Uncertainties surround mass dismissals in Brazil following Supreme Court ruling

10.08.2022 4 min read

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In a decision issued on 8 June 2022, Brazil's constitutional court ruled that in mass dismissals intervention by the union representing the affected workers is necessary. The Federal Supreme Court (STF) summarised its ruling as follows: "Prior union intervention, which must not be confused with prior authorisation by union entities or collective bargaining conventions and agreements, is an indispensable procedural requirement for a mass dismissal of workers". The decision was issued in a "general repercussion" case, and consequently the STF's ruling is binding on all lower courts throughout Brazil.

The issue is a crucial one for entrepreneurs who intend to do business in Brazil because the general rule under Brazilian employment law is that employees may be dismissed at any time, without cause, as long as they do not have any type of temporary job tenure, and the dismissal is not arbitrary or abusive. Unhappily, in our view, rather than settling the law, the STF's recent decision only generates a new problem for Brazilian employers.

One aspect of the problem is that, differently from other jurisdictions, Brazilian legislation does not establish what can be considered a "mass dismissal". How many employees must be let go at the same time before the dismissals will constitute a mass dismissal? Does the number depend on the size of the company? Do all the employees have to work in the same sector? Do the dismissals all have to happen at the same time, or can successive individual dismissals over a short period of time also constitute a mass dismissal, as in France, for example, when a dismissal of at least ten employees over a 30-day period is considered a mass dismissal (article L1233-46, Code du Travail)?

It's true that in the case before the STF there was no doubt that a mass dismissal was involved, since 4,400 workers were let go at the same time – a very large number of

employees for any company. Still, a precise definition of the concept of mass dismissal is extremely important, since the court's ruling imposes a new requirement for the validity of such dismissals. What is missing is the basic premise for the application of the requirement: which elements will trigger a mass dismissal, so that employers will know when compliance is required.

The decision creates other grey zones. In particular, the scope and content of the "union intervention" now required of employers is not at all clear. The STF's ruling expressly states that neither prior authorisation from union nor collective bargaining culminating in a collective agreement or convention is needed for mass dismissals. But what are the contours of union intervention in what is essentially a business decision? Is it enough for the employer to give the union notice of its intention to reduce the workforce and the reasons for the decision? Would the employer then have to wait for the union's response and make concessions to the union before implementing the workforce reduction? Would one or two rounds of negotiation be sufficient? The STF's decision provided no answers to these questions, leaving a wide margin for legal uncertainty, which is already a significant factor in labour and employment relations in Brazil.

Similarly, the STF does not address the consequences of failing to comply with the new requirement. If an employer dismisses employees without first consulting the union, would the employees be entitled to some kind of compensation? Or would the employer be obligated to reinstate the employees? And what happens in cases where the employer's establishment is being shut down, so that reinstatement is impossible because the company is no longer operating? At least for now, these questions also remain without clear answers, making business owners' decisions more difficult because they cannot foresee and assess the risks involved in mass dismissals.

Still, there is a ray of hope for those brave enough to do business in Brazil. The case decided by the STF arose prior to the inclusion of article 477-A in the Consolidation of Labor Laws (CLT – Consolidação das Leis do Trabalho) under the Employment Reform of 2017. Article 477-A represents the

legislature's attempt to clarify the issue by making multiple or mass dismissals equivalent to individual dismissals, and stating categorically that neither union authorisation nor a collective agreement is required to make mass dismissals valid. There was much debate over the constitutionality of the provision at the time it was added to the CLT, culminating in a constitutional challenge, ADI 6142, which has not yet been decided by the STF.

Given the tenor of its decision in June of this year, the STF is likely to hold that article 477-A CLT is constitutional, at least to the extent that it excludes the need for union authorisation or collective bargaining in mass dismissals. Some employment law specialists, however, argue that the STF's June decision has the consequence of making article 477-A unconstitutional to the extent that the provision makes mass dismissals equivalent to individual dismissals. Whatever the outcome, we can expect these points to be addressed by the STF in constitutional challenge ADI 6142.

Hopefully, the STF will take advantage of the constitutional challenge to answer the other questions discussed in this article, especially the concept of mass dismissal, the contours of union intervention, and the consequences of failure to comply with the requirement for union intervention. Only with answers to these questions will business owners have a sufficient understanding of their legal obligations to make efficient decisions in the often unpredictable and always bold adventure of doing business in Brazil.

*This article was written by our Labor and Employment lawyer, Fernanda Nasciutt, and published by the International Employment Lawyer. Click here and find out more.

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