
Legal Update_3rd Quarter 2021

Labor Newsletter

November 15, 2021



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Laboratory

In this editorial, we would like to highlight three rulings from the ones we address in this newsletter.

The exceptional lockdown measures, which enforced mandatory remote work, gave rise to numerous difficulties in managing professional and personal life. However, they also made it possible a degree of flexibility and saving in time (spent commuting). This demonstrated the importance of the element time in organizing professional and personal life.

The rulings of the Porto Court of Appeals of March 22, 2021, and April 19, 2021, address this matter directly, which is why we will be discussing them in this newsletter.

The ruling of March 22, 2021, pertains to an employee's increased commuting time due to a change of workplace following changes in the employer's business, which is a matter that arises frequently. In its decision, the court found that a total commute time (home-work-home) of two hours and twenty minutes fell "*within the reasonable limits.*"

The ruling of April 19, 2021, highlighted the importance of striking a work-life balance and upholding an employee's right to have a working schedule that is compatible with the right to care for a minor, which restricts the employer's power to set the working schedule.

Whereas the two rulings above pertain to time, the one we address below pertains to remuneration.

The ruling of the Coimbra Court of Appeals of September 8, 2021, establishes that remuneration should be agreed and set as a gross amount, rendering void contractual clauses that i) establish a net remuneration value, and ii) oblige employers to pay any taxes or other charges for the employee.

This type of clause is not common in purely internal contracts, but it is becoming more frequent in cases of international mobility, where their purpose is fiscal neutrality with regard to the various tax systems to which the expatriate may be subject.

Aside from the argument given in this ruling and the ensuing judgment, we highlight the importance of clarifying the value of remuneration, as several benefits established in labor law (e.g., salary supplements and compensation/indemnity) are calculated on the basis of the gross value of base remuneration.



In addition to the rulings we highlight, in this newsletter, we also address other court judgments of interest, which we recommend reading.

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



Legislation

Ordinance 149/2021 of July 15, 2021

Establishes the conditions for the *Instituto do Emprego e Formação Profissional, IP's (IEFP, IP) ex officio* verification of waiving the extraordinary incentive for normalizing business activity.

Ordinance 170-A/2020 of July 13, in the text given by Ordinance 294-B/2020 of December 18, defined the rules and procedures for waiving the extraordinary incentive to normalize business activity for the transition from extraordinary support to the gradual return to business, on the basis of the exceptional waiver mechanism established in Decree Law 98/2020 of November 18, which altered, on an exceptional and temporary basis, the scheme that extends the extraordinary support for maintaining employment contracts.

The waiver, with the ensuing transition from extraordinary support to the gradual return to business, can be verified *ex officio*, at any time, through an exchange of information between IEFP, IP and the competent Social Security service.

Regional Decree Law 23/2021/A of July 22, 2021

Adapts the Labor Code to the Autonomous Region of the Azores by reducing the 180-day trial period to 90 days for employees who are in long-term unemployment or are seeking their first employment.

In the Autonomous Region of the Azores, in the case of indefinite-period employment contracts, a 90-day trial period applies to employees who are in long-term unemployment or are seeking their first employment, by contrast to the 180-day trial period that applies to these situations in Mainland Portugal and that, to date, had also applied in regional legislation.

Ordinance 161-A/2021 of July 26, 2021

Regulates the processing of the tender for exceptional contracting of fixed-term employees, as part of the execution of the projects included in Portugal's Recovery and Resilience Plan.

Decree Law 53-B/2021 of June 23 establishes an exceptional system of budgetary execution and procedural simplification for carrying out the projects included in Portugal's Recovery and Resilience Plan. This system seeks to provide the targeted entities with swift and transparent mechanisms to materialize policy measures or investments. This ordinance establishes an exceptional, especially simplified, and urgent fixed-term human resources contracting system, to be processed exclusively by electronic means, which this ordinance now regulates.



Extension ordinances

Area of activity	Ordinance
<p>Surveillance and cleaning</p>	<p>Ordinance 152/2021 - Official Gazette of the Republic of Portugal 137/2021, Series I of July 16, 2021 Establishes the extent of the changes to the collective bargaining agreement between the Association of Security Companies (AES – <i>Associação de Empresas de Segurança</i>) and the Trade Union of Janitorial, Surveillance, Cleaning, Domestic, and Other Service Employees (STAD – <i>Sindicato dos Trabalhadores de Serviços de Portaria, Vigilância, Limpeza, Domésticas e Atividades Diversas</i>) and other.</p>
<p>Security companies</p>	<p>Ordinance 153/2021 - Official Gazette of the Republic of Portugal 137/2021, Series I of July 16, 2021 Establishes the extent of the changes to the collective bargaining agreement between the Association of Security Companies (AES – <i>Associação de Empresas de Segurança</i>) and the Federation of Industry and Services Trade Unions (FETESE - <i>Federação dos Sindicatos da Indústria e Serviços</i>) and another party.</p>
<p>Aviation</p>	<p>Ordinance 154/2021 - Official Gazette of the Republic of Portugal 139/2021, Series I of July 20, 2021 Establishes the scope of the agreement and its amendments between Ryanair – Designated Activity Company, <i>Sucursal em</i></p>



	<p>Portugal, and the Trade Union of Civil Aviation Pilots (SPAC – Sindicato dos Pilotos da Aviação Civil).</p>
<p>Charities</p>	<p>Ordinance 184/2021 - Official Gazette of the Republic of Portugal 172/2021, Series I of September 3, 2021 Establishes the scope of the amendments to the collective bargaining agreement between the National Confederation of Charities (CNIS – <i>Confederação Nacional das Instituições de Solidariedade</i>) and the National Federation of Trade Unions of Employees in Public and Social Functions (FNSTFPS – <i>Federação Nacional dos Sindicatos dos Trabalhadores em Funções Públicas e Sociais</i>).</p>
<p>Hospital Common Use Service</p>	<p>Ordinance 191/2021 - Official Gazette of the Republic of Portugal 179/2021, Series I of September 14, 2021 Establishes the scope of the amendments to the collective bargaining agreement between the Hospital Common Use Service (SUCH – <i>Serviço de Utilização Comum dos Hospitais</i>) and the Trade Union of Public Administration and Public Entities (SINTAP – <i>Sindicato dos Trabalhadores da Administração Pública e de Entidades com Fins Públicos</i>).</p>
<p>Jewelry industry</p>	<p>Ordinance 192/2021 - Official Gazette of the Republic of Portugal 179/2021, Series I of September 14, 2021 Establishes the scope of the collective bargaining agreement between the Portuguese Association of the Jewelry Industry (APIO – <i>Associação Portuguesa da Indústria de Ourivesaria</i>) and the Inter-Trade Union Federation of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphic, Print, Energy, and Mining Industries (FIEQUIMETAL – <i>Federação Intersindical das</i></p>



	<i>Indústrias Metalúrgicas, Químicas, Eléctricas, Farmacêutica, Celulose, Papel, Gráfica, Imprensa, Energia e Minas).</i>
Urban services	Ordinance 195/2021 - Official Gazette of the Republic of Portugal 182/2021, Series I of September 17, 2021 Establishes the scope of the business agreement between the Lisbon Municipal Mobility and Parking Company (EMEL – <i>Empresa Municipal de Mobilidade e Estacionamento de Lisboa, E. M., S. A.</i>) and the Trade Union of the Portuguese Retail, Office, and Service Employees (CESP – <i>Sindicato dos Trabalhadores do Comércio, Escritórios e Serviços de Portugal</i>).
Meat-processing industry	Ordinance 196/2021 - Official Gazette of the Republic of Portugal 182/2021, Series I of September 17, 2021 Establishes the scope of the collective bargaining agreement between the National Association of Slaughterhouses and Poultry Meat-Processing Industries (ANCAVE – <i>Associação Nacional dos Centros de Abate e Indústrias Transformadoras de Carne de Aves</i>) and the National Trade Union of Agriculture, Forestry, Fishing, Tourism, Food Industry, Drinks, and Similar Industry Employees (SETAAB – <i>Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins</i>).
Horticulture, fruit farming, and flower growing	Ordinance 197/2021 - Official Gazette of the Republic of Portugal 182/2021, Series I of September 17, 2021 Establishes the scope of the collective bargaining agreement between the Association of Horticulturists, Fruit Farmers, and Flower Growers of the Odemira and Aljezur Municipalities (AHSA – <i>Associação dos Horticultores, Fruticultores e Floricultores dos</i>



	<i>Concelhos de Odemira e Aljezur</i>) and the National Trade Union of Agriculture, Forestry, Fishing, Tourism, Food Industry, Drinks, and Similar Industry Employees (SETAAB – <i>Sindicato Nacional dos Trabalhadores da Agricultura, Floresta, Pesca, Turismo, Indústria Alimentar, Bebidas e Afins</i>).
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National case law

Ruling of the Porto Court of Appeals of March 22, 2021

The change in workplace involving a commute to and from the workplace of almost 2 hours and 20 minutes for the employee, as opposed to the 10 minutes it had previously taken, is lawful, as a client of the employer no longer authorizes the employee's presence on its premises.

The Porto Court of Appeals found that the employer had a valid management interest that justified the decision to change the workplace of an employee, who is a cleaner, because one of the employer's clients decided to no longer authorize her to continue providing her cleaning services on its premises, forbidding her from entering them and taking her access card from her.

The judgment of the Porto Court of Appeals was based on the following arguments:

- The employer had no other option and acted in good faith, in fulfillment of its rights and duties, including adjusting the working schedule to minimize the impact of the change on the employee's personal and family life.
- The changes and adjustments required in the organization of the employee's family and personal life (spending 1 hour and 10 minutes commuting rather than 5 minutes, and the same time to return home at the end of every working day) are not enough to conclude that there is serious harm.
- Specifically, the employee *previously "benefited from an unusual situation, at least for those living in large urban areas (...) by which her workplace was practically next to her home."* For this reason, she would merely "miss" the convenience of this situation and would "need to make adjustments to her personal and family life to commute from her home to her workplace and back."
- The commute time in question (1 hour and 10 minutes each way) falls "within reasonable limits."



Ruling of the Porto Court of Appeals of April 19, 2021

The fact that the employee has a child under 12 years of age whose school closes at 6 p.m., and that she has no other family or institutional support, limits the employer's power to change her working schedule beyond that time.

The Porto Court of Appeals found that achieving a work-life balance requires the implementation of several sectoral policies and the possibility (albeit not the obligation) of positive discrimination in favor of families, with the institutionalization of flexible working schedules.

The employee requesting the measure proved that the school of her child, who is under the age of 12, closes at 6 p.m., and there was no one she could leave the child with after 6.30 p.m.

As the Labor Code enshrines the flexibilization of working schedules for employees who have children under the age of 12, and based on the proven facts, the Porto Court of Appeals upheld the precautionary measure, and ordered that a working schedule compatible with the employee's care of her minor child be set.

Ruling of the Porto Court of Appeals of April 29, 2021

The application of 2/3 of the unseizable income rules to the amount the insolvent party receives as compensation for the termination of the employment contract is only justified if the insolvent party has no other income.

The Porto Court of Appeals found that if, in the month when the compensation for the termination of the contract is received, it totally or partially exceeds the insolvent party's available income, coming to be totally or partially part of his or her available income, there is no reason to apply the unseizable income rules, as the insolvent party's minimum subsistence has been guaranteed. Consequently, applying the unseizable income rules established in the CPC to the insolvent party's available income would be granting the insolvent party a twofold benefit, which is unlawful.

Ruling of the Lisbon Court of Appeals of April 28, 2021

Sending an email to the employer's CEO at 11.20 p.m. on a Sunday, stating that, if unanswered, the matter would be taken to the National Data Protection Commission, is not untimely or harassing, and the disciplinary sanction of suspension with loss of remuneration imposed on the employee is unlawful.

The Lisbon Court of Appeals found that i) sending messages late at night, particularly on work matters, is usually intended "to ensure that the recipient will see that message the following morning as soon as they turn on their work computer"; and ii) it is not proven that, by sending an email on a Sunday at 11.20 p.m., the employee intended to harass the employer's CEO.



Regarding the contents of the message itself, the Lisbon Court of Appeals found no threat or anything “*that might cause fear or concern or hinder its recipient’s freedom in decision-making.*” The Lisbon Court of Appeals found that the employee only warned that he would appeal to the body that he saw fit, the National Data Protection Commission, regarding what he considered a breach in the protection of his personal data (i.e., sending sensitive information via computerized means, with the passwords being sent through the same means as the encrypted information).

The Lisbon Court of Appeals decided that the matter was not liable to disciplinary procedures, and the disciplinary sanction of suspension with loss of remuneration over 24 days was unlawful, ordering the employer to refund the amount discounted from the employee’s remuneration.

Ruling of the Coimbra Court of Appeals of September 8, 2021

Contractual clauses that transfer payment of taxes or any other charges from taxpayers to the companies for which they work are void.

The Coimbra Court of Appeals found that contractual clauses, both written and verbal, that impose the payment of any taxpayers’ charges on their employers are considered void.

The agreement between the employee and the employer regarding the payment of a net remuneration, including both Social Security contributions and personal income tax payments, cannot be considered valid under law, particularly Decree Law 375/74 of August 20 (“Decree Law 375/74”).

Decree Law 375/74 establishes that the taxes and charges borne by the employer must be added to the remuneration paid in net terms. For example, if an employer pays a net amount of €1,000 to an employee and the payment of that net amount generates taxes and charges amounting to €250, which the employee should pay but the employer pays instead through an agreement between both parties, Decree Law 375/74 requires that the gross remuneration due to the employee must be €1,250, with the employee paying the €250 in taxes and charges, ultimately receiving the same net amount of €1,000 that he or she received when the employer paid those taxes and charges.

The Coimbra Court of Appeals finds that employees’ remuneration must be set in gross terms, including in its total the value the employees have to pay in taxes and charges. The Coimbra Court of Appeals also found that, despite this invalidity, the employee is entitled to the salary differences between the net remuneration agreed and any quantitatively lower remuneration paid.

The mere passage of time without the claimant having claimed the amounts in question is not enough for the defendant to acquire a well-founded conviction.



European case law

Court of Justice of the European Union (“CJEU”) ruling of July 15, 2021

The prohibition of any visible form of expression of political, philosophical, or religious beliefs in the workplace may be justified by the employer’s need to appear neutral before their clients or to prevent social conflict.

The CJEU declared that Article 1 and Article 2.2.(a) of Council Directive 2000/78/EC of November 27, 2000 (“Council Directive 2000/78/EC”) must be interpreted as meaning that a company’s internal rule of prohibiting employees from using any visible sign of political, philosophical, or religious beliefs in the workplace does not constitute direct discrimination due to religion or belief, as defined in the directive, provided the rule applies generally and indistinctly.

Article 2.2.(b) of Council Directive 2000/78/EC should be interpreted as meaning different treatment that is indirectly based on religion or other beliefs, arising from a company’s internal rule that prohibits employees from using any visible sign of political, philosophical, or religious beliefs in the workplace, may be justified by the employer’s wish to follow a neutrality policy.

The CJEU found that a prohibition limited to the use of conspicuous and large signs of political, philosophical, or religious belief may constitute direct discrimination based on religion or beliefs, which cannot be justified on the basis of a neutrality policy.



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