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Unprecedented times and the need to adapt to the global changes - A legal perspective

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In these unprecedented times, where world supply chain has been severely affected and global markets crashing, employers globally are faced with the unenviable task of deciding the fate of its employees and its businesses. As country after country goes into lockdown resulting from the CORVID-19 pandemic, whole industries have ground to a sudden halt. The retail, manufacturing, hospitality and travel sectors and such other related services have been hit particularly hard as a result. Globally, Companies have laid off thousands of workers, cut jobs placed employees on furlough[1].

In Sri Lanka, unlike most countries, the Employment Laws are stringent and designed to protect the interests of the employees as well as the employers and are governed by a series of Statues and Regulations. Employers in Sri Lanka, ranging from manufacturing to hospitality, import – export to SME's, banks and financial institutions, in an attempt to keep businesses afloat are contemplating a variety of options which include down-sizing, retrenchments and lay-offs as provided for by the Termination of Employment [Special provisions] Act as more long-term solutions and salary/income reductions, pay cuts, reductions and/or non-payment of allowances, furlough and deferment of Social Security Benefits as more short-term options.

These short-term options discussed and referred to above are based on a multitude of queries raised by employers over the past few days and in the interest of keeping the respective businesses afloat. As at now, the Government has not proposed/put- forward any concrete bailout plans for businesses and employers and hence the need to visit the existing and applicable Laws in respect of immediate short term relief sought by the employers which this article will seek to focus on.

Legislation in Sri Lanka relating to Industrial, Employment and Labour relations can be divided into the following categories;

1. Laws on Social Security
    i. Employees Provident Fund Act

[1] unpaid leave - rather than laying employee off permanently

ii. Employees Provident Fund (Special Provisions) Act

iii. Employees Trust Fund Act

iv. Employees Trust Fund (Special Provisions) Act

v. Payment of Gratuity Act

2. Laws on Welfare and Well-being of Employees

i. Employment of Women, young Persons and Children Act

ii. Maternity Benefits Ordinance

iii. Employment of Females in Mines Act

3. Occupational safety and health and Workmen's compensation

i. Factories Ordinance

ii. Workmen's Compensation Ordinance

4. Laws relating to terms and conditions of Employment

i. Wages Board Ordinance No: 24 of 1941, as amended

ii. Shop and Office employees' (Regulation of Employment and Remuneration) Act

iii. Employment of Trainees (Private Sector) Act

5. Labour relations

i. Trade Union Ordinance

ii. Employees Councils Act

iii. Industrial Disputes Act

iv. Termination of Employment of Workers (Special Provisions) Act No: 45 of 1971 as amended

6. Law relating to Plantations and Estate labour
    i. Estate Labour (Indian) Ordinance
    ii. Medical Wants Ordinance
    iii. Indian Immigrant Labour Ordinance
    iv. Minimum Wages (Indian Labour) Ordinance
    v. Trade Union Representatives (Entry in Estates) Act
    vi. Estate Quarters (Special Provisions) Act
    vii. Allowances to Plantation Workers Act
    viii. Services Contracts Ordinance

7. Foreign Employment

For the purposed of this article, the provisions in relation to the short-term options and the Law relating to same is analysed and discussed. It is to be borne in mind that unlike most statutes, Employment Law Statutes carry penal consequence for breach of its provisions by way of fines and jail terms or both. Whilst the first charge is on the company, thereafter there is individual liability on the directors or individuals as employers in the case of sole proprietorships and partnerships. Hence it is advisable to consider all legal aspects prior to taking any decision in respect of the short term options referred to above.

The legislation that would have an impact on the said short term relief sought by the employers are as follows;

i. Shop and Office Employees' (Regulation of Employment and Remuneration) Act No: 19 of 1954 as amended
ii. Termination of Employment of Workers (Special Provisions) Act No: 45 of 1971, as amended

iii. Employees Provident Fund Act No: 15 of 1958, as amended

iv. Wages Board Ordinance No: 24 of 1941, as amended

Short Term options considered by Employers

Salary/income reductions, reductions and/or non-payment of allowances, deferment of Social Security Benefits and furlough.

'Salary' is a more common phrase used to define "earnings[2]". Earnings is defined as follows and includes;

(a) Basic wages or salary,

(b) Cost of living allowance, special living allowance and other similar allowances,

(c) Payment in respect of holidays[3].

(d) The cash value of any cooked or uncooked food provided by the employer to employee and any such commodity used in the preparation of or composition of any food as is so provided. The employer must assess the monthly value of the food so supplied and include it in the total earnings. The Commissioner of Labour is empowered to revise the assessment of the value of the food where such assessment is considered to be low, and his decision is final.

(e) Meal allowance

(f) Commissions paid to employees for services rendered.[4]

(g) payments made by way of piece-rate earnings

[2] Section 47 – Employee Provident Fund Act

[3] This would include payments made in respect of weekly, public and annual holidays as well as casual and privilege leave

[4] Regulation 60(3) as published in the Gazette No: 14711 dated 2nd September 1966

Total earnings do not include the following:-

(a) Rent allowance, children's allowance, travelling allowance, entertainment allowance.

(b) Overtime payments, but certain payments will not be classified as overtime payments, e.g. payments made for work done on a public or weekly holiday, in which event the payment is deemed to be an enhanced rate of wages for that day and not as overtime.

(c) Bonus payments.

Authorised deductions under the Shop and Office Employee Act

The Shop and Office Employees' (Regulation of Employment and Remuneration) Act No: 19 of 1954 as amended [hereinafter sometimes referred to as "***S & O Act***"] Provides for the deduction of salary to be made by the employer under certain circumstances. The payment of wages and/or remuneration is set out in Part II of the said S&O Act and employers are obliged to comply with the said provisions strictly.

As the Law stands, an employer cannot reduce and/or deduct wages/salary of an employee save and except under the provisions for 'Authorised Deductions' and together with the express consent of the employee. Deductions are permitted [without approval of the employee] under the Income Tax Law[5] and deductions in compliance with an Order of Court[6]. Any deductions authorised by the S&O Act[7] shall be with the express consent of the employee. The law dictates that such deductions shall not exceed 60% of the of the remuneration payable to an employee and such deductions shall be with the consent of the employee[8].

Authorised deductions referred to above under the said S & O Act include;

(a) Any advance payment made by the employer to the employee paid out of the remuneration payable to the employee for the remuneration period

(b) Contribution to pension funds, provident funds, insurance or saving scheme or recreation club approved in writing by the Commissioner and operated wholly or mainly by the employer[9],

[5] Section 19[1] [a] [i] S & O Act.
[6] Section 19[1] [a] [ii] S & O Act.
[7] Section 19[1] S & O Act.
[8] Section 19[1] [a] S & O Act.
[9] Regulation 18[1]

(c) The price of any food or article of food supplied to the employee by the employer[10], charges for lodging provided by the employer[11] and house rent provided by the employer[12],

(d) Sum required to be furnished as security by the employee, being a sum not in excess of the sum approved by the Commissioner[13]

(e) Any sum approved in writing by the Commissioner as a charge for any amenities or services provided by the employer[14]

(f) The price of any goods sold to the employee[15]

(g) Fine imposed by the employer[16]

(h) Loans taken by the employee from any fund managed wholly or partly by the employer[17]

(i) Payments made out of the remuneration of the employee at the instance of the employee to any person other than the employer of the agent of the employer[18]

As such, it is the law that an employer cannot withhold and/or make any deductions and/or reductions from the salary of an employee unless under the provisions of the said S & O Act.

In terms of Section 46[1] of the said S & O Act *"The Commissioner of Labour shall be the Officer in Charge of the general administration of the Act"* and further has exclusive jurisdiction in resolving disputes in relation to unpaid remuneration**.** The said S & O Act imposes a liability on the employer to make payment of the salary [Earnings as defined above] and the failure of an employer to make such payment to an employee and in the event of the failure to make such payment, the Commissioner of Labour is empowered to institute Action against such errant employer[19] for the recovery of unpaid salary.

[10] Regulation 18[2]
[11] Regulation 18[2]
[12] Regulation 18[3]
[13] Regulation 18[4]
[14] Regulation 18[5]
[15] Regulation 18[6]
[16] Regulation 18[7]
[17] Regulation 18[8]
[18] Section 19[1]
[19] Section 50A - S & O Act]

Section 50A reads as follows;

> ***"The liability of an employer to pay under this Act any sum as remuneration to any person employed in or about the business of any shop or office shall be a first charge on the assets of that business, notwithstanding anything in any other law"***

Further in terms of the Law[20] the Commissioner is empowered to institute Action against an errant employer to recover unpaid salary in any Primary Court or Magistrates Court.

It follows that in the event of failure to make payment of the salary by an employer and due prosecution an errant employer, such employer shall be guilty of an offence as set out in Section 51[1] of the said S & O Act, which reads as follows;

> ***Section 51 (1) In the event of any contravention of or failure to comply with any provision of this Act, other than the provisions of section 30, section 43 or section 45, or of any regulation, relating to any shop or office or to the employment of any person in or about the business thereof, the employer shall be guilty of an offence and shall be liable to a fine not exceeding five hundred rupees or to imprisonment of either description for a period not exceeding six months or to both such fine and imprisonment.***

The aforesaid provisions are supplemented by Section 53(1) which states upon being found that the employer has failed to make payment, the Court is entitled to order a further penalty of 10% to be paid to the employees over and above the sums that fall due.

In terms of the Employee Provident Fund Act No: 15 of 1958, as amended[21], [***"EPF Act"***] an employer is prohibited from reducing the earnings of an employee that would in turn reduce the contributions payable by the Employer to the Provident Fund. Hence, apart from the provisions of the S&O Act, there is further bar on the employer in reducing the salary of an employee which would render such reduction an offence[22] on the part of the employer. It is to be noted further that in the event of such reduction of salary and the consequential

[20] Section 50B – S & O Act
[21] Section 19 of the EPF Act
[22] Section 40 of the EPF Act

reduction of Provident Fund contribution, the Commissioner is entitled[23] to direct the employer to pay the difference in the contribution to the Fund.

In the said circumstances, whilst earnings cannot be reduced, an employer may consider the deferment and/or non-payment of Allowances and other payments [that do not fall within the definition of "earning"] as an immediate and viable option. However, in the event an employer is unable to meet the monthly wage bill, it is advisable to obtain a direction from the Commissioner of Labour prior to making deductions to salary.

A further option considered by employers is to withhold or defer the payment of Provident Fund payments. In terms of the EPF Act there is a legal obligation upon the employer to contribute to the said Provident Fund[24]. In the event of a failure of an employer to make its contribution to the Provident Fund, the Commissioner is entitled to recover such sums not paid together with a surcharge[25] thereon and further institute Action for the recovery of same in Court[26]. As such, a decision to defer payment of provident fund and/or refrain from paying provident fund would be contrary to law and as such untenable.

The Law does not provide for salary reductions and/or non-payment of Social Security Benefits in Sri Lanka. The options available to employers are limited in the present context save a direction from the Commissioner of Labour or the written consent of the employee authorizing the deduction of earnings subject to the parameters of the existing Laws.

The Wages Boards Ordinance contains specific provisions that apply to certain trades [i.e.- Garment manufacturing, Hotel and Catering, Printing etc.,] in respect of the terms and conditions of employment and the minimum wages payable to employees in such particular trade. This Ordinance contains similar provisions to that of the S&O Act in respect of non-payment and/or reduction of wages and carries penal sanction for non-payment or reduction of payment of wages and as such restricts the ability of an employer to reduce or deduct wages of an employee for any reason whatsoever.

[23] Section 12[1] – EPF Act
[24] Section 10[2] – EPF Act
[25] Section 16 – EPF Act
[26] Section 17 – EPF Act

It is also to be noted that in terms of the Termination of Employment of Workers (Special Provisions) Act No: 45 of 1971 as amended [***"TEWA"***] terminating the employment of an employee for non-disciplinary reasons must be in accordance with the provision of the said TEWA.

TEWA provides that no employer shall terminate the scheduled employment of any workman[27] otherwise than on account of disciplinary measures[28] either:

(a) without the prior consent in writing of the workman being obtained; or

(b) the prior written approval of the Commissioner being obtained

In terms of the said TEWA any termination of employment by the employer [other than for disciplinary reasons] based on the following would be deemed contrary to Law[29] ;

(a) Non-employment of a workman whether **temporarily** [such as furlough] or permanently

(b) Non-employment on account of closure of business

As such, the concept of furlough is contrary to Law and hence untenable in Sri Lanka.

For purposes of completeness it must be stated that the provisions of TEWA shall **not** apply[30] in the following instances:

- To an employer by whom less than fifteen (15) workmen on average have been employed during the period of six (06) months preceding the month in which the employer seeks to terminate the employment of a workman.
- To the termination of employment of any workman who has been employed by an employer for a period of less than one hundred and eighty (180) days.

A more specific question that was raised was the right of the employers to act in terms of a provisions in the Contract of Employment, whereby the parties have agreed to the right to terminate the agreement with notice to the other or in the alternative to make a payment in lieu of such notice.

[27] Section 2[1] - TEWA
[28] Section 2[4] - TEWA
[29] Section 2[4] - TEWA
[30] Section 3[1] – TEWA

It is a general principle of law that a private agreement such as contract of employment cannot alter the general law or that parties cannot contract outside the law as set out in the Legal Maxim *Pactis privatorum juri publico non derogatur*[31]

A majority of Employment Contracts contain such a clause and it has been argued that parties are at liberty to act in terms thereof. However, such a clause is, in my opinion and in considering the Sri Lankan Law, invalidated by a positive rule of law and in particular, the TEWA. As discussed above, an employer is entitled to terminate the scheduled employment of a workman [a] for disciplinary reasons, and [b] for non-disciplinary reasons. As stated above, an employer is entitled to, in law to terminate the services of an employee for misconduct and in terms of the Industrial Disputes Act No: 43 of 1950, as amended [**"*IDA*"**], an employee is entitled to move the Labour Tribunal in the event such employee is aggrieved by such dismissal[32]. However, in the event an employer seeks to rely on such a termination clause, such termination of the contract shall contravene the TEWA and in particular, Section 2 thereof.

It is further to be noted that, in terms IDA[33] the Labour Tribunal is empowered to disregard any term/condition that is stipulated in a contract of employment that is deemed unfair or contrary to law. As such, an employee whose services have been terminated by an employer placing reliance on such a clause have the right to seek relief either under the TEWA or IDA. In summary, every decision to terminate the employment of an employee for any reason whatsoever, other than on disciplinary grounds, must be compliant with Section 2 of the TEWA.

There is, in this context, an immediate need for the Commissioner of Labour to balance the scales between the parties and ensure a fair and reasonable outcome to employers and their employees in the short term and for the legislature to take cognizance of the changing demands of the global market place, as well as the local industries/businesses and amend the Laws which provides for the continuation of businesses as opposed to complete shutdown and the consequent mass scale loss of employment.

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[31] Halsbury Laws of England. Third Edition Vol 8. Page 141. Broom's Legal Maxims at Page 506
[32] Section 31[B][1] - IDA
[33] Section 31[B][4] - IDA