DISMISSAL PROTECTION IN THE BRICS COUNTRIES IN LIGHT OF ILO CONVENTION NO. 158

ELENA SYCHENKO,

Saint Petersburg State University (Saint Petersburg, Russia)

MAURO LARUCCIA,

Jorge Duprat Figueiredo Foundation for Safety and Occupational Health at Work (Fundacentro) and Pontifical Catholic University of São Paulo (São Paulo, Brazil)

DALTON CUSCIANO,

Jorge Duprat Figueiredo Foundation for Safety and Occupational Health at Work (Fundacentro) and Getúlio Vargas Foundation (São Paulo, Brazil)

LI WENPEI,

China University of Labor Relations (Beijing, China)

IRINA CHIKIREVA,

Tyumen State University (Tyumen, Russia)

PAUL SMIT,

North-West University (Potchefstroom, South Africa)

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The BRICS countries have aspirations to achieve sustainable development in their economies and environmental protection. These aspirations have an important social aspect in the area of employment protection as it relates to ensuring fair development. In order to establish national standards for dismissal protection in four of the BRICS countries (Brazil, Russia, China and South Africa) the authors have considered the legislation and relevant national case law. This paper includes a review of International Labour Organisation (ILO) standards of dismissal protection, which are used as a pattern

for comparison. The paper consists of five parts: the first deals with the history and explores the legal standards adopted in the ILO Convention No. 158; the remaining four parts present the research on each of the national dismissal protection systems in the four BRICS countries under study. The authors conclude that even though the national systems are different and have dissimilar scopes in respect of dismissal protection, their regulations are largely in line with the Convention, which has not been ratified by any of the BRICS countries; and that international instruments even without ratification may be a helpful instrument for shaping the national system of dismissal protection, and for providing guidance to policymakers and legislators.

Keywords: dismissal protection; BRICS; ILO; redundancy; justified dismissal; remedy.

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Introduction

The recent development of BRICS cooperation demonstrates that the field of employment protection and achieving social justice is one of the significant spheres for this union. The BRICS countries met in Russia in 2016 to discuss core labor and employment issues. A year later the BRICS Labour and Employment Ministers' Declaration was adopted,[1] which underlined the need to enhance employment protection and ensure the transition to formal labor markets, emphasizing in particular the value of social dialogue. This document was warmly welcomed by International Labour Organisation (ILO) Director-General Guy Ryder, as it is in line

[1] BRICS Labour and Employment Ministers' Declaration, Chongqing, China, 27 July 2017 (Oct. 19, 2019), available at https://www.ranepa.ru/images/media/brics/china2016/BRICS%20MD%200725-EWG%20Meeting.pdf.

with ILO values.[2] The BRICS declaration adopted in Xiamen on 4 September 2017 reflected partly the minister's statements. Thus it reaffirmed the commitment to fully implementing the 2030 Agenda for Sustainable Development.[3] The heads of the BRICS states underlined the aspirations to achieve sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner. It was also stated that the establishment of sustainable peace requires a comprehensive, concerted and determined approach, based on mutual trust, mutual benefit, equity and cooperation, that addresses the causes of conflicts, including their political, economic and social dimensions.[4] These words are consonant to the preamble of the ILO Constitution:

> Whereas universal and lasting peace can be established only if it is based upon social justice; … Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.[5]

Employment protection is traditionally built upon three pillars: antidiscrimination policy, fair and safe working conditions and dismissal protection. The present paper will research the peculiarities of the latter in the BRICS countries, namely in Russia, China, Brazil and South Africa. The analysis of the national legislation and the relevant case law will be organized on the sample of dismissal protection provided by the ILO in the ILO Termination of Employment Convention (No. 158) which was adopted in 1982, entered into force on 24 November 1985. This Convention was not ratified by none of the BRICS states, however, as a certain benchmark, it provides us with standards which will be used for comparing the national approaches to dismissal protection. The paper consists of five parts: the first deals with the history and explore the legal standards adopted in the Convention, other four parts present the research of national dismissal protection systems in the four BRICS countries.

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[2] ILO head praises BRICS countries' commitment to social dialogue, International Labour Organization, 3 August 2018 (Oct. 19, 2019), available at https://www.ilo.org/moscow/news/WCMS_636211/lang--en/index.htm.

[3] This affirmation was also repeated in the most recent 10th BRICS Summit Johannesburg Declaration, adopted on 26 July 2018 (Oct. 19, 2019), available at https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration.

[4] BRICS Leaders Xiamen Declaration, Xiamen, China, 4 September 2017 (Oct. 19, 2019), available at https://brics.mid.ru/en_GB/document/-/asset_publisher/VmQiTl1AUALV/content/samen-skaa-deklaracia-rukovoditelej-stran-briks-samen-kitaj-4-sentabra-2017-goda?redirect=%2Fen_GB%2Fdocuments&inheritRedirect=true.

[5] ILO Constitution (Oct. 19, 2019), available athttps://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO. These words were also part of the Nobel lecture delivered by David A. Morse, who spoke on behalf of the International Labour Organisation in 1969 (Oct. 19, 2019), available at https://www.nobelprize.org/prizes/peace/1969/labour/lecture/.

1. ILO Termination of Employment Convention (No. 158)

The traditional rules governing the contract of employment were characterized by a formal symmetry of the rights of the parties to terminate the contract of employment, by giving notice, without either party having to justify its decision. But this approach which is characteristic for civil law could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment. The national movements towards workers' protection resulted in an extension of the period of notice, introduction of the payment of a severance allowance and some other measures to restrict the employer's discretionary power to terminate the employment relationship for any reason or without reason.[6] However until 1950 there was no international action in this field and the scope of protection between countries varied greatly. In particular significant differences could be noted in the approach of Soviet and Western blocks of countries, which as two poles, either created a "hyperprotection" scheme, prohibiting the dismissal of some groups of workers even for just reason (Russia), and "laissez faire" scheme, leaving the dissolution of contract at the discretion of the employer (the United Kingdom).[7] The national regulations of other countries could be placed on the line between these poles depending on the level of granted dismissal protection. This was the background for the development of the ILO standards for dismissal.

In a resolution adopted in 1950, the International Labour Conference noted the absence of international standards on the termination of contracts of employment and requested a report on national law and practice on the matter for consideration by the Conference.[8] Following the research of national regulations of dismissal the ILO Conference adopted the Termination of Employment Recommendation (No. 119) in 1963. This document for the first time introduced the general rule of the need to have a "valid reason" for the dismissal and listed the reasons which could not constitute such valid reason (discriminatory reasons and the affiliation with the trade union). It also fixed the obligation to notify about the dismissal, to guarantee some form of income protection and to provide workers with the right to appeal against unjustified dismissal. It also contained provisions concerning the reduction of the work force, which included the obligation of consultation with workers' representatives, consideration of measures alternative to collective redundancy,

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6 *Protection Against Unjustified Dismissal: General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982* 1 (Geneva: International Labour Office, 1995).

7 *See, e.g.*, the materials of the Royal Commission on Trade Unions and Employers' Associations concerning introduction of dismissal protection regulations which led to the adoption of Industrial Relations Act in 1971. This Act introduced an opportunity to receive compensation for unfair dismissal in Great Britain. Royal Commission on Trade Unions and Employers' Associations, 1965–1968: Report (London: H.M.S.O., 1969).

8 *Protection Against Unjustified Dismissal*, *supra* note 6, at 2.

notification of the competent public authorities in advance in some cases, the rules to establish criteria for selecting workers to be dismissed and the priority of re-engagement by the employer when he again engages workers.

The personal scope of this Recommendation was very limited as the following groups might be excluded: (a) workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration; (b) workers serving a period of probation determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period; and (d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the Recommendation.

Though providing limited personal scope, this instrument, according to the ILO Committee of Experts, had played an important role in encouraging protection against unjustified termination of employment, and thereby favoring the promotion of employment security which is an essential aspect of the right to work.[9] Provisions of this kind could be found also in countries which previously sought to limit the

> discretionary power of the employer through concepts of abuse of right or abusive dismissal and in other countries, in all regions of the world, at all stages of economic development and of all political complexions.[10]

Based on the positive experience of the implementation of the Recommendation, in 1979 the ILO decided to put on the agenda the adoption of the Convention on dismissal protection, which was indeed adopted in 1982.

The ILO Termination of Employment Convention (No. 158), compared to Recommendation No. 119[11] (considered above) provides a more detailed and more flexible instrument for dismissal protection regulations. It changed the list of workers who might be excluded from the scope of protection, removing civil servants, but fixed an opportunity to exclude from the application of the Convention or certain provisions thereof "categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention" and "other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them." Such derogation might be established after consultation with the organizations of employers and workers concerned, where such exist.

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9 *Protection Against Unjustified Dismissal*, *supra* note 6, at 2.

10 *International Labour Conference: Termination of Employment at the Initiative of the Employer* 7 (Geneva: International Labour Office, 1980).

11 It was replaced with the new edition of Recommendation No. 166 in 1982.

The Convention also stated that temporary absence from work because of illness or injury shall not constitute a valid reason for termination, provided special norms for the notification of trade union and special authorities in case of redundancies and regulated the burden of proof distribution. New norms linked the calculation of the severance payment with the length of service and the level of wages (Art. 12).

Even though the Convention was drafted as a flexible instrument, it was negatively perceived by the employers. Already in 1995 the employers concluded that ILO Convention No. 158 ought to be revised as soon as possible.[12] They pointed out that on the basis of the interpretation given by the Committee of Experts the Convention did not just set minimum standards, but much more due to the extensive interpretations. They supposed that the modest number of ratifications of the Convention, contrasted with the fact that two-thirds of Conference delegates had voted in favor of its adoption, can be explained by the reference to the factual establishment of a higher level of protection for workers then fixed in the text of the Convention.[13]

Indeed, according to the ILO database, ILO Termination of Employment Convention (No. 158) to date has been ratified by thirty-six countries.[14] This is a low ratification indicator, as there are 196 member states in the ILO and at least 130 have voted for its adoption. It is interesting to note that mostly developing countries are on the list of the states which have ratified the Convention. Among developed countries it has been ratified only by Spain, Sweden, Luxembourg, Finland, France, Australia, Cyprus, Latvia, Montenegro and Portugal.

As mentioned before, none of the BRICS countries have ratified the Convention; however, as this paper will demonstrate, even without formal ratification, national regulations largely conform with ILO standards, at least as far as they are fixed in the text of the Convention.

In the next four parts of this paper, these national ways will be considered in more detail and the structure of each section will be determined on the basis of the structure of the Convention. In that way, we will consider the scope of national dismissal protection, justification for dismissal, prohibited grounds and special procedures for some workers, the issue of notifications, and the right to appeal, and, finally, severance payment and possible reinstatement will be analyzed.

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12 *Record of Proceedings, International Labour Conference, 82nd Session, Geneva, 1995* (Geneva: International Labour Office, 1996), at 24/32, para. 88 & 24/36, para. 99 (Oct. 19, 2019), also available at https://www.ilo.org/public/libdoc/ilo/P/09616/09616(1995-82).pdf.

13 *Protection Against Unjustified Dismissal*, *supra* note 6, para. 21.

14 Ratifications of C158 – Termination of Employment Convention, 1982 (No. 158) (Oct. 19, 2019), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312303.

2. BRICS Countries' Regulations Relating to Dismissal Protection

2.1. Brazil

ILO Termination of Employment Convention (No. 158) came into force in Brazil on 10 April 1996 when the Brazilian Parliament ratified the Convention on protection against arbitrary dismissal or termination without just cause.[15,16] On 20 November 1996, after only 224 days in force, Brazil withdrew from the Convention through Decree No. 2.100/1996, an action which raised much discussion over the resulting precariousness of jobs and insecurity at work.

It is important to note that the Brazilian legal system is based on the Roman code, and, since 1 May 1943, Brazil has had a Labor Law Consolidation (Consolidação das Leis do Trabalho (CLT) in Portuguese) under Decree No. 5.452, which is still in force and which was inspired by the *Carta del Lavor*o from Italy, published in 1927, and the *Encyclical Rerum Novarum*, a document of the Catholic Church regarding workers' conditions.[17]

The CLT is the principal body of labor legislation in the private sector in Brazil and with the Brazilian Federal Constitution of 1988, regulates a number of labor provisions such as safety and health at work, entitlements, paid vacations, overtime rates, 13th salary, limiting work hours at night, monthly minimum wage, collective bargaining, and the right to strike in both the public and the private sectors.

As to employee dismissal, Brazilian legislation has changed over time, beginning in 1943 when the Brazilian Labor Law Consolidation was published and the principle of job stability was enshrined in its Articles 492 to 500.[18]

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15 Alexandre A. Belmonte, *Os direitos fundamentais juslaborais e a Convenção nº 158 da Organização Internacional do Trabalhoitle* [*Fundamental Human Rights and Convention No. 158 of the International Labour Organisation*] in *Direito Constitucional do Trabalho: o que há de novo?* [*Constitutional Labor Law: What's New?*] 367 (F.R. Gomes (ed.), Rio de Janeiro: Lumen Juris, 2010).

16 ILO, Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment (2009) (Oct. 19, 2019), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_100768.pdf.

17 Decreto nº 19.841, de 22 de outubro de 1945, promulga a Carta das Nações Unidas, da qual faz parte integrante o anexo Estatuto da Corte Internacional de Justiça, assinada em São Francisco, a 26 de junho de 1945, por ocasião da Conferência de Organização Internacional das Nações Unidas [Decree No. 19.841 of 22 October 1945, promulgates the United Nations Charter, of which the Annex to the Statute of the International Court of Justice, signed at San Francisco on 26 June 1945, on the occasion of the United Nations International Conference, is an integral part] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/D19841.htm; Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor (Oct. 19, 2019), available at http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

18 Decreto-Lei nº 5.452, de 1º de maio de 1943, aprova a Consolidação das Leis do Trabalho [Decree-Law No. 5.452 of 1 May 1943, approves the Labor Law Consolidation] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm.

Employment stability was guaranteed to industrial and commercial workers after ten years' service, as well as the right to compensation if they were not put on permanent contracts and were unjustly dismissed.

Further, it made clear that any change in the ownership of an establishment or in the management of an enterprise would be without prejudice to employment, as it would not affect length of service calculations for compensation purposes.

In case of bankruptcy or collective insolvency, compensation for dismissal would have priority status. Pay cuts were prohibited, except in case of jeopardy or *force majeure*.

Other equally relevant rights included priority for rehiring or for maintenance of the previous wage in cases where *force majeure* might justify dismissal or reduced earnings. Brazilian Law also established the concept of solidarity among the same economic group, which means that if one employee worked at three different companies belonging to the same economic group, the employers were defined as one single employer for the purpose of calculating years of service.

Over time, employers started to dismiss workers on the eve of reaching job stability status – ten years – which led to intense judicial litigation, and was the reason why the Brazilian Superior Labor Court (Tribunal Superior do Trabalho (TST) in Portuguese), basing its decision on precedents, declared, by its jurisprudential guidance No. 26, that,

> A hindrance to [job] stability is to be presumed in the case of the dismissal, without due cause, of an employee who reaches nine years of service to the enterprise.[19]

This jurisprudential guidance was in force until November 2003.

The Brazilian legislator, aware of the rising tensions between employers and employees over job stability, created on 13 September 1966, by Law No. 5.107, the Length of Service Guarantee Fund (Fundo de Garantia do Tempo de Serviço (FGTS) in Portuguese) that is still in force today. FGTS was the first wave of liberalization of the Brazilian labor market, and the legal embodiment of an employer's right to dismiss, thus ending the job stability after ten years for workers. It is important to note that workers who already had the job stability kept it, for FGTS became mandatory only for all new workers in 1979, that is, between 1966 and 1979 a worker could choose between job stability after ten years and FGTS; after 1979, all employees were obligated to be affiliated with the FGTS system.[20]

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[19] TST, Súmula nº 26 – RA 57/1970, DO-GB 27.11.1970 (Oct. 19, 2019), available at https://www.legjur.com/sumula/busca?tri=tst&num=26.

[20] Carlos A.C. Viegas, *Convenção 158 da OIT: Breves considerações sobre sua aplicabilidade e conseqüências* [*Convention No. 158 of the International Labour Organisation: Brief Considerations on its Applicability and Consequences*], XIII(77) Âmbito Jurídico (2010).

In the FGTS system, employers are required to make contributions to FGTS, in an amount corresponding to 8 percent of an employee's monthly compensation, in a bank account managed by a Federal Government Institution, in the name of each employee, and owing each employee private access to the account. The deposits are to earn a total annual yield of 3 percent plus inflation.

Under the Brazilian Federal Constitution of 1988 and the CLT Brazilian employees also have certain employment rights regardless of the employer activity or employee's position, such as a monthly minimum wage of R$998.00 (effective in 2019), which is equivalent to US$250.00, 13th month salary, annual paid vacation of thirty days with a one-third bonus on the payment, which can be divided into three periods over the course of a year. One period must be longer than fourteen days and the other two periods have to have at least five days each, and the worker's vacation period cannot begin on the two days preceding a holiday, or on weekly rest days, usually Saturdays and Sundays.

Brazilian employees also have the right to one day off per week, preferably on Sundays, and the right of unemployment insurance (established originally in 1986); and to be eligible to receive it, workers must be unemployed and must have been dismissed without cause. They may receive three to five payments, depending on how long they worked on a formal job. For example, if the employee worked at least six months, he has the right to receive three payments; if he worked for twelve months, he has the right to receive four payments; and if he worked for twenty-four months, he has the right to receive five payments. The period between one unemployment insurance request and another must be at least sixteen months.

If an employee is dismissed without cause, he has the right to receive compensation (a fine) from his employer of 40 percent of the balance of his individual accounts in his FGTS during the time of his labor relationship with the company. Since the end of 2001, the employer must also pay additional compensation (a fine) equal to 10 percent of the deposits in the employee FGTS account to the federal government (Complementary Law No. 110/2001).[21]

Causes that may be considered to be justifications for avoiding payment of fines can be divided into three groups: (a) capacity, (b) behavior and (c) needs of the company, establishment or service. These justifications do not apply to certain types of workers protected by the Brazilian Federal Constitution of 1988, such as pregnant women, union leaders, and incumbents and alternates of workers' representation in the Internal Commissions for the Prevention of Accidents (Comissão Interna de Prevenção de Acidentes (CIPA) in Portuguese).

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[21] Lei Complementar nº 110, de 29 de junho de 2001, institui contribuições sociais, autoriza créditos de complementos de atualização monetária em contas vinculadas do Fundo de Garantia do Tempo de Serviço – FGTS [Complementary Law No. 110 of 29 June 2001, institutes social contributions, authorizes credits of monetary restatement supplements to linked accounts of the Length of Service Guarantee Fund] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/LEIS/LCP/Lcp110.htm.

The same occurs with the infra-constitutional legislation, either by reception or by means of later edited norms. It includes the differentiated protection of employment for the holders of the representation of the workers in the National Social Security Council, in the FGTS Curatorial Council and in the Previous Conciliation Commissions, in addition to injured workers, the elected officers to the position of management of a cooperative of the employees linked to a certain company, and public servants during the electoral period.

National law also guarantees the employment of the worker in the pre-retirement period. As the Constitution is silent with respect to other workers, it is possible to dismiss without just cause, since the compensatory indemnity of 50 percent of the value of the FGTS is paid.

The cases that constitute grounds for dismissal with justified cause are:

1. Fraud, willful misconduct or dishonest acts, such as stealing corporate material or falsification of documents;

2. Misbehavior, which is a wide category including sexual harassment or using company properties for personal matters without authorization;

3. Competition with the employer or conflict of interest, meaning regular conduct of business by the worker for his own or another person's account, without the employer's authorization, in competition with the employer or to his detriment. Business activity conducted by employees that generates a conflict of interest with the employer also constitute grounds for dismissal;

4. Definitive prosecution of the employee – the employer has the right to dismiss the employee who has been sentenced for having committed a crime, unless the sentence has been suspended;

5. Slothfulness or gross negligence, an extreme carelessness on the part of the employee that shows a reckless disregard for his legal duty that can cause damage to the employer's company, including property or company image;

6. Drunkenness while on duty or drug intoxication – if an employee appears to work drunk or under the influence of drugs, he can be dismissed with justified reason. Also, an employee who usually drinks alcohol at his work place can be dismissed;

7. Breach of company secrets – this consists of the violation of confidential information by the employee;

8. Indiscipline or insubordination occurs when the employee disobeys an order that he was aware of when taking the job or that has already been determined previously;

9. Abandonment of the job for more than thirty days without authorization or justification;

10. Injury, meaning physical or verbal aggression in the workplace against any person, including the employer or a superior, except in self-defense or in defense of third parties;

11. Habitual gambling, since gambling is prohibited in Brazil;

12. Prejudicial Acts to national security; and

13. Loss of a professional license instrumental to the function exercised.

Furthermore, the CLT identifies a series of situations as grounds for the employer to terminate a contract, such as (i) abusive acts (e.g. prevents the access of others to the workplace) committed by strikers during a strike that is recognized as illegal. It is important to say that mere participation in a strike action does not constitute serious misconduct, and (ii) unjustified refusal by the employee to follow legal policies on occupational safety and health or employee refusal on the use of personal protective equipment required by law.[22]

In a dismissal with cause, severance entitlements include only outstanding remuneration, unused vacation time and a one third bonus over unused vacation pay, so the employee does not receive an additional fine, equal to 40 percent of the deposits made in his FGTS account; also he does not receive the proportional 13th salary and the salary regarding prior notice. Additionally, he is not eligible to receive unemployment insurance.

In a termination initiated by the employee, he has to give notice of thirty days to the employer and his severance entitlements include only outstanding remuneration, unused vacation time, a one third bonus over unused vacation pay and a prorated 13th month salary. He also is not eligible to receive unemployment insurance.

In a dismissal without cause, severance entitlements include prior notice equal to thirty days plus three extra days per year of work, limited to sixty days that are equal to twenty years of work relationship in the same company, resulting in a maximum of ninety days, prorated 13th month salary, all unused vacation time with a one-third bonus over all vacation payments, and a 50 percent fine on the employee's balance in the FGTS. The employee who is dismissed without cause has the right to unemployment insurance.

In a termination by mutual agreement, severance is the same as that applicable in a dismissal without cause, but notice is reduced by half, the employer pays a 20 percent fine on the FGTS, and the worker is not eligible to receive unemployment insurance.

If the dismissal was due to just cause or at the request of the worker, the re-admission can be done at any time. In cases of dismissal without just cause, Ministerial Order No. 384/1992 of the Ministry of Labor provides that the employee can only be rehired ninety days after termination. In case of noncompliance with this rule, there may be a characterization of unemployment insurance fraud and fraud in regard to the FGTS.[23]

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[22] Decree-Law No. 5.452 of 1 May 1943, *supra* note 18.

[23] Portaria Ministerial nº 384, de 19 de junho de 1992, dispõe sobre fraude no Fundo de Garantia do Tempo de Serviço – FGTS [Ministerial Order No. 384 of 19 June 1992, provides for fraud in the Length of Service Guarantee Fund] (Oct. 19, 2019), available at http://www.guiatrabalhista.com.br/legislacao/mtb384.htm.

Once notice is given, dismissal becomes effective upon expiration of the respective period of notice. If the employer reconsiders the termination before the end of the notice period, the worker may accept or reject that decision. If the worker accepts or continues to work after the notice period expires, the employment contract will remain valid.

If, during the period of notice given to the employee, he commits any action deemed by law to be a just cause for dismissal, he forfeits the right to wages for the remainder of the period of notice; but if the employer commits any action justifying immediate cancellation of the contract, during the period of notice, he is obliged to pay the wages for the rest of the period of notice, without prejudice to any compensation that may be due.

It is possible to give an advance notice of eight days, if the employee is paid weekly and has less than one year of job tenure in the case of dismissal without a justified reason.

The differences between unemployment insurance and FGTS are significant for understanding the distinctive effects that they have on the intensity of job search and the quality of job adherence. On the one hand, employees can use all of the FGTS money before finding another job, there existing, thus, a greater incentive to more intensively search for a job and a higher risk of job non-adherence. On the other hand, unemployment insurance ensures a search with more job adherence since workers are more selective regarding the kind of work they will accept, which tends to increase the duration of unemployment.

In some cases, employers cannot dismiss without cause some employees' categories because they enjoy job stability, for example pregnant women, a leader of a trade union board, workers' representatives on the CIPA and the employee injured at work.

Pregnant woman have job stability from the confirmation of the pregnancy until five months after the birth of their child – the objective being, besides the protection of the unborn, to guarantee to the future mother a pregnancy with tranquility. The ignorance of the state of pregnancy by the employer does not exclude the right to payment of the indemnity due to job stability, and the guarantee of employment to the pregnant woman only authorizes the reintegration if this occurs during the period of job stability. Otherwise, the guarantee is restricted to salaries and other rights corresponding to the period of job stability.

The employee elected to the position of workers' representatives on the CIPA has provisional job stability from the registration of his candidacy up to one year after the end of his term. The purpose of the norm is to protect the elected employee against possible reprisals of the company, due to possible rigor in the supervision of labor safety standards. If the job stability holder is dismissed without just cause, he is entitled to the reintegration to the position or, in the impossibility of doing so, to the receipt of the compatible indemnification.

The union leader has job stability in employment from the application until one year after the mandate (Art. 543 § 3 CLT), even if he is elected as a substitute, unless he commits a serious misdemeanor.[24]

The employee who suffers an accident at work has a minimum job stability of twelve months in the company, from the end of the sickness benefit granted to the employee. To be entitled to job stability for one year, the removal by accident must have been longer than fifteen days. If the period in which he was removed is shorter, the worker is not entitled to the benefit. If the employee contracted an illness and it is proven that it was due to the activity that he performed, he will also be entitled to the benefit.

In the case of dismissal of workers hired before 1979 who have not opted for the FGTS system, the courts may order full compensation or reinstatement.

The maximum time period after dismissal notification up to which a claim concerning dismissal can be made is twenty-four months (Art. 7(XXIX) of the Brazilian Federal Constitution), and labor claims may be filed for the five-year period preceding the exercise of these rights. An employer ownership change does not affect the rights acquired by employees under the CLT or the Brazilian Federal Constitution, and an employee is not allowed to waive legal rights in an employment contract.[25]

Disputes arising out of relations between employers and employees should be settled by the labor courts. Judges in labor courts are specialists in labor law, and all labor courts are federal courts. The employee claim will be initiated in the jurisdiction of the employee's work place, and judicial procedures for labor lawsuits are basically set in the CLT, but in the absence of provisions therein, the Brazilian Civil Procedure Code will apply.

In the case of appeals, they will be addressed to the Regional Labor Courts (Tribunal Regional do Trabalho (TRT) in Portuguese) that will review with a panel of three judges both factual and all legal decisions made by the lower labor court. In the case of appeal of a Regional Labor Court decision, the matter will be examined by the Brazilian Superior Labor Court, which will review only the breach of federal law or conflict with precedent cases in the decision made by Regional Labor Courts.

2.2. Russia

ILO Convention No. 158 has not been ratified by Russia. The basis for legal dismissal protection in the Russian Federation was formed during the socialist period of the

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[24] Decree-Law No. 5.452 of 1 May 1943, *supra* note 18.

[25] Emenda Constitucional nº 45, de 30 de Dezembro de 2004, altera dispositivos dos arts. 5º, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 e 168 da Constituição Federal, e acrescenta os arts. 103-A, 103B, 111-A e 130-A, e dá outras providências [Constitutional Amendment No. 45 of 30 December 2004, amends the provisions of Articles 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168 of the Federal Constitution, and adds Articles 103-A, 103B, 111-A and 130-A, and other provisions] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc45.htm.

development of the USSR. The Labour Code of that period aimed to stabilize labor relations, eliminate unemployment and solve economic and political problems of the state.

Employment protection and dismissal protection are one of the significant spheres for social policy.[26] The current Labor Code of the Russian Federation of 2001 provides a list of grounds for dismissal, prohibited grounds and special procedures for some employees, for example, pregnant women, minors, employees' representatives, the head of an enterprise, his deputies and the chief accountant. It also contains notifications and severance payment in some cases, the right to appeal and possible reinstatement.

The grounds for dismissal should be related to the employer's operational requirements or to the employee's guilty behavior or misconduct. The reason for dismissal affects the number of guarantees for employees.

Dismissal must be lawful and in accordance with the established procedure.

According to Article 81 of the Labor Code of the Russian Federation, the employer may dismiss an employee in the following cases:

1. Liquidation of a company or termination of business by an individual entrepreneur;

2. Job redundancy;

3. Discrepancy of the employee for the occupied position or performed work due to insufficient qualification according to the results of certification;

4. Change of ownership of the organization (only for the head of an enterprise, his deputies and the chief accountant);

5. Duplicative culpable nonperformance of labor duties if the employee has had a disciplinary sanction;

6. Gross misconduct:

– absenteeism that is an employee's absence in the workplace without a good reason during the working day (shift), or in the case of absence without a valid reason for more than four hours during the working day (shift);

– appearance of an employee in a condition of alcoholic, narcotic or other toxic intoxication at his workplace or on the site of the employer's organization or in any place where the employee must perform labor functions according to the employer's instructions;

– disclosure of secrets protected by the law such as civil, commercial, professional, and others, which have become known to the employee in connection with the performance of employment duties, including disclosure of personal data to another employee or employer;

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[26] *See more* in *Лютов Н.Л., Герасимова Е.С.* Международные трудовые стандарты и российское трудовое законодательство [Nikita L. Lyutov & Elena S. Gerasimova, *International Labour Standards and Russian Labour Legislation*] (2nd ed., Moscow: Center for Social and Labor Rights, 2015).

– perpetration of theft (including minor theft) of other people's property, embezzlement, deliberate destruction or damage, established by court verdict or order of a judge, a body, an official empowered to deal with cases on administrative offences;

– violation of labor protection rules and requirements if the violation results in grave consequences (industrial accident, crash, disaster) or knowingly created a true threat of effects established by the Commission for the protection of labor or by the occupational safety Commissioner;

7. Commitment of fault actions by an employee who is working with monetary or commodity values if these actions lead to loss of trust of an employer in the employee;

7.1. The employee's failure of taking measures to prevent or resolve the conflict of interests of which he is a party; in other words: failure or submission of incomplete or inaccurate information on their income, expenses, the costs of assets and liabilities of property, failure or submission of deliberately incomplete or inaccurate information on income, expenses, assets and liabilities of property of their spouse and minor children, on the opening accounts (deposits), storage of cash and property in foreign banks located outside the Russian Federation, on possession and/or use of foreign financial instruments employed by their spouse and minor children in cases stipulated by the Labor Code, other Federal Laws, normative legal acts of the President of the Russian Federation and the Government of the Russian Federation, if these actions give rise to a loss of confidence on the part of the employer in the employee.

This point is applied for employees of the Central Bank of the Russian Federation, state corporations, public law companies, the Pension Fund of the Russian Federation, the Social Insurance Fund of the Russian Federation, the Federal Compulsory Medical Insurance Fund in compliance of the Federal Law of 25 December 2008 No. 273-FZ "On Counteracting Corruption";

8. Commitment of immoral transgression by an employee who is performing pedagogical functions incompatible with the continuation of this work;

9. Adoption of unjustified decision by the head of the organization (branch, Representative Office), his deputies and the chief accountant, causing the violation of property, its unlawful use or other damage to the property of the organization;

10. A single gross violation by the head of the organization (branch, representative office), his deputies of their duties;

11. Employee's submission of fake documents to an employer when entering into an employment contract;

12. In cases specified in a labor contract with the head of an organization or members of the collegial executive body of an organization;

13. In other cases stipulated by the Labor Code and other Federal Laws.[27]

It is not allowed to dismiss an employee on the initiative of the employer (except in the case of liquidation of the organization or termination of the activities by an individual entrepreneur) during the period of his temporary disability and on holiday.

Dismissal related to discrimination is not allowed.

Article 3 of the Russian Labor Code provides that no one may be restricted in his labor rights and freedoms or receive any benefits on the grounds of sex, race, color of skin, nationality, language, origin, property, family, social or professional status, age, place of residence, attitude towards religion, beliefs, membership or non-membership of public associations or any social groups as well as other circumstances unrelated to an employee's professional qualities.

Discrimination does not include distinctions, exceptions, preferences, as well as limitation of the rights of employees, determined by the specific requirements of a particular job, established by federal law, or attributable to special care extended by the State to persons in need of increased social and legal protection, either established by the Labor Code or, in the cases to ensure national security, the maintenance of an optimal balance of labor resources in priority employment of citizens of the Russian Federation and to address other problems of domestic and foreign policy of the State.

Russian labor legislation provides for special protection against dismissal for pregnant women, employees under the age of eighteen, heads (and their deputies) of elected collegial bodies of primary trade union organizations, members of the trade union organization, as well as employees elected to the labor dispute commission.

The termination of labor contracts with pregnant employees is not allowed, excluding the event of company liquidation or cessation of activities of the individual entrepreneur.

The employer has the right to terminate a labor contract with an employee under the age of eighteen at the initiative of the employer (except for cases of liquidation of an organization or termination of the activity by an individual entrepreneur) only upon an agreement of the appropriate State Labor Inspection and Commission on Juvenile Affairs and the Protection of their Rights in addition to the general procedure.

Dismissal of the heads (and their deputies) of elected bodies of the primary trade union organizations not exempt from the main work, in case of job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties, if the employee has a disciplinary sanction, is possible only with the prior consent of the appropriate higher elected trade union body in addition to the general procedure.

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[27] Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labor Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

These guarantees for the heads of the elected body of the primary trade union organizations and its deputies remain in effect for two years after the end of their term of office.

Dismissal of ordinary members of a trade union organization as well as employees elected to the labor disputes commissions in case of job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties, if the employee has a disciplinary sanction, is possible only taking into account the reasoned opinion of the relevant elected trade union body in addition to the general procedure.

Dismissal of employees in connection with their participation in a collective labor dispute or in a strike is not allowed.

The employer has the right to dismiss an employee without taking into account the decision of the appropriate higher elective trade union body if such a decision is not filed within the prescribed period or if the decision of the appropriate higher elective trade union body on a disagreement with the dismissal recognized by the court as unjustified on the basis of the employer's statement.

Article 144.1 of the Criminal Code of the Russian Federation provides for criminal liability for unjustified dismissal from work on the grounds of reaching their pre-retirement age, i.e. the age prior to five years before the appointment of an old-age pension, i.e. women over fifty-five years old and men over sixty years old.[28]

The employer must comply with the dismissal procedure, depending on the reasons for dismissal:

– offer a transfer to another job during job redundancy and insufficient qualifications;

– notification of dismissal in advance in the case of liquidation of a company and job redundancy;

– obtain a trade union's reasoned opinion in the case of dismissal due to job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties if the employee has a disciplinary sanction.

The employee is entitled to severance pay at dismissal in case of liquidation of a company and job redundancy and change of the owner of the property of the organization (only for the head of an enterprise, his deputies and the accounting manager).

The employee shall not be dismissed for reasons related to his conduct or work performance until he is provided with the opportunity to defend himself against the allegations by written explanation.

The employee who considers that he has been the subject of an unjustified dismissal measure will have the right to appeal against that measure before a court.

Employees turning to the court with claims arising out of employment relations shall be exempted from payment of duties and court expenses.

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[28] Уголовный кодекс Российской Федерации от 13 июня 1996 г. № 63-ФЗ // Собрание законодательства РФ. 1996. № 25. Ст. 2954 [Criminal Code of the Russian Federation No. 63-FZ of 13 June 1996, Legislation Bulletin of the Russian Federation, 1996, No. 25, Art. 2954].

In the case of recognition of illegal dismissal by the court, the employee shall be restored to his post.

The body considering an individual labor dispute shall determine the average salary for the employee for all the time of forced absenteeism or the difference in pay for all the time of performance of the lower paid job.

The body considering an individual labor dispute shall determine the average salary for the employee for forced absenteeism or the difference in pay for all the time of performance of the lower paid job.

In the case of illegal dismissal or illegal dismissal procedure, the court may, upon the employee's claim, decide to grant compensation for moral damage caused to the employee by such actions. The court shall determine the amount of the compensation.[29] These measures provide protection against illegal dismissal.

2.3. China

Protection against dismissal is a system of restrictions on the lawfulness of termination of existing employment relationships by the employer. It is an important part of the Chinese labor law system, and mainly reflected by the substantive or procedural restrictions placed on the employer's right to dismiss employees. The Chinese rules of protection against dismissal are prescribed mainly in the Labor Law of the People's Republic of China and the Labor Contract Law of the People's Republic of China (hereinafter referred to as the "Labor Contract Law"; other Chinese laws listed below will be abbreviated without the name of the country). In China's labor laws and regulations, dismissal consists of fault dismissal,[30] no-fault dismissal[31] and economic dismissal.[32] In order to prevent the employer from abusing its right to dismiss employees and maintain the stability of labor relations, the law has stipulated relevant conditional and procedural restrictions, in which protection against dismissal plays an important role.

The Chinese rules of protection against dismissal are relatively strict.[33] According to the Organisation for Economic Co-operation and Development (OECD) Employment Outlook Report 2013, China ranked first among thirty-four OECD member countries and nine emerging economies in terms of the comprehensive level of protection against individual and collective dismissal. Specifically, protection against individual

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[29] Articles 193, 261, 269, 373, 374, 375, 394, 415 of the Labor Code of the Russian Federation.

[30] Stipulated in Article 39 of the Labor Contract Law of the People's Republic of China (Oct. 19, 2019), available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76384/108021/F755819546/CHN76384%20Eng.pdf.

[31] Stipulated in Article 40 of the Labor Contract Law of the People's Republic of China.

[32] Stipulated in Article 41 of the Labor Contract Law of the People's Republic of China.

[33] *See more* in 邱婕.《劳动合同法》十周年回顾系列之八《劳动合同法》之解雇保护制度研究[J].中国劳动, 2018(08): 82–88 [Qiu Jie, *The Eighth Anniversary of the Labor Contract Law: The Eighth Review of the Labor Contract Law of the Dismissal Protection System*, 8 China Labor 82 (2018)].

dismissal in China is obviously at a high level, and higher than the average level of OECD member countries. Protection against collective dismissal in China is slightly higher than the average level of OECD member countries.[34]

Regarding reasons for dismissal, China adopts a strictly restrictive, enumerative model.[35] Reasons for dismissal consist of reasons for fault dismissal, reasons for no-fault dismissal and reasons for economic dismissal.

Firstly, there are six reasons for fault dismissal, stipulated in Article 39 of the Labor Contract Law. They are as follows:

> (1) the laborer is proved during the probation period not to satisfy the requirements of employment;
>
> (2) the laborer materially breaches the Unit's rules and regulations;
>
> (3) the laborer commits serious dereliction of duty or practices graft or corruption, causing substantial damage to the Unit's interests;
>
> (4) the laborer has additionally established a labor relationship with another Unit which materially affects the completion of his tasks or refuses to rectify the matter when brought to his attention by the Unit;
>
> (5) the laborer uses such means as fraud, coercion or taking advantage of the Unit's unfavorable position to sign or change the labor contract against its genuine will, causing the labor contract to be invalid; or
>
> (6) the laborer has his criminal liability investigated in accordance with the law.

Secondly, there are three reasons for no-fault dismissal, stipulated in Article 40 of the Labor Contract Law.[36] They are as follows:

> (1) after the regulated period of medical leave for an illness or non-work related injury expires, the laborer is incapable of performing his original work or is incapable of performing a new job as arranged by the Unit;
>
> (2) the laborer is proved incompetent and remains incompetent after training or adjustment of his position; or
>
> (3) a major change in the objective circumstances relied upon at the time of conclusion of the labor contract hinders continued fulfillment of the

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[34] OECD, "Chapter 2: Protecting Jobs, Enhancing Flexibility: A New Look at Employment Protection Legislation" in *OECD Employment Outlook 2013* (Paris: OECD, 2013) (Oct. 19, 2019), also available at http://www.oecd.org/els/emp/Employment-Outlook-2013-chap2.pdf.

[35] 黎建飞.解雇保护:我国大陆与台湾地区之比较研究[J].清华法学, 2010, 4(05): 5–14 [Li Jianfei, *Dismissal Protection: A Comparative Study of Mainland China and Taiwan*, 4(5) Tsinghua Law Journal 5 (2010)].

[36] 姜颖,沈建峰.正确评估《劳动合同法》适时修改《劳动法》[J].中国劳动关系学院学报, 2017, 31(03): 53–59 [Jiang Ying & Shen Jianfeng, *Correctly Evaluating the Labor Contract Law to Amend the Labor Law in Time*, 31(3) Journal of China Institute of Industrial Relations 53 (2017)].

original contract and, after consultations, the Unit and laborer are unable to reach agreement on amending the labor contract.

Finally, there are four reasons for economic dismissal, stipulated in Article 41 of the Labor Contract Law. They are as follows:

(1) restructuring pursuant to the Enterprise Bankruptcy Law;
(2) serious difficulties in production or business operations;
(3) staff reduction is still necessary after modification of contract due to changes in the enterprise's production, major technological innovation or adjustment of the business operation style; or
(4) other major changes in the objective economic circumstances relied upon at the time of conclusion of the labor contracts, rendering them non-performable.

The prohibition of the dismissal clause is at the core of the system of protection against dismissal. In China, a complete system of protection against dismissal has been developed based on the prohibition of the dismissal clause.[37] Article 42 of the Labor Contract Law addresses the prohibition of dismissal by the employer.[38] It stipulates:

A Unit may not dissolve a labor contract pursuant to Article 40 (no-fault dismissal) or Article 41 (economic dismissal) hereof if the laborer:
(1) is suspected of being exposed to occupational hazards;
(2) has suffered an occupational disease or a work-related injury;
(3) is in the mandatory medical treatment period;
(4) is a female employee in her pregnancy, delivery, or lactation period;
(5) has been working for the Unit continuously for no less than 15 years and is less than 5 years away from his mandatory retirement age;
(6) finds himself in other circumstances stipulated in laws or administrative regulations.

China's labor laws and regulations contain many provisions protecting the legitimate rights and interests of specific groups of workers, especially female workers. Thus, according to Article 42 of the Labor Contract Law, a Unit may not unilaterally dissolve a labor contract pursuant to Article 40 (no-fault dismissal) or Article 41 (economic dismissal) if the laborer is a female employee in her pregnancy, delivery or lactation period.

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[37] *See, e.g.*, Zengyi Xie, *Labor Law in China: Progress and Challenges* 91–94 (Berlin: Springer, 2015).

[38] 李凌云.解雇保护水平国际比较研究[J].中国劳动, 2016(21): 9–14 [Li Lingyun, *International Comparative Study on the Level of Dismissal Protection*, 21 China Labor 9 (2016)].

Notice of dismissal is an important part of protection against dismissal, as well as a powerful legislative measure to protect employees' rights.[39] Notice of dismissal is a procedure widely adopted in ILO conventions and the labor laws of many countries. In Article 40 (no-fault dismissal) of the Labor Contract Law, a Unit may dissolve a labor contract by giving the laborer thirty days' prior written notice, or one month's wage in lieu of notice. That is to say, in China the employer shall give the laborer thirty days' notice in case of no-fault dismissal. The employer does not need to give notice to the laborer in case of fault dismissal.

According to Article 43 of the Labor Contract Law, when a Unit is to dissolve a labor contract unilaterally, it shall give the labor union notice of the reasons in advance and listen to the opinions of the labor union.[40] However, in practice it is quite common for enterprises to dismiss employees without notifying trade unions. Judicial treatment of this practice is a problem. Is dismissal without notice of the trade union legally effective? The Supreme People's Court's Interpretation of Several Issues Concerning the Application of Law in Trial of Labor Dispute Cases (IV) gives the final conclusion on this issue. Article 12 of the Interpretation stipulates that any dismissal conducted by an enterprise without notifying the trade union is unnecessarily invalid because the enterprise may give a supplementary notice before prosecution. That is to say, even if an employee applies to the arbitration committee for illegal dismissal with procedural defects (assuming there is no dispute over other substantive rights) after a Unit dismisses him without notifying the trade union, and the arbitration supports the employee, the dismissal is still effective as long as the Unit remedies the procedural defects by giving a supplementary notice to the trade union before prosecution.

Articles 77 and 79 of the Labor Law stipulate: in case of labor disputes between the employer and laborers, the parties concerned can apply for mediation or arbitration, bring the case to courts, or settle them through consultation. Once a labor dispute occurs, the parties involved can apply to the labor dispute mediation committee of their unit for mediation; if it cannot be settled through mediation and one of the parties asks for arbitration, application can be filed to a labor dispute arbitration committee for arbitration.[41] Either party can also directly apply to a labor dispute arbitration committee for arbitration. The party that has objections to the ruling of the labor arbitration committee can bring the case to a people's court.

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[39] *See, e.g.*, 李国庆.预告解雇制度的解释论基础[J].福建江夏学院学报, 2013, 3(02): 61–66 [Li Guo-qing, *Interpretation Theory Based on Dismissal with Notice*, 3(2) Journal of Fujian Jiangxia University 61 (2013)].

[40] 董保华.我国劳动关系解雇制度的自治与管制之辨[J].政治与法律, 2017(04): 112–122 [Baohua Dong, *Discussion on the Autonomy and Regulation of Labor Dismissal System in China*, 4 Political Science and Law 112 (2017)].

[41] *See, e.g.*, Haina Lu, *New Developments in China's Labor Dispute Resolution System: Better Protection for Workers' Rights?*, 29(3) Comparative Labor Law & Policy Journal 247 (2008).

Thus, after a labor dispute occurs, the parties can make remedies through consultation, mediation or labor arbitration, which can be chosen in no particular order. But labor arbitration comes before prosecution. That is to say, a party can only bring the case to a people's court after it applies to a labor dispute arbitration committee and has objections to the ruling of the committee. But there is one exception – "final ruling." According to Article 47 of the Law of the People's Republic of China on Labor Dispute Mediation and Arbitration, arbitral awards regarding disputes concerning the recovery of remuneration for work, medical expenses for work-related injuries, economic compensation or damages, which does not exceed the twelve-month amount of the local minimum monthly wage standard, and disputes over work hours, rest and leaves, social insurance, etc., due to the implementation of the national labor standards shall be final and the awards shall become legally effective as of the date of issuance. However, the final ruling only applies to the employer. If the employer has objections to the ruling, it can only apply for cancellation of the arbitration award to the intermediate people's court where the labor dispute arbitration committee is located within thirty days from the date of receiving the award. If the laborer has objections to the ruling, he can still bring a lawsuit to the people's court within fifteen days from the date of receiving the arbitration award.

Article 46 of the Labor Contract Law stipulates:

> In any of the following circumstances, the Unit shall pay economic compensation to the laborer:
>
> (1) the laborer resigns due to the Unit's fault;
>
> (2) the labor contract is dissolved after such dissolution was proposed to the laborer by the Unit and the parties reached a consensus thereon;
>
> (3) fault dismissal;
>
> (4) economic dismissal;
>
> (5) a fixed term labor contract is terminated upon expiration, except in the case where the laborer does not agree to renew the contract even if the Unit proposes to renew the labor contract while maintaining or improving the conditions stipulated in the current contract;
>
> (6) the labor contract is terminated because the Unit is declared bankrupt, has its business license revoked, is ordered to close down or decides to dissolve ahead of schedule; or
>
> (7) other circumstances specified in laws or administrative laws and regulations. It can be seen that the employer does not need to give economic compensation to the laborer if the labor contract is dissolved due to the subjective fault of the laborer, and shall give economic compensation to the laborer if the labor contract is dissolved by the employer not due to the laborer's subjective fault or due to the employer's fault.

In addition, Article 47 of the Labor Contract Law stipulates the criteria for economic compensation. There are mainly two types. For the first type:

> The economic compensation calculation rate is based on the number of years the laborer worked in the Unit. Economic compensation equivalent to one month's wage[42] should be paid to the laborer for every one year he has worked in the Unit. The economic compensation for a laborer who worked less than one year but more than six months is equivalent to the calculation based on one year of work; the economic compensation for a laborer who has worked for less than six months is equivalent to half of the above monthly wage. No maximum limit is set.[43]

For the second type:

> If a laborer earns a monthly wage that is more than 3 times the average monthly wage of the municipality or in the city with districts where the Unit is located, the economic compensation rate paid should be 3 times the average monthly wage, and the years of service counted for economic compensation shall not exceed 12 years.

Article 48 of the Labor Contract Law stipulates:

> If a Unit dissolves or terminates a labor contract in violation of this Law and the laborer demands continued performance of such contract, the Unit shall continue performing under the contract. If the laborer does not demand continued performance of the labor contract or if performance of the labor contract has become impossible, the Unit shall pay compensation to the laborer according to this Law.

So, if a Unit dissolves or terminates a labor contract in violation of the law, the laborer can possibly be reinstated, but in China it is difficult to implement reinstatement. According to a social survey, employees usually leave the company voluntarily within three years after reinstatement, and there are few cases of normal continuation of service, which makes compensation the most-adopted measure. In the absence of trust between the employers and employees, employers usually prefer to resolve the problem through compensation.

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[42] Monthly wage refers to the concerned laborer's average monthly wage for the last 12 months prior to termination of the labor contract.

[43] *See* Samir R. Chatterjee, *Impact of Labor Contract Law 2008 on Human Resource Practices in China: Balancing Social Harmony and Market Efficiency*, 6 Amity Global HRM Review 16 (2016).

2.4. South Africa

South African dismissal law is mostly regulated by the Labour Relations Act 66 of 1995 (LRA)[44] which must be interpreted in terms of constitutional rights; it does not deal with lawful or unlawful dismissals but with fair or unfair dismissal.

In order to understand and consider the personal and material scope of protection offered to employees in South Africa, it is important first of all make an evaluation of the principles of protection as stipulated in specific sections of the South African Constitution.[45]

Section 9 of the Constitution deals with the equality of all citizens:

> Equality
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 23 of the Constitution is headed "Labour Relations" and establishes a set of broadly expressed labor rights that accrue to a variety of parties including but not limited to employers, workers and their respective representative organizations.[46] This is the most important section in the South African Constitution relating to work. These fundament labor rights are:

> (1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right –
>
> (a) to form and join a trade union;

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[44] Labour Relations Act 1995 (Act No. 66 of 1995) (Oct. 19, 2019), available at https://www.wipo.int/edocs/lexdocs/laws/en/za/za091en.pdf.

[45] Constitution of the Republic of South Africa (Act No. 108 of 1996) (Oct. 19, 2019), available at https://www.gov.za/sites/default/files/images/a108-96.pdf.

[46] André Van Niekerk et al., *Law@work* 37 (3rd ed., Durban: LexisNexis, 2015).

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right –

(a) to form and join an employers' organisation, and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right –

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

(6) National legislation may recognise union security arrangements contained in collective agreements.

These fundamental rights and their interpretation by the courts have resulted in the development of a significant constitutional jurisprudence relevant to workers, employers and their representative bodies.

Section 39 of the Constitution:

Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

Section 231 of the Constitution:

International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232 of the Constitution:

Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 233 of the Constitution:

Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Constitutional bill of rights in section 9 and the labor rights in section 23 have the potential to affect labor law in three ways. They can be used to:

1. Test the validity of legislation that seeks to give effect to fundamental rights;[47]
2. Interpret legislation to give effect to fundamental rights;[48] and
3. Develop the common law.[49]

It is also clear that sections 39, 231, 232 and 233 of the Constitution of the Republic of South Africa ensure that international law and international agreements, which include ILO conventions are applicable and enforceable in the Republic of South Africa.

Article 4 of ILO Convention No. 158 provides that an employee shall not be dismissed unless there is a valid reason for such termination. This reason must be

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47 In *South African National Defence Union v. Minister of Defence & Another* (1999) 20 I.L.J. 2265 (CC) the Constitutional Court considered whether the absence of a justifiable duty to bargain in the LRA infringed the constitutional right to engage in collective bargaining.

48 In *Sidumo and Another v. Rustenburg Platinum Mines Ltd. and Others* [2007] 12 B.L.L.R. 1097 (CC) the Constitutional Court relied on the constitutional right to fair labor practices.

49 In *Old Mutual Life Asurance Co. SA Ltd. v. Gumbi* [2007] 8 B.L.L.R. 699 (SCA) the Supreme Court of Appeal held that the common law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

related to the capacity or the conduct of the employee or for reasons based on the operational requirements of the employer.[50]

Section 188(1) of the LRA provides that:

> [a] dismissal that is not automatically unfair, is unfair if the employer fails to prove –
> (a) that the reason for dismissal is a fair reason –
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (iii) that the dismissal was effected in accordance with a fair procedure.

This is also reflected in Schedule 8, item 2(1) of the LRA which stipulates that a dismissal is unfair if it is not effected for a fair reason. The reasons for a dismissal relate to substantive fairness. South African labor legislation does not specify what actions or reasons can justify a dismissal; it only stipulates that it has to be for a fair and valid reason. The LRA, however, states that the following types of misconduct by an employee *might* justify dismissal: gross dishonesty; willful damage to the property of the employer; willful endangering of the safety of others; physical assault on the employer, client or customer and gross dishonesty but subject to the rule that each case must be judged on its own merits.[51] Should the employer fail to prove that the dismissal was for a fair and valid reason the dismissal will be considered to be an unfair dismissal. If the dismissal of the employee is determined to be unfair, the employer can be ordered, by the labor dispute resolution tribunal to do one or more of the following:[52]

> Re-instate the employee;
> Re-employ the employee; and
> Pay compensation to the employee up to a maximum of twelve months' wages.[53]

Certain types of dismissal in South Africa are considered to be automatically unfair and such dismissals are viewed in a very serious light; and the employee

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[50] Engeline G. van Arkel, *A Just Cause for Dismissal in the United States and the Netherlands: A Study on the Extent of Protection Against Arbitrary Dismissal for Private-Sector Employees Under American and Dutch Law in Light of Article 4 of ILO Convention 158* 322 (The Hague: Boom Juridische Uitgevers, 2007); S.W. Kuip, *Ontslagrecht met bijzondere aandacht voor de dringende reden* [*Dismissal Law with Special Attention to the Urgent Reason*] 280 (Deventer: Kluwer, 1993); E. Sims, *Judicial Decisions Concerning Dismissals: Some Recent Cases*, 134(6) International Labour Review 675 (1995).

[51] Schedule 8 ("Code of Good Practice: Dismissal"), item 4 of the LRA.

[52] The labor dispute resolution tribunal in South Africa is known as the Commission for Conciliation, Mediation and Arbitration (CCMA).

[53] S 193(1)(a–c) of the LRA.

can get up to twenty-four months' wages as compensation, whereas for a normal unfair dismissal compensation is limited to twelve months' wages. Should the reason for dismissal be related to any of the following, the dismissal will be considered automatically unfair:

– The employee was dismissed for participation in a protected strike;
– The employee was dismissed because he refuses to do the work of an employee who is on strike;
– The employee was dismissed because he exercised his rights in terms of the LRA, an example being a member of a trade union;
– The employee was dismissed for being pregnant, intended pregnancy or any reason related to pregnancy;
– The reason for dismissal was related to discrimination; and
– The reason for the dismissal is related to the transfer of a business.[54]

In line with Article 4 of ILO Convention No. 158, South African dismissal law states that a dismissal must be for a fair and valid reason, relating to the capacity and conduct of the employee or the operational requirements of the employer. South African dismissal law does not specify for which reasons an employee can be dismissed or what the prohibited grounds for a dismissal are; it does, however, draw a distinction between an unfair dismissal, for which an employee can get a maximum of twelve months' wages as compensation, and an automatically unfair dismissal, for which an employee can get a maximum of twenty-four months' wages as compensation.

If the dismissal relates to the operational requirements of the employer, the employer must pay the employee at least one week's remuneration for every year of completed service as the minimum severance pay. This amount is over and above notice pay and all other statutory payments which can include leave pay for any leave credits the employee might have and wages for the time the employee has worked for which he has not yet been paid.

Article 7 of ILO Convention No. 158 states that an employee may not be dismissed for reasons based on conduct or performance before he is provided with an opportunity to defend himself against the allegations made.

This is the only pre-dismissal procedure required by the Convention. A closer look shows that the employee must merely be afforded an opportunity to defend himself against allegations. Article 7 does not provide any further guidance on details regarding pre-dismissal procedures, and it can only be presumed that the intention was that it would be left to the devices of individual countries to establish their own guidelines in this regard. One aspect that is clear, however, is that formal procedures akin to court procedures were not envisioned when the Convention was introduced.

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[54] S 187(1)(a–h) of the LRA.

It has become standard practice in South Africa that in terms of most disciplinary codes and procedures the right to defend oneself means more than some *pro forma* meeting at which a supervisor politely listens to the excuses for the misconduct as tendered by the employee.[55] In 1986, the former Industrial Court of South Africa in *Mahlangu v. CIM Deltak*[56] interpreted the right to defend oneself to include a checklist of strict court-like procedures.

However, with the implementation of the LRA and Schedule 8 in 1995, the South African legislature has made an attempt to move away from over-proceduralizing disciplinary enquiries. Schedule 8 introduced a break with the traditional formalistic checklist approach, which had been developed for disciplinary enquiries by the Industrial Court.[57]

Schedule 8, item 4(1) states the following:

> The employee should be allowed the opportunity to state a case in response to the allegations.

The wording in Schedule 8 in this regard is very similar to that found in ILO Convention No. 158.

In the *Avril Elizabeth Home for the Mentally Handicapped v. Commission for Conciliation Mediation and Arbitration and Others*[58] judgment, the right to state a case was summarized by Van Niekerk to mean the following:

> [I]t means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.

The *Avril Elizabeth Home for the Handicapped* judgment indicates a clear and definite break with the court-like procedures of the formal Industrial Court and especially with the procedural requirements as laid down in the *Mahlangu v. CIM Deltak* matter. It is submitted that the *Avril Elizabeth Home for the Handicapped* judgment interprets item 4(1) of Schedule 8 correctly. ILO Convention No. 158 does not require a strict formal procedure either. The main reason for a disciplinary enquiry is to determine the real reason for a dismissal; and if the real reason can be

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55 According to James R. Redeker, *Discipline: Policies and Procedures* 26 (Washington, D.C.: Bureau of National Affairs, 1983). *See also Cycad Construction (Pty) Ltd. v. Commission for Conciliation Mediation and Arbitration and Others* [1999] Z.A.L.C. 186, where the court stated that requiring the employer to hear both sides of the story limits the harm that a wrong decision can cause. It is also not a requirement for a disciplinary enquiry to be strict and formalistic.

56 (1986) 7 I.L.J. 346 (IC) at 365.

57 Bruno P.S. Van Eck, *Latest Developments Regarding Disciplinary Enquiries*, 26(3) South African Journal of Labour Relations 24, 26 (2002).

58 (2006) 27 I.L.J. 1466 (LC).

determined in an informal disciplinary process, it is sufficient. This is exactly what the judgment in *Avril Elizabeth Home for the Handicapped* states.

The right of an employee to respond against the allegations of his employer is contained in South African dismissal law.

Item 4(1) of Schedule 8 expands on this principle and provides that before an employee can respond against the allegations made by the employer the employer merely has to:

i. notify the employee of the allegations;

ii. provide a notice in a form or language that the employee can reasonably understand;

iii. provide the employee must have reasonable time to prepare him- or herself, and

iv. provide the employee the opportunity to be represented by a fellow employee or trade union representative; and

v. after the enquiry the employee must be informed of the decision taken and reminded of his or her right to refer a dispute to the CCMA or a bargaining council.

Article 7 of the Convention also states that an employee must be given an opportunity to defend himself "unless the employer cannot be reasonably be expected to provide this opportunity." Just as in Article 7 of the Convention, Schedule 8, item 4(4) also provides that in exceptional circumstances the employer may dispense with the pre-dismissal procedures.

It is submitted that South African dismissal law, without doubt, complies with Article 7 of the Convention. Item 4(1) of Schedule 8 even goes beyond Article 7 and provides guidance on how the right to respond against the allegations made by the employer should occur. Despite this, Schedule 8 retains an informal and reasonably open-ended character.

The third core principle contained in ILO Convention No. 158 relates to the right to appeal. Article 8 of the Convention states that an employee who feels that his dismissal was unjustified "shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

Article 8 refers to the right of appeal to an impartial body, and it does not refer to a higher level of appeal within the organization or a higher level of management after the opportunity to defend himself has been given.

As is the case with ILO principles, there is no explicit statutory right to an internal appeal hearing in South African dismissal law. However, item 4(3) of Schedule 8 provides that

> the employee should be reminded of any rights to refer the matter to a council with jurisdiction or the Commission or to any dispute resolution procedures established in terms of a collective agreement.

This can be viewed as an external appeal.

From the above it is clear that the employer is obliged to remind the employee of his right to refer a dispute to an appropriate bargaining council or the CCMA. This in fact reminds the employee of his right to appeal in accordance with Article 8 of ILO Convention No. 158 against his dismissal to an impartial body. The arbitration process at the CCMA is a *de novo* process[59] and is regarded as an adequate substitute for an internal appeal hearing.

Conclusion

The research on the national systems of dismissal protection in the four BRICS countries under study revealed the variety of levels and means of workers' protection used by the states. It also demonstrates that these national regulations are largely in line with ILO Convention No. 158. This observation leads us to the conclusion that the international instruments even without ratification may be a helpful instrument for shaping the national system of dismissal protection, being the guiding star for the policymakers and legislators.

Finally, we would like to express the view that the developed dismissal protection should not be an obstacle for investment in a particular country. Even though some scholars in economics express the opposite view and even though the report of the World Bank provides a ranking of business regulations and their enforcement across 190 countries which includes redundancy rules and redundancy costs. This approach was heavily criticized by lawyers in general and labor scholars in particular. A thorough calculation of the redundancy payments levels says little about the stability of the employment relations and the productivity of labor under just conditions. It has been empirically proven that fair labor conditions are the factor increasing the productivity of labor, and dismissal protection, in our view, makes up an important part of these conditions. Therefore, concluding this paper we emphasize that dismissal protection in the BRICS countries considered here is largely in line with ILO standards and contributes to the establishment of fair labor relations, and thus constitutes an investment advantage for these states.

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[59] *Malelane Toyota v. Commission for Conciliation Mediation and Arbitration and Others* [1999] 6 B.L.L.R. 555 (LC).

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Information about the authors

Elena Sychenko (Saint Petersburg, Russia) – Associate Professor, Law Faculty, Saint Petersburg State University (7 22nd Line of Vasilievsky Island, Saint Petersburg, 199106, Russia; e-mail: e.sychenko@spbu.ru).

Mauro Laruccia (São Paulo, Brazil) – Associate Professor of Business, School of Economics, Business and Accounting, Pontifical Catholic University of São Paulo (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: mauro.laruccia@fundacentro.gov.br).

Dalton Cusciano (São Paulo, Brazil) – Ph.D. Candidate, Getúlio Vargas Foundation, Adjunct Professor, Getúlio Vargas Foundation and National School of Business and Insurance (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: dalton.cusciano@fundacentro.gov.br).

Irina Chikireva (Tyumen, Russia) – Associate Professor, Labor Law and Entrepreneurship Department, Tyumen State University (38 Lenina St., Tyumen, 625000, Russia; e-mail: i.p.chikireva@utmn.ru).

Li Wenpei (Beijing, China) – Professor, Vice Dean of the Law School, China University of Labor Relations (45 Zengguang Rd., Haidian District, Beijing, 100048, China; e-mail: wenpei.Lee@outlook.com).

Paul Smit (Potchefstroom, South Africa) – Associate Professor of Labor Relations, School of Industrial Psychology and Human Resource Management, Faculty of Economic and Management Sciences, North-West University (11 Hoffman St., Potchefstroom, 2520, South Africa; e-mail: paul.smit@nwu.ac.za).