Labor Newsletter

CAPE VERDE

May 2020

OPINION

THE LABOR CONTRACT SUSPENSION REGIME UNDER LAW NO. 83/IX/2020 ("SIMPLIFIED LAYOFF")

The labor contract suspension regime ("Lay-off") is foreseen in Article 198 of the Labor Code ("LC").

According to paragraph 1 of said Article, the employer may suspend the work of all or part of the employees, up to 120 days, based on circumstantial market constraints, economical or technological reasons, lack of supply of raw materials of other goods, that have a significant impact on the normal activity and provided that the suspension is necessary to keep the company's viability or to avoid significant damage.

Furthermore, according to the procedure set forth in such article, *the employer must inform, with a prior notice of 15 working days, the General Directorate of Labor and the union delegates or, in the absence of such delegates, the labor unions about the reasons, deadline and suspension extension, as well as it must inform the employees about the motives, deadline and suspension extension, with a prior notice of 7 days concerning the labor contracts suspension date.*

Finally, during the Lay-off period, notwithstanding eventual agreements with the employees, these last are entitled to receive, at least, **(i)** base-salary during the first 7 days of suspension; **(ii)** 50% of base-salary during the remaining suspension period; and **(iii)** right to vacations, under the terms of the LC.

With the gazetting of Law No. 83/IX/202, of 4 April 2020, the Lay-off regime foreseen in Article 198 of the LC has been simplified, namely concerning the deadlines and communication procedures, making the regime, effectively, more simplified.

Thus, under this simplified procedure, the maximum duration for the labor contract suspension becomes 90 days (instead of 120 days), as from 1 of April 2020; the allowance that the employees are entitled to receive during the Lay-off period becomes 70% of its reference salary (and not 50% of its base-salary), being this allowance paid directly to the employee in the proportion of 35% by the employer and 35% by the Social Protection System management entity.

Adding to these effects also comes the contributions and levies exemptions for the National Social Security Institute, both to employers (16%) and to employees (8,5%).

It is worth highlighting that the approved measure by the Cape Verdean competent authorities considering that, unlike what occurred in other countries where the Lay-off regime was simplified, Cape Verde set forth that part of the assistance due to the employees covered by the simplified Lay-off regime would be directly borne by the

National Social Security Institute, considering the expectable cash-flow constraints that companies are facing because of the current pandemic situation.

Thus, at the same time it allowed the employers to alleviate its cash-flow during its activity suspension, forced by measures related with the pandemic such as the mandatory lockdown and closure of borders, it granted the employees an assistance greater than the assistance foreseen in the LC (50% of base salary).

Unfortunately, it is not so welcomed the position adopted by the National Social Security Institute when confronted with the allowance payments to the employees covered by the Layoff simplified regime since, without any legal grounds for such matter, only paid the employees allowances after the companies entering into an agreement with the National Social Security Institute regarding their debt's regularization.

CASE LAW

Court of Appeal of Sotavento – Decision of 17/01/2019

Dismissal by redundancy; Dismissal with just cause due to fact attributed to employee; declaration effectiveness; prevalence of different reasons to contract termination.

In the present case, the employee claimed that, on 4 January 2016, he received a notification from its employer under which it announced its intention of firing the employee through redundancy and that the work place would be extinct by 13 february of the same year. The employee also claimed that in january he was prevented, by its employer, to present to its workplace. He concluded saying that his workplace was extincted without, however, being complied the terms foreseen in articles 236.º ex vi 220.º of Labor Code, hence being a wrongful dismissal.

The employer replied recognizing that it has communicated to the employee on the said date the redundancy of its workplace, with effect to 13 February 2016, adding, however, that it does not owe anything to the employee since he was dismissed with just cause due to the fact that he had given 10 consecutive unjustified absences. However, it also claims that the employee reacted, through its union structure, by 6 january of that year, and that the employer replied to such union in 11 January of said year, reaffirming its intention to extinct the workplace and communicating to the employee that its workplace would be extinct on the initially estimated date. It concluded stating that the employee did not presented to its workplace since 8 January 2016, having from such date 10 consecutive unjustified absences.

Therefore, the Court focused on two key points (i) the effectiveness of the confirmation communication of redundancy and (ii) the possibility of occurrence of any other reason of labor contract extinction during the prior notice period.

Addressing the first question, the Court puts on crisis the position of the employer, since it considers that the dismissal by redundancy was carried out by the employer on 11 January 2016, that confirmed the dismissal of the employee on 13 February of said year, has become effective as soon as the recipient was informed thereof, this means, the employee, in this case represented by the union structure. That's because, as the Court decided, the decision of dismissal means an unilateral negotiable statement, receivable and irrevocable, being, however, its efficiency suspended during the prior notice period.

Concerning the second question, the Court also rebuts the decision of the employer, herein with an unusual position. The Court underlines the time gap between the performance of several acts, and while assessing them, reaffirms that considering that the disciplinary procedure only had its final decision on 22 February 2016, that is, 9 days after the date foreseen for the dismissal by redundancy becomes effective, which was supposed to be on 13 february of that year, that was the last form of termination of the labor contract instead of the first one.

The Court ends up basing this position assuming that during the prior notice period, the labor contract was still in force, there being the rights and duties of both parties also in force, wherefore the employee was still under the disciplinary umbrella of the employer and, in case any fact with disciplinary relevance occurred (undertaking of 10 unjustified absences), the relevant disciplinary procedure had to be enforced, and concluded before the labor contract termination by any other reason.

Hence, the Court deemed the decision of dismissal by just cause null and void, making prevail the dismissal by redundancy, condemning the employer to pay a compensation correspondent to such figure.

This decision proves to be, in a way, innovative, because the Court did not consider the dismissal decision carried out by the employer as an wrongful dismissal, opting by the inefficiency of the disciplinary procedure final decision.

NEW LEGISLATION

- **Joint Order No. 1/2020, of 18 march 2020**, which declares the contingency situation on national territory, attempting to control the epidemiological situation of the country in order to anticipate and contain possible infection lines;
- **Resolution No. 51/2020, of 20 march 2020**, which approves the contingency measures on Boa Vista island;
- **Presidential Decree No. 6/2020, of 28 march 2020**, through which the State of Emergency was declared in the Republic of Cape Verde, for a period of 20 days, starting on 29 march 2020;
- **Decree-Law No. 36/2020, of 28 march 2020**, which rules the state of emergency setting forth several exceptional measures, being worth of highlighting, among others: i) interdition of flights and maritime connections, both national and international; ii) the general duty of home confinement; and iii) the lockdown of public and private companies;
- **Resolution No. 58/2020, of 30 march 2020**, which approves several measures aimed to family social protection, and protection of income of those who work on informal sector of economy and that were affected by the restricting measures to fight COVID-19;
- **Decree-Law No. 37/2020, of 31 march 2020**, which sets forth exceptional and temporary measures on social protection and approves tax and parafiscal and human resources measures in order to reply to new SARS-CoV-2, causative of the disease COVID-19;
- **Decree-Law No. 38, of 31 March**, which lays down exceptional measures to protect the loans of families, companies, social protection institutions and some other entities belonging to social economy, as well as a special regime of personal guarantees of the State following the declaration of the state of emergency in the country;
- **Decree-Law No. 41/2020, of 2 april 2020**, which sets forth the inclusion social income.
- **Law No. 83/IX/2020, of 4 april 2020**, which sets forth exceptional and temporary measures to respond to the epidemiological situation caused by coronavirus SARS-CoV-2 and disease COVID-19.
- **Presidential Decree No. 07/2020, of 17 april 2020**, which declares the extension of the state of emergency declaration in order to maintain the measures already in force, and the potential enforcement of some other measures deemed necessary, complying with constitutional framework, in order to avoid the spread COVID-19 all over the national territory;
- **Decree-Law No. 44/2020, of 17 april 2020,** which rules the application of the state of emergency, under the terms in which it was extended by Presidential-Decree No. 07/2020, of 17 april 2020;
- **Decree-Law No. 47/2020, of 25 april 2020**, which sets forth the rules for facial masks use, as an ancillary measure to mitigate the Sars-Cov 2 spread, as well as other hygienization, infection prevention and sanitary surveillance, as a result of the public health safeguard principle;
- **Presidential Decree No. 8/2020, of 2 may 2020**, which declares the extension of the state of emergency declaration on Santiago and Boa Vista islands;
- **Decree-Law No. 49/2020, of 2 may 2020**, which rules the state of emergency application, under the terms it was extended by Presidential-Decree No. 08/2020, of 2 may 2020;
- **Resolution No. 71/2020, of 13 may 2020**, which amends and republishes the measures aimed to family's social protection and to protect the informal sector of the economy affected by the restricting measures to fight COVID-19;
- **Presidential Decree No. 9/2020, of 14 may 2020**, which declares the extension of the state of emergency on Santiago Island;
- **Decree-Law No. 51/2020, of 14 may 2020**, which rules the state of emergency application, under the terms it was extended by Presidential-Decree No. 09/2020, of 14 may 2020.

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