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Employment Law

Newsletter | Portugal

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Contents

- *Laboratory*
- Legislation
- Extension orders
- European case law
- National case law

I. *Laboratory*

The Supreme Court judgments discussed below deal with an important issue for collective bargaining agreements: the exact date their expiry becomes enforceable.

Collective bargaining may prove to be an important instrument for adapting the legal framework to the specific circumstances or the development of each production facility or of a given economic sector.

However, collective bargaining agreements can only serve this vital purpose if they are flexible and adaptable enough to meet the changes and pressures companies face in real life.

This adaptability mainly depends on how long the agreed measures will remain in force. When parties agree to negotiate specific conditions, to the extent allowed by general labor law, each measure applicable to them must have a timeframe. It must be made clear when these measures will expire, compelling the parties to negotiate new conditions to govern them thereafter, in a new context.

This has not been the case in Portugal, where collective bargaining agreements tend to be perpetuated, due to the legal framework, combined with interpretations that only tighten legal restrictions.

For this reason, the Supreme Court rulings are most welcome, although we cannot fail to criticize the incorporation, through article 109 of the Labor Code, of a "new" requirement for enforcing expiry that is somewhat difficult to deduce from the letter of the law.

Maria da Glória Leitão
Head of the Department of Employment Law

II. Legislation

Order 411-A/2019 – Diário da República 251/2019, Series I, December 31, 2019,
Introduces the first amendment to Order 182/2018, of June 22, regulating the working conditions of office employees not covered by specific collective agreements

This order introduces the first amendment to the order regulating the working conditions of office employees not covered by specific collective regulations, by:

- increasing the meal allowance from €4.50 to €4.80; and
- increasing the minimum monthly salary scale.

III. Extension orders

Activity area	Order
Pharmaceutical industry	**Order 10/2020 – Diário da República 15/2020, Series I, January 22, 2020,** Establishing the extension of the amendments to the collective bargaining agreement between APIFARMA (Portuguese Pharmaceutical Industry Association) and FIEQUIMETAL (Inter-Trade Union Federation of Metalwork, Chemical, Electrical, Pharmaceutical, Pulp, Paper, Graphics, Printing, Energy and Mining Industries) and another party.
Motor vehicle inspection	**Order 11/2020 – Diário da República 15/2020, Series I, January 22, 2020,** Establishing the extension of the amendments to the collective bargaining agreement between ANCIA (National Association of Vehicle Inspection Centers) and FETESE (Industry and Services Trade Union Federation).

Woolens, textiles and others	**Order 12/2020 – Diário da República 15/2020, Series I, January 22, 2020,** Establishing the extension of the amendments to the collective bargaining agreement between ANIL (National Association of Woolens Manufacturing) and another party, and COFESINT (Federation of Industry, Energy and Transport Trade Unions) and another party.
Cork	**Order 13/2020 – Diário da República 15/2020, Series I, January 22, 2020,** Establishing the extension of the amendments to the collective bargaining agreement between APCOR (Portuguese Cork Association) and SINDCES/UGT (Trade, Offices and Services Trade Union (office employees)).

IV. European case law

Judgment of European Court of Justice, December 12, 2019

Pension supplement available only to women is direct discrimination on grounds of sex, infringing the principle of equal treatment of men and women

A father of two children receiving a pension from the National Institute for Social Security, Spain (INSS), for permanent absolute incapacity, brought an administrative complaint against the latter, claiming that, based on the General Law on Social Security (LGSS), as the father of two daughters, he should be entitled to receive a pension supplement.

The INSS, however, dismissed his complaint, stating that the pension supplement at issue is granted exclusively to women receiving a contributory pension from Spanish social security and who are mothers of at least two biological or adopted children, because of their demographic contribution to social security, whereas men in an identical situation do not have that entitlement.

Subsequently, the complainant challenged the decision in *Juzgado de lo Social No 3 de Gerona*, which submitted a request for a preliminary ruling to the European Court of Justice (ECJ) concerning the compatibility of the provisions of Article 60 (1) of the LGSS with EU law, particularly Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

In its findings, the ECJ began by explaining the boundaries of "pay" within the meaning of Article 157(2) TFEU and Directive 2006/54/EC and held that the concept cannot be extended to include social security schemes or benefits.

However, it found that the pension supplement at issue falls within the scope of Directive 79/7/EC, on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The court also found that, through Article 4 (1) of Directive 79/7/EC, Spanish national legislation treats men less favorably; therefore, it is appropriate to establish whether men and women are in comparable situations, in view of the subject and purpose of national legislation, which makes the distinction at issue.

The Spanish government defended this distinction on two grounds: (i) women's greater demographic contribution to social security; and (ii) the aim to reduce the gap between pension payments to men and women arising from differences in career paths, as women's careers are the most affected by having children.

The ECJ held that the grounds stated were not sufficient to prevent the above situation from being comparable to that of a man who has also contributed to social security and has been exposed to the same career-related disadvantages due to taking on the task of raising his children.

According to the court's case law, a derogation from the prohibition of all direct discrimination on grounds of sex is possible only in the situations set out in Article 7 of that Directive. As none of the exceptions apply to this case, the court found that this type of national legislation constitutes direct discrimination on grounds of sex, which is prohibited by Directive 79/7/EC.

V. National case law

Ruling by Supreme Court of Justice, December 11, 2019

Expiry of collective bargaining agreement does not require official publication of notice of expiry, but if it is not published, the expiry is only enforceable when employers inform employees of such in writing

The Court of First Instance ruled in favor of an employers' association that brought proceedings against a trade union organization, to claim recognition of the expiry of a collective bargaining agreement (CBA) the two parties had signed, effective on December 1, 2015.

The part of the first instance ruling concerning the expiry of the CBA was upheld on appeal by the Porto Court of Appeal. However, it held that, even though the expiry had been confirmed, it only becomes enforceable when the expiry notice is officially published. Therefore, the publication is constitutive in nature, making it a pre-requisite for the expiry to take effect. Since in this case, the notice had not been officially published, the Court of Appeal overturned that part of the decision.

Both courts had held that the CBA expired on December 1, 2015, so the main question for the Supreme Court of Justice (SCJ) was whether the expiry only takes effect when the expiry notice is officially published.

The SCJ held that the letter of the law does not permit the conclusion that expiry only takes effect when the notice is published, rather that expiry occurs *ope legis*, and that the law clearly distinguishes between the expiry date and the date the expiry notice is officially published.

The court added that, under Article 502 (6) (current paragraph 8) of the Labor Code, the notice concerns the CBA's expiry date. As the notice cannot be published before the expiry date, the notice must refer to an earlier date. If the publication of the notice were to have a constitutive effect, then that would grant it retroactive effect, which would breach Article 5 of the Civil Code.

The SCJ highlighted that the administrative services of the DGERT (Directorate-General for Employment and Labor Relations) can deny the deposit of an agreement and, consequently, its publication, but only on the grounds of the procedural errors explicitly referred to in Article 494 (4) of the Labor Code.

If lawmakers sought to make the effects of expiry dependent on the official publication of the notice, they would have determined the application of the rules on deposit and publication or stated it explicitly. The SCJ added that making the effects of expiry contingent on the notice being published would give the authorities powers that are not granted under law.

Therefore, contrary to all recent Courts of Appeal case law (giving constitutive effects to the official publication of the notice), the SCJ held that the publication required by law in expiry situations *is nothing other than a simple notice* with only declaratory effects.

However, the SCJ added a new "requirement" for the expiry of collective bargaining agreements to be enforceable: if this notice is not published, then, under Articles 106 (1) and (3 l) and 109 (1) of the Labor Code, the employer has the obligation to inform the employee in writing of the expiry of the CBA within the following 30 days.

In short, expiry does not depend on the official publication of the expiry notice, but if it is not published, the expiry only becomes enforceable on employees when employers inform them in writing.

N.B. The SCJ handed down another judgment on the same date, December 11, 2019, with the same conclusions and reasoning, although worded differently as it was drafted by a different reporting judge.

Ruling by Lisbon Court of Appeal, September 10, 2019

Insomnia constitutes moral damages and should be protected by law. Employers must compensate employees for this situation

Three employees who were part of a collective redundancy challenged its lawfulness. They claimed reinstatement in their jobs and €60,000, €50,000 and €40,000 compensation, respectively, for moral damages.

The employees alleged that, as a result of the unfair loss of their livelihoods, they had suffered from depression, anxiety and insomnia, and had required psychological and psychiatric treatment.

The Court of First Instance declared the collective redundancy unlawful, and, establishing the facts as proven, ordered the employer to pay each of the employees €5,000 compensation for moral damages.

The employer appealed the decision, but the Lisbon Court of Appeal highlighted that, under Article 389 (1) (a) of the Labor Code, if the dismissal is found to be unlawful, the employer should be ordered to pay the employee compensation for damages, material or otherwise, provided the damages are serious enough to warrant protection by law.

Based on the proven facts, specifically the insomnia and the psychiatric treatment required, the Court of Appeal considered the damages serious enough to warrant protection by law. Referring to the equity principle, the court found the sum of €5,000 to be appropriate.

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