

VIRAL LAW

A blog series on legal issues arising from the *Corona* pandemic

Meeting Employer obligations during the *Corona* Pandemic

by

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The recent outbreak of COVID-19, and the resulting partial lock down of the country, have adversely affected businesses that were already struggling to survive post the Easter bombings. Employers are now faced with the situation of having to keep their staff back at home but also, at the same time, being legally obliged to make payment of salaries. How then do employers meet these payment obligations at a time when the businesses are generating limited, if not no, income?

At the outset, it is to be noted that the labour law framework in Sri Lanka has not expressly provided for such a situation¹. Also, unlike most other countries, the government has not yet stepped into announce a relief package either for struggling businesses or for those employers who are unable to make payment of salaries. A few examples of such packages being offered abroad, and which could perhaps assist the Sri Lankan government in formulating its own relief schemes are (a) the *COVID Employer Refund Scheme* announced by the Government of Ireland which enables employers to make payment, and receive a refund, of € 203 per week paid to employees who have been temporarily laid off;² and (b) the *Employer COVID-19 Wage Subsidy* put together by the Government of New Zealand which provides employers with a maximum subsidy of \$ 150,000 in respect of employee payments.³ Some, if not most, of these schemes are conditional on employers retaining a certain percentage of their cadre in continued employment.

If businesses are to survive in Sri Lanka, therefore, solutions both within and outside the existing legal framework would need to be explored. Some of these solutions are listed out below for consideration:

1. Negotiated Settlements Between Employers and Employees

The damage that has been caused by the COVID-19 virus on the economy is unprecedented. Both employers and employees therefore would need to address the situation before them rationally and meet halfway. Whilst employers need to ensure that some payment is made, employees need to also understand that the payment of full salaries at this time may not be possible. Employees would also presumably choose job security over full payment.

¹ Although the provisions of the Termination of Employment of Employment of Workmen (Special Provisions) Act No. 45 of 1971 deals with the closures of businesses, and the minimum compensation to be provided thereat, that is the last resort for employers who would instead presumably like to keep their businesses afloat during these times. In any event, the provisions of the TEWA only apply to employers who have more than fifteen (15) employees.

² <https://www.gov.ie/en/service/6c6582-employer-covid-19-refund-scheme/>

³ <https://www.workandincome.govt.nz/documents/eligibility/emergencies/covid-19/wage-subsidy-and-leave-payment-employer-support-factsheet.pdf>

In the event that the parties are able to negotiate a reduction in wages for a period of time, the same can be given legal effect to by the Commissioner of Labour in terms of Section 3(a) of the Industrial Disputes Act No. 43 of 1950 (as amended) (“**IDA**”).⁴ Employers are reminded that (a) unlike the provisions of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 (“**TEWA**”), the IDA applies to employers of even one employee and therefore even small businesses can utilize this option; (b) to be legally binding, the negotiated settlement may need to be sent before the Commissioner of Labour; (c) care has to be taken that all wage reductions are done across the board so as to avoid allegations of unfair or unjust termination.; and (d) for those industries that are unionized, any negotiated settlements would require the approval of the trade union.

In the event that the parties are unable to negotiate a settlement, all is not lost as there are various options such as conciliation and voluntary arbitration that are provided for in the IDA, which would help them achieve a settlement.

2. *Cessation of Discretionary Payments*

Whilst the primary obligation of employers in an employer-employee relationship is the payment of wages, this obligation does not extend to discretionary payments such as bonuses, variable allowances not forming a part of the basic salary, etc. As such, employers can temporarily cease making such payments and reduce the financial burden. Again though, care is to be taken as to what constitutes a discretionary payment and what payments have through practice and / or the contract of employment, formed a part of the basic salary of an employee - as a failure to make payment of the latter, without the approval of the employee, could cause the employer to be in breach of his obligations in terms of the contract of employment.

3. *Shedding of Excess Cadre*

Although not ideal, it is inevitable that if the current situation continues, employers may need to shed their excess cadre in order to keep their businesses afloat. For those employers who have more than fifteen (15) employees this would require the approval of the Commissioner of Labour in terms of TEWA. Those with less than fifteen (15) employees would need to carry the scheme out in with the approval of employee through offering them financial incentives, i.e. voluntary retirement schemes. Although the same requires an expenditure, it may prove less costly in the long term, than keeping such employees on.

⁴ This remedy extends to any “industrial dispute” between employers and employees and the definition of “industrial dispute” in the IDA is wide enough to cover disputes regarding terms of employment.

Another option that employers could explore is to see whether they could terminate employees by claiming an event of *force majeure*. This argument has however not been tested and care would need to be exercised in utilizing the same.

4. Seasonal Workers

One sector that has been particularly affected is the hotel sector, with the President of the Tourist Hotels Association of Sri Lanka calling it “...the worst crisis we have ever seen in the tourism industry,”⁵ One option that is legally available to employers in this sector is the shedding of those workers who could be classified as “seasonal employees” and those whose contracts of employment are temporary or casual in nature. Whilst hoteliers are advised to obtain counsel on the classification of these workers, this is a distinctive advantage that the industry possesses that it should utilize.

These then are some of the options that are available for employers to explore. Employers are advised to make these decisions in consultation with legal counsel and entities such as the Employers’ Federation of Sri Lanka as local labour laws are skewed towards employees and any perceived reduction in employee benefits may not be well received, unless done within the existing framework.

⁵ <https://economynext.com/sri-lanka-tourism-could-be-facing-worst-crisis-in-history-from-coronavirus-hotels-chief-59061/>