

Awards of costs and honoraria in employment lawsuits after the Employment Reform

22.06.2022 3 min read

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One of the most polemic issues under the Employment Reform relates to free access to the courts and court-awarded legal honoraria.

Legal honoraria (honorários de sucumbência, or the honoraria of defeat) are honoraria payable by the defeated party to the successful party's legal counsel, in an amount determined by the court as a percentage of the amount in dispute. The intention of court-awarded honoraria is to help the successful party defray the cost of engaging legal counsel, and are a normal feature of civil litigation in Brazil.

Until November 2017, however, the labor courts did not award legal honoraria against unsuccessful claimants if they were represented by their union, they earned less than two times the minimum monthly salary, or their economic situation was such that they could not pay costs and legal honoraria without detriment to their ability to support themselves or their families, according to the rules established in Restatement of Precedents (Súmula) 219 issued by the Superior Labor Appeals Court, the TST (Tribunal Superior do Trabalho, the highest instance for employment and labor matters

Based principally on the second requirement – lack of detriment to the well-being of the claimant's family – most claimants were able to obtain free access to the courts, with the resulting waiver of costs and court-awarded legal honoraria, if their lawsuit was unsuccessful.

The Employment Reform made important changes to this rule by introducing a new article 791-A to the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho), which provides for payment of court-awarded legal honoraria in an amount ranging from 5% to 15% whenever a party is unsuccessful in any of the claims made in employment lawsuits. The new provision was responsible for a significant drop in the number of new lawsuits brought before the Labor Courts or, more precisely, in the number of claims made in employment lawsuits, since each unsuccessful claim would result in an award of legal honoraria to the other party's legal counsel.

Under article 791-A, legal honoraria will be awarded against a claimant when (i) the claimant is not entitled to free access to the courts, in which case the honoraria will be enforced in the employment lawsuit, and, if the claimant is successful in part, the honoraria will be deducted from the award made to the claimant or (ii) if the claimant is entitled to free access to the courts, then payment of the court-awarded honoraria is suspended for two years, unless the lawyer entitled to the honoraria proves that he or she has insufficient funds, and brings proceedings to enforce the honoraria, which is an unlikely scenario.

Nevertheless, in October 2021, the Supreme Federal Court (STF – Supremo Tribunal Federal, Brazil's constitutional court) decided constitutional challenge ADI 5.766, and ruled that article 791-A§4 CLT is unconstitutional, staying all proceedings in which an award of legal honoraria had been made against unsuccessful claimants.

According to the STF, the provision violates the more needy population's right of access to justice, and restricts fundamental rights such as free access to the courts. Moreover, the provision is contrary to *jus postulandi* – the right of claimants, in some situations, to bring employment lawsuits without being represented by a lawyer – guaranteed under Brazilian employment law.

Thus, despite the changes made by the Employment Reform, the current scenario is much like the pre-reform scenario, and no award of legal honoraria will be made against unsuccessful claimants who are entitled to free access to the courts.

Despite the calls for change made by labor and employment attorneys, the Employment Reform has not been successful in dealing with an issue that is not only important but would represent a real advance in Brazilian employment law, in comparison with other branches of the law.