

Mass dismissals in Brazil: what are its legal requirements?

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Mass dismissals are a thorny issue for employers in Brazil. After all, what is the concept of mass dismissals? How many employees must be let go at the same time before the dismissals will constitute a mass dismissal? What are the legal requirements for this type of layoff, and how is it different from individual dismissals? Must the workers' union be involved in (or authorize) the dismissal process? These and other questions have always afflicted the corporate world, especially in times of economic or financial crisis, when business owners may have to resort to mass dismissals in order for the business to survive, or, in the worst case scenario, may be compelled to dismiss all employees when the company simply cannot continue operating.

Until 2017, Brazilian legislation contained no provisions that might provide some guidance in cases of mass dismissals, and the Labor Courts relied on general principles and ILO conventions and treaties to support their decisions, which generally required union involvement in mass dismissal processes. The Employment Reform of 2017 added article 477-A to the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho), which, in an attempt to clear up the confusion around the issue, equates multiple and mass dismissals to individual dismissals and categorically states that union authorization is not required for such dismissals to be valid, much less a collective bargaining agreement.

The new provision was the target of considerable criticism, with various commentators arguing that it violated labor-related principles under the constitution, culminating in a Constitutional Challenge (ADI 6142), which is still pending in the Federal Supreme Court (STF – Supremo Tribunal Federal). In any event, the question of union involvement had been brought to the STF's attention in an earlier case, appeal RE 999435, involving General Repercussion Theme 638.

The STF's decision in appeal RE 999435 was issued recently, on June 8, 2022. A majority of the court (7 to 3) concurred in Justice Edson Fachin's opinion, and the STF issued the following "Thesis" or ruling on General Repercussion Theme 638 proposed by Justice Roberto Barroso: "Prior union intervention, which must not be confused with prior authorization by union entities or collective bargaining conventions and agreements, is an indispensable procedural requirement for a mass dismissal of workers."

Although the STF's ruling makes it clear that neither authorization by the workers' union nor a collective bargaining agreement is necessary, the requirement for union participation in the dismissal process goes contrary to the line that had been taken by the Labor Courts.

In fact, with the increased volume of mass dismissals brought on by the economic and financial crisis caused by the covid-19 pandemic, a significant number of mass dismissals wound up before the Labor Courts. The

precedents show that most Labor Appeals Courts had rejected union participation and/or other prerequisites to the validity of mass dismissals.

An example can be found in a recent decision by Appeal Judge Nuria de Andrade Peris, of the Labor Appeals Court of Rio de Janeiro, reversing a decision at first instance against the barbecue restaurant Fogo de Chão which had ordered the employer to reinstate 100 employees let go during the pandemic and to pay BRL 17 million in damages for collective non-economic injury.

In truth, article 477-A CLT does not conflict directly with the STF's ruling in Theme 638, since the ruling requires only union involvement in the process, not the union's approval or authorization. Nonetheless, it seems to us that the STF's ruling has more disadvantages than advantages, especially since it raises more questions than it resolves: what constitutes a "mass dismissal" and what are the contours of the required "union intervention"? In our view, the Supreme Court may have lost a good opportunity to inject some legal certainty into a situation that is a cause for concern for many Brazilian companies.

NOTES

[1] See, for example, Delgado, Mauricio Godinho. *Curso de direito do trabalho: obra revista e atualizada*. 18. ed. São Paulo, SP: LTr, 2019. pp. 1361-4.

[1] RO - 0100413-12.2020.5.01.0052, 6ª Turma, TRT 1. Relatora Desembargadora Nuria de Andrade Peris, DEJT 03/05/2022.

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