CUATRECASAS

Employment

Newsletter | Portugal

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I. Legislation

Decree Law no. 56 /2019 – *Diário da República* no. 81/2019, Series I, April 26, 2019

Strengthens powers and incentives applicable to the collection of Social Security debts

This Decree-Law came into force on 1 May 2019.

Order no. 112-A/2019, Diário da República no. 73/2019, 1st Supplement, Series I April 12, 2019

Regulates the creation of the Generation-Contract measure

Generation-contract comprises an incentive for hiring young people looking for their first job and the long-term or very long-term unemployed.

The incentive contained in this Order comprises two forms of support:

- A cash grant awarded by the Institute for Employment and Vocational Training
- Partial or full exemption from paying employer's social security contributions.

This Order came into force on 13 April 2019.

II. Extension Orders

Sector	Order
Fuels	**Order no. 106/2019 - *Diário da República* no. 71 /2019, Series I, April 10, 2019** Establishing the extension of the amendments to the collective bargaining agreement between ANAREC – National Association of Fuel Retailers and FEPCES - Portuguese Federation of Business, Offices and Services Trade Unions and others.

Driving Schools	**Order no. 107 /2019 - *Diário da República* no. 71/2019, Series I, 10 April 2019** Establishing the extension of the collective bargaining agreement between APEC – Portuguese Driving Schools' Association and FECTRANS – Transport and Communications Trade Union Federation.

III. National Case-law

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

A strong company case for closing down a site and permanently transferring the place of employment does not preclude the employees' right to terminate contract, when this gives rise to significant harm.

This case concerned an employee who terminated his employment contract after having his place of employment transferred owing to his employer's change of premises.

This, therefore, raised the question as to whether the permanent transfer of the place of employment, decided unilaterally by the employer – who moved his premises from Porto to Lisbon – causes the employee significant harm or not, and if accordingly, it constitutes legitimate grounds for employees to terminate their employment contracts.

The Porto Court of Appeal began by stating that ascertaining whether or not serious harm had been caused by the employer's change of premises had to be undertaken on a case-by-case basis. When analysing the criteria used in case law to assess whether or not serious harm had been caused, the Court completely disagreed with the position whereby *"the degree of harm caused must also be assessed in comparison to the gravity of the impact that not moving would entail for the company"*, but rather that such an assessment should only consider the employee's interests.

Hence, the Court specified that the following factors should be taken into consideration to ascertain whether or not serious harm had been caused: *(i)* the spouse's place of employment; *(ii)* the children's school; *(iii)* support provided to other family members; *(iv)* the employee's engagement in other professional or outside-work activities; *(v)* lack of transport or very unreliable transport; *(vi)* and, in addition, commuting time to the new place of employment.

The Porto Court of Appeal came to the following conclusions from its analysis: *"what arises is that this is not merely an issue of inconvenience or disadvantage that the employee should bear with, for the benefit of the company's operations, which is what having to commute a few extra miles or walk a few more minutes from the bus-stop to the new place of employment would amount to".*

The Porto Court of Appeal concurred with the findings of the Court of First Instance in this case, in that transferring the place of employment from Porto to Lisbon did in fact cause the employee serious harm, since such a transfer entailed being away from his family who lived in Porto, in their own home, and where his whole life was based.

The Court of Appeal ruled that, despite the employer's decision to move site having been a legitimate one, the employee's termination of employment, under the terms and effects of Article 194 (1) (a) of the Labor Code *"only requires that serious harm has occurred and not that the employer fail to justify the change in the place of employment",* and that the ceiling placed on severance pay already reflects the legitimacy of the employer's acts, since it is below the ceiling on severance pay in ordinary lawful termination of employment contracts (i.e. between 15 and 45 days of basic salary plus seniority allowance for each year of service) and is equivalent to severance pay in a collective redundancy (i.e. 12 days of basic salary plus seniority allowance for each year of service).

Ruling by the Lisbon Court of Appeal, of February 13, 2019

Reducing *per diem* payments depends on a tangible change in the grounds for its payment

This case concerned an employee who, in addition to her basic salary, received a monthly housing allowance of 520 Euros, to offset the costs of having to work on the Portuguese mainland, when her place of residence was Ponta Delgada, in addition to a *perd diem* of 30 Euros for travel expenses.

In 2012, her employer unilaterally changed these allowances to a lump-sum payment of 700 Euros, in addition to her basic salary, which covered housing and *per diem* payments.

The employee brought a claim in court for her employer to be ordered to pay her housing allowance and *per diem*, attributed respectively for the purpose of offsetting the costs of living on the mainland when she had a house in Ponta Delgada, and for her constant presence on construction sites, in her Christmas and vacation allowances.

On this point, the Lisbon Court of Appeal ruled that the sums claimed by the employee were not remunerative in nature, since they had a specific and personalized aim – an allowance to offset living away from Ponta Delgada -, and that they did not exceed the additional costs that they aimed to offset, namely the employee's housing and travel costs. Hence, the Lisbon Court of Appeal ruled that such allowances (for living on the Portuguese mainland and for being constantly on construction sites) should not be included in the calculation of the Christmas and vacation allowances. With regard to the lawfulness of the changes to these allowances, the Court of Appeal ruled that, despite them not being remunerative in

nature, since they had a specific and personalized purpose, they should only be changed were such purpose to have changed, in other words *"only through a tangible change in the grounds for paying such allowances, in terms of the factors for calculating and settling them, can their amount be legitimately modified."*

As a result, despite proof that the number of building projects undertaken by the employer fell and that his business volume shrank, and that the employee monitored fewer projects in light of a work accident she had had, the Court considered this justification to be too vague to provide reasonable grounds for deciding to reduce the allowances paid for living on the Portuguese mainland and being constantly on construction sites.

The Lisbon Court of Appeal added that the employer, in all due rigour, should have set out the link between this change and the reduction in the allowances and at the same time, should have invoked the arrangements concerning abnormal changes in circumstances to justify his decision. Having failed to do so rendered such a reduction unlawful.

Ruling by the Évora Court of Appeal, of February 14, 2019

A fight between two employees whilst at work constitutes a work accident.

This case concerned a hotel waitress who got involved in a physical confrontation with a colleague whilst they were both at work.

The employee in question was left completely incapacitated for any kind of work for a period of 60 days, as a result of this physical confrontation. She brought a claim against the insurance company and her employer, for the episode to be considered a work accident and to be paid damages for her temporary incapacity and medical costs.

The Court of First Instance accepted her claim, ruling that these events were a work accident.

The insurer appealed against the decision, basing its case on the fact that the assault was not unexpected, since the victim of the attack had racially insulted her colleague and, therefore, an essential component of a work accident was not present: the occurrence of a natural event.

The Évora Court of Appeal pointed out that even though a legal definition of a work accident did not exist, *"doctrine and case-law indicate certain essential characteristics for considering an occurrence to be a work accident. It must arise suddenly or unexpectedly, occur without being predictable and be caused by factors beyond the employee's will"* and that *"a work accident occurs, regardless of the location in question, whenever an employee is present there because of or as a result of his work duties, at the company's order, subject to the employer's direct or indirect control".*

The Évora Court of Appeal ruled that the reasons for the assault had not been proved and that, even if it had been provoked by the employee's racial insults, her colleague's reaction was disproportionate and did not meet the criteria for legitimate self-defence.

The Évora Court of Appeal therefore ruled that the episode should be deemed a work accident, since the injuries were caused by a work colleague when they were both at work and because the victim had been incapacitated for work.

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