

CONFERENCE REVIEW NOTES

INTERNATIONAL SEMINAR REVIEW NOTES DISMISSAL PROTECTION IN THE BRICS COUNTRIES*

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Introduction

Legal scholars from Brazil, South Africa and Russia gathered in Saint Petersburg on 25 January 2019 to attend the International Legal Science Seminar hosted by the Department of Labor Law and Labor Protection at Saint Petersburg State University.

The city of Saint Petersburg became an intellectual centre of debate and discussion for seminar participants on the theme “Dismissal Protection in the BRICS Countries.” The 2019 International Legal Science Seminar focused on the important issues relating to dismissal protection in South Africa, Brazil and Russia in terms of the International Labour Organization (ILO) Convention 158. The seminar was a resounding success, opening up prospects for legal scientific collaborations in research on legislation in the BRICS countries.

Before offering a summary of the presentations from the seminar, it should be useful as background to review related presentations given in another setting prior to the seminar.

* This review is prepared based on the material in the presentations provided by the speakers at the International Legal Science Seminar.

1. Background to the BRICS International Legal Science Seminar

The 10th BRICS Academic Forum drawing attendees from academia, think tanks and non-governmental organizations from Brazil, Russia, India, China and South Africa took place in Johannesburg, South Africa on 28–31 May 2018. The event was hosted jointly by the BRICS Think Tank Council (BTTC) and the South African BRICS Think Tank (SABTT) with the support of the South Africa Government and the National Institute for the Humanities and Social Sciences (NIHSS) as SABTT custodian and coordinator. The core objective of the Forum was to encourage academic and research interests, bring together collective knowledge and expertise, and shape the intellectual remit of intra-BRICS discussions. The Forum theme “Envisioning Inclusive Development Through a Socially Responsive Economy” set the framework for discussion and elaboration on many issues, one of which was comprehensive social protection.¹ Dismissal protection is an essential part of this sphere. The basic provisions are provided under the ILO Convention 158 concerning termination of the employment relationship at the initiative of the employer, which includes the following provisions.

A worker shall not be dismissed without a valid ground for dismissal linked to the worker’s ability or conduct, or based on the operational requirements of the undertaking, establishment or service.

Temporary absence from work due to illness or injury shall not constitute a valid reason for dismissal.

The employees shall not be dismissed for reasons connected with their conduct or work until they have been offered the opportunity to defend themselves against the allegations made.

The employees who consider that they have been the subject of an unjustified dismissal measure will have the right to appeal against that measure before an impartial body such as a court, a labor court, an arbitration board or an arbitrator.

The burden of proving the existence of a valid ground for termination of employment shall be on the employer.

If the bodies reach the conclusion that the dismissal is unjustified, they can annul the dismissal and/or they shall be entitled to order the payment of adequate compensation.

The employee who is to be dismissed will be entitled to a reasonable period of notice or compensation for the particular period, unless he/she has been guilty of serious misconduct, that is to say, misconduct of such a nature that the employer cannot reasonably be expected to continue to employ the worker during the period of notice.

¹ Elena Gladun, *BRICS Development Through Socially Responsive Economy*, 5(3) BRICS Law Journal 152 (2018).

The ILO Convention 158 has not been ratified by the BRICS countries. Brazil ratified this Convention in 1996, but denounced it a few months later because the Convention had a negative impact on the Brazilian labor market – dismissal protection must be balanced.

2. Summary of the International Legal Science Seminar

The International Legal Science Seminar, held at Saint Petersburg State University on 25 January 2019, brought together scholars from the top institutions of academia of Russia, South Africa and Brazil to discuss the challenges relating to dismissal protection.

The seminar's theme "Dismissal Protection in the BRICS Countries" enabled discussion and elaboration of many issues, with the focus on the following:

- Sources of the BRICS countries' dismissal law;
- Dismissal protection in the BRICS countries in light of the ILO Convention 158;
- The types of justification for dismissal;
- Notifications;
- The right to appeal;
- Severance payment and possible reinstatement.

The key speakers at the seminar were distinguished researchers: Professor Paul Smit, Associate Professor of Labor Relations, School of Industrial Psychology and Human Resource Management, Faculty of Economic and Management Sciences of North-West University, South Africa; Professor Mauro M. Laruccia, PhD in Communication and Semiotics, engaged by Fundacentro/Ministry of Economics, Professor at Pontifical Catholic University of São Paulo (PUC-SP), Brazil; Professor Dalton T. Cusciano, PhD Candidate in Public Administration and Government at FGV/SP, engaged by Fundacentro/Ministry of Economics, Professor at the Law School of São Paulo FGV/SP and ENS/SP, Brazil; and Elena Sychenko, Associate Professor, Law Faculty of Saint Petersburg State University, Russia.

Professor Smit delivered a presentation titled "Dismissal Protection in South Africa in Terms of the ILO Convention 158." He noted that the South African Constitution is the source of South African dismissal law. The Constitution defines the basic principle that everyone has the right to fair labor practices. The Labor Relations Act (LRA) and the Code of Good Practice determine that dismissal must be for a fair reason and in accordance with a fair procedure. However, the concept of fairness has not been defined.

The LRA recognizes only three grounds on which a dismissal might be fair:

- Employee conduct/misconduct;
- Employee capacity/incapacity (e.g. poor work performance or health problems);
- Employer operational requirements (in this case, severance is paid).

For any dismissal to be fair it must comply with substantive fairness (the reason justifies a dismissal) and procedural fairness (the dismissal must follow procedure).

If a dismissal is considered unfair, the employee can make a claim for reinstatement or re-employment. There are no fixed rules on this issue, as every case will be judged on its own merits.

Dismissal may be justified for reasons of gross dishonesty, wilful damage to property, endangering the safety of others, assault on the employer or fellow workers or customers.

All other reasons will have to be justified as fair.

Summary dismissal does not exist. In all circumstances, the employer must prove that the offence committed by the employee justifies a dismissal.

Some types of dismissal are viewed as very serious, and the employee can get up to twenty-four months wages as compensation (over and above reinstatement or re-employment).

The following will be viewed as automatically unfair grounds for a dismissal:

- Employee participation in a protected strike;
- Union membership;
- Any reason related to discrimination;
- Pregnancy or intended pregnancy or if the employee is on maternity leave;
- Selective dismissal;
- Any reason related to transfer of business.

A dismissal will only be considered fair if a disciplinary hearing is held in which five principles must be observed:

1. Notification of the employee of allegations;
2. Opportunity to state a case;
3. Reasonable time to prepare;
4. Assistance by fellow employee/shop steward;
5. Informing the employee of the outcome and reminding the employee of the right to refer to the CCMA or BC.

The CCMA and BC are statutory dispute resolution organizations. The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body established under the terms of the Labor Relations Act. A Bargaining Council (BC) is a dispute settlement body for specific industries, e.g. the automotive industry.

Although the ILO Convention 158 was not ratified by South Africa, its principles have been fully incorporated into dismissal law.

Professor Laruccia and Professor Cusciano gave their presentation on “Dismissal Protection in Brazil.” They informed attendees that the Labor Law Consolidation (in Portuguese, CLT) is the principal body of labor legislation in the private sector in Brazil. The Brazilian Labor Law Consolidation was inspired by the Carta del Lavoro of Italy, published in 1927, and the Encyclical Rerum Novarum, a document of the Catholic Church on workers’ conditions. People employed under the CLT (known

as *celetistas*) are in a formal employment relationship. They make up 52 per cent of the Brazilian working class.

The legal basis of dismissal protection for Brazilian public sector professionals is different from that for the private sector. Law No. 8,112/1990 and the Brazilian Constitution of 1988 are the main sources of rules for the federal Brazilian civil service. Brazilian public sector professionals gain stability after three years of work experience. They have a higher level of social guarantees and can be dismissed only after an administrative or judicial process.

Dismissal protection in the private sector under the Labor Law Consolidation (CLT) has other rules. Employment stability is first guaranteed to industrial and commercial workers after ten years' service, as well as the right to compensation if they are not put on permanent contracts and are unjustly dismissed. It then makes clear that any change in the ownership of an establishment or in the management of an enterprise will be without prejudice to employment, as it will not affect the length of service calculations for compensation purposes. Compensation for dismissal will have a priority status in case of bankruptcy or collective insolvency.

What subsequently occurred is that employers started to dismiss workers on the eve of reaching – stability status – ten years of work, which led to intense judicial litigation. The Brazilian Superior Labor Court (in Portuguese, TST), basing its decision on precedents, declared that,

A hindrance to 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.

Consequently, employers began to dismiss workers with eight years of service. Obviously, another concept of dismissal protection against layoffs was necessary.

The solution was found in Law No. 5107 of 13 September 1966 that created the Length of Service Guarantee Fund (FGTS), which created a financial instrument of protection against dismissal.

The FGTS aims at protecting the worker who has been fired due to lay-offs by means of opening an account attached to the labor contract. At the beginning of each month companies deposit an amount corresponding to 8 per cent of the salary of each employee. Employees, under certain circumstances (e.g. dismissal with no cause, retirement, serious illness), may withdraw these contributions made by the employer. The companies' contributions are made as deposits in a restricted-access bank account, in the name of each employee, and these accounts are managed by a Federal Government Institution (Caixa Econômica Federal). The deposits made yield annual interest of 3 per cent plus inflation. If an employee is dismissed without cause, the employer must also pay the employee an additional fine, equal to 40 per cent of the deposits made into the employee's FGTS account during the time of his/her

employment with the company. Another fine equal to 10 per cent of the deposits made into the employee's FGTS account during the time of his/her employment with the company has to be paid to the government. Employers must pay one month's salary as severance pay for the notice period when dismissing employees without cause and without prior notice. This prior notice has a minimum time of 30 days, up to 90 days according to the time of hiring (30 days plus 3 days for the year of hiring, limited to 90 days.)

Employees dismissed without cause have access to unemployment insurance for three to five months (depending on the length of the labor contract).

Causes for dismissal are the following:

- Impropriety of conduct;
- Unacceptable behavior;
- Criminal activity;
- Neglect;
- Habitual drunkenness;
- Secrecy breach;
- Indiscipline/Insubordination;
- Job abandonment;
- Physical offences;
- Moral offences;
- Gambling.

Companies try not to fire their employees by claiming justification for dismissal, for it often results in lawsuits. Also, getting fired by justified dismissal leaves a negative impression on the employee's professional record and it may directly affect the prospects of getting a new job. Brazil has about 5 million worker-related judicial suits pending, most of which are related to justified dismissal cases.

The Brazilian Parliament ratified the ILO Convention 158 on protection against arbitrary dismissal or termination without just cause. However, the ILO Convention 158 was in force for only seven months, between 10 April 1996 and 20 November 1996, for in that same year Brazil denounced the ILO Convention 158 because it had had a negative effect on the Brazilian labor market, according to the Brazilian Institute for Applied Economic Research (Ipea). For example, the possibility of being offered a formal contract diminished and employers refrained from employing staff. Women and unskilled workers suffered the most during that seven-month period.

Professor Sychenko, in her report titled "Dismissal Protection in Russia in Light of ILO Convention 158," pointed out that although the principles contained in the ILO Convention 158 can be found in the legislation of many countries, there are only a few countries that apply all of the principles (only 18 out of 105 ILO member states, and the same number out of the 35 countries that have ratified the Convention). The Convention has not been ratified by Russia. The Labor Code of the Russian Federation provides a list of grounds for dismissal. Dismissal must be lawful and in

accordance with the established procedures. The employer may dismiss an employee in the following cases:

1. Liquidation of a company;
2. Job redundancy;
3. Insufficient qualifications;
4. Change of the owner of the property of the organization (only for the head of an enterprise, his/her deputies and the accounting manager);
5. Duplicative culpable non-performance of labor duties if the employee has a disciplinary sanction;
6. Gross misconduct –
 - absenteeism;
 - appearance at work in a condition of alcoholic, narcotic or other toxic intoxication (drunkenness);
 - disclosure of secrets (secrecy breach);
 - theft and embezzlement at work;
 - violation of labor protection rules and requirements.

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

- offer a transfer to another job in respect of job redundancy and insufficient qualifications;
- notify in advance of dismissal 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 non-performance of labor duties, if the employee has a disciplinary sanction.

The employee is entitled to severance pay at dismissal in the case of liquidation of a company and job redundancy.

The employee shall not be dismissed for reasons connected with his conduct or work until he has been offered 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.

In concluding her remarks, Professor Sychenko underlined the high standards of dismissal protection among the BRICS countries. High standards of dismissal protection often lead to abuse by some employers who put pressure on employees to quit a job “voluntarily” or refuse to offer a formal contract. Excessive protection from dismissal thus may lead to discrimination in the labor market.

The participants at the International Legal Science Seminar agreed on the necessity to hold similar events on a regular basis.

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