<u>COVID-19 – PITFALLS FACED BY THE EMPLOYER AND THE NEED OF THE HOUR</u>

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When the first patient was infected with a virus now known as Covid-19 in December 2019, no one envisaged that it would result in a pandemic of such great proportion. There have been numerous pandemics in the history of the human civilization. In the 20th century we witnessed pandemics such as the Spanish Flu, Asian Flu and the Hong Kong Flu. The first pandemic faced in the 21st century was the A(H1N1) otherwise known as the Swine Flu. Some of these pandemics have, up to now claimed more victims, none have had such an impact globally as Covid-19.

As Covid-19 has infected more than two and a half million people in more than two hundred countries, it has caused the global economy to come to a virtual standstill.

Sri Lanka, being a participant in international trade and tourism has been adversely affected. In addition to the repercussions faced due to the impact of Covid-19 internationally, Sri Lanka's economy has countenance a further blow due to the imposition of an island wide curfew to minimize the spread of the virus.

As result of the spread of this virus globally and the promulgation of curfew within the island, all trade and commerce has stalled dealing a severe blow to businesses. Exporters had orders cancelled overnight, the tourism industry has come to a grinding halt with no tourists visiting the country and the manufacturing industry is unable to continue operations.

We have now come to realize the stark reality - things are bound to get worse before it gets better. The question on everyone's mind is, "when?" With no vaccine or cure in the foreseeable future and number of infected on the rise both locally and globally - this is not a question which can be answered with any certainty.

At present, the conundrum faced by industries is to ensure survival without any sustainable income. Employers are compelled to pay their employees' wages even though they are unable to report to work or participate constructively in the daily operations. Employers are unable to obtain bank financing to meet their basic costs. Shareholders are faced with an additional burden of being required to make further investments without any hope of any return in the foreseeable future. In the eyes of the shareholder one viable option will be to take the ultimate decision - liquidation. This will have far reaching consequences not only to the economy of the country but also on the social fabric.

An alternative to liquidation is to take steps to reduce the ongoing liability till the return of normalcy. One option available is to reduce ongoing costs - such as the cost of labour. Keeping this option in mind there are many questions that loom in the minds of the Sri Lankan business community.

The most pressing are:

1. Can an employer reduce the wages of its' workman?
2. Can an employer take steps to reduce its' workforce?
3. Is our Labour Laws and is the Commissioner General of Labour suitably empowered to resolved issues that will arise as a result of Covid-19?

## IS THE REDUCTION OF SALARIES PERMITTED BY LAW?

Prior to delving into the question as to whether it is legally possible to reduce salaries of employees, it is necessary to examine the definition of “wages”, “salaries” or “remuneration” given in several pieces of legislation in Sri Lanka.

These terms have been interpreted in several legislative enactments such as the Shop and Office Act[1], Employee Provident Fund Act[2], Employee Trust Fund Act[3] and the Payment Gratuity Act[4]. It must be noted that in all these enactments an employee’s wage or salary includes “cost of living allowances” and “special living allowances” and/or “other similar allowances”.

Accordingly, employers are required to calculate contributions to be made to the Employee Provident Fund, the Employee Trust Fund, payments as Gratuity and also for the computation of compensation in terms of the Termination of Employment of Workmen (Special Provisions) Act[5].

Hence, allowances such as cost of living allowances, special living allowances and other similar allowances all come within the definition of “remuneration” or “wage or salary” and must be considered part and parcel of an employee’s remuneration.

S. R. De Silva states that in relation to the Employment Provident Fund Act “*non-recurring cost of living gratuity paid under certain Collective Agreements to which the Employer’s Federation of Ceylon or its members are parties, do not, by practice as a result of certain understandings with unions, attract provident fund contributions*[6]”. He further states that “total earnings” do not include rent allowances, children’s allowances[7]

In the case of **Coca Cola Beverages Limited Vs. The Commissioner General of Labour and others**[8] an allowance of Rs. 8500/- was paid to the 6th Respondent. As the Petitioner failed to include the allowance when calculating gratuity, the Commissioner General of Labour instituted action. The position of the Petitioner before the Court of Appeal was that the allowance of Rs. 8500/- was a "perk" and therefore did not attract the provisions of the Gratuity Act and the Employee Provident Fund Act. Goonaratne J held that if an allowance is paid as "perk" it would not attract the provisions of the Gratuity Act and the Employees Provident Fund Act. However, His Lordship was of the view that no evidence was placed before Court that the allowance was in actual fact paid as a "perk". His Lordship further distinguished this case from the National Workers Congress Vs. Madihahewa[9] for the reason that "price and price share supplement" and "attendance incentive" paid in the Madihahewa case was a non-recurring allowance unlike the allowance paid to the 6th Respondent in the Coca Cola case.

Hence, it must be deduced that allowances which can be established to be "perks", which are not recurring and/or do not fall within the definition of "cost of livening allowance", "special living allowance" or "other special allowance" do not form part of "wage" and "salary and remuneration" of an employee. Thus, it can be concluded, that it is well within the employer's right to cease making such payments at its' desecration at times such as these.

We shall now deal with the reduction to salaries (which includes "cost of livening allowance", "special living allowance" or "other special allowance") making reference to several legislative enactments.

Both the Shop and Office Act[10] and the Wages Boards Ordinance[11] (which contain identical provisions) do not provide for the reduction of remuneration but instead provides for the "deduction" of remuneration in certain circumstances. The Employer is required to make deduction in terms of the Law or in compliance with an order of Court. In addition, an employer is entitled to make such deductions in case of authorized deductions with the consent of the employee.

As previously mentioned, this particular section deals "deductions" as opposed to "reductions". Therefore, the Shop and Office Act and the Wages Board Ordinance, do not in any way provide for nor does it deal with the reduction of remuneration.

The Employee Provident Fund Act[12] and the Employee Trust Fund Act[13] contain the identical but rather ambiguous provisions relating to the reduction of earnings of an employee. For the purpose of clarity, the relevant section is reproduced below:

> *"No employer shall, **by reason of his liability to pay in respect of any employee any contribution or surcharge under this Act**, reduce the earnings of that employee or alter to the detriment of such employee any benefit which the employee is entitled to under the provisions of any written law or under the terms and conditions of his employment."*

This section stipulates, that an employer is prohibited from reducing the earning of an employee if the intention is to reduce the employer liability to make contributions or pay surcharge in respect of an employee. Thus, the Employee Provident Fund Act and the Employee Trust Fund Act only deals with the reduction of earning in specified circumstances and does not deal with reduction in general terms.

As no legislation explicitly prohibits the employer from reducing an employee's earnings for reasons such as to avert financial disaster that will be sustained by industries as a result of the adverse repercussions caused by the Covid-19 pandemic to the country and the world. This does not arm the employer with the authority to reduce an employee's earnings or salary unilaterally.

A contract of employment is like any other contract/agreement entered into between two parties confers rights and obligations on both. Under a contract of employment, the foremost obligation of the employer is to pay the employee remuneration agreed upon while the foremost obligation of the employee is to discharge the agreed services diligently and efficiently. In the event of either party failing to discharge a duty or an obligation conferred in terms of the said contract, such defaulting party would be in breach of the contract.

S. R. De Silva has stated that "*in conceptual terms it can be said that when an employer breaches a fundamental obligation of the contract of employment, the employee is entitled to treat such a breach as a constructive termination by the employer, which puts an end to the contract*"[14]. S. R. De Silva further provides examples in order to enunciate the above:

> "*If an employer refuses to pay an employee his salary in circumstances which make such refusal illegal, the employee can treat the employer's refusal as a constructive termination of the contract or again, the employer may seek to unilaterally vary the contract on a fundamental matter, e.g. demote him. In such cases the employee often purports to resign from the service of the employer for the reason that the latter has compelled him to do so. Such a resignation is in law a constructive termination by the employer and does not*

*preclude the employee from claiming relief before a Labour Tribunal on the basis that there has been a termination by the employer.*"

Hence, if an employee's salary (a fundamental element in the contract) is unilaterally reduced by the employer, it will be considered as a fundamentals breach of the contract and thus illegal. The employee will then be entitled to consider such an act as an act of constructive termination and seek his remedy in the Labour Tribunal. An employee may also complain of nonpayment of earned wages to The Commissioner General of Labour who after due inquiry has the power to prosecute[15].

Thus, the only recourse available to any employer is to reduce an employee's salary, in these perilous times would be with the consent of the employee. Hence, consent would amount to a consensual alternation of the contract of employment. However, here too the employer is faced with restrictions. In terms of the Wages Boards Ordinance[16] the Minister of Labour has declared a number of Wages Boards in respect of numerous trades which stipulates the minimum wage that is payable in the relevant trade. The employer is not permitted, even with consent of the employee reduced the salary of such employee below the minimum wage stipulated by the relevant Wages Board. However, the Wages Board Ordinance restrictions may not apply to executive staff and the senior management team as most of the Wages Board decisions are for supervisory level and below.

## IS RETRENCHMENT PERMITTED BY LAW?

As previously stated, the Covid-19 pandemic has caused business activities of most organizations to come to a virtual halt. In this predicament, many organizations are considering to downsizing its work force in other words retrenching employees.

In Sri Lanka there are two primary legislative enactments that deal with retrenchment. One is the Termination of Employment of Workman (Special Provisions) Act (TEWA) and the other is the Industrial Disputes Act and more specifically part IVB[17].

In order for the provisions of TEWA to be applicable, certain criteria must be fulfilled. One is that an employer has to on an average employ not less than fifteen employees during a period of six months prior to the month of termination[18]. This is slightly different to the Industrial Disputes Act. Part IVB of Industrial Disputes Act will be applicable to an employer has employed not less than fifteen workmen on an average for a working day in the month preceding the month in which notice of the intention to effect retrenchment[19]. It must be noted that the qualifying period under TEWA is six months prior to termination while in terms of the Industrial Disputes Act the period is

one month prior to making an application to the Commissioner of Labour. The next criterion required to be fulfilled in terms of TEWA is that an employee must be in employment for a period not less than one hundred and eighty days within a continues period of twelve months[20]. The other requirement is that termination should not have been effected by way of retirement in accordance with the provisions of a collective agreement that was in force at the time of retirement or a contract of employment which expressly stipulates the age of retirement[21]. Further the provisions of TEWA is not applicable to employees of the Government, Local Government Service Commission, local authority, cor-oprative society or public corporations[22]. It is noted that even though the provisions of TEWA do not apply to those employed in public corporations, such employees can find cover under the Industrial Disputes Act. It must also be noted the part IVB of the Industrial Disputes Act does not apply to employees who are covered under TEWA[23]

TEWA forbids an employer terminating a workman except with the prior written approval of the Commissioner General of Labour or with the prior consent in writing of a workman[24]. The said Act goes on to state that an employee is deemed to be terminated if a workman is not provided employment by his employer either temporarily or permanently or in consequence of closure of the employers' trade, industry or business. However, the exception is if the termination is due to punishment consequent to disciplinary action[25]. The employer is required to notify such workman in writing the reasons for termination[26].

The Industrial Disputes Act[27] requires an employer to follow the procedure setout in the event of retrenchment of any workman to whom the provisions of the Industrial Disputes Act is applicable unless such retrenchment is in consequence of an agreement between the employer or the representative of the employer and the workman or the representative of the workman, or a settlement or award under the Act. Hence, the termination of any employee for non-disciplinary reasons contrary to the above would be illegal and unlawful.

Even in the prevailing situation, termination of a workman due to the effects of Covid-19 will have to be in compliance with the provisions of TEWA and/or the Industrial Disputes Act depending on its' applicability. Thus, as it stands today, following the procedure set out in TEWA or the Industrial Disputes Act will be a long drawn out process especially after the 2003 amendment to TEWA,[28] which sets out a procedure which has been held to be not mandatory but directory. The only recourse available to an employer is to offer a severance package to employees who have become redundant in return for their resignation. However, this will be a costly exercise for an employer in the present context.

Even if an employer or a workman does not fall within the ambit of TEWA or part IVB of the Industrial Disputes Act, this does not bestow the employer with an unfettered right to terminate the services of a workman. The reason being, that even though the provisions of the said Acts are not applicable, an employee shall have an unfettered right to make an application to the Labour Tribunal to seek redress based on equity. In addition, the Commissioner General of Labour or the Minister of Labour, may, in the above circumstances act in terms of Section 3 and/or 4 of the Industrial Disputes Act when the matter is brought to his notice by the employee and refer the dispute to Conciliation, Arbitration or to an Industrial Court.

In these circumstances it is of paramount importance that all parties concerned (i.e. the employer, the employee and the Commissioner of Labour) act with the best interest of all parties in mind to ensure the survival of industries, and to minimize the negative social repercussions until normalcy is established.

## IS OUR LABOUR LAWS SUITABLY EQUIPPED TO RESOLVED ISSUES THAT HAS ARISEN AS A RESULT OF COVID-19?

Due to the economic downturn consequent to Covid-19, the most expected labour related issues that may arise would relate to reduction of salaries and the retrenchment workman. The question is whether our labour laws are suitably equipped to deal with these disputes in a timely, efficient and equitable manner.

As already mentioned earlier, the reduction of salaries and the retrenchment of workmen (without the involvement of the Commissioner of the Labour) must be with consent of each affected workman. However, if such consent is refused and the employer choses to go ahead, this action would give rise to an industrial dispute.

In the event an employer decides to reduce wages without consent of the workman, this unlawful act will be dealt with by the Commissioner General of Labour in terms of the provisions of either the Shop and Office Act or the Industrial Disputes Act.

The Shop and Office Act provides that the employer pay a workman remuneration directly other than authorized deductions made with consent of such workman.[29] The Act further specifies that the employer shall fix a period in respect of which remuneration is payable (which cannot exceed one month). It also specifies the time frame within which remuneration must be paid.[30] The Shop and Office Act makes the failure to pay remuneration in accordance with the provisions of the Act an offence and imposes the penalties and punishments that will be meted out to an errant employer.[31]

Since the Shop and Office Act does not deal with the reduction of remuneration and if an employer does reduce the remuneration of a workman without his consent, the Commissioner General of Labour is empowered to institute action against such employer.[32] An inquiry need not be held to offer the employer an opportunity to establish a justification for the reduction of remuneration. Instead, if it is established that an employee's remuneration was in fact reduced, the Commissioner General of Labour will be compelled to institute proceedings against an errant employer. In this situation, the Commissioner General of Labour will not be in a position to consider the financial impact of Covid-19 or incidental circumstances of an employer prior to taking legal action.

If however the Commissioner General of Labour is of the opinion that the question of reduction does not fall within the ambit of the Shop and Office Act, in such an instance the Commissioner General of Labour or the Minister of Labour may consider the reduction, a dispute and act in terms of the Industrial Disputes Act and refer the dispute to Conciliation, Arbitration or to an Industrial Court. The pitfalls of such a reference shall be discussed later.

On the question of retracement of workmen (for non-disciplinary grounds), there are two alternatives that are available to an employer. One, is to obtain permission of the Commissioner General of Labour by way of an application[33] or secondly to terminate the services of a workman without permission. In the latter instance such termination will be considered illegal, null and void, and shall be of no effect[34] and a workman is entitled to make an application to the Commissioner General of Labour within six months of such termination[35].

In both instances the Commissioner General of Labour will conduct an inquiry in order to ascertain if the employer is entitled to terminate the services of a workman or not.

When an application is made by the employer to obtained permission, the Commissioner General of Labour may either grant or refuse permission. If permission is granted, it may be subject to certain terms and conditions including terms and conditions relating to the payment of a gratuity or compensation[36]. Either way an employer will be liable to pay wages until the date of the decision of the Commissioner General of Labour.

If a workman is terminated without the permission of the Commissioner General of Labour and an application is made in terms of section 6B, the Commissioner General of Labour may either order continued employment[37] or if the termination is in consequence of the closure by his employer of any trade, industry or business the Commissioner General of Labour may order the employer to pay the workman compensation as an alternative to the reinstatement and gratuity or any other benefits payable[38] as reinstatement will not be possible.

The provisions of the Industrial Disputes (Hearing And Determination Of Proceedings) (Special Provisions) Act, requires the Commissioner General of Labour to make his decision within two months of receiving applications as per sections 2, 6 and 6A(1) of TEWA[39]. However, in the experience of the writers, these inquiries, often take a period in excess of a year.

The employer will have to expend a fair amount of money as the employer will be required to pay the workman his or her wages. Even in a situation where a workman is terminated without permission for the reason that sections 5 of TEWA make any termination in contravention to the said act illegal, null and void, and accordingly be of no effect. After the conclusion of the inquiry or during the pendency of it, the employer may be ordered to reinstate the employee with back wages and other benefits[40] and pay compensation which is capped at a sum of Rs. 1.25 million. Though TEWA does not bind the Commissioner General of Labour to award compensation but to act on his discretion, and in the event of wrongful termination, it is the practice that compensation is awarded and is thus calculated based on a formula already determined and duly published in the gazette[41].

These provisions are counterproductive in this present situation. Industries have come to a grinding halt. The continued payment of wages is draining industries dry. The only option available to employers is to terminate excess workman in order to ensure continuation of industries. In the event of termination, expenses will have to be incurred which to many employers will be prohibitive. The laws relating to retrenchment are inadequate and insufficient to deal with situations such as these in a fair and impartial manner considering the plight of both the employer and the employee.

Regarding *other disputes* that may arise as a consequence of the Covid-19, the Commissioner General of Labour and the Minister are enabled with certain provisions in the Industrial Disputes Act. Under the said Act, the Commissioner of Labour is empowered to refer disputes to Conciliation and Arbitration[42] . The Minister is empowered to refer such disputes to Arbitration or to an Industrial Court.[43]

When a dispute is referred to Conciliation, the Commissioner Labour or the authorized officer is required to bring about a settlement within one month[44]. However, if a settlement is not possible, such dispute will be referred to Arbitration or to an Industrial Court by the Commissioner General of Labour or the Minister as the case may be. In terms of the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act, an arbitration referred by the Minister or the Commissioner General of Labour is required to be concluded within three months of such reference[45]. However, there is no such time limit placed on Industrial Courts in both the Industrial

Disputes Act and the Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act.

However, despite such time limitations being placed, these proceedings cannot be concluded within the prescribed period and it will be ineffective in the current situation. It is imperative that disputes are resolved swiftly and expeditiously.

In perilous times such as these, it is of utmost importance that neutral and equitable ground is struck to ensure the survival of industries and the wellbeing of the workman as the collapse of either will result a plethora of social and financial issues. There are a few concessions that can be made available to the employer depending on the approach taken by the authorities. For instance, the Employee Provident Fund Act[46] and the Employee Trust Fund Act[47] specifically states the period within which contributions have to be made. Further both Acts[48] empower the Commissioner General of Labour and the members of the ETF Board, to levy a surcharge for delayed contributions. However, authority is given to the Commissioner General of Labour and the members of ETF Board to use their discretion if the employer is able to satisfy it that the nonpayment was due to reasons beyond the control of the employer.

It is imperative that the Commissioner General of Labour and the Minister of Labour act in a objective manner and afford industries all possible leeway in their discretion for the benefit of the economy.

## THE NEED OF THE HOUR

The laws relating to employment are very stringent and do not afford any leeway to the authorities or the employer to act in a pragmatic manner to ensure equity to both parties.

The Commissioner General of Labour is not provided with authority to promulgate necessary regulation to rapidly ease the burden on the employer and to provide temporary relief to the employee during these treacherous times.

There are several provisions in our labour laws which place undue burden on the employer. For instance, in the present context where employees are unable to attend to their duties, the employer is compelled to make contributions to EPF and ETF on behalf of such employee which places immense financial burden on the employer. Even when an employer discontinues the employment of a workman with his or her consent, in terms of the Payment of Gratuity Act, the employer is required to pay the employee gratuity within a period of thirty days of cessation of employment. If the employer fails to do so he will be liable to pay a surcharge[49].

Other jurisdictions have identified the necessity for the involvement of the state to reduce the burden on the employer and have taken pragmatic steps to cushion the blow for both the employer and employee. For instance, in Singapore the state will put in place a "Job Support Scheme" where the employer will be provided with a 75 per cent subsidy for the first $4,600 of gross wages paid for all local employees. Other countries too are on the verge or already have passed urgent legislation to reduce the burden on both the employer and the employee. Hence, it is of utmost importance that the legislature intervenes and enact legislation to minimize the effect of Covid-19 on the industries and employees.

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[1] Shop and Office Act No. 19 of 1954 (as amended)
[2] Employee Provident Fund Act No. 15 of 1958 (as amended)
[3] Employee Trust Fund Act No. 46 of 1980 (as amended)
[4] Payment Gratuity Act No. 12 of 1983 (as amended)
[5] Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended)
[6] The Law of Superannuation Benefits in the Private Sector by S. R. De Silva, Monograph No. 5, Second Edition, 2002 - Page 9.
[7] Page 10 - The Law of Superannuation Benefits in the Private Sector by S. R. De Silva, Monograph No. 5, Second Edition, 2002.
[8] CA(W)382/2009 with CA(W)383/2009 Court of Appeal Minutes 06.03.2013
[9] Court of Appeal Application 1128/2001
[10] Section 19(1) of the Shop and Office Act No. 19 of 1954 (as amended)
[11] Section 2(a) of Wages Boards Ordinance No. 27 of 1941 (as amended)
[12] Section 19 of the Employee Provident Fund Act No. 15 of 1958 (as amended)
[13] Section 23 of the Employee Trust Fund Act No. 46 of 1980 (as amended)
[14] The Contract of Employment by S. R. de Silva, monograph No.4 – page 158
[15] Section 50B of the Shop and Office Act No. 19 of 1954 (as amended)
[16] Wages Boards Ordinance Ordinance No. 27 of 1941
[17] Industrial Disputes Act No. 53 of 1973 (as amended)
[18] Section 3(1)(a) of the Termination of Employment of Workman (Special Provisions) Act No. 45 of 1971 (as amended)
[19] Section 31E(1)(a) of Industrial Disputes Act No. 53 of 1973 (as amended)
[20] Section 3(1)(b) of the Termination of Employment of Workman (Special Provisions) Act No. 45 of 1971 (as amended)
[21] ibid Section 3(1)(c)
[22] ibid Section 3(2)(d),(e),(f),(g),(h),(i)
[23] ibid Section 4
[24] Section 2(1) of the Termination of Employment of Workman (Special Provisions) Act No. 45 of 1971 (as amended)
[25] ibid Section 2(4)
[26] ibid Section 2(5)
[27] Section 31F of Industrial Disputes Act No. 53 of 1973 (as amended)
[28] Termination of Employment of Workmen (Special Provisions) Amendment Act No. 12 of 2003
[29] Section 19(1)(a) of the Shop and Office Act No. 19 of 1954 (as amended)
[30] ibid Section 19(b)
[31] ibid Section 52

[32] ibid Section 50B
[33] Section 2(2)(a) of Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended)
[34] ibid Section 5
[35] ibid Section 6B
[36] ibid Section 2(2)(e)
[37] ibid Section 6
[38] ibid Section 6A
[39] Sections 11, 12 and 13 of Industrial Disputes (Hearing and Determination of Proceedings) (Special Provisions) Act No. 13 of 2003
[40] Section 6 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (as amended)
[41] ibid Section 6D
[42] Section 3 of the Industrial Disputes Act No. 43 of 1950 (as amended)
[43] ibid Section 4
[44] ibid Section 11(3)
[45] ibid Section 14
[46] Section 10 of the Employee Provident Fund Act No. 15 of 1958
[47] Section 16 of the Employee Trust Fund Act No. 46 of 1980
[48] Section 16 of the Employee Provident Fund Act No. 15 of 1958 and Section 27 of the Employee Trust Fund Act No. 46 of 1980
[49] Section 5 of the Payment of Gratuity Act No. 12 of 1983 (as amended)