

Coming up in Brazil's constitutional court: collective dismissal, the continuing effect of expired collective agreements, and negotiated relaxation of employment rights

18.06.2021 5 min read

Authors

Cibelle Linero

There can be no doubt that the STF's pronouncement on these matters is timely and will make a significant contribution to legal certainty and predictability in labor relations.

Related areas

Labor and Employment

Topics

Labor and Employment BMA

Review STF Trials Employment flexibility

In recent years, Brazil's Labor Courts have been exercising their "creative powers". At times, decisions are "creative" not just for their new insights and ideas about the law, but also because they "create" rights where the law does not.

Three examples of this "defensive decisionmaking" – especially by the Superior Labor Appeals Court (TST – Tribunal Superior do Trabalho) – merit attention because they will be considered by Brazil's constitutional court, the Supreme Federal Court (STF – Supremo Tribunal Federal).

The first case deals with collective dismissals of employees. Since the beginning of the last decade, the Labor Courts have taken the position that collective dismissals are ineffective unless they are preceded by collective bargaining. The leading case – which became notorious – involves Embraer's dismissal of thousands of employees in 2009, which was held to be invalid.

The case is now before the STF (Appeal RE no. 999.435). The appeal has "general repercussion" status, which means that the STF's interpretation of the law will be binding on all lower courts. So far, five justices have issued their opinions, and the vote stands at three to two in favor of the position that collective dismissals do not need to be preceded by negotiations with the union, supporting the letter of the law in article 477-A of the Consolidation of Labor Laws. The outcome is difficult to predict, however, because Justice Dias Toffoli's vote will be determining, and he has not yet issued his opinion.

In the second case, the STF will assess the TST's activism on the subject of the continuing effect of expired collective bargaining agreements (Constitutional Challenge ADPF no. 323). In 2012, the TST reversed its earlier position and altered Restatement of Precedents 277 to provide that when collective conventions (made between labor unions and employers associations) and collective agreements (made between labor unions and individual employers) expire, they are incorporated into employees' individual terms and conditions of employment until a new convention or agreement is issued.

This about-face by the TST received hard criticism and culminated in a

decision by Justice Gilmar Mendes of the STF staying the effect of the new wording given to the Restatement by the TST. Justice Mendes' decision seems to reflect a tendency (as yet incipient) in the STF toward the position that the application of the provisions of collective bargaining instruments is limited by the instrument's term – once the term expires, the provisions cease to have effect – following the letter of the law in article 614§3 of the Consolidation of Labor Laws.

The third, and perhaps most anxiously awaited, case will come before by the STF in the next few weeks. It deals with the extent to which collective bargaining can adapt rules under labor legislation (Appeal ARE no. 1.121.633 and Constitutional Challenge ADPF no. 381). Justice Mendes is the reporting justice in this case as well, and he has already taken the position that the provisions of collective conventions and agreements should be respected, even if they relax em

need to be preceded by negotiations with the union, supporting the letter of the law in article 477-A of the Consolidation of Labor Laws. The outcome is difficult to predict, however, because Justice Dias Toffoli's vote will be determining, and he has not yet issued his opinion.

In the second case, the STF will assess the TST's activism on the subject of the continuing effect of expired collective bargaining agreements (Constitutional Challenge ADPF no. 323). In 2012, the TST reversed its earlier position and altered Restatement of Precedents 277 to provide that when collective conventions (made between labor unions and employers associations) and collective agreements (made between labor unions and individual employers) expire, they are incorporated into employees' individual terms and conditions of employment until a new convention or agreement is issued.

This about-face by the TST received hard criticism and culminated in a decision by Justice Gilmar Mendes of the STF staying the effect of the new wording given to the Restatement by the TST. Justice Mendes' decision seems to reflect a tendency (as yet incipient) in the STF toward the position that the application of the provisions of collective bargaining instruments is limited by the instrument's term – once the term expires, the provisions cease to have effect – following the letter of the law in article 614§3 of the Consolidation of Labor Laws.

The third, and perhaps most anxiously awaited, case will come before by the STF in the next few weeks. It deals with the extent to which collective bargaining can adapt rules under labor legislation (Appeal ARE no. 1.121.633 and Constitutional Challenge ADPF no. 381). Justice Mendes is the reporting justice in this case as well, and he has already taken the position that the provisions of collective conventions and agreements should be respected, even if they relax employee rights, as long as the rights in question are not protected by the Federal Constitution.

The debate in the third case promises to be more complex, because a number of questions must be answered: (i) will only constitutionally protected rights be the hard line that collective bargaining cannot cross? (ii) if employee rights are relaxed through collective bargaining, do employers have to offer an advantage in exchange in order for the relaxed rights to be valid? (iii) if so, will the collective convention or agreement have to link the relaxed right to the advantage offered in exchange? (iv) when the relaxed

rules are found to be invalid, is the entire collective convention or agreement invalid, or just the provisions relaxing employee rights? (v) does relaxation of employees rights through collective bargaining depend on the existence of an economic crisis?

Any attempt at prediction would be little more than a guess. But there can be no doubt that the STF's pronouncement on these matters is timely and will make a significant contribution to legal certainty and predictability in labor relations – a value that sometimes has only secondary importance for the Labor Courts.

****This article is part of no. 72 of BMA Review. [Click here to view the list of all articles.](#)***

› PROFESSIONALS

Professionals who combine legal insight and market perspective



Cibelle Linero