
Labor

Newsletter | Portugal

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I. Laboratory

There is life beyond COVID-19.

The most awaited and newsworthy legal issues relate to the aid granted to companies and employees aimed at removing the difficulties caused by the pandemic, and those are the ones included in our newsletters relating to COVID-19 legislation.

Through publishing newsletters regularly, we continue to report on what is happening in labor legislation and case law beyond matters that exclusively relate to COVID-19.

In this newsletter, we draw special attention to two court rulings on the lawfulness of dismissals.

The Supreme Court of Justice's ruling highlights the obvious; i.e., to dismiss employees because their jobs no longer exist, employers must prove that those positions no longer exist in the company's organization and cannot be maintained under another name or category. Regarding this matter, it is worth recalling the competence attributed to labor inspectors to suspend a dismissal when there is evidence that it is unlawful.

The Court of Appeal of Évora makes an interesting analysis of the disturbing impact of unjustified absences in the employer's workplace, which, revealing a clear lack of interest and diligence on the part of the employee, meet the conditions for just cause.

In the next newsletter, we will report on legislation that has been published in October.

Maria da Glória Leitão,
Head of the Labor Law Department



II. Legislation

Decree-Law 35/2020 - Official Gazette of the Portuguese Republic No. 134, Series I of 2020-07-13

Amends the protection of employees against the risks relating to the exposure to carcinogens or mutagens they undergo while working, transposing Directive (EU) 2017/2398, 2019/130 and 2019/983

This decree-law amends, for the second time, Decree-Law 301/2000 of November 18, by defining the occupational exposure limit value as the weighted average concentration limit of a carcinogen or mutagen present in the air at the workplace, measured in the breathing zone of an employee over a given period.

The employer must evaluate the risks to guarantee employees' health and safety, which are:

- the nature, degree and duration of exposure to the carcinogen or mutagen;
- the concentration of the carcinogen or mutagen in the air at the workplace, considering the value limits for occupational exposure; and
- the actual conditions of occupational exposure, including the link with other occupational risk factors.

Employers must evaluate the risks every three months if (i) any changes are made in the work conditions, (ii) the value limits of professional exposure have been reached, or (iii) the health and safety result justifies it. In the evaluation, employers must identify the employees who were exposed and organize and file the updated data records electronically (i.e., the records of work-related accidents and confirmed professional exposures).

Order 206/2020 - Official Gazette of the Portuguese Republic No. 167, Series I of 2020-08-27

Regulates the measure *Estágios ATIVAR.PT*, which consists of supporting young people in their integration in the job market or supporting the unemployed in their professional reorientation

This order revises the value of the internship grant to establish references that reinforce the worth of qualifications and the associated salary advantage of entering the job market.

It also aims to help the newly unemployed with transitory mechanisms, such as (i) enlarging the scope of eligibility of the measure's recipients, (ii) reinforcing the tools to turn internship agreements into permanent employment contracts, and (iii) extending (on an exceptional basis) ongoing internship projects for an additional three-month period.



Order 207/2020 - Official Gazette of the Portuguese Republic No. 167, Series I of 2020-08-27

Regulates the measure *Incentivo ATIVAR.PT*, which provides financial support to employers that hire the unemployed who are registered in the Institute of employment and professional training (*Instituto do Emprego e da Formação Profissional, I. P.*)

This order regulates the measure *Incentivo ATIVAR.PT*, which supports the hiring of the unemployed to create sustainable jobs and to promote employability for those who are less integrated in the job market.

Employers can benefit from a support equivalent to 12 times the value of the Social Benefits Reference Amount (IAS); i.e., $12 \times \text{€}438.81 = \text{€}5,265.72$ for permanent contracts; and 4 times the value of the IAS, amounting to $\text{€}1,755.24$, for fixed-term contracts. In certain situations, this support may be increased.

Employers are also rewarded for converting the fixed-term contracts specified in this order into permanent contracts. This award amounts to a value equivalent to two times the monthly base salary specified in the contract, and up to a limit of five times the value of IAS.

Decree-Law 70/2020 - Official Gazette of the Portuguese Republic No. 181, Series I of 2020-09-16

Increases the age to access pensions and eliminates sustainability in the regime of anticipation of the age for old-age retirement of the general regime of social security for specially protected professions

This decree-law adapts the regime of anticipation of the age for old-age retirement of the general regime of social security for specially protected professions. The age at which old-age retirement can be accessed is increased to the specific age of each specially protected professions, taking into consideration the average life expectancy of the population at 65 years of age. The sustainability factor is no longer applied when calculating old-age pensions within the scope of the regimes of anticipation of the age for the old-age pension.



III. Extension orders

Area of activity	Order
<p>Slaughter plants</p>	<p>Order 167/2020 - Official Gazette of the Portuguese Republic No. 132/2020, Series I of 2020-07-09</p> <p>Extends the amendments to the collective bargaining agreement entered into between the National Association of Slaughter Plants and Poultry Processing Industries (ANCAVE) and the National Union of Employees in Agriculture, Forest, Fishing, Tourism, Food and Drinks Industry (SETAAB).</p>
<p>Meat trade (Lisbon and Setúbal districts and Belmonte, Covilhã and Penamacor counties)</p>	<p>Order 168/2020 - Official Gazette of the Portuguese Republic No. 132/2020, Series I of 2020-07-09</p> <p>Extends the amendments to the collective bargaining agreement entered into between the Association of Meat Traders of Lisbon and other employee associations and the Union of Employers of the southern meat industry and trade.</p>
<p>Tripe industry</p>	<p>Order 176/2020 - Official Gazette of the Portuguese Republic No. 143/2020, Series I of 2020-07-24</p> <p>Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of Manufacturers of Tripe and Others (ITA) and the Union of Trade, Offices, Services, Food, Hotel and Tourism (SinCESAHT).</p>



<p>Security</p>	<p>Order 185/2020 - Official Gazette of the Portuguese Republic No. 152/2020, Series I of 2020-08-06 Extends the amendments to the collective bargaining agreement entered into between the Association of Security Companies (AES) and the Union of Employees of Lobby, Surveillance, Cleaning, Domestic and Other Services (STAD).</p>
<p>Security</p>	<p>Order 186/2020 - Official Gazette of the Portuguese Republic No. 152/2020, Series I of 2020-08-06 Extends the amendments to the collective bargaining agreement entered into between the Association of Security Companies (AES) and the Federal Union of Industry and Services (FETESE) and others.</p>
<p>Liberty insurances</p>	<p>Order 187/2020 - Official Gazette of the Portuguese Republic No. 152/2020, Series I of 2020-08-06 Extends the amendments to the collective bargaining agreement entered into between the Portuguese branch of insurance company Liberty (Liberty Seguros, Compañía de Seguros y Reaseguros, S.A.) –and the Union of Employees in Insurance Activity (STAS) and others.</p>
<p>Tanneries</p>	<p>Order 188/2020 - Official Gazette of the Portuguese Republic No. 152/2020, Series I of 2020-08-06 Extends the amendments to the collective bargaining agreement entered into between the Portuguese Association of the Industry of Tanneries and the Federal Union of Textiles,</p>



	Wool, Clothing, Shoe and Fur Employees of Portugal (FESETE).
Wholesale of pharmaceutical and chemical products	Order 202/2020 - Official Gazette of the Portuguese Republic No. 163/2020, Series I of 2020-08-21 Extends the amendments to the collective bargaining agreement entered into between the Association of Chemical and Pharmaceutical Products Wholesalers (GROQUIFAR) and the Federal Inter-Union of Metallurgical, Chemical, Electrical, Pharmaceutical, Cellulose, Paper, Graphic, Print, Energy and Mining Industry (FIEQUIMETAL).
Glass production industry	Order 209/2020 - Official Gazette of the Portuguese Republic No. 170/2020, Series I of 2020-09-01 Extends the amendments to the collective bargaining agreement entered into between the Association of Flat Glass Manufacturers of Portugal and the Federal Portuguese Union of Construction, Ceramics and Glass (FEVICCOM) and others.
Industry of forest, agriculture and environment	Order 211/2020 - Official Gazette of the Portuguese Republic No. 172/2020, Series I of 2020-09-03 Extends the amendments to the collective bargaining agreement entered into between the National Association of Forestry, Agricultural and Environmental Companies (ANEFA) and the Union of Employees in Agriculture, Forest, Fishing, Tourism, Food and Drinks Industry (SETAAB).



<p>Industry of dairy products</p>	<p>Order 212/2020 - Official Gazette of the Portuguese Republic No. 172/2020, Series I of 2020-09-03</p> <p>Extends the amendments to the collective bargaining agreement entered into between the National Association of Dairy Producers (ANIL) and others and the Union of Dairy Products, Food, Agriculture, Offices, Trade, Services, Road Transportation, Metalworking, Metallurgy, Civil Construction and Wood.</p>
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IV. Domestic case law

Ruling of the Supreme Court of Justice of July 8, 2020

If an employer dismisses an employee because his or her job position no longer exists in the company, the employer must prove that this is actually the case. The job functions of the dismissed employee cannot be carried out by other employees, even if they are not remunerated and regardless of their job category.

In this case, the employee judicially challenged his dismissal, which was supposedly caused by the extinction of his job position. However, the first instance court declared the dismissal legal.

Unsatisfied with the decision, the employee filed an appeal to the Court of Appeal of Lisbon. This court altered the sentence, but only regarding the facts considered proved or not proved, and it dismissed the appeal by confirming the first instance court's decision.

Still unsatisfied, the employee filed an appeal to the Supreme Court of Justice, requesting that (i) the judgment be revoked; (ii) he be reinstated in his role in the company; (iii) he be paid the remuneration the company would have paid him had it not dismissed him, from the date he was dismissed and until *res judicata*; and (iv) he be paid compensation for immaterial damages.

According to the employee, after he was dismissed, an intern and other employees with fixed-term contracts occupied his position. Consequently, the Supreme Court of Justice clarified that, to dismiss an employee because his or her position no longer exists in the company, the employer must prove that the position in question has actually disappeared from its organization. Therefore, if the employer intends for interns or other persons to fill that position, even if those persons are



not remunerated, the employer cannot dismiss an employee because his or her job position no longer exists, as this is not actually the case.

The Supreme Court of Justice also added that, if the tasks the dismissed employee previously carried out are transferred to an employee with a fixed-term contract, the only fact that should be considered is whether those tasks are being carried out by an employee with a fixed-term contract, not their job category or whether they have additional functions.

The Supreme Court of Justice also explained that, even if the job position no longer exists in the company, if there are other positions with identical functions, the cost criterion will be the third legal criterion to be considered. The first and second criteria to be analyzed are the evaluation of the employee's performance and his or her academic and professional abilities, respectively. Only then is the cost criterion applied; i.e., the employee's experience in that position and his or her seniority in the company. When selecting the employee whose job position will become extinct, the employer must follow this order.

The Supreme Court of Justice concluded by considering that the functions the dismissed employee previously carried out continued to be carried out in the company. Therefore, the Supreme Court of Justice declared the dismissal unlawful, and the employer was obliged to reinstate the employee and pay the remuneration that it would have paid the employee if it had not dismissed him, from the date of the dismissal and until *res judicata*.

Ruling of the Évora Court of Appeal of July 4, 2020

For the penalty for dismissal with cause to be enforced, the professional relationship must no longer be possible. This happens when an employee shows an obvious disinterest in his or her role, as well as a lack of diligence while working, resulting in other employees being overloaded with work and causing dysfunctions in the employer's organization (e.g., customer service delays).

In this case, an employee challenged his dismissal following the disciplinary proceedings his employer brought against him. The employee contested it, claiming that the disciplinary proceedings were null because the accusation note was not considered, and because there was no hearing of the requested witness. The employee also argued that the accusation note was null because it was impossible to determine the number of days and hours he was accused of being absent. The employee also claimed that the number of absences were not enough to give rise to a just cause for dismissal.

In response, the employer argued that it did not receive a response to the accusation note and that the printout of an email the employee presented did not prove that the document in question had been received.



The first instance court concluded that the disciplinary proceedings were null, as it considered that the employee had proved that he had sent his written defense, even though it was unknown whether the instructor of the disciplinary proceedings had received that document. It also concluded that the accusation note was null because it did not contain a detailed description of the ascribed facts. Therefore, the first instance court declared the dismissal unlawful, and the employer was obliged to pay the employee the remuneration he would have received if he were not dismissed, from the dismissal and until *res judicata*, as well as compensation.

The employer filed an appeal to the Évora Court of Appeal. This court considered that the effective reception of the accusation note by the employer as not proved, as the burden of proof for this matter was on the employee. The Évora Court of Appeal also considered that the lack of description of the ascribed facts in the accusation note would only result in the disciplinary proceedings being declared null when it can be shown that the employee did not understand it, harming his right to defend himself.

As more than 10 unjustified interpolated absences in a calendar year was proven, exempting the employer from having to prove damages or serious risks for the work and that the absences of the employee caused damages and disturbances in the employer's organization, which led to other employees being overloaded in their work and their having to be allocated to the area where the dismissed employee carried out his tasks. The employee's absences also caused delays to customer service. Therefore, the court considered that the employee's behavior showed a clear lack of interest and diligence, meaning the conditions for a just dismissal were met.

The Court of Appeal revoked the first instance court's judgment.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our Task Force by email TFcoronavirusPT@cuatrecasas.com or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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