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The employer's right to implement mass termination at will



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Recently, the Labor Court of Appeals of the 15th Region (located in Campinas, State of São Paulo) issued a very contentious decision in the case involving EMBRAER's (the Brazilian airplane manufacturing company) dismissal of more than four thousand employees, induced by the global crisis. The case basically involves the dispute regarding the company's right to proceed with mass termination. The decision on the case was the spark for an intense public debate about the employer's right to dismiss a significant number of employees at will.

In Brazil, as a general rule, employers can freely terminate employees without cause or at will, provided the employer pays the legal indemnification due to the dismissed worker according to the applicable employment rules. This means that the employer is not required to motivate the termination of employment contracts, even in cases of mass terminations that might impact the local community.

However, despite that, upon deciding the EMBRAER case, the Labor Court of Appeals, in a preliminary decision, issued an injunction suspending the effects of the dismissal of the four thousand EMBRAER employees. On doing that, the Labor Court of Appeals said that the employer's right to dismiss at will should be somehow balanced in view of constitutional principles, such as freedom, dignity and labour's worth appreciation. This decision, although unprecedented, was in line with a judicial trend of using constitutional principles as means to allow courts to apply a less rigid interpretation of legal provisions. This is the so-called constitutionalisation of rights, seen as a movement by courts to allow judges to disregard the written law and innovate whenever they see a profoundly unfair situation resulting from the application of a legal provision as it is in the law.

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TERMINATE EMPLOYEES WITHOUT CAUSE OR AT WILL,
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ACCORDING TO THE APPLICABLE EMPLOYMENT RULES

Proceeding in this way, the Labor Court of Appeals decided, in violation of the Brazilian Labor Code, which allows the termination of employees at will, even in cases of mass terminations, to expand the role of constitutional principles.

Usually principles should only be used as broad directions to guide the judge when the topic of discussion is not clearly ruled by the law or when there are divergent doctrine and/or court decisions. The problem with this decision is that it seems to give the courts an excuse to disregard the law whenever they disagree with the end result of its application to the concrete situation. This creates a high degree of insecurity regarding the enforceability of the existing legislation. The system should protect those who are in compliance with the law, in a way that no one should be ordered to act differently from what is clearly stipulated by law.

The Labor Court of Appeals' initial decision was written by a Justice of the court who defends the need to regulate mass termination in Brazil or to eliminate the rule that allows unmotivated terminations. For this reason, the decision was fiercely attacked by those who believe the country needs a more stable business environment that foments entrepreneurship, and protects legitimate business initiatives from unexpected changes in the legislation when they abide by the existing laws.

Both parties have valid points: it is fair to seek some limitation to a company's ability to terminate a significant number of employees without motivation or prior negotiations with the employees' unions and to try to explore means to minimise the unavoidable effects of mass terminations. However, it is also fair that companies in compliance with existing laws are not penalised by creative interpretations of these laws.

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Assuming that the terminations carried out in the EMBRAER case were, in fact, necessary to preserve the company and avoid undesirable effects on the economic crisis that could affect even more jobs and significantly reduce tax revenues, it seems clear that no one could contest the decision to terminate those employees. Asking if the terminations were motivated is the same as applying a rule that does not exist to the case, revoking the company's right to unmotivated termination. If the law does not require companies to explain and demonstrate the need to terminate thousands of employees, then the courts should not ask companies to do so unless the law is changed.

Even though this decision may be clearly questioned, as it violates applicable rules, it has, on the other hand, fomented a healthy debate about the regulation of mass terminations that may result

in future bills of law, either limiting the right to mass termination at will or eliminating the concepts of unmotivated termination. In such a manner, the EMBRAER case is a case in which the Judiciary branch is invading the field of the Legislative branch. However, this process will force congress to enact laws that would not prevent the termination of those four thousand employees, assuming they were properly motivated, but would introduce in the legal system mechanisms to try to avoid or minimise the effects of these undesirable and most of times unavoidable events.

In the EMBRAER case, the first decision suspending the termination was then revoked and the company was allowed to terminate, but ordered to pay benefits not provided for in the law (extension of medical plan) and to pay salaries related to the period of suspension of the termination.

This decision was then the subject of an appeal to the Superior Labor Court, which granted the company's request to maintain the effects of the previous decision (obligation to pay these additional benefits and salaries) until the appeal is finally ruled by one of its chambers. The Superior Labor Court will then have the final say on how the existing laws should be interpreted and applied. Even so, given the actual circumstances, Congress should consider whether it is time to review these laws and adjust them.

USUALLY, PRINCIPLES SHOULD ONLY BE USED AS BROAD DIRECTIONS TO GUIDE THE JUDGE WHEN THE TOPIC OF DISCUSSION IS NOT CLEARLY RULED BY THE LAW OR WHEN THERE ARE DIVERGENT DOCTRINE AND/OR COURT DECISIONS