VALADAS CORIEL
& ASSOCIADOS
ADVOGADOS

www.valadascoriel.com

EMPLOYMENT AND SOCIAL SECURITY BULLETIN

Case Law Highlights
Brief Commentary to the SCJ Ruling of 10/12/2022
Pp. 2

NOVEMBER 2022

Case Law Highlights

Employee with family responsibilities – Flexible Working Schedule – Definition of the weekly rest days

Ruling of the Supreme Court of Justice ("SCJ") from 10/12/2022 – Proc. 433/20.9T8BRR.L1.S1

It was widely covered by the media – which is not common as far as employment law matters are concerned – a Ruling of the SCJ concerning a topic we have been covering in our monthly Bulletin: the flexible working schedule for employees with family responsibilities.

In this Ruling the Court upheld the view that the wording of articles 56th and 57th of the Portuguese Labour Code ("LC") does not exclude the fixation of the weekly rest days, including Saturday and Sundays, in the legal framework of the flexible working schedule upon the employee with family responsibilities' request.

Without ever specifically stating it, the practical effect of this decision is that an employee who has accepted to render work for an employer under a rotating shiftwork regime (which involves that the weekly rest days will not always coincide with the weekends) may, at a certain stage of the employment relationship, impose to the employer to stop working under such regime and to begin working under a fixed working schedule.

Let's look at the issue in further detail:

The underlying factual situation of the Ruling concerned an employee who works at a store located at a shopping mall that is open to the public 7 days a week, with opening hours at 10AM and closing hours between 11PM and 12AM. The employee sent a letter to the employer claiming the application of the flexible working schedule for employees with family responsibilities in which she stated that (i) she had 2 children under her care, one with 10 years old and the younger with just 6 months, (ii) her husband also worked under a rotating shiftwork regime and that (iii) the day-care facility attended by the younger child is only open from Monday to Friday from 7AM to 6.30PM and, therefore, required that her rotating weekly rest days were defined to be enjoyed during the weekends.

The letter sent by the employee to her employer is nothing but a reflection of an unfortunate reality that affects thousands of employees in Portugal: the lack of parental care support structures, notably, of day-care facilities, that allow parents to conciliate their fundamental right to family life with the development of their professional career. Not to mention the salary levels which are totally inappropriate to allow an actual possibility of conciliating family life with the professional activity.

When one analyze the content of the letter, it becomes clear that the employee did not wish to implement any sort of flexible working schedule but, instead, that her weekly rest days would no longer be rotating and that a fixed schedule was implemented. In other words, that the weekly rest days would coincide with the weekends.

In the Ruling under analysis the Court espoused an understanding that, in our view, has no strong underpinnings in the law and that, at least apparently, intends to "transfer" to employers the burden of promoting the conditions that allow the possibility of conciliating family and professional life far beyond the legal framework that is in force in our jurisdiction, in an exercise of "creative jurisprudence".

In order to avoid the risk of an abstract view on the topic, let's start by looking at the legal data. According to article 56th of the LC, employees with children under 12 years of age or, regardless of their age, with disability or chronical disease and that live in the same household, are entitled to a flexible working schedule, being that such right may be claimed by either of both parents.

Paragraph 2 of the mentioned article adds that it is understood as a flexible working schedule the one in which the employee may choose, within certain time slots, the starting and ending hours of the daily regular working hours.

Under paragraph 3 of the same article, the flexible schedule to be drafted by the employer shall:

- Include one or more periods in which the employee's presence is mandatory, with a duration of at least half of the daily regular working hours;
- Define the slots for the start and ending of the daily regular working hours, each with a duration that shall not be inferior to a third of the daily regular working hours, being that the length of these intervals may be reduced in order to accommodate the schedule with the undertaking's working hours;
- To establish a break period with a duration not longer than 2 hours.

Please note that the employer may only refuse the employee's request on grounds of very serious needs related to the company's business or on the impossibility of replacing the employee.

And, within this legal framework, the question that we raise is if one employee that renders work under a rotating shiftwork regime and whose weekly rest days are also rotating - not always falling on weekends - may ask for the enforcement of a schedule which, in practical terms, is a fixed one.

In our understanding, although there is nothing that refrains the employer from, when faced with such kind of requests, accept it and therefore draft a schedule to be applied to the employee under those terms, the law does not require it to do so since such schedule does not amount to a flexible one.

Therefore, it is our understanding that when faced with such a request the employer is not required to justify its refusal on grounds of a very serious needs related to the company's business or on the impossibility of replacing the employee, being enough to claim that employee's request does not fall within the concept of flexible working schedule.

The SCJ underpins its view on the fact that the definition of the weekly rest days is part of the employee's working schedule – and we do not challenge that, challenging however that the law imposes on the employer an obligation to fixate those days – and that the legal principles included on articles 59th, paragraph 1, subparagraph *b*) and 67th, paragraph 2, subparagraph *h*) of the Portuguese Constitution, aimed at ensuring the possibility of conciliating professional and family life, require an interpretation of article 56th of the LC to an extent that includes the setting of the weekly rest days, as that is the only way to achieve the law's purpose of allowing the conciliation of professional and family life.

In spite the Court's rationale, we find that it does not takes into consideration another fundamental right, the employer's right to freedom of private economic initiative, also framed in the Constitution, which guarantees that, within the legal limits – and, as far as working schedules are concerned, the consideration of the employee's need to conciliate professional and family life is one of those limits – it has the right to establish the working schedules it finds are better fitted to enable the achievement of its business goals and also that, apart from the ones precisely foreseen in the law, no other working schedules may be imposed on the company nor any other measures that curtail the degree in which it may manage its workforce.

Furthermore, in our view the Court's Ruling does not evaluate the impact that the flexible working schedule may have (and has in most cases) on the situation of the other employees, that may be forced to accept changes on their working schedules in order to allow the employer to cope with the employee's request.

And there is also another legal aspect which was not taken into consideration by the Court. In fact, if we consider the legal framework foreseen in the LC in relation to the protection of parenthood, we can conclude that there is a number of provisions that grant the employees the right to be exempted from performing work under specific working schedules, such as adaptability, the so called bank of hours, concentrated schedule and nighttime work. However, the lawmaker has not foreseen such right as far as shiftwork is concerned. Therefore, there is no legal grounds for the employee to exempt himself from working under such regime.

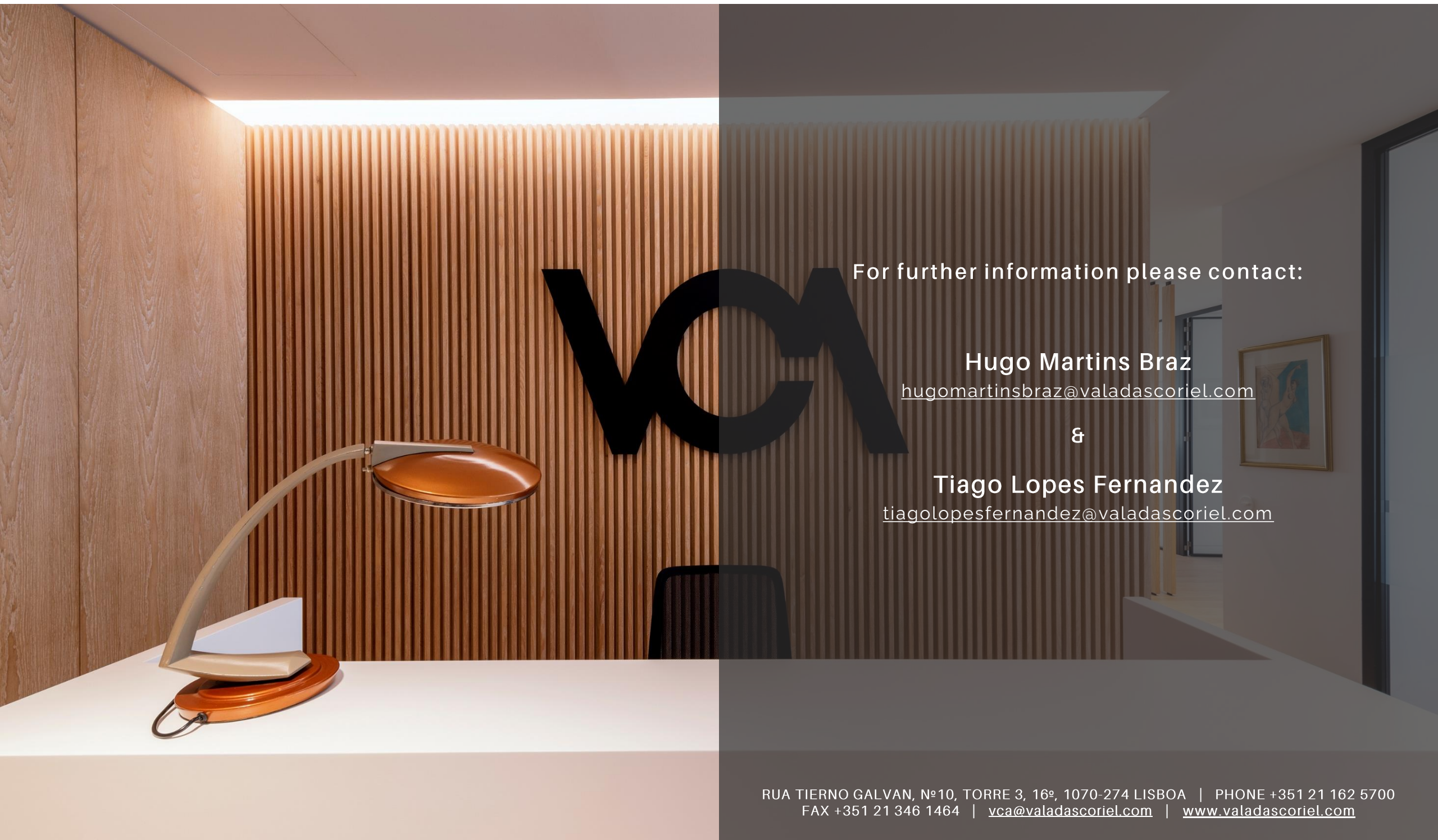
In conclusion, in our understanding, given the wording of article 56th of the LC, the SCJ Ruling lacks sufficient support in the law. Notwithstanding, in light of this decision, it is most certain that, at least in the foreseeable future, the lower courts will follow the SCJ's understanding as well.

EMPLOYMENT DEPARTMENT

Hugo Martins Braz
Partner
hugomartinsbraz@valadascoriel.com

Tiago Lopes Fernandez
Of Counsel
tiagolopesfernandez@valadascoriel.com

Maria Moura Fonseca
Senior Associate
maria.fonseca@valadascoriel.com



For further information please contact:

Hugo Martins Braz
hugomartinsbraz@valadascoriel.com

&

Tiago Lopes Fernandez
tiagolopesfernandez@valadascoriel.com

RUA TIERNO GALVAN, Nº10, TORRE 3, 16º, 1070-274 LISBOA | PHONE +351 21 162 5700
FAX +351 21 346 1464 | vca@valadascoriel.com | www.valadascoriel.com