

Limits on damages for non-economic injury

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Perhaps one of the most criticized changes made by the Employment Reform of 2017 was article 223-G§1 of the Consolidation of Labour Laws (CLT – Consolidação das Leis do Trabalho), which establishes caps on the amount of reparation for non-economic injury (moral damage) that can be awarded by the Labour Courts. Prior to the change, damages for this type of injury were governed by the general principles under the Civil Code; now, article 223-G requires the Labor Courts to fix the amount of reparation according to the seriousness of the offense (mild, medium, serious or very serious), with minimum and maximum amounts for each degree of seriousness, subject to a ceiling of 50 times the injured party's monthly salary for very serious offenses.

Many employment law specialists objected to what they refer to as a “price scale” for non-economic injuries, arguing that it fails to comply with the constitutional notion of equitable treatment, and is incompatible with the principle of proportionality set out in article 5(V) and (X) of the Federal Constitution. In addition, linking damages to the injured party's remuneration offends the principle of the dignity of the human person (article 1(III) of the Federal Constitution) and results in discrimination against low-paid workers. Some labor judges take the same position, as reflected in Restatement of Law 18, adopted at the 2nd Symposium on Material and Procedural Employment Law organized by the National Association of Labor Court Magistrates – ANAMATRA, holding that the new provision is unconstitutional.

These questions eventually took the form of Constitutional Challenges (ADIs 6050, 6069 and 6082), dealing with the constitutionality of articles 223-A to 223-G of the CLT. The Federal Supreme Court's judgment in the Constitutional Challenges began on October 27, 2021, with the release of the opinion written by the reporting Justice, Gilmar Mendes. Justice Mendes would grant the actions in part, holding (among other things) that “the criteria for quantification of reparation for non-economic injury provided for in article 223-G§1 of the CLT must be treated by the judge as guidance in making his or her decision. Nonetheless, it is constitutional to award damages in amounts higher than the limits established in art. 223-G§1(I) to (IV), on considering the circumstances of the case and the principles of reasonability, proportionality and equal treatment.” Judgment was interrupted when Justice Nunes Marques requested the record for review, and had not resumed by the date this article was written. As a result, the Supreme Court has not yet taken a position on the constitutionality of article 223-G CLT.

Even so, although some Labor Appeals Courts have held that article 223-G CLT is unconstitutional, most have applied the article's provisions as a guide to the amount of damages payable, not infrequently reducing the amount of damages awarded at first instance to comply with the criteria established in

the CLT. Even the highest labor court, the Superior Labor Appeals Court, has issued decisions applying article 223-G without questioning its provisions.

We do not yet know how the Federal Supreme Court will rule on the constitutionality of the rules for fixing damages for non-economic injury introduced by the Employment Reform. There is no denying, however, that in most cases the new criteria are being applied by the Labor Courts.

It seems, therefore, that “pricing” rules introduced by the Employment Reform have been accepted as guidance in fixing damages for non-economic injury, although a constitutional interpretation of the new rules would allow higher amounts to be awarded where the circumstances of the case require, in accordance with the constitutional principles of reasonability, proportionality and equal treatment before the law.

NOTES

[1] See, for example, Delgado, Mauricio Godinho. *Curso de direito do trabalho: obra revista e atualizada*. 19. ed. São Paulo:LTTr, 2020. pp. 804-5.

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