CUATRECASAS

NEWSLETTER I EMPLOYMENT

CONTENTS

EMPLOYMENT LAW NEWSLETTER I DECEMBER, 2017

I EXTENSION ORDERS

Sector	Order
Handling	**Order no. 361/2017 - *Diário da República* no. 227/2017, Series I, November 24, 2017** Establishes the extension of the collective bargaining agreement and its amendment between AESH – Association of Handling Sector Companies and SITAVA – Aviation and Airport Workers Trade Union.
Pharmaceutical Industry	**Order no. 362/2017 - *Diário da República* no. 229/2017, Series I, November 28, 2017** Establishes the extension of the collective bargaining agreement between APIFARMA - Portuguese Pharmaceutical Industry Association and FIEQUIMETAL - Inter-trade Union Federation of Metalwork, Chemical, Electrical, Pharmaceutical, Pulp, Paper, Graphics, Printing, Energy and Mining Industries and another.
Private Hospital Care	**Order no. 376/2017 - *Diário da República* no. 241/2017, Series I, December 18, 2017** Establishes the extension of the amendments to the collective bargaining agreement between APHP - Portuguese Association of Private Hospital Care and FESAHT - the Federation of Farming, Food, Beverages, Hospitality and Tourism Trade Unions.

Laundry, Tailoring, Shoe repairs and Key cutting	**Order no. 377/2017 - *Diário da República* no. 241/2017, Series I, December 18, 2017** 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 FESETE - the Trade Union Federation of Textiles; Woollens, Garments; Footwear and Leather Workers.

II NATIONAL CASE LAW

Ruling by the Porto Court of Appeal, November 6, 2017
Sportsman Employment Contract – Court of Arbitration for Sport

In the case under review, "X", a professional footballer, brought proceedings on the basis of an employment contract against "Y", a sports entity, for the sum of € 15,914.76 plus interest.

To that end, he alleged having entered into a sportsman employment contract with "Y" on July 1, 2014, for the 2014/15 and 2015/16 seasons, and that he had not been paid either remuneration for the month of May 2016 nor the agreed amount for accommodation expenses for the said month.

"Y" contended that the Labour Court where "X" had brought proceedings lacked jurisdiction over the subject matter, considering (i) their agreement established under clause 15 of the employment contract, which provided that *""Y" and the player agree that any disputes arising from this contract shall be resolved through a Commission of Arbitration established pursuant to the provisions of article 55 of the CBA* [Collective Bargaining Agreement] *..."* and (ii) the provisions of articles 1 (1), 3 (3) and 4 (1) of the Court of Arbitration for Sport Act, approved by Act 74/2013, of September 6.

In fact, Act 74/2013, of September 6, established the Court of Arbitration for Sport (CAS), stipulating that the said Court specifically had jurisdiction to deliver justice in disputes arising from the legal framework for sports or concerning sports activities.

Subsequently, the "Transitional Rule" contained in in Article 3 (3) of Act 33/2013, of September 6, amended Act 74/2013, of September 6, by providing that *"Commissions of Arbitration which have been assigned exclusive or prior jurisdiction (…) shall remain in*

force until July 31, 2016, whereupon the respective arbitration jurisdiction shall be conferred upon the CAS."

Indeed, when the contract of employment as a sportsman for the 2014/15 and 2015/16 seasons was signed, Act 74/2013, of September 6, was not yet in force. Nevertheless, when "X" sought a settlement to the dispute, that is to say, on January 17, 2017, the commissions of arbitration had been replaced by the CAS.

The Court of First Instance, therefore, ruled that the Labour Court lacked jurisdiction on the subject matter, and as a result, "Y" did not have a case to answer in that Court, having concluded that the matter in hand fell within the jurisdiction of the Court of Arbitration for Sport, and that the dispute should have been referred to it.

"X" contested the decision by lodging an appeal to the Porto Court of Appeal, on the grounds that the termination of the Commission of Arbitration does not authorize lawmakers to simply transfer such instance's jurisdiction to a new arbitration tribunal, with entirely different procedures, procedural rules and costs, ignoring those cases in which the parties, under the auspices of legally guaranteed private autonomy, took a free, informed and jointly agreed decision to confer jurisdiction for possible disputes upon a given court of arbitration.

In view of the fact that bringing an employment dispute arising from a sportsman employment contract requires the explicit and unequivocal will of the parties, and that an appeals procedure before the CAS must be foreseen in the respective collective bargaining agreement, the Court of Appeal ruled that, since July 31, 2016, there had been a legal vacuum in collective regulation regarding the resort to the CAS on matters of voluntary arbitration.

Furthermore, it added that when "X" sought a settlement to the dispute, the arbitration clause in his employment contract was unenforceable, with everything carrying on as if it was no longer in force, whereby, if rules on the matter are not set out in the collective bargaining agreement, the only possible conclusion is that disputes arising from an employment contract as a sportsman fall within the jurisdiction of the Labour Courts.

Thus, the Court of Appeal concluded that the provision contained in Article 3 (3) of the Court of Arbitration for Sport Act cannot be imposed on parties which had agreed upon "another entity with jurisdiction" to resolve the dispute, especially since a future revision of the collective bargaining agreement may not provide for any appeal to the CAS on matters of voluntary arbitration.

Ruling by the Lisbon Court of Appeal, October 11, 2017
Reduction in Remuneration – Administrative offence

In the case under review, an administrative fine of € 8,160.00 was imposed on "X", for having breached the principle of the irreducibility of remuneration.

In this regard, (i) the monthly salary of employee "B", pharmacist's assistant, was cut from €1,950.00 in January 2012 to € 1,275.00 in May 2012; (ii) the monthly salary of employee "C", pharmacist, was cut from €2,500.00 in January 2012 to € 2,125.00 in May 2012; (iii) the monthly salary of employee "D", pharmacist's assistant, was cut from €1,950.00 in January 2012 to € 1,657.50 in May 2012, and € 1,436,50 in October 2012; (iv) the monthly salary of employee "E", pharmacist, was cut from € 2,150.00 in January 2012 to € 1,827.50 in May 2012 and € 1,583,84 in October 2012; and (v) the monthly salary of employee "F", cleaner, was cut from € 663,86 in January 2012 to € 552,30 in May 2012.

"X" contested this administrative decision through the Court of First Instance, alleging that (i) the proceedings were null and void, since the administrative notices had not been served on the Company Managing Director, (ii) the administrative fine had been imposed on the basis of general criteria and not on specific facts; (iii) they had gone through very difficult times financially; (iv) the cut in remuneration had been agreed with the employees and, in some cases, had gone hand-in-hand with a reduction in working time or the provision of other perks; (v) the cuts in remuneration were temporary and based on the collective bargaining agreement signed with the trade union.

The Court of First Instance rejected the claim for annulment, upholding the administrative decision, whereupon "X" lodged an appeal against the judgement to the Lisbon Court of Appeal, which, in turn, annulled the ruling and sent the case back for a new judgement.

A new judgement was subsequently handed down which rejected the legal challenge and upheld the administrative decision, hence, "X" lodged an appeal against this judgement before the Lisbon Court of Appeal.

Thus, the Lisbon Court of Appeal was asked to rule on a number of issues, including the appropriateness, proportionality and degree of hardship caused by the upholding of the administrative decision.

The Court found that "X" was the owner of a pharmacy which went through very difficult times financially, as a result of narrowing margins on medicines; the general economic recession which caused a downturn in demand for medicine; customers choosing cheaper medicines and an increase in the purchase of generic drugs rather than branded medicines; and that these circumstances even brought about a revision of the collective bargaining agreement in force for the sector, which lowered remuneration.

Notwithstanding, the collective bargaining agreement only included such a provision as of June 23, 2012, i.e. after remuneration had been cut and, furthermore, it was only applicable to affiliated pharmacists, after the date in question and not beyond December 31, 2013. Such premises were not fulfilled in the case in hand.

The Labour Code sets out the following grounds for the decision to impose an administrative fine in addition to the provisions of the general statutory rules on administrative offences: the degree to which recommendations made in the written warning have been breached; coercion; misrepresentation; deceit or any other dishonest means adopted by the perpetrator.

Meanwhile, the general statutory rules on administrative offences stipulate that the decision regarding the quantum of the administrative fine is based on the grounds of the seriousness of the administrative offence; culpability; the perpetrator's economic circumstances and the financial gain obtained from having committed the administrative offence.

In this regard, the Lisbon Court of Appeal dismissed the cut in remuneration of employees "C" and "F", since the former had been earning the salary of a technical manager, but ceased to perform such tasks, thus casting doubt as to whether or not such a reduction could have been caused by the corresponding contractual amendment, and the latter had her working hours reduced.

Whilst the agreement entered into with the employees concerning the salary cuts did not in the Court's opinion justify the act *per se*, it should, nevertheless, be taken into consideration for assessing the perpetrator's culpability.

In addition, the Lisbon Court of Appeal ruled that the drop in "X"'s turnover should be considered, since the level of the administrative fine must also be based on the perpetrator's economic circumstances.

The Court found on the basis of the proven facts indicating a minor offence, specifically that the cut in remuneration concerned three employees (and not five, as originally ascribed), the fact that "X" had obtained their agreement, in addition not least, to the attested erosion of turnover, that there were mitigating circumstances and, therefore, set the fine at € 5,100.00.

CUATRECASAS

CONTACT

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

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. The personal data you provide us, including your email address, will be treated in accordance with national and European data protection legislation. If you do not wish to continue receiving this Newsletter, please send an e-mail to cuatrecasasportugal@cuatrecasas.com