding, the Court of First Instance found that applying a Company-level Agreement could not put employees at a disadvantage compared to the effects of applying the general principles of the Labour Code, and therefore ruled that the constitutional principle of “equal pay for equal work” had been breached.

The employer rejected the decision and lodged an appeal to the Court of Appeal, which overturned the Court of First Instance’s ruling and found that the principle of equal pay for equal work had not been breached.

The Labour Code sets out that someone who alleges discrimination must indicate the employee or employees compared to whom he has suffered discrimination, whilst the employer must prove that the difference in treatment is not based on any grounds for discrimination.

Thus, the said provision establishes a reversal of the burden of proof compared to the general principle, since the burden of proof lies with the employer and not the employee.

Nevertheless, and as was underscored by the Court of Appeal, this kind of reversal is only applicable when the employee who claims discrimination on the part of the employer actually alleges and demonstrates facts, which could in some way fall within the realm of discriminatory behavior.

From this perspective, the Court of Appeal found that the said presumption was not applicable in this case, since the employee did not allege and was thus unable to demonstrate any facts that are tantamount to discriminatory behavior.

Accordingly, the employee had to allege and prove facts pertaining to the nature; quality, and quantity of work performed by employees in the same company and in the same grade, which would allow one to conclude that the payment of different remunerations breached the principle of “equal pay for equal work”.

The Court of Appeal, therefore, found that the substance of the facts did not constitute a breach of the constitutional principle of “equal pay for equal work”.

Following an appeal on points of law lodged by the employee, the Supreme Court of Justice upheld the Court of Appeal’s findings, having concluded that the employee had not proven that the employer had breached the “equal pay for equal work” principle, and that, in the
light of the submissions, the employer could establish certain differences in remuneration within the same category and grade according to performance and merit in the tasks assigned to employees and which form part of a competitive corporate structure.