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Employment Law

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Setting the amounts of the extraordinary supplementary disability and old-age pensions under the social security scheme.

This Order took effect on January 1, 2019.

II. Extension orders

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Press	**Order no.79/2019 - Diário da República no. 53/2019, Series I, March 15, 2019** Extending the amendments to the collective bargaining agreement between APIMPRENSA – Portuguese Press Association and FETESE - The Industry and Services Trade Union Federation
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Super Bock Group	**Order no. 86/2019 – *Diário da República* no. 58/2019 series I, March 22, 2019** Extending the amendments to the collective bargaining agreement between the Super Bock Group, SGPS, S.A and another and the National Trade Union of Food and Beverages and connected Trade and Industry Workers.

III. National Case-law

Ruling by the Porto Court of Appeal, of January 7, 2019
Right to effective work

The Authority for Working Conditions imposed a fine on the employer for very serious administrative offences, concerning the breach of the duty to provide good physical and moral working conditions and the prohibition of unjustifiably preventing the performance of effective work. The employer contested the case in court.

The employer alleged that, in light of the facts, he did not prevent the employees from performing their occupational activities.

The Porto Court of Appeal examined two issues concerning the duty to provide effective work. Firstly, whether or not the employer has to wilfully breach this obligation and, secondly, whether or not the employer's conduct can be justified on the grounds of internal re-structuring.

The Court stated that the duty to provide effective work requires that employees be integrated into the productive structure, reflected in their being given the opportunity to really perform the activity in their contracts – notwithstanding specific situations, such as those arising from a temporary factory closure; preventive suspension as part of disciplinary proceedings; serving a penalty of suspension without pay, and others in which the objective circumstances justify not providing effective work.

The Court went on to state that one cannot conclude that the performance of effective work has been "obstructed" in every situation in which employees are inactive, but only in those situations in which the employer wilfully and apart from any objective grounds connected to changes in company fortunes, does not give employees anything to do.

The Porto Court of Appeal ruled that in the case in hand, the employer acted wilfully by picking out employees, who could be laid off as a result of re-structuring, with a view to

increasing company profitability, which was the employer's lawful right. In this context, the employer made a redundancy offer to a number of employees considered superfluous. Following their refusal to accept the offer, the employer transferred them from their units to a support unit, without assigning them any tasks, which the Court considered not merely wilful but also pre-meditated.

The employer sought to justify his acts by alleging that they fell within the scope of freedom of economic initiative.

Notwithstanding, the Porto Court of Appeal ruled the placement of these employees in a support unit without assigning them any tasks represented a breach of the duty to provide real work and pointed out that, in light of the re-structuring undertaken, the employer was under an obligation to terminate the employment contracts through individual or collective redundancies, which are the solutions provided by the law to protect the constitutional right he was claiming of the freedom of economic initiative.

Ruling by the Supreme Court of Justice, of March 19, 2019

Re-classification of employees

The case concerns the interpretation of clauses relating to the re-classification of general clinical medical assistants to specialized clinical medical assistants, contained in the Collective Bargaining Agreement signed between the Portuguese Association of Private Hospitals - APHP and the Portuguese Confederation of Farming, Food, Beverages, Catering and Tourism Trade Unions, published in the Work and Employment Bulletin (*Boletim do Trabalho e Emprego),* no. 15, on 22 April 2010.

During the course of an inspection, the Authority for Working Conditions (ACT) considered that clinical medical assistants working for a private hospital should be classified as specialized clinical medical assistants, as they had over eight years of service.

The said private hospital considered that the ACT has miss-interpreted clause 68 (b) of the Collective Bargaining Agreement, and that, not only should length of service be taken into account, but that the following criteria also had to be met: (i) employees' qualification; (ii) the needs of the organization where they are employed; and (iii) length of service.

Thus, the private hospital brought interpretation proceedings regarding the said clause 68. The Court of First Instance ruled that employees with the necessary academic and vocational qualifications for the higher category and eight years of experience when the Collective Bargaining Agreement entered into force should be included in the category of specialized clinical medical assistants, regardless of the organization's interests. With regard to other employees, they could only be re-classified as specialized should they fulfil the qualifications and length of service requirements and their promotion be in the organization's interest.

The Portuguese Confederation of Farming, Food, Beverages, Catering and Tourism Trade Unions lodged an appeal before the Guimarães Court of Appeal, which ruled that all employees in the occupational categories of hospital ward; operating theatre; sterilization and haemodialysis clinical medical assistants should be re-classified as specialized clinical medical assistants, provided that when the Collective Bargaining Agreement came into force, they met the length of service requirement. Those employees who joined after the entry into force of the Collective Bargaining Agreement would have to meet all the requirements concerning length of service, qualifications and the company interest in their classification as clinical medical assistants.

The issue was then analysed by the Supreme Court, which clarified at the outset that what was at stake in the appeal was the rule concerning the re-classification of a category of employees contained in the Collective Bargaining Agreement signed in 2000 between the APHP and FESAHT (superseded by the Collective Bargaining Agreement published in the Work and Employment Bulletin no. 15, on April 22, 2010) to another category contained in the 2010 Collective Bargaining Agreement and the effects of this move on the career progression of re-classified employees.

Hence, the Supreme Court clarified the difference between the concepts of "classification" and "re-classification". Occupational classification determines the occupational categories of employees when they join a profession and governs progression through the different occupational categories. Occupational re-classification establishes the arrangements for employees in a specific career structure, which was replaced by another one to transfer to the latter and determines which occupational categories employees should belong to under the new system. Occupational re-classification seeks to safeguard employees' legitimate expectations of career progression, which should not be thwarted by their career structure having been replaced by another.

Accordingly, the Supreme Court ruled that classification requirements bore no influence on re-classification, since they were separate concepts, and that the clause of the Collective Bargaining Agreement in question should be interpreted as meaning that eight years' length of service was enough for clinical medical assistants to be re-classified as specialized clinical medical assistants, thereby upholding the ruling under appeal.

The Supreme Court added that having two distinct concepts did not breach the principle of equality, since the inequality was objective and arose from different situations. Hence, the principle of equal pay for equal work enshrined in Article 59 (1) of the Constitution of the Portuguese Republic had been respected.

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