CUATRECASAS

Legal Update - 1st Quarter 2022

Labor Newsletter

May 16, 2022

Contents

Laboratory

We can group the court decisions highlighted in this newsletter into three main sections: (i) transfer of undertakings, (ii) fixed-term contracts, and (iii) workplace accidents. In this newsletter, there is also a "bonus" section on substituting employees during strikes, which is particularly important in the event of social unrest. The rulings on the transfer of undertakings are of particular interest, as they address an important question on this matter: Is there a transfer of undertakings in a succession of service providers?

Portuguese and European Union (EU) case law have worked towards defining the concept of "transfer of undertakings" ("TUPE"). First, the implementation of the TUPE system is not limited to direct relations between the previous and the subsequent owner of the undertaking; second, the undertaking being "transferred" is no longer limited to a tangible economic unit (e.g., physical premises, equipment, raw materials, and tangible assets), but can now be carried out when the undertaking consists only—or mainly—of individuals with certain expertise, provided the "economic unit" is maintained.

These issues tend to become more pertinent in cases involving a change of service or outsourcing provider, particularly when the service is mainly based on the workforce (e.g., security and cleaning services are typically brought to Portuguese and EU courts, although they are not the only ones).

Although the rulings cited in this newsletter cover several interesting issues relating to TUPE, we focus on one question in particular: In each specific change of service providers, what is required for a TUPE to apply? The rulings in question give opposite decisions in situations that are essentially the same: the succession of companies providing security services.

The Évora Court of Appeals "takes it for granted" that the succession of service providers constitutes a TUPE, meaning the employment contracts are transferred to the new provider automatically. In contrast, the Guimarães Court of Appeals, in a well-reasoned resolution, tries to establish the role the personal factor plays in defining the economic unit as a group of employees, concluding that it is irrelevant, particularly because, in the case concerned, the new employer does not "take on" any of the previous provider's employees.

On another note, we inform that, as of June 18, companies with 50 or more employees must have a whistleblower channel. For those who were unable to attend—either in person or online—the whistleblowing conference that Cuatrecasas held in partnership with Expresso on May 11, you can watch the recording **here**.

Maria da Glória Leitão,
Partner in the Labor Law Practice Area

Legislation

Law 1/2022 of January 3, 2022

Extending the justified absence period following the death of first-degree relatives, amending the Labor Code.

Law 1/2022 of January 3 extends the justified absence period following the death of a first-degree relative from 5 to 20 consecutive days. This possibility has been extended to the death of a person in a de facto partnership or the death of the person with whom the employee lives.

Furthermore, employees may now be absent for up to five consecutive days following the death of their non-separated spouse or the spouse of a first-degree relative.

Law 5/2022 of January 7, 2022

Establishing the regime for bringing forward pension entitlement due to disability.

This law lowers the age at which individuals are entitled to their pension due to disability when those individuals meet, cumulatively, the following conditions: (i) they are aged 60 or older; (ii) they have a degree of disability equal to or higher than 80%; and (iii) they have contributed to social security for at least 15 years with a degree of disability equal to or higher than 80%.

The sustainability factor does not apply to the calculation of the pension amount or to the penalty for lowering the usual retiring age.

Ordinance 6/2022 of January 4, 2022

Carrying out the annual update of workplace accident pensions for 2022.

The ordinance increase the value of wrokplace accident pensions by 1%.

Ordinance 7/2022 of January 4, 2022

Establishing the conditions for publishing and recording working hours.

This ordinance introduces new rules on the conditions for publishing the working hours of both fixed and mobile employees, and the way working hours are recorded, including the use of IT systems, for (i) employees operating automobile vehicles; (ii) mobile employees in railway transport not subject to the control established by EU law; (iii) freelance drivers in mobile transport not subject to the control established in EU law, as well as drivers working in transport for electronic platforms (TVDE).

Ordinance 26/2022 of January 10, 2022

Establishing the "Empreende XXI" measure.

This ordinance establishes support for young people seeking their first jobs to create and develop new business projects, as well as for those who are unemployed and registered with the Employment and Professional Training Institute (*Instituto do Emprego e da Formação Profissional*, "IEFP").

The support available includes financial support (either for setting up companies or for employees themselves); vocational training; specialized mentoring and consultancy; and the possibility of setting up incubators when necessary.

Ordinance 38/2022 of January 17, 2022

Establishing the Sustainable Employment Commitment (*Compromisso Emprego Sustentável)* measure.

This ordinance creates an incentive for companies to hire, for an indefinite period, those whose are unemployed and registered with the IEFP. To do this, financial support for employment can be combined with financial support for paying social security contributions, which can also be combined with tax and non-tax incentives for employment.

Financial support is also increased for (i) hiring job seekers aged 35 or under, as well as for hiring individuals with disabilities; (ii) contracts with a base salary equal to or higher than twice the national minimum wage; (iii) jobs in the interior; and (iv) hiring people of the sex that is underrepresented in a given profession.

Ordinance 64/2022 of February 1, 2022

Establishing the pathologies for which a disability medical certificate for multi-use may be issued, as part of the assessment process by a medical board for assessing disabilities, without the need for an in-person examination of the interested party.

As part of the transitional and exceptional system for issuing a multiple disability certificate established in Decree-Law 1/2022 of January 3, the ordinance sets out (i) the pathologies that may benefit from this certificate, with the documentary assessment of the interested party by a medical board for assessing disabilities; and (ii) the disability coefficient to attribute to each pathology and the information to be submitted by the interested party.

Regional Legislative Decree 5/2022/M

Approving the value of the minimum monthly wage guaranteed for the Autonomous Region of Madeira.

This legislative decree increases the minimum monthly wage in the Region of Madeira to €723.

Extension ordinances

Activity area	Ordinance
Aviation	**Ordinance 31/2022 - Official Gazette of the Republic of Portugal 10/2022, Series I of January 14, 2022** Extending the company agreement and its changes between SATA Internacional - Azores Airlines, SA and the Portuguese Civil Aviation Flight Personnel Trade Union (SNPVAC).
Public works and services	**Ordinance 32/2022 - Official Gazette of the Republic of Portugal 10/2022, Series I of January 14, 2022** Extending the collective agreement between the Construction, Public Works and Services Companies Association (AECOPS) and others and the Federation of Trade Unions in Industry and Services (FETESE) and others.
	Ordinance 33/2022 - Official Gazette of the Republic of Portugal 10/2022, Series I of January 14, 2022

Glass transformation sector	Extending the changes to the collective agreement between the Association of Plate Glass Transformation Companies and the Portuguese Federation of Construction, Ceramics, and Glass Trade Unions (FEVICCOM) and another trade union.
Automobile inspection centers	**Ordinance 34/2022 - Official Gazette of the Republic of Portugal 10/2022, Series I of January 14, 2022** Extending the collective agreement between the Portuguese Association of Automobile Inspection Centers (ANCIA) and the Federation of Trade Unions in Industry and Services (FETESE).
Education	**Ordinance 35/2022 - Official Gazette of the Republic of Portugal 10/2022, Series I of January 14, 2022** Extending the changes to the collective agreement between the Union of Portuguese Mutual Societies and the Portuguese Education Federation (FNE) and others.
Trade and services	**Ordinance 36/2022 - Official Gazette of the Republic of Portugal 11/2022, Series I of January 17, 2022** Extending the collective agreement between the Commercial Association of the Aveiro District (ACA) and the Trade Union of Trade, Office and

	Service Workers of Portugal (CESP) and another trade union.
Aviation	**Ordinance 37/2022 - Official Gazette of the Republic of Portugal 11/2022, Series I of January 17, 2022** Extending the company agreement and its changes between SATA Internacional - Azores Airlines, SA and the Aviation and Airport Workers Trade Union (SITAVA) and another trade union.
Metallurgical, metalworking, and electromechanical sector	**Ordinance 103/2022 - Official Gazette of the Republic of Portugal 40/2022, Series I of February 25, 2022** Extending the changes to the collective agreement between the Association of Portuguese Metallurgical, Metalworking, and Related Industries (AIMMAP) and the Portuguese Industry and Energy Trade Union (SINDEL).
Trade and services	**Ordinance 104/2022 - Official Gazette of the Republic of Portugal 41/2022, Series I of February 28, 2022** Extending the changes to the collective agreement between the Commercial, Industrial and Services Association of Bragança (ACISB) and others and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES).

Electricity, domestic appliances, photography, and electronics sectors	**Ordinance 117/2022 - Official Gazette of the Republic of Portugal 56/2022, Series I of March 21, 2022** Extending the changes to the collective agreement between the Business Association of the Electricity, Domestic Appliances, Photography, and Electronics Sectors (AGEFE) and the Portuguese Federation of Trade Unions in Trade, Offices and Services (FEPCES).
Trade and services	**Ordinance 122/2022 - Official Gazette of the Republic of Portugal 59/2022, Series I of March 24, 2022** Extending the changes to the collective agreement between the Commercial Association of the Viana do Castelo District and the Trade Union of Trade, Office and Service Workers of Portugal (CESP).
Janitorial, security, cleaning, and domestic services	**Ordinance 123/2022 - Official Gazette of the Republic of Portugal 59/2022, Series I of March 24, 2022** Extending the changes to the collective agreement between the Portuguese Facility Services Association (APFS) and the Trade Union of Workers in Janitorial, Security, Cleaning, Domestic and Other Services (STAD) and others.
	Ordinance 124/2022 - Official Gazette of the Republic of Portugal 59/2022, Series I of March 24, 2022

Leather processing and related trades	Extending the changes to the collective agreement and the Portuguese Association of Footwear, Parts, and Leather Goods Companies (APICCAPS) and the Federation of Trade Unions in Textile, Woolens, Clothing, Footwear, and Leather Workers of Portugal (FESETE).
Trade and services	**Ordinance 125/2022 - Official Gazette of the Republic of Portugal 59/2022, Series I of March 24, 2022** Extending the collective agreement between the Commercial Association of the Aveiro District (ACA) and the Trade Union of Trade, Office and Service Workers of Portugal (CESP) and another trade union.
Aviation	**Ordinance 133/2022 - Official Gazette of the Republic of Portugal 63/2022, Series I of March 30, 2022** Extending the collective agreement between SATA Internacional - Azores Airlines, SA and the Trade Union of Civil Aviation Pilots (SPAC).
Horticultural industry	**Ordinance 134/2022 - Official Gazette of the Republic of Portugal 63/2022, Series I of March 30, 2022** Extending the changes to the collective agreement between the Portuguese Association of Traders and Industrial Producers of Food Products (ANCIPA) and the

	Federation of Trade Unions in Agriculture, Food, Beverages, Hospitality, and Tourism of Portugal (FESAHT) and others (horticultural industry).

Portuguese case law

Judgment of the Guimarães Court of Appeals of January 20, 2022

There is no presumption of a TUPE merely because a certain provision of services is awarded, without a time gap, to a new operator in a public tender.

In the case analyzed by the Guimarães Court of Appeals, the question was whether there was a TUPE between two service providers (Company X and Company Y) that succeeded each other in the same workplace and that provided the same type of services to the same contracting entity (in this case, *Infraestruturas de Portugal*).

Infraestruturas de Portugal awarded to Company X the provision of security services for a railway station; after the contract with Company X ended, *Infraestruturas de Portugal* awarded the same services to Company Y.

Company Y provided the same services as those of Company X, for which it used equipment that belonged to the contracting authority (*Infraestruturas de Portugal*) and that Company X had used previously.

Company X notified its employees who worked at the workplace that their employment contracts would be transferred to Company Y because there was a TUPE. Company Y refused to accept that a TUPE applied in this case, and it refused to take on Company X's employees who worked at the workplace. One employee challenged his dismissal against Company X, if a TUPE did not apply; or against Company Y, if a TUPE did apply.

It was proven that there was no transfer of tangible assets from Company X to Company Y, and the proceedings established that Company Y did not take on any employees who had previously worked for Company X.

The court ruled that, in this case, a TUPE did not apply, meaning the employment contracts should not be transferred to the new service provider. The Guimarães Court of Appeals clarified that, in cases like this one, where the operation of a

specific activity is transferred between competitors, a mere succession of businesses in a certain activity must be distinguished from a TUPE.

For a TUPE to apply, the court found that not only must there be an economic unit, but that economic unit must maintain the previous service provider's identity after

the new operator comes in. The economic unit's identity must not be extinguished with the employer's loss of a client, but must continue and be passed on to the new service provider.

The court emphasized that a presumption of transfer cannot be made. The existence of an economic unit within the sphere of the "assignor" is not enough to impose the transfer of employment contracts on the "assignee." To make this distinction, the factual circumstances that characterize the operation must be considered, including the type of business or undertaking, whether or not tangible assets are transferred, the value of the intangible assets at the time the customers are or are not transferred, and the extent to which the activities carried out are similar. As this activity is essentially based on the workforce, what is particularly important is whether (i) a substantial number of employees are taken on, and (ii) the previous operator's employees are taken on and, if so, the extent to which they are important for the activity to continue.

Because, in this case, the identity of the economic entity that existed in the sphere of the previous contractor (Company X) was not maintained, it cannot be considered that a TUPE applied.

Judgment of the Évora Court of Appeals of January 27, 2022

With the TUPE from one business to another, the employment contracts of the employees working in that undertaking are also transferred. If, in turn, the employer to whom the undertaking is transferred assigns its contractual position to a third party, they will also transfer the circumstances associated with the employment contracts that were initially transferred to it by the first employer.

This lawsuit pertained to transferring an employment contract, first as part of a succession of service contracts, and then, following the assignment, to a third company, of the contractual position of the service provider.

Securitas provided security services to Hospital de São João through a service contract. Once that contract ended, the hospital awarded the security services to a new provider, VPOTEC. VPOTEC then assigned its position in the service contract to a third party, Powershield.

A Securitas employee, being informed by his employer (Securitas) of the transfer of his employment contract in the transfer of the provision of services, was not taken on by VPOTEC, nor, later, by Powershield. VPOTEC did not accept that a TUPE applied in this case. Powershield claimed that (i) a TUPE did not apply in this case; and (ii) it was unaware of this employee, who was not included in the list of VPOTEC employees, all of whom it took on.

To summarize, the Évora Court of Appeals ruled as follows:

(i) There was a TUPE between Securitas and VPOTEC, "*through which it came to provide the security services that, until then, had been provided by Securitas,*"

"*using the same facilities and the same means that belong to the hospital, and carrying out the same functions [...].*"

(ii) The Securitas employee's employment contract was transferred to VPOTC.

(iii) By not taking this employee on, VPOTEC "*promoted acts that objectively constitute grounds for unfair dismissal*."

(iv) With the assignment of the contractual position, Powershield became responsible for the circumstances associated with that unfair dismissal, as it had accepted all the rights and obligations arising from the service contract associated with the assignor's position, and it was obliged to take on the employee in the same undertaking in which he had worked.

(v) Because the "*undertaking is the facilities where* [the employee] *provided his services*" and "*was assigned*" to Powershield, Powershield is obliged to reinstate the employee in his previous position.

For procedural reasons, Powershield was finally ordered to pay compensation instead of reinstating the employee.

Judgment of the Guimarães Court of Appeals of January 20, 2022

The existence of a time gap between the provision of activities is relevant for the purpose of applying article 112.4 of the Labor Code

According to the Guimarães Court of Appeals, the reduction or removal of the trial period depending on the duration of previous employment of the same employee by the same employer for the provision of the same activity, particularly through a fixed-term contract, a temporary employment contract, a service contract, or an internship contract, under article 112.4 of the Labor Code, applies to all situations in which a previous provision of the activity performed the function attributed to the trial period, as the parties already have mutual knowledge that justifies its reduction or removal.

The Guimarães Court of Appeals highlights the importance that a time gap can have on this exclusion, as significant changes, particularly technological or organizational changes, can take place during that time gap, with implications for the employee's adaptability and performance. In these cases, the full use of the trial period established by law or by an agreement is justified.

In this case, there was a period of only 35 days between the 70 days of work under the first contract and the 39 days of work under the second one, "*which is too short to presume any significant change*," according to the Guimarães Court of Appeals, and which, in any case, was not brought forward by the employer in its statement of defense.

Judgment of the Guimarães Court of Appeals of February 3, 2022

Mere fluctuations in demand are part of the normal operation of the market, meaning fixed-term employment contracts based on an "exceptional increase in company activity" cannot be based on those fluctuations, but only on truly exceptional situations.

The Guimarães Court of Appeals found that, in the case of fixed-term contracts based on an "exceptional increase in company activity," the validity of the term cannot be based on market fluctuations and studies and plans pertaining to lower or higher demand, when the employer's *modus operandi* is the successive hiring of employees in response to this exceptional increase, dismissing them at the end of the term.

"Exceptional increase in company activity" only includes anomalous, extraordinary, and temporary quantitative fluctuations. Mere "peaks" in service volume arise from normal market fluctuations inherent to the business, and they do not in themselves justify making use of fixed-term contracts.

The Guimarães Court of Appeals ruled that the increase or decrease in demand is part of the normal operation of the market, so fixed-term contracts are not admissible, but require a truly exceptional situation.

Judgment of the Guimarães Court of Appeals of February 3, 2022

Fixed-term contracts based on article 140.4 of the Labor Code do not require a strong basis, but rather a simple indication of the law on which they are based.

Under article 140.4 of the Labor Code, fixed-term contracts are permitted for (i) the "launch of a new activity for an uncertain duration, as well as for the start-up of a new company or undertaking belonging to a company with fewer than 250 employees, within two years from any of those events"; and for (ii) the "employment of an individual in a situation of long-term unemployment."

The Guimarães Court of Appeals ruled that, unlike with fixed-term contracts that are based on article 140.2 of the Labor Code, for which a stronger basis is required (i.e., stating the specific circumstances that justify fixed-term contracts), fixed-term contracts based on article 140.4 of the Labor Code only require that the law on which they are based be stated, as references to established law are commonly used to describe a given situation.

Judgment of the Guimarães Court of Appeals of January 20, 2022

In ongoing special workplace accident procedures, the court may freely attribute to the injured party absolute and permanent inability to carry out their usual work,

after an expert medical report, and the court is not bound by the majority opinion given in the expert report.

The expert medical report constitutes evidence subject to the judge's free assessment, and it does not constitute a decision on the degree of disability to be established. The answers that the medical experts give must enable the judge to analyze and consider the degree of disability to be attributed. However, the court's freedom to assess the medical factors in the procedure is not synonymous with arbitrariness, and therefore the medical experts must state the factors on which they base their opinion and justify it.

Therefore, expert medical reports are merely pieces of evidence. If the report or its basis is deficient, obscure, or contradictory, the courts may not consider those examinations, as they have the discretion to assess the evidence.

Judgment of the Supreme Court of October 13, 2021

A mere breach of safety rules does not suffice to establish the mischaracterization of workplace accidents; rather, the employee's gross negligence and their awareness of this breach is also required.

In the case of an employee who removed a protection harness to go to the bathroom, but who then decided to help another employee carry a panel (breaching safety rules), after which he slipped and fell, it cannot be stated that he acted in a "*voluntary and conscious manner*."

The Supreme Court ruled that it was only proven that the employee assisted a colleague momentarily, as he always used safety equipment, meaning he must have removed the harness due to the urgency of the situation. Therefore, the employee's actions cannot be disaproved, as the circumstances in which his colleague required assistance, or whether this assistance was unnecessary, were not established.

Consequently, finding that it cannot be concluded that the employee acted with gross negligence or without justification, the Supreme Court ruled that the workplace accident had not been mischaracterized.

Judgment of the Évora Court of Appeals of February 9, 2022

To prohibit the substitution of employees who are on strike, it is understood that the workplaces of employees who carry out tasks at various workplaces of the employer have as their workplace the one at which they are scheduled to work on the day of the strike, as of the date the strike notice is given.

To ensure the effects of a strike are not neutralized, the Labor Code prohibits employers from substituting employees who are on strike with individuals who, on the date the strike notice was given, were not working at the workplace in question.

In this case, the employer ordered an employee who worked at one of the employer's workplaces to work, on the day of the strike, at the workplace affected by the strike, where the employee also worked occasionally.

The court ruled that, in cases in which there are successive changes of workplace planned in advance, alternating between the employer's various workplaces, it must be understood, for the purposes of substituting employees who are on strike, that their workplace is the one where they had been scheduled to work on the day of the strike as of the date the strike notice is given. Therefore, if the employee had been scheduled to work at another workplace, he or she cannot be asked to work at the workplace affected by the strike, and in that situation, he or she would be considered an external employee at the service of that workplace.

EU case law

Judgment of the Court of Justice of the European Union of January 13, 2022

Under EU law, collective agreements are prohibited under which, to determine whether the threshold of worked hours that entitles employees to an overtime supplement is reached, the hours corresponding to the annual paid vacations taken by the employee are not considered worked hours.

It is unanimous and consistent case law of the Court of Justice of the European Union ("CJEU") that any practice or omission by an employer that potentially deters an employee from benefiting from annual vacation is incompatible with the right to annual paid vacation established in Article 7.1 of Directive 2003/88.

In this case, the CJEU ruled that a mechanism to record worked hours established in a German collective agreement, in which the hours corresponding to the annual paid vacation taken by employees were not counted as worked hours for the allocation of an overtime supplement, was incompatible with the right to annual paid vacation.

The provision in the collective agreement made it practically impossible to reach the threshold of worked hours that entitled employees to the overtime supplement in months when employees exercised their right to vacation, regardless of the hours worked in the remainder of that monthly period. The CJEU ruled that the mechanism was apt to deter employees from exercising their right to annual paid vacation.

Judgment of the CJEU of February 24, 2022

Under EU law, provisions are prohibited that exclude unemployment benefits from the social security benefits granted to domestic workers under a legal social security regime, as this provision disproportionately affects female workers and is not justified by objective reasons that do not relate to discrimination based on sex.

The CJEU was asked to give a preliminary ruling on a Spanish legal provision under which domestic workers were expressly excluded from protection against unemployment in terms of social security.

Exclusion from protection against unemployment results in domestic workers being unable to receive other social security benefits to which they might be entitled, the granting of which is subject to the termination of their right to unemployment benefits, such as permanent disability benefits or social assistance for the unemployed.

A situation in which an apparently neutral provision, criterion, or practice places individuals of either sex in a situation of comparative disadvantage with respect to individuals of the other sex is considered indirect discrimination by reason of sex, unless the provision, criterion, or practice is objectively justified and the means to achieve it are appropriate and necessary.

The CJEU ruled that, because there is a special social security regime for domestic workers that excludes them from eligibility for the unemployment benefits under the general social security regime, and because it is statistically proven that women work in this profession significantly more than men do, this Spanish legal provision should be considered as indirect discrimination based on sex and, consequently, as contrary to EU law.

Judgment of the CJEU of February 10, 2022

EU law, to guarantee equal treatment in employment and professional activity, establishes that the concept of "reasonable adaptations for individuals with disabilities" means employees, including those who are trainees after being employed, who, due to their disability, are declared as unfit to carry out the essential functions of their position, can be assigned to another position, provided this does not impose a disproportionate burden on the employer.

The CJEU ruled that, when an employee becomes permanently unfit to maintain their position due to a disability, their reassignment to another position can constitute an adequate measure as part of the "reasonable adaptations" established in Article 5 of Directive 2000/78. However, the CJEU ruled that, to establish whether the adaptations constitute a disproportionate burden, the financial costs involved, the size, and the financial resources of the company should be considered, as well as the possibility of receiving public funds or other aid.

The CJEU clarified that equal treatment in employment and professional activity includes being able to access employment, independent work, and professional activity, as well as access to all types and levels of professional guidance, vocational training,

advanced vocational training, and professional retraining. Therefore, it extends to individuals who are in a preparatory stage or an apprenticeship for a profession, when it takes place in conditions of actual and effective salaried work, for and under the management of an employer.

For additional information on the contents of this document, please contact Cuatrecasas.