CUATRECASAS

Employment Law

Newsletter | Portugal

February 2019

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I. Legislation

Order no. 50/2019 - Diário da República no. 28/2019, Series I, February 8, 2019

Establishing the sustainability factor and the age of eligibility for the old age retirement pension

Establishes the age of eligibility for the old-age retirement pension at 66 years and 5 months in 2020 and the sustainability factor applicable to the statutory amount of old-age pensions paid through the national social security system at 0.8533.

Regional Legislative Decree no. 1/2019/M - Diário da República no. 33/2019, Series I, February 15, 2019

Adopting the monthly minimum wage in the Autonomous Region of Madeira

Sets the minimum monthly wage applicable in the Autonomous Region of Madeira at € 615.

This Regional Legislative Decree took effect retroactively from 1 January 2019.

Order no. 49/2019 - Diário da República no. 28/2019, Series I February 8, 2019

Adopting the coefficients to be applied to annual remunerations

Adopts the coefficients to be applied to annual remunerations which serve as a benchmark for calculating disability and old-age pensions paid by the national social security system and old-age, retirement and disability pensions paid by the integrated social protection scheme.

Act no. 22/2019 - Diário da República no. 40/2019, Series I February 26, 2019

Establishing the occupational welfare scheme for classical or contemporary ballet dancers

Establishes the occupational welfare scheme for classical or contemporary ballet dancers and amends Act 4/2008, of February 7, adopting the system of employment contracts for stage artists.

II. National Case-law

Ruling by the Porto Court of Appeal, of November 8, 2018

Harassment

In this case, the employee claimed that the behavior of the manager of the hotel where she was employed was tantamount to harassment and claimed the payment of non-material damages.

The said manager's behaviour comprised sending somewhat impolite e-mails to the employee and disclosing their content to colleagues (regardless of the fact that they did not contain any instruction, which the colleagues needed to know about). According to the Porto Court of Appeal, his aim was to embarrass and upset the employee. Furthermore, the employer sent an e-mail to a client in which he criticised the employee's work. The Court denounced such behaviour and deemed it excessive and extremely serious, with the aim of embarrassing and humiliating the employee.

The Court of First Instance decided that the manager's constantly telling her off and the emails copied to colleagues were deemed to have occurred over too short a space of time to be considered harassment.

For its part, the Porto Court of Appeal noted that the current wording of Article 29 of the Labour Code, added the expression "particularly" in the definition of the term "harassment", thereby breaking the erstwhile link between harassment and grounds of discrimination, and considering the possibility of harassment occurring in situations which do not involve such grounds.

Furthermore, the Court of Appeal underscored the importance of and the difficulty in drawing a distinction between harassment and ordinary disputes, which may arise in any labour relationship and concluded that, despite the situation at issue having only lasted for a month and a half, the specific circumstances of the case were sufficient to enable it to fall within the scope of harassment. The Court of Appeal declared that this situation goes beyond mere arguments; stress in the workplace; discourteousness, or a certain "abuse" of authority, but was rather a situation of constant hostile pressure, with an unlawful aim (humiliation, embarrassment and upsetting the employee), thereby creating an equally hostile work environment.

Ruling by the Porto Court of Appeal, of December 7, 2018

Use of security camera footage in the workplace for disciplinary purposes

In this case, the employer brought disciplinary proceedings against a petrol station employee who engaged in romantic acts with her boyfriend in the workplace during her working hours, and used the security camera footage as evidence.

The employee alleged that the use of such footage as evidence was inadmissible, since it comprised unreasonable intrusion into one's private life and a violation of the right of personal portrayal. The Court of First Instance, however, considered the usage of such footage to be lawful and valid, and allowed it to be examined at the court hearing.

The employee challenged the decision by lodging an appeal before the Porto Court of Appeal. The Court examined whether the employee's private right to engage in romantic acts with her boyfriend could be exercised in the workplace and during her working hours, since, although it is a private area, it is accessible to the public. It also considered whether the security camera footage could be screened during a court hearing.

At the outset, the Court of Appeal pointed out that the petrol station's security cameras had been duly authorized by the National Data Protection Commission (NDPC) for the purposes of protecting persons and property (and not for monitoring the employee's performance of her work), which is justified on premises such as a petrol station with a coffee-shop.

The Court also found that engaging in romantic acts in the work place accessible to the public and during working hours, disrupts business activity by deterring customers from entering when they see such acts occurring, thereby causing a loss of business. Hence, the employee's private right to engage in romantic acts should not be protected by the prohibition set out in Article 20 (1) of the Labour Code, which stipulates that "employers cannot undertake remote surveillance in the workplace, by using technological equipment, for the purposes of monitoring employees' work performance."

The Porto Court of Appeal ruled that the legal principles in domestic legislation concerning data protection were observed and the employee was aware of the security cameras, so the screening of the security camera footage taken in the workplace was admissible as evidence for disciplinary purposes.

III. European Case-Law

Ruling by the European Court of Justice, of November 14, 2018

Equal treatment in employment and occupation – Direct discrimination on grounds of religion

This case concerns litigation between an Austrian company and Markus Achatzi (one of its employees) regarding his right to an additional payment for work performed on a Good Friday.

Pursuant to Austrian law, Good Friday is a paid public holiday, entailing a 24-hour rest period, for members of the Churches identified in the law. If a member of one of those churches does nevertheless work on that day, he is entitled to additional pay in respect of that public holiday.

Markus Achatzi did indeed work on a Good Friday without receiving any additional remuneration, since he was not a member of any of the Churches identified in domestic law. He claimed that he suffered discrimination by being denied the additional public holiday pay, and sought payment from his employer of €109.99 plus interest.

The Supreme Court of Austria submitted 4 questions to the European Court of Justice (ECJ) concerning Article 21 of the European Union Charter of Fundamental Rights, which prohibits discrimination, on the specific grounds of religion, and Articles 1 and 2 of Directive 78/2000 on equal treatment in employment and occupation.

The ECJ firstly found that the Austrian legislation at issue gives rise to a difference in treatment between employees on the direct basis of their religion, by establishing the right to a public holiday on Good Friday and additional remuneration for working on that day, only for employees who are members of one of the churches covered by the said legislation.

The Court went on to examine whether such a difference in treatment relates to categories of employees who are in comparable situations, bearing in mind that it is not required that the situations be identical, but only that they be comparable and that the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner, in the light of the benefit concerned.

With regard to the public holiday, the Court pointed out that the grant of a public holiday is not subject to the condition that the employee must perform a particular religious duty during that day, but rather only to the condition, that such an employee must formally belong to one of those churches. The situation of such an employee is no different in that regard from that of other employees who wish to have a rest or leisure period on Good Friday without, however, being entitled to a corresponding public holiday because they do not belong to one of the churches in question.

Having regard to the additional remuneration, the Court underscored that the employee is entitled to such public holiday pay even if he worked on Good Friday without feeling any obligation or need to celebrate that religious festival. Therefore, his situation is no different from that of other employees who worked on Good Friday without receiving such a benefit. It follows that the national legislation at issue in the main proceedings has the effect of treating comparable situations differently on the basis of religion. This therefore amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78.

In light of there being a difference in treatment on the grounds of religion, the Court examined whether this direct discrimination could be justified as a means of preserving the rights and freedoms of others or of compensating for disadvantages linked to religion.

The Court found, however, that the national measures at issue cannot be regarded as necessary for the protection of the freedom of religion, since employees belonging to religions other than those referred to in national legislation, wishing to celebrate festivals, which do not coincide with the public holidays set out in law, is possible under Austrian law, in principle, not through the granting of an additional holiday, but mainly by being authorised by their employer to be absent from work in order to perform the religious rites associated with those festivals.

Similarly, the Court found that the legislation at issue could not be considered as a measure aimed at compensating for disadvantages linked to religion, since employees belonging to other religions, whose important festivals do not coincide with the public holidays foreseen in domestic legislation can, in principle, be absent from work in order to perform the

religious rites associated with those festivals only if they are so authorised by their employer.

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