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Is the 'Agreement' between the Minister of Labour, The Employers' Federation of Ceylon and other Unions valid in Law?

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We have been made aware by way of press conferences and newspaper articles regarding an 'Agreement' that had been reached on 4th May 2020. The said decisions are pursuant to *inter alia* several representations made by Employers across industries/businesses and further to representations made by The Employers' Federation of Ceylon[1] ["EFC"] by its letter dated 25th April 2020[2]. *[Caveat: The Ministry of Labour has not as at 16th May 2020 published the said 'Agreement' in any form].* The said 'Agreement' proceeds on the basis of a submission addressed to the Hon. Minister of Skills Development, Employment and Labour Relations, where the Task Force set up to look into the effects of the pandemic on employment related matters in Sri Lanka which functions under the aegis of the Hon.Minister reached these decisions acting together with the EFC and other Trade Unions.

The Employers' Federation of Ceylon ["EFC"] based on the aforesaid, has by its Circular No:31/2020 [a news item in respect of same is found on the EFC Website[3]] addressed to the membership of the EFC, apprised its membership of a discussion between the Hon. Minister of Skills Development, Employment and Labour Relations and states that the said discussion was concluded on 4th May 2020 having finalised the payment of wages on a pro-rated basis which draws a distinction between the payment of wages in respect of employees who performed work and those who had to be 'benched' (i.e. did not have any work or the employer could not offer work).

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[1] The Employers' Federation of Ceylon (EFC) was established in 1929 as an organization of employers dealing with labour and social issues in Sri Lanka. EFC is a Trade Union registered under and in terms of the Trade Union Ord No.4 of 1935. It is a Trade Union for Employers in Sri Lanka. http://www.employers.lk/

[2] The Employer's Federation of Ceylon, letter to Hon. Minister of Skills Development, Employment and Labour Relations (25th April 2020) available at <http://www.employers.lk/efc-news/751-efc-seeks-post-covid-short-term-relief-for-employers-submissions-to-the-hon-minister-of-skills-development-employment-a-labour-relations>

[3] Historic Tripartite deal reached on Wages Board pay for employees during COVID-19 (13 May 2020) available at <http://www.employers.lk/efc-news/752-historic-tripartite-deal-reached-on-wages-board-pay-for-employees-during-covid-19>.

[For the schemes detailed in the Circular as having formed part of the Tripartite 'Agreement' is annexed hereto at the end of this Article]

The Legitimacy of the 'Agreement'

The 'Agreement' comes on the back of health concerns and governmental restrictions surrounding the Covid-19 pandemic that has disrupted businesses on a global scale and created an environment where workers have been unable to report to work and/or where businesses have had to cease operations in its entirety or limit their operations. In these unprecedented circumstances, the need for ensuring the continuity of businesses is the hot topic of discussion worldwide, with different businesses opting for varied approaches to sustain operations. One such talked about alternative has been to permit businesses to temporarily vary the heretofore agreed wages of its employees.

In this background, we are sensitive to and acknowledge the need for the timely intervention by the government to allow for relief to businesses by permitting a lawful reduction of salaries. We acknowledge the difficulty at this time for most businesses and certain sectors to pay full salaries to employees when such businesses have ceased operations or have no turnover or income in the recent months owing to health and safety measures imposed to limit the spread of the pandemic.

However, the 'Agreement' has to our knowledge neither been formalised according to law nor has it been reduced to writing in any form, except for the circular sent by the EFC to its membership. In these circumstances, the said 'Agreement' very definitively lacks legal validity, and employers ought to be cautious in giving effect to the temporary relief measures agreed to by only those who participated in the discussions and specified in the said circular. It is therefore reasonable to conclude that an employer or employee who is neither a member of the EFC or any other Trade Union may opt not to follow the scheme set out in the 'Agreement' but to take arbitrary decisions that best suit the individual business requirement. This then raises the question whether such decision by an employer to act outside the purview of the agreement would be prosecuted by operation of law or whether the Commissioner of Labour would refuse to prosecute an employer based on a complaint made by an employee for non-payment of remuneration?

Whilst agreements can take many forms [verbal, written or by implication], for any agreement of this nature [which has statutory and penal consequences] to have merit, it must be formalised, usually in writing and signed by all Parties or representative stakeholders and thereafter legitimised in law as the 'Agreement' seeks to vary the existing Employment law. The absence of such formalisation would mean that it would later be difficult if not impossible to place any reliance on such 'Agreement' or to hold any party thereto accountable for the said measures or to plead ones case before the Commissioner of Labour or a Court of Law in seeking to defend the decision to act on the said 'Agreement', as it lacks legal sanction.

Secondly, and more importantly, the effect of the 'Agreement' would be to change the current legal provisions.[4] Employment contracts, and more particularly the remuneration or salaries afforded to employees which are governed by Contract Law and the legal protections afforded to employees under different statutes such as *inter alia* the Shop and Office Employees (Regulation of Employment and Remuneration) Act No: 19 of 1954 (as amended), Wages Board Ordinance No: 24 of 1941, as amended and the National Minimum Wage of Workers Act No: 3 of 2016. This 'Agreement' seeks to vary the salaries of employees in a manner that affords relief to businesses during these trying times when revenue and/or income generation is severely affected. We note that the 'Agreement' does take into consideration the legal minimum wage in Sri Lanka which is set at Rs.14,500/- and ensures that workers are not paid less than the national minimum wage. However, what is the position of an employer who is completely incapable of paying any wages due to complete shutdown of its business and has no turnover? The 'Agreement' is silent on this aspect and offers no relief to such employers. Would this mean that these employers will be outside the 'Agreement' and prosecuted in terms of the law?

It is further important to bear in mind that the basic principles of Administrative Law prevent Ministers and Administrators from arbitrary decision making. Therefore, while we concede that in certain instances Ministers do have discretionary power over their subject matter, that discretion must be exercised within the confines of the law and within the ambit of discretion given to them.

[4] This is evident further in the wording of paragraph 8 of the EFC Circular No:31/2020 which specifies that the termination of employees "*will have to be dealt with under existing laws*" thereby confirming that the outcome of this 'Agreement' was on the understanding that adequate legal mechanisms was created or will be created whereby salaries can legally be reduced.

Has the Minister used his legal discretionary powers to give effect to the 'Agreement'?

The Shop and Office Act empowers the Minister with wide discretion to make regulations to give effect to the scheme and provisions of the Act.[5] There is no record of the Minister having utilised the provisions of the Act to have made a formal regulation giving effect to the substantive remedies set out in the 'Agreement', the acceptance of which would have to be published in the Gazette after having being duly passed by Parliament.[6] In the present context where the Parliament is not in session, had such a regulation been made the Cabinet of Ministers may approve/authorise the said regulation on the basis that the same would subsequently be ratified by Parliament, and this process would be legally valid. It is to be noted that retrospective approval by the new parliament would be in exceptional circumstances demanded by the current crisis. However, the provisions of the law are clear in that no legally enforceable regulation can be passed in an *ad hoc* manner by the Hon. Minister. Additionally, decisions with regard to renumeration may also be considered under the provisions of Part III of the Shop and Office Act.[7] Therefore, there are adequate legal provisions that could have and ought to have been used to make the provisions of the 'Agreement' legal and enforceable. The circumstances are cautionary in that it could be argued that where the law provides for a means by which the Minister could have legitimized the decisions reached by the 'Agreement' and did not do so, such action by the Minister was deliberate and therefore there was no intention to afford such relief to businesses.

The Minister cannot delegate his discretionary powers to the Task Force or the Commissioner of Labour or any other individual

We have become aware, that in the event any decisions made by employers under this 'Agreement' is subsequently challenged before the Labour Department or a Court of Law, certain stakeholders propose to argue that the Commissioner as the Administrator or Competent Authority of the said Employment Statutes and which department is under the auspices of the Minister of Labour can give effect to the 'Agreement', or grant "administrative

[5] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), Section 66(1).
[6] Ibid, Section 66(3).
[7] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), Sections 20-39.

relaxation" or in effect not comply with the law as it stands today and thereby safeguard employer interests *viz a viz* the 'Agreement'.

In our view such position is untenable in law. An essential element to the lawful exercise of discretionary power is that it should be exercised by the authority on whom it is conferred (i.e. the Hon. Minister of Labour), and thus can be exercised by no one else.[8] Court will as a normal practice be strict in requiring that the power be exercised by the "precise person or body stated in the statute" and will hold decisions taken by agents, sub committees or delegates to have been *ultra vires* (i.e. beyond one's legal power and authority) no matter the extent to which the said delegation has been expressly authorised by the individual vested with the authority.[9] Thus in an instance where the Minister has discretionary power, that power is inalienable and must be exercised by the Minister himself. Therefore, even a formalised decision by the Task Force appointed by the Hon. Minister or the acts of the Commissioner of Labour would have to be specifically 'signed off' or expressly approved by the Minister himself. For example a reference to industrial arbitration can only be made under the hand of the Minister of Labour in terms of the Industrial Disputes Act. Any reference to Arbitration by the Commissioner of Labour will be held to be *ultra vires* the powers of the Commissioner.

In light of the above discussion it is advisable that all employers/businesses exercise extreme caution in availing themselves of the schemes set out in the 'Agreement' as they could find themselves having no legal basis if a disgruntled employee subsequently claims that his wages be paid in full or that the employer did not offer work when such work was available as is common knowledge that it is an absolute that remuneration must be paid in full unless the workman/employee is unwilling to work by reason of illness or other such circumstance envisaged in law.[10]

The only document available in respect of the Tripartite 'Agreement' under discussion is the circular of EFC to its Membership, that has since been circulated widely among stakeholders and Employers.

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[8] Wade and Forsyth, *Administrative Law* (10th Edn., OUP 2009) at p.259.
[9] Ibid.
[10] Shop and Office Employees (Regulation of Employment and Remuneration) Act No. 19 of 1954 (as amended), Sections 19, 35.

Legality of certain schemes in the 'Agreement'

The scheme/s set out as part of the 'Agreement' are concerning for three principle reasons;

(a) The schemes specify that it is 'applicable to all sectors without exception'.[11] However, it does not appear to take into account small scale businesses and appears to be aimed only at the larger companies and conglomerates. It is doubtful that, for instance a small-scale hotel catering to the tourist industry with a small staff, could afford to pay its workers even the minimum wage having received zero income in the past couple of months and no prospective income in the foreseeable future. In our experience, larger conglomerates with diversified businesses have the luxury transferring employees between sectors to ensure that they are engaged in active employment (i.e. transferring employees in tourism to agricultural sectors etc) and therefore are better placed to utilise the scheme in the 'Agreement'.

(b) The scheme in the 'Agreement' appears to give employers the discretion to decide who to 'bench' and who to roster for work and encourages employers to 'rotate workers' whenever possible. There is no basis on which employers have to 'employ' or offer work to the entirety of its workforce and some could in fact find themselves 'benched' more frequently than others. This discretion provided to employers could in certain instances amount to discrimination on particular grounds that are not permitted under the Sri Lankan Constitution.[12]

(c) Finally, there appears to be a further understanding that there is a possibility of this becoming a more frequent practice[13], despite the alleged applicability of the scheme being limited to May and June 2020[14]. Sri Lankan labour laws are well-known for being comprehensive in the scope of protection afforded to employees and the possibility of "an environment for employees to get accustomed to apportioning of wages etc",[15] will assumedly not be looked upon favourably by the Courts.

Post pandemic recovery would entail in business models and company structures undergoing drastic change and employers would look at new methods of engaging employees in work,

[11] The Employers' Federation of Ceylon Circular No:31/2020, para. 3.
[12] Constitution of the Democratic Socialist Republic of Sri Lanka, Article 12(2); see also Article 12(1).
[13] The Employers' Federation of Ceylon Circular No:31/2020, paras. 9 and 10.
[14] The Employers' Federation of Ceylon Circular No:31/2020, para. 2.
[15] The Employers' Federation of Ceylon Circular No:31/2020, para. 9.

such a part time work or work from home models that would by itself require drastic modernisation of our existing laws.

The views articulated herein are based on the available information and material as at the time of this writing.

16th May 2020.

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Annexure - The schemes of the Tripartite 'Agreement' as conveyed by The Employers' Federation of Ceylon Circular No:31/2020

The agreement reached is as follows.

1. **The scheme will be applied to pro-rate wages in respect of employees who cannot be deployed at work simultaneously due to health restrictions**. Members are encouraged to rotate workers wherever possible and give as many opportunities for employees to resume work & supplement their livelihoods under this scheme.

2. **Similarly, the scheme which is applicable to monthly paid employees in all sectors, will be limited in its application for the months of May and June 2020.**

3. **The Scheme is applicable to all sectors without exception. However, any employer who cannot afford to pay employees based on this scheme could make representations to the Commissioner General of Labour**. The Secretariat remains ready to assist such members by taking up such matter on a priority basis.

4. Only **employees who reported for duty or those who could not do so due to restrictions imposed by employers** due to health reasons **are eligible** to be considered under this scheme**.**

Nonetheless, employees unable to report for work to due to restrictions imposed by the authorities, could also be considered under this scheme and payments made on the basis that they have been 'benched'.

Employees who absent themselves from work despite being rostered and fail to provide acceptable reasons for their absence should be placed on **no pay** (in lieu of days of such absence).

Others who may provide satisfactory explanations, should be placed on leave, as appropriate.

5. According to the agreement reached**, employers will apportion and pay wages for days worked based on the basic salary, and for the days not worked (days on the bench without any work) wages will be apportioned and paid either at the rate of 50% of the basic wage Or Rs 14,500/-, whichever is higher.**

Step 1. a. To ascertain the daily rate at which employees who performed work should be paid the following method of calculation should be applied
b. Divide the Monthly basic salary by 30 / 26 days* (*method of division to ascertain the daily rate in your establishment should be applied)
c. Thereafter, to arrive at the salary to be paid for the days worked, multiply the daily rate by the number of days worked
Step 2. a. To ascertain the daily rate at which employees who were benched have to be remunerated, divide Half the Basic Salary OR Rs 14,500/-, whichever is higher, by 30 / 26 days* (*method of division to ascertain the daily rate as used in 1 (b.) above).
b. Thereafter, to arrive at the salary to be paid for the days not worked, multiply the daily rate by the number of days not worked.
Step 3. **To ascertain the Monthly salary to be paid to an employee, add the figures finally arrived at (sum totals) as set out in item 1 (c.) & 2 (b.)**

Example**: Assuming an employee is offered 15 days of work and stays on the bench for 15 days.**

	Basic Salary - Rupees		**30000**		**20000**
Step 1	**Daily Rate**	**30,000 / 30**	**1000**	**20000/30**	**666**
	Salary for the days worked		**15000**		**9990**
Step 2	**Daily Rate**	**15,000/30**	**500**	**14500/30**	**483**
	Salary for the days not worked		**7500**		**7250**
Step 3	**Total Salary for the month**		**22500**		**17240**
		Applied 30 days	**Higher rate applied**		

6. It was agreed that employers will consider the basic salary considered in pro-rating wages for the purpose of calculating gratuity.

7. As always, members are requested to make use of social dialogue tools at enterprise level to educate, discuss and thereafter implement this scheme. Establishments that have recognized unions as bargaining agents as well as instituted worker councils will be expected to engage with such bodies.

8. Though reported in the media, there was no understanding whatsoever that employers will not resort to terminations of employment. **For the time being, such matters will have to be dealt with under existing laws.**

9. It must be noted that though this scheme is an initial step, it is nonetheless a historic agreement since it's a rare occasion in our history where all stakeholders agreed – at National Level- to 'pro-rate' wages. Importantly, it also **paves the way to further discuss and solidify schemes such as 'job sharing'** which we envisage **to be very much part of our work routine in the months / years to come.** Similarly, it also **creates an environment for employees to get accustomed to apportioning of wages etc**.

10. **The secretariat has made arrangements to assist members to formulate new clauses to be inserted in letters of appointment / agreements to reflect these new terms** as well as the requirement to re-visit terms and conditions of employment in case of situations that are beyond the control of both employers and employees – both man made and natural disasters, including pandemics.

11. The EFC will continue to pursue its endeavors to obtain further relief for its members at this critical yet important time in our history.