

OPINION

THE (NEW) SIMPLIFIED LAYOFF REGIME UNDER LAW NO. 97/IX/2020, OF 23 JULY 2020

On 23 July of the current year, it was gazetted Law no. 97/IX/2020 which approved the extension of the simplified layoff regime in the Cape Verdean jurisdiction, being this regime applicable to all private sector employers, as well as to the employers that are, by legal imposition, prevented from carrying out their activities due to the COVID-19 pandemic.

Unlike the previous simplified layoff regime (Law no. 83/IX/2020, 4 April 2020), the law-maker, even though innovating when comparing with the previous Law, has been inspired in measures that are currently in force in other legal jurisdictions, such as collective dismissal or individual redundancy during a specific period of time for the employees included in the layoff regime.

Regarding this measure, the law-maker intends to strengthen employees protection included in the layoff regime, thus prohibiting the dismissal modalities set out above during the layoff period (1 July to 30 September), as well as during the 120 days following the termination of the layoff period (31st of January of 2021). Although comprehensible and followed in other countries with the same legal matrix, this measure proves to be overly burdensome to the employers that, unable to predict the future, are in an indecision situation regarding the extension of the labor contracts suspension.

If, in one hand, by extending the suspension period, the employers reduce their immediate costs with the human resources allocated to their activities, on the other hand they take substantial solvency risks, if the extension does not allow a third renewal of the layoff until the end of the year, thus not being possible for the employers to use the collective dismissal or individual redundancy.

These hindrances become more serious for the employers related to the tourism sector (not only the employers directly related with this sector, but also the employers indirectly related), since their activities are suspended since mid-March, thus not generating any kind of revenue since the beginning of the pandemic.

Taking into consideration that Cape Verde economy is strongly dependent of the tourism sector and that there is no expectable date for tourists to return to Cape Verde in a near future, this legal hindrance does not take into consideration the economic struggles that companies are currently dealing with, nor their need to reduce part of their workplaces with the purpose to protect their solvency.

On the other hand, this regime also implements a more bureaucratic process for employers to comply with, comparing with the previous regime, rather than a simplified and automatic extension for the employers that were already benefiting from this regime, which will originate more slowness in the payment of part of the employee's wage by the National Social Security Institute.

Besides the abovementioned measures, others are worth highlighting, such as the sharp drop on turnover in the same period of, at least, 40%, instead of the 30% foreseen in the previous regime, being also established express prohibitions to employers during the layoff period that may lead to the loss of the assigned benefits, further setting out the possibility of employers to use this period to provide training to personnel.

The extension of this regime until the end of the year its considered essential by the employers, that have already informed that they don't have a safeguarded situation, which may lead to a higher increase in the unemployment rate during 2021 than the already expected.

CASE LAW

Barlavento Court of Appeal – Decision of 18/10/2019

Wrongful Dismissal; Fixed term labor contract; undetermined labor contract; Seasonality.

This case involved a lawsuit emerging from an employment contract, brought up by an employee against her employer, requesting that its dismissal should be considered null and illegal, as well as that it was acknowledged that its labor relationship should be recognized as an employment contract for an unlimited term.

For such purpose, the plaintiff used her seniority, which at the date of dismissal was of about three years, as well as the lack of motive for the signature of her fixed term employment contract, which was signed on the basis of the seasonality of the activity of the employer, as per paragraph c) of number 1 of article 361.⁹ of the Labor Code.

It is worth mentioning that the plaintiff was hired to perform the activity of cleaner by means of a fixed term employment contract for an initial period of three months, renewable for equal periods, being the defendant an hotel. The defendant argued that the plaintiff had a fixed term employment contract since its activity is seasonal and that the hotel's occupation rate varies in accordance with the period of the year, as well as the fact that the majority of the employees of such professional category are female, with a high rate of working absences and maternity leave requests.

The court ruled in favor of the employee, considering that it was the employer who had to prove that all the seasonality requirements were present, considering also that the defendant had the obligation to prove that employee's activity was seasonal and that such fact should be already foreseen in the fixed term labor contract.

On the other hand, the Court also took into account the full duration of the fixed term employment contract, substantiating that a fixed term employment contract that has lasted for about three years should never be deemed as a fixed term employment contract based on seasonality of the activity, since the seasonality is something that is assessed annually, that is to say, it should be based on the high and low seasons in a given year, thus considering the season when more employees are needed to cope with the work in progress.

LEGAL NEWS

- Resolution no. 85/2020, of 18 June 2020 – amends Resolution no. 77/2020, of 29 May 2020 which approves the strategy of progressive termination of the restrictive measures and sets forth the general health conditions applicable to institutions, companies, services or activities, as well as the specific proceedings to be carried out in the context of the prevention of SARS-CoV-2 contamination.
- Decree-Law no. 58/2020, of 29 July 2020 – Sets forth the Legal Regime of Mandatory Workman Compensation Insurance against Work Accidents and Occupational Diseases.

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