CUATRECASAS

Legal Update – 2nd Quarter 2022

Labor Newsletter

Contents

- Laboratory
- Legislation
- Extension ordinances
- Portuguese case law
- EU case law

Laboratory

There were few significant legislative developments in labor law in the quarter covered in this Newsletter. However, the next few months promise to be more interesting, as Parliament signaled the general start by approving Bills 15/XV/1 and 175/XV/1. These bills aim to amend the labor legislation in the context of the dignified work agenda and the regime on absences due to gestational bereavement, respectively.

In the same July 8 session, several other bills introduced by the political parties *Bloco de Esquerda* and *Livre* were referred to the Employment, Social Security and Inclusion Committee.

Final approval and subsequent entry into force of these amendments – at least the amendments in Bill 15/XV are likely to be successful, with more or less a few tweaks here and there – will have a significant impact on several aspects of individual and collective employment relationships which we will discuss in the next Newsletter.

As regards the court decisions cited in this Newsletter, we would like to draw your attention in particular to two rulings that discuss the classification of certain situations with employees as occupational accidents that show the breadth of what falls within that definition.

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

Legislation

Ordinance 136/2022 of April 4

Is the fifth amendment to Ordinance 128/2009 of January 30, which regulates the measures for *Contrato emprego-inserção* and *Contrato emprego-inserção+* ("Employment contract-insertion" and "Employment contract-insertion+").

Ordinance 128/2009 of January 30, as amended, regulates the *Contrato emprego-inserção* and *Contrato emprego-inserção+* measures through which socially necessary work is performed.

By way of these amendments, individuals who are registered with the IEFP (Employment and Professional Training Institute) and are temporary protection beneficiaries or refugees but do not receive unemployment benefits, allowances or social inclusion income are now included in the *Contrato emprego-inserção+*.

Ordinance 141/2022 of May 3

Establishes the extraordinary regime for deferred payment of social security contributions and expands the supplementary regime for deferred tax obligations in the first semester of 2022

This ordinance regulates the Portuguese Classification of Economic Activities and the codes listed in the table of activities for the main purposes of personal income tax of employers and self-employed individuals in the private and social sectors that are covered by the extraordinary regime for deferred payment of social security contributions, as well as of the individual and collective taxpayers covered by the extension of the supplementary regime that defers the tax obligations to be complied with in the first semester of 2022, under the terms and for the purposes of Decree Law 30-D/2022 of April 18.

Ordinance 144/2022 of May 13

Determines the occupations excluded from the scope of application of Decree Law 28-B/2022 of March 25

In the wake of the humanitarian crisis caused by the armed conflict in Ukraine, the government adopted a number of measures to ensure that displaced persons are welcomed and integrated effectively.

In this context, Decree Law 28-B/2022 of March 25 established measures for the recognition of professional qualifications of beneficiaries of temporary protection due to the armed conflict in Ukraine, under Council of Ministers Resolution 29-A/2022 of March 1, as amended.

This ordinance determines the professions excluded from the scope of application of Decree Law 28-B/2022 of March 25.

Extension ordinances

Activity area	Ordinance
Hospitals	**Ordinance 145/2022 – Official Gazette of the Republic of Portugal 93/2022, Series I of May 13, 2022** Extending the changes to the company agreement between *Serviços de Utilização Comum dos Hospitais* (SUCH) and the Public Administration and Public Purpose Entity Employees Trade Union (SINTAP) and others.
Steel, chemical, electricity, pharmaceutical, cellulose, paper, printing, press, energy and mining industries	**Ordinance 149/2022 – Official Gazette of the Republic of Portugal 94/2022, Series I of May 16, 2022** Extending the collective agreement between National Association of Paper and Card Industries (ANIPC) and the Interunion Federation of Steel, Chemical, Electricity, Pharmaceutical, Cellulose, Paper, Printing, Press, Energy and Mining Industries (FIEQUIMETAL) and its amendments.
Trade and services	**Ordinance 148/2022 – Official Gazette of the Republic of Portugal 94/2022, Series I of May 16, 2022**

	Extending the changes to the collective agreement between Region of Leiria Commerce, Industry, Services and Tourism Association (ACILIS) and others, and Commerce, Offices and Services of Portugal Trade Union (CESP).
Hospitals	**Ordinance 147/2022 – Official Gazette of the Republic of Portugal 94/2022, Series I of May 16, 2022** Extending the changes to the company agreement between *Serviço de Utilização Comum dos Hospitais* (SUCH) and Federation of Trade Unions of Agriculture, Food, Drinks, Hotels and Tourism (FESAHT) of Portugal and others.
Trade and services	**Ordinance 146/2022 – Official Gazette of the Republic of Portugal 94/2022, Series I of May 16, 2022** Extending the collective agreement between the Hotel Association of Portugal (AHP) and the Service, Commerce, Restaurant and Tourism Employees and Technical Personnel Trade Union (SITESE).

Portuguese case law

Judgment of the Supreme Court of April 21, 2022

When ascertaining a disciplinary offense, the important issue is not the result or any loss arising from a certain behavior but whether the conduct in itself breached duties inherent to the employment relationship that should have been respected.

In this ruling, the Supreme Court of Justice considered the requirements for a disciplinary offense and the criteria for applying the penalty of dismissal.

In this case, a female employee – a travel manager – cancelled a large booking without consulting her immediate superior, thus showing carelessness and lack of attention in the performance of her duties.

The Supreme Court of Justice explained that what is important to ascertain a disciplinary offense is not the result or any damage deriving from a given behavior but whether the conduct itself and the actions of the employee which led to the result were unlawful and culpable, and whether she deliberately or negligently breached duties inherent to the employment relationship that she should have respected in performing the contract.

As it was found that the employee's conduct in cancelling the booking was in line with the employer's usual practice and internal procedures for this matter which she was bound to follow, her conduct must be regarded as not being unlawful or culpable.

The Supreme Court of Justice also ruled that even if the employee's conduct were considered culpable, the purpose of punishment might have been achieved through other less severe penalties.

Judgment of the Porto Court of Appeals of June 8, 2022

For an employment contract to be terminated under article 343(b) of the Labor Code, the impossibility must be "supervening," "absolute" and "definitive." It is not enough for there to be an aggravated situation or excessive burden. The employee must be permanently incapable of performing his or her duties.

According to the Porto Court of Appeals, an employee returning to work, even with only residual working capacity, is not a situation of absolute impossibility but instead of being unsuitable for the job. Suitability is a requirement for the protection for employees with chronic diseases or reduced working capacity established in the provisions of the Portuguese Labor Code, the United Nations Convention on the Rights of Persons with Disabilities and the Charter of Fundamental Rights.

The concept of irreversibility is crucial for the impossibility to be classified as absolute and definitive. In the case of a prolonged illness from which it is difficult to

recover, the reversibility of the illness is not ruled out, so the definitiveness of the impossibility and, therefore, the expiry of the employment contract, cannot be determined.

The Porto Court of Appeals held that long periods of sick leave do not support the conclusion that the employee is permanently incapable of performing because of that sick leave.

The Porto Court of Appeals took the view that the impossibility must affect all of the work to be done and, therefore, the contract does not expire when the decline in the employee's capabilities means that other tasks or duties can still be assigned. The employee's specific duties and "incapabilities" must always be taken into account.

Judgment of the Porto Court of Appeals of June 8, 2022

An occupational accident is any accident that occurs at the time and in the place where the employee is directly or indirectly subject to the employer's control, even if it takes place outside of the workplace and of working hours.

The Porto Court of Appeals discussed whether it should consider as an occupational accident an accident that happened at night, outside of working hours, when a driver who had already reached the limit on driving hours needed to rest and decided to spend the night in the truck he was driving.

The facts proved that the employee had the accident (a fall) when he was spending the night in his employer's truck assigned to him when he opened the truck door to satisfy his physiological needs, lost his balance and fell two meters, hitting the ground and sustaining injuries to his face.

In terms of time and space, the core elements of an occupational accident are considered to be the time and place of work and, more specifically, every moment and every place in which the employee is under the direct or indirect control of the employer, i.e., legally dependent on it.

The Porto Court of Appeals considers that this "broadening" of the concept is based on the theory of the risk of authority that derives from the fact that employees are at the service of their employers even when they are not performing tasks inherent to their jobs.

As the truck belonged to the employer, and the employee was at the scene of the accident performing a service ordered by the employer and subject to its authority, the Porto Court of Appeals ruled that the accident must be considered an occupational accident.

Judgment of the Lisbon Court of Appeals of May 25, 2022

In fixed-term employment contracts, employees who are unlawfully dismissed have, at least, the right to the remuneration they ceased to earn from the date of dismissal until the end of the contract term, if this is earlier than the final decision. The term "remuneration" includes not only "salary as such" but all other amounts that the employees would have earned up to the end of the contract term, including the severance pay they would receive if the contract had expired at the end of its term.

In the case at hand, the Court discussed whether the employee could accumulate unlawful dismissal damages plus severance for termination of the employment contract.

Regarding fixed-term contracts, the Lisbon Court of Appeals stated that the damages provided in article 393(2)(a) of the Labor Code are very broad in scope and establish a compensatory amount for the lack of job security.

The Lisbon Court of Appeals concluded that these damages are not simply to compensate for length of service and, therefore, payment of the remuneration would not settle the entire amount due for termination of the contract. Everything that would be due in terms of remuneration up to the end of the contract term must be included.

Judgment of the Lisbon Court of Appeals of April 27, 2022

Ascertaining the breach of the principle of equal pay requires proving facts that, at the very least, enable a conclusion as to equal work – i.e., the work is of the same nature, quality and quantity – between two employees who do not receive the same remuneration. It is not enough, therefore, to demonstrate that the category or the type of duties performed by the employees is the same.

The **Lisbon Court of Appeals** considered that, to demonstrate that the principle of equal pay was breached, it is necessary to ascertain facts that, at the very least, enable the conclusion as to equal work–that the work is of the same nature (assessing its difficulty, arduousness and danger), the same quality (assessing responsibilities, technical requirements, knowledge, capability, practice and experience) and the same quantity (assessing duration and intensity).

In the case at hand, only salary disparity was argued, based on the specific duties actually performed by all the employees – nurses, in this case. The plaintiffs neither claimed nor demonstrated facts that, at the very least, enable to confirm equal work in terms of duration, quantity and quality as outlined above.

Judgment of the Porto Court of Appeals of April 4, 2022

Mutual aggression between two employees in the workplace, during working hours, because of the work and resulting in injuries to one of them, constitutes an occupational accident.

The case examined by the Porto Court of Appeals concerned whether an assault that occurred in the workplace can be considered an occupational accident. The situation involved mutual physical aggression, including punching, kicking and hair pulling, which resulted in injuries to one of the employees.

The Porto Court of Appeals clarified that the concepts of occupational accident and the objective liability of the employer are based on the theory of the risk of authority, which is in turn based on the employer's liability arising from the possibility of exercising its authority over its employees. It dismisses the causal link between the work and the accident and focuses on some connection between the work and the accident.

The connection or causation between the work and the accident arises from or is contained in the fact that the accident occurred in the workplace during working hours, and the injured person does not have to prove, in relation to an accident that occurs in these circumstances, that it took place because of the actual work.

Therefore, the court ruled that the assault can be classified as an occupational accident.

European Union case law

Judgment of the Court of Justice of the European Union (CJEU) of May 12, 2022

By applying the principle of equal treatment to ensure the protection of temporary agency employees, European Union law is at odds with Portuguese legislation that provides that the severance pay to which temporary agency employees are entitled for termination of their employment relationship with a company using their services, for the unused paid annual vacation days and the corresponding vacation bonus is lower than the compensation to which they would be entitled, in the same situation and on a similar basis, if they were recruited directly by that company.

The issue discussed in this case concerned which calculation method should be used to determine the number of unused paid vacation days and the corresponding vacation bonus upon termination of a temporary employment contract with a company using the employee's services.

The Court of Justice of the European Union clarifies, first, that the concept of "basic working and employment conditions" within the meaning of the first subparagraph of article 5(1) of Directive 2008/104, read in conjunction with article 3(1)(f) of that Directive, must be interpreted as including the severance that an employer is

obliged to pay an employee upon termination of the temporary employment relationship for unused paid annual vacation days and the corresponding vacation bonus.

The CJEU further clarifies that the first subparagraph of article 5(1) of Directive 2008/104 provides that temporary agency employees must, for the duration of their assignment at a company using their services, benefit from, at least, the same basic working and employment conditions that would apply if they were recruited directly by that company to perform the same tasks, under penalty of breaching the equal treatment principle.

Under article 185(6) of the Labor Code, however, temporary agency employees are only entitled to vacation days and a vacation bonus calculated in proportion to the time worked, while employees recruited directly are entitled to paid vacation under the general regime established in articles 237 to 239 and 245 of the Labor Code.

Nonetheless, the CJEU ruled that the general regime on vacation leave established in articles 237 to 239 and 245 of the Labor Code must be applied in the case at hand, because the phrase "in proportion to the term of their contract" in article 185(6) of the Code must not be read automatically and exclusively in conjunction with the provisions of article 238(1). It must also be read in conjunction with the other provisions of that general regime to determine the amount of severance pay to which the applicants in the main proceedings may be entitled for the unused paid annual vacation leave and the corresponding vacation bonus on termination of their temporary employment relationship.

When this is the case, temporary agency employees can be considered as benefiting from basic working and employment conditions during their assignment to a company that are at least the same as those that would apply to them if they were recruited directly by that company to perform the same duties during the same period. It cannot be concluded, therefore, that the principle of equal treatment established in the first subparagraph of article 5(1) of Directive 2008/104 is breached.

CUATRECASAS

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