CUATRECASAS

Employment

Newsletter | Portugal

December 2018

Contents

I. National Legislation

Decree-Law no.117/2018 - Diário da República no. 249/2018, Series I, 27 December 2018

Setting the amount of the guaranteed minimum monthly remuneration for 2019

Decree-Law no.117/2018 was published on 27 December, setting the amount of the guaranteed minimum monthly remuneration at €600,00, as of 1 January 2019.

This increase in the guaranteed minimum monthly remuneration will also affect maximum compensation calculations in collective redundancies; individual redundancies or dismissal for unsuitability; termination of the employment contract by the employee, and the calculation of protected earnings rates in attachment orders.

Decree-Law no.118/2018 - Diário da República no. 249/2018, Series I, 27 December 2018

Establishing extraordinary minimum supplementary pensions

Decree-Law no.118/2018 was published, establishing extraordinary minimum supplementary disability and old-age pensions within the social security scheme. This piece of legislation took effect on 1 January 2019.

This law sets out that the supplement is a monthly cash benefit and is granted automatically. The following groups of people are entitled to the supplement, provided they meet other requirements:

- Recipients of disability, old-age and survivors' pension from the social security scheme or retirement and survivors' pensions from the integrated social protection scheme, with minimum disability or old-age pensions awarded as of 1 January 2019;
- Recipients of minimum disability or old-age pensions, awarded between 1 January 2017 and 31 December 2018.

Decree-Law no.119/2018 - Diário da República no. 249/2018, Series I, 27 December 2018

Amending the general social security scheme's legal framework of protection in the events of disability and old-age

Decree-Law no.119/2018 introduced a number of amendments to the general social security scheme's legal framework of protection in the events of disability and old-age (adopted under Decree-Law no.187/2007 of 10 May), notably:

- The age at which an individual becomes eligible for an old-age pension is calculated by subtracting 4 months from the applicable statutory age of retirement for every year beyond 40 years of paying social security contributions levied on taxable income. This

decrease, however, cannot result in eligibility to an old-age retirement pension before reaching the age of 60;

- The right to apply for a pension under the flexible-age rules for entitlement to an old-age pension is extended to cover beneficiaries who are older or younger than their age of entitlement to an old-age pension in force in the first year of an early retirement pension or pension bonus. In order to be eligible for an early retirement pension, beneficiaries must have reached the age of 60 and have records of at least 40 years of pensionable income;
- The following pensions shall henceforth be exempt from the sustainability factor: disability pensions; old-age pensions converted from disability pensions; the old-age pensions of beneficiaries who have become pensioners at the statutory age or their age of entitlement, or at a later age; old-age pensions under the flexible-age rules, and early retirement pensions by dint of very long periods of contributions.

These rules take effect as of 1 January 2019. Nevertheless, the flexible-age rules for old-age pensions take effect as per the following terms:

- As of 1 January 2019, they shall be applicable to beneficiaries who have reached the age of 63 and whose pensions are awarded thereafter;
- As of 1 October 2019, they shall be applicable to beneficiaries whose pensions are awarded thereafter;
- Up to 1 October 2019, beneficiaries under the age of 63 will remain eligible for an old-age pension under the flexible-age rules in force on 31 December 2018.

II. Extension Orders

Sector	Order
Biscuit and similar products sector	**Order no. 304/2018 - Diário da República no. 228/2018, Series I, 27 November 2018** Establishing 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).
Águas do Norte, S.A.	**Order no. 313/2018 - Diário da República no. 235/2018, Series I, 6 December 2018**

	Establishing the extension of the collective bargaining agreement between Águas do Norte, S.A. and others and STAL – National Trade Union of Local and Regional Government, Public Company and Concessionaire and Similar Employees and one other. **Order no. 314/2018 - Diário da República no. 235/2018, Series I, 6 December 2018** Establishing the extension of the collective bargaining agreement between Águas do Norte, S.A and others and SINDEL – National Industry and Energy Trade Union and one other.
Hospitality and Tourism	**Order no. 323/2018 - Diário da República no. 240/2018, Series I, 13 December 2018** Establishing the extension of the amendments to the collective bargaining agreement between the Algarve Hotels and Tourist Resorts Association (AHETA) and SITESE - Services, Trade, Catering and Tourism Employees and Technicians Trade Union.

III. Domestic Case-law

Ruling by the Supreme Court, 31 October 2018
Work accident – Remuneration – On-call Allowance

This ruling concerns the case of an employee who suffered a work accident when he fell down a flight of stairs whilst carrying an oxygen tank, during work and under his employer's instructions. The employer had transferred liability for work accidents to an insurance company, which was also made a defendant in the proceedings.

The employee claimed compensation from the insurer, in accordance with the Court's decision, in addition to the payment of an on-call allowance from the employer (liability for which had not been transferred to the insurance company), since it should be considered part of his remuneration.

The court of first instance ruled partly in favour of the claimant, and ordered the defendants to pay an annual life-long pension, as well as an allowance for severe disability and compensation for temporary disabilities.

The defendants contested the decision on appeal before the Court of Appeal (Lisbon), which ruled partly in their favour, thus overruling the court of first instance's judgement concerning the order to the employer and thereby dismissing that part of the claim. The Court of Appeal (Lisbon) also revised the factual basis and the ruling concerning the insurer, ordering it to pay a significantly lower life-long annual pension than that contained in the First Instance's ruling.

The employee appealed the Court of Appeal (Lisbon) judgment before the Supreme Court (STJ), on the grounds that the Court of Appeal had wrongly concluded that the on-call allowance did not fall within the bounds of the legal concept of remuneration for the purposes of Article 71 of Act no. 98/2009, of 4 September (framework of remedies for work accidents and occupational illnesses), since it had not been paid on a regular basis over the 12 months prior to the accident. In the employee's view, the ruling *"violated the victim's rights to be compensated for future loss of earnings in line with the level of earnings at the time of the accident."*

At the outset, the STJ noted that the concept of remuneration foraeseen in the aforementioned article 71 of Act no. 98/2009 differed from the one set out in the Labour Code, since the former encompassed *"all regularly paid allowances which are not intended to compensate the victim for unplanned costs".* Hence, it does not refer to payments in return for performing work, but rather to a broader notion comprising all allowances received by the victim which are not intended to offset unplanned costs.

In light of STJ case-law, the Court ruled that the on-call allowance (intended to compensate employees for the inconvenience of having to be easily reachable and available for work) earned by the victim over 7 months in the year before the accident (that is to say, during those months in which the employee was actually on-call) forms part of his remuneration and should thus be included in the calculations of his work accident compensation. Lawmakers intended to compensate victims for the loss of or reduction in earnings from work, including all regular payments made to employees and on which they plan their lives.

Ruling by the Supreme Court, 27 November 2018
Lawful dismissal – Freedom of Expression

This ruling concerns proceedings brought to contest the procedural formalities and lawfulness of the dismissal of an employee (who worked as a pilot-in-command for his airline employer) following a post he made on Facebook criticising one of his employer's board members.

The case was dismissed by the court of first instance, which rejected all the claims made against the employer. The employee appealed the decision before the Court of Appeal which upheld the ruling, with the employee then having appealed before the Supreme Court (STJ).

The post in question was published after the employee had been informed that he had been temporarily suspended whilst a disciplinary enquiry was ongoing into a flight delay for technical reasons and the employee's ensuing refusal to pilot the plane until the problem had been resolved. The post was addressed to one of his employer's board members, who had questioned him about the reasons for the delay. The employee was upset by the said board member's conduct and had, thus, published a text on Facebook in which he described him as a *"puto mal-educado" (rude little kid)* and *"prepotente" (high and mighty)*, but without actually naming him.

The STJ began its analysis of the case by noting that the employee did not make these statements within the company, raising the issue as to whether or not *"there are bounds on employees' freedom of expression outside this realm and at the very least, even if the answer is affirmative, (...) whether these bounds would be the same or somewhat more flexible."* The STJ followed the Court of Appeal's reasoning on this point by concluding that the employee made these statements in the public domain, given the high number of people to whom the publication was addressed (N.B. the employee had 837 "friends" on Facebook).

Nevertheless, the STJ pointed out that the issue at stake in this case was not only to determine whether or not the employee had committed a disciplinary offence, but, moreover, if he had, to determine whether or not it comprised lawful grounds for dismissal.

When assessing the employee's degree of culpability, the STJ initially considered not only his level of education, but also his level of *"emotional stress"* when he published his text. Hence, the STJ highlighted the fact that the employee made the post on Facebook when he had just found out that he had been suspended.

Furthermore, the STJ also took into consideration not only the fact that the employee's comments did not name either the company he worked for or the board member in question (even though it was accepted that they had been identified), but also the "*exaggerated claims"* made in these statements and that they were of a general nature *"such as any citizen could make when referring to occasional misuses of authority*".

In addition, when analysing the following excerpt from the employee's publication: *"As a result of behaviour (...) towards, (...) a certain Mr. Board Member (rude little kid, high and mighty), which constitutes lack of respect towards company management; and the lack of respect towards those who work for a living, if he was my son, he'd get a good clip round the ear, but as he isn't, let his father who didn't know how to bring him up, put up with him",* the STJ, whilst recognizing that the contents were insulting and disrespectful and therefore breached the duty of respect and courtesy, decided that such conduct did not meet the criteria of lawful grounds.

The STJ found that no material damage to the employer had been proved and that there was little damage to its image, since the post did not name the company. Furthermore, the Court appreciated the employee's 14 years of company service and the fact that, up until his suspension, he had always been a credit and an asset to the company.

The STJ therefore found the dismissal to be wrongful, since it was disproportionate to the employee's conduct, and ruled partly in favour of the claimant, ordering the employer to pay compensation as an alternative to reinstatement, along with the payment of remuneration lost by the employee during the period between his dismissal and the final disposal of the STJ ruling. The STJ, however, rejected the claim against the employer for non-material losses, for lack of evidence.

Ruling by the Court of Appeal (Évora), 29 November 2018
Work accident – Remuneration - Overtime

This ruling concerns special proceedings following a work accident brought by the victim to sue his employer and the insurer.

The court of first instance ruled partly in favour of the claimant and notably set the victim's annual remuneration for the purposes of work accident compensation at €14,476.97.

The employee contested the decision by appealing it before the Court of Appeal (Évora), in particular on the grounds that the case file contained various documents which would allow one to reasonably conclude that the employee would earn overtime in the following months and that such payments should be encompassed in the remuneration calculation.

Furthermore, the employee also argued that as it was impossible in this case to refer back to average earnings of previous years (since the employee had only started the job the month before the accident), the Court should consider road hauliers' common practice of breaking down drivers' remuneration into several components which were paid every month (that is to say, regularly and continuously), thereby making them part of remuneration.

The employee also alleged that with regard to the concept of remuneration for the purposes of calculating work accident compensation, the onus was on the employer or whoever had assumed the duty to remedy in his place (in this case, the insurer) to prove that the victim's earnings were not part of his remuneration. In light of the insurer having failed to prove that overtime payments were not made in return for performing work, the presumption of Article 258 (3) of the Labour Code, according to which any allowances employers pay to employees are presumed to be remunerative, had not been rebutted.

In this particular case, the Court of Appeal (Évora) pointed out that the concept of remuneration enshrined in Act no. 98/2009 is extended *"to all regularly paid allowances, even if, in law or any other applicable source of labour law, they do not assume this nature".*

Bearing in mind that in this case, it had been proved that whilst the employment contract had been in force until the time of the accident, payments had been made for overtime, even though it had been impossible to ascertain whether or not they were regular in nature, in light of the short lapse of time, the Court of Appeal (Évora) ruled that the presumption of Article 258 (3) of the Labour Code was applicable.

Hence, the victim merely had to allege and prove that he had earned money for overtime, on a monthly basis, which he did. Conversely, since neither the employer nor the insurer were able to prove facts that would cast doubt on such overtime continuing or there having been exceptional or one-off circumstances between the start of the employment contract and the date of the accident, which would rebut the presumption, the Court of Appeal (Évora) ruled that *"overtime paid must be considered an integral part of the victim's remuneration for the purposes of calculating compensation/pension owing to the victim."*

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