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Employment

Newsletter | Portugal

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I. *Laboratory*

Due to the national and international emergency situation caused by the COVID-19 pandemic, we did not publish our February newsletter (which had been finalized), so we could give priority to companies' more specific and urgent needs.

We now resume publication of our regular newsletter on topics that are not related to COVID-19 matters. COVID-19 matters are dealt with in specific newsletters, which you can find here and here.

The case law reviewed in this newsletter brings us good news, but also raises a cause for concern.

The good news stems from a ruling by the Porto Court of Appeal, which accepts that waivers signed by employees are valid documents in the context of the termination of employment contracts by agreement. This decision runs counter to recent case law, which, in certain situations, had allowed for employees' claims concerning labor credits to be re-analyzed, even when they had signed a full waiver of all outstanding credits arising from the contract termination.

Such a possibility could undermine legal security and certainty when negotiating and concluding agreements to terminate employment contracts or on the final payment of labor credits.

Our cause for concern arises from the contents of a Supreme Court ruling of December 11, 2019, which in reviewing the lawfulness of a collective redundancy, held that *"the company must demonstrate that it is truly facing a crisis and that making employees redundant is a rational means of tackling it."*

However, the almost unanimous agreement in relevant case law and doctrine on this matter has been that Courts are not invested with the power to make judgments on management decisions and that entrepreneurs may take discretionary decisions within the bounds of good faith. To a certain extent, this ruling calls such an understanding into question.

Lastly, we wish to draw your attention to the Employment Alert concerning the start of the transitional period for companies to comply with the hiring quotas for disabled people.

Maria da Glória Leitão,
Head of the Department of Employment Law

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II. Employment Alert

Hiring disabled people, with a degree of disability of 60% or more – beginning of the transitional period and the obligation to ensure that 1% of new hires each year are disabled people.

Law no. 4/2019, of January 10, sets out that medium and large enterprises, with 75 or more or 250 or more employees, respectively, must ensure that their staff comprises at least 1% for the former and 2% for the latter of disabled people, with a degree of disability of 60% or more.

The transitional period for the enforcement of this law began on February 1, 2020 (corresponding to compliance with the quotas); it will last for five years for companies with between 75 and 100 employees and four years for companies with over 100 employees.

With a view to ensuring the gradual enforcement of the legal rules, Law no. 4/2019 also sets out that, as of February 1, 2020, all companies falling within its scope must ensure that 1% of new hires each year concern disabled people, with a degree of disability of 60% or more.

Failure to meet the obligations established in this law constitutes a minor or serious administrative offence.

Employers, however, can be exempted from these rules, upon request addressed to the Authority for Working Conditions, containing the relevant required opinions and declarations from the INR, I.P. (National Institute for Rehabilitation) and the IEFP, I.P. (Institute for Employment and Vocational Training), justifying such exemption either on the impossibility of applying the legal rules to the vacancy in question or on there not being enough applicants with disabilities enrolled at the job center, who meet the requirements for filling the vacancies advertised in the previous year.

III. Legislation

Order no. 27/2020 – *Diário da República* no. 22/2020, Series I, January 31, 2020
Adjusting the Social Benefits Reference Amount (IAS)

The Social Benefits Reference Amount *(IAS)* has been adjusted from €435.76 to €438.81 for 2020.

Order no. 28/2020 – *Diário da República* no. 22/2020, Series I, January 31, 2020
Establishing the annual indexation of pensions and other social benefits

Pensions, specifically disability and old-age pensions paid by the Social Security system, as well as old-age, retirement and disability pensions paid by the Convergent Social Protection scheme, have been adjusted for 2020, as follows:

i. Pensions of not more than €877.62 are increased by 0.7% (and by a minimum of €1.91);
ii. Pensions of between €877.62 and €2,632.86 are increased by 0.24% (and by a minimum of €6.14);
iii. Pensions of over €2,632.86 have not been adjusted.

This Order also establishes the 2020 annual indexation of Convergent Social Protection scheme pensions granted by the CGA (civil servants' general fund) and pensions for permanent disability to work and occupational illness-related deaths, as follows:

i. Survivors' pensions, armed forces survivors' pensions and others granted by the CGA of up to €438.81 are increased by 0.7%;
ii. Survivors' pensions, armed forces survivors' pensions and others granted by the CGA of up to €1,316.43 are increased by 0.24%;
iii. Survivors' pensions, armed forces survivors' pensions and others granted by the CGA of over €1,316.43 have not been adjusted.

Order no. 30/2020 – *Diário da República* no. 22/2020, Series I, January 31, 2020
Establishing the statutory age of retirement with pension rights in 2021

The statutory age of retirement with pension rights in 2021 is set at 66 years and 6 months.

Order no. 36-A/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020
Introducing the second amendment to Order no. 214/2019, of July 5, regulating the Support Measure for the Return of Emigrants to Portugal, within the framework of the 'Return Program'

The following modifications have been made to the 'Return Program':

a) The eligibility criteria are amended to include the granting of support to Portuguese emigrants with a fixed-term employment relationship, provided that the first term lasts for at least six months;

b) Increases the ceiling on the contribution towards transporting personal effects from non-EU countries to Portugal;
c) Adjusts the top-up support provided for each family member, who joins the beneficiary in taking up residence in Portugal;
d) Provides top-up support to emigrants whose place of work is located in municipalities within Portugal.
e) Extends the period of validity of the measure to cover employment contracts concluded up to December 31, 2021.

Regional Legislative Decree no. 2/2020/M – *Diário da República* no. 44/2020, Series I, March 3, 2020

Establishing the amount of the monthly minimum wage for the Autonomous Region of Madeira

Establishes that the monthly minimum wage for the Autonomous Region of Madeira is €650.88.

IV. Extension orders

Sector	Order
Porto trade	**Order no. 31/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishing the extension of the amendments to the collective bargaining agreement between Porto Trade Association and others and CESP (Portuguese Trade, Offices and Services Trade Union) and one other.
Cork	**Order no. 32/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishing the extension of the amendments to the collective bargaining agreement between APCOR (Portuguese Cork Association) and FEVICCOM (Portuguese Construction,

	Ceramics and Glass Trade Unions Federation) and others (factory workers).
Chemical products (pest control)	**Order no. 33/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishing the extension of the amendments to the collective bargaining agreement between GROQUIFAR (Chemical and Pharmaceutical Products Wholesalers' Association) and FIEQUIMETAL (Inter-trade Union Federation of Metalwork, Chemical, Electrical, Pharmaceutical, Pulp, Paper, Graphics, Printing, Energy and Mining Industries (pest control)).
Dock work	**Order no. 34/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishes the extension of the amendments to the collective bargaining agreement between the Association of Terminal Operators of the Douro and Leixões Ports and another and the Trade Union of Dockers, Gate and Traffic Clerks of the Douro and Leixões Ports.
Two-wheel industries	**Order no. 35/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishing the extension of the collective bargaining agreement between ABIMOTA (National Association of Two-Wheel Industries, Metal fittings, Furnishings and similar products) and SINDEL (National Industry and Energy Trade Union) and one other.

Cookies manufacturing	**Order no. 36/2020 – *Diário da República* no. 23/2020, Series I, February 3, 2020** Establishing the extension of the amendments to the collective bargaining agreement between AIBA (Association of Biscuit and similar product manufacturers) and FESAHT (Federation of Farming, Food, Beverages, Hospitality and Tourism Trade Unions (factory, ancillary and maintenance staff).
Social solidarity	**Order no. 44/2020 – *Diário da República* no. 33/2020, Series I, February 17, 2020** Establishing the extension of the amendments to the collective bargaining agreement between CNIS (National Confederation of Charities) and FEPCES (Portuguese Office, Trade and Services Trades Union Federation) and others.
Freight road transport	**Order no. 49/2020 – *Diário da República* no. 40/2020, Series I, February 26, 2020** Establishing the extension of the amendments to the collective bargaining agreement between ANTRAM (National Association of Public and Road Transport of Goods) and FECTRANS (Transport and Communications Trades Union Federation) and others.
Aveiro trade	**Order no. 62/2020 – *Diário da República* no. 47/2020, Series I, March 06, 2020** Establishing the extension of the amendments to the collective bargaining agreement between ACA (Aveiro Trade Association) and CESP (Portuguese Trade, Offices and Services Trade Union) and other.

Cleaning services	**Order no. 72/2020 – *Diário da República* no. 53/2020, Series I, March 16, 2020** Establishing the extension of the amendments to the collective bargaining agreement between APFS (Portuguese Facility Services Association) and STAD (Concierge, Surveillance, Cleaning, Domestic and Miscellaneous Activities Trade Union) and other.

V. Domestic case law

Ruling by the Supreme Court of Justice, December 11, 2019

The aim of cutting costs arising from the operation of a concrete store, prompted by a fall in its turnover during the previous two years, does not constitute valid grounds for closing it down and the resulting collective redundancy.

Three employees were made redundant as part of a collective redundancy, on the grounds of the closure of the shop where they were employed. The employees challenged the collective redundancy as unlawful and their case was upheld by the Court of First Instance.

The employer appealed the decision before the Lisbon Court of Appeal, which overturned it and exonerated the employer.

The Lisbon Court of Appeal essentially based its ruling on the discretionary power of employers to take management decisions and found that all the legal formalities had been met for proceeding with the collective redundancy. Furthermore, it held that the employer's intention to *"increase sales in the other three shops by closing this one, since it had the lowest sales and they had been decreasing in recent years"* was legitimate.

The employees did not accept the ruling and appealed it before the Supreme Court, where once again, the employee argued that the reason for closing the shop, and the ensuing collective redundancy, was that it was less viable than the other three shops he ran and thus he wished to reduce his operating costs.

Nevertheless, the Supreme Court held that the employer had not produced any market studies to substantiate this allegation, *i.e.*, establishing that reducing costs by closing the shop would

enhance the viability of his activity in that sector, and stated that *"the company must demonstrate the existence of an effective crisis and that making employees redundant is a rational means of tackling it."*

The Supreme Court added that, in addition to sales having fallen, the employer must demonstrate that such a fall has caused him significant losses, to the extent of jeopardizing his business stability – the so-called "economic crisis" situation.

The Supreme Court concluded that the collective redundancy was unlawful and ordered the employer to pay compensation to the three employees concerned.

Ruling by the Porto Court of Appeal, September 23, 2019

Waiver signed by an employee is a valid document in the context of termination of employment contract by agreement, when the employee is aware of its content.

This case concerns an employee who challenged the collective redundancy he was part of and claimed payment of various labor credits, allegedly owed to him.

The employee, however, had signed a declaration issued by the employer, attesting he had received all overdue and due credits, further stating that *"having received the aforementioned amounts, I have nothing more to receive"*.

Thus, the debate centered on whether a general waiver, in which an employee waives his right to claim further payments of credits, constitutes a claims remittal.

The Court of First Instance held that it was a remittal contract, so that the employee would no longer be entitled to receive any salary credits.

At the appeals stage, the Porto Court of Appeal upheld the lower court's decision, essentially on the grounds that a declaration holds the meaning that a reasonable recipient, in the circumstances in which the declaration was made, would assign it, according to so-called "recipient impression theory". In fact, the employee and employer had exchanged correspondence, which demonstrated that the two parties had negotiated the payments to be made as a result of the termination of the employment contract.

The Court also based its findings on the fact that the employee had sent the employer an e-mail message, three months before he signed the waiver, in which he accepted the employer's proposal for calculating his severance pay, without prejudice to his right to claim other labor credits arising from the employment relationship, not included in the said compensation.

The Court of Appeal held that if a person of average diligence wished to maintain the position set out in the said e-mail, would never fully subscribe, three months later, to a declaration which clearly and unequivocally waives any and all claims for further payment.

Hence, the waiver at issue constituted a claims remittal and the Court of Appeal rejected the possibility of the employee claiming any further credits.

Ruling by the Évora Court of Appeal, September 24, 2019

Football matches organized by employees during their lunch hour are a personal leisure activity, without any connection to employment relationships. Any injuries sustained during the course thereof are not covered by work accident protection.

An employee, a heavy goods vehicle driver, brought special work accident proceedings on the grounds of a knee injury suffered while playing football with work colleagues, during his lunch hour on the employer's premises.

The Court of First Instance held that the football match in which the employee was participating was not directly connected to his work duties as a driver nor had his employer given him instructions to carry out this activity and that, therefore, the mere coincidence of the accident having occurred on the employer's premises did not constitute grounds to define it as a work accident.

The employee appealed the decision, but the Évora Court of Appeal upheld the lower court's decision. Indeed, the Court held that work accidents occur when there is a causal link to the employment relationship. Since the employee was not working whilst he was playing football, the Court found that the accident had not occurred as a result of him performing his work duties as a driver.

Thus, the Court of Appeal considered that the employee had taken part in the football match, a leisure activity, upon his own free decision, and that there was no evidence of an employer's authority or of the employee following instructions, hence the accident could not be considered a work accident.

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