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EMPLOYMENT AND EMPLOYEE BENEFITS

Employment and employee benefits in Sri Lanka: overview

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SCOPE OF EMPLOYMENT REGULATION

1. Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Laws applicable to foreign nationals

Sri Lankan employment laws do not distinguish between foreign or local employees and are applied equally to both, irrespective of whether the employment is regular, on a fixed-term basis, casual or seasonal. The main provisions concerning employment are as follows:

- Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 and amendments to this Act.
- Wages Board Ordinance No 27 of 1941 and amendments to this Ordinance.
- Factories Ordinance No 45 of 1942 and amendments to this Ordinance.
- Industrial Disputes Act No 43 of 1950 and amendments to this Act.
- Workmen's Compensation Ordinance No 19 of 1934 and amendments to this Ordinance.
- Trade Union Ordinance No 14 of 1935 and amendments to this Ordinance.
- Maternity Benefits Ordinance No 32 of 1939 and amendments to this Ordinance.
- Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 and amendments to this Act.
- Employees Provident Fund Act No 15 of 1958 and amendments to this Act.
- Employees Trust Fund Act No 46 of 1980 and amendments to this Act.
- Payment of Gratuity Act No 12 of 1983 and amendments to this Act.
- National Minimum Wages of Workers Act No 3 of 2016.
- Budgetary Relief Allowance Act No 4 of 2016.
- Inland Revenue Act No 24 of 2017.

Laws applicable to nationals working abroad

The only other regulation specific to nationals working abroad is the Sri Lanka Bureau of Foreign Employment Act No 21 of 1985.

EMPLOYMENT STATUS

2. Does the law distinguish between different categories of worker? If so, what are the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

Categories of worker

Sri Lankan employment law does not distinguish between categories of employment for the purposes of the application of employment law. The definitions of "workman" and "employee" as contained in the statutes apply equally to all categories of employees. However, in practice, the following categories of employment have been identified:

- Probationary employment: persons who are serving a probation period under a contract of employment.
- Regular employment: persons employed under general contracts of employment.
- Casual employment: persons employed on a short-term needs basis, which generally does not relate to the employer's core business.
- Seasonal employment: persons employed in industries that have seasonal demands, to meet the additional manpower requirements of those seasonal demands.
- Fixed-term employment: persons employed for a fixed-term period.

Whilst an employee renders service under a "contract of service", an independent contractor provides services under a "contract for services". In determining whether a person has rendered services as an employee or as an independent contractor, a labour forum or Sri Lankan court will go beyond the provisions of the contract or written instrument (even though such writing will be of evidentiary value during an inquiry/trial process) and consider all of the facts and surrounding circumstances under which such services were rendered. Sri Lankan courts have followed English judicial precedents in formulating several tests to be applied in determining and distinguishing between an employment relationship and a contract for services, which are also followed by the labour forums. These tests comprise the following:

- Control test.
- Integration test.
- Economic reality test.

In applying any of these tests, the following factors are taken into consideration to determine whether an employment relationship, rather than a contract for services, exists (these are not meant to be exhaustive):

- Control test:
  - the exercise of control/direction/supervision or a reporting mechanism (that is, attendance/adherence to leave procedure, and so on);
  - exercise of disciplinary control/right of dismissal;
  - power of selection;
  - power of exclusivity of service.
- Integration test:
  - whether the work/function performed is a core activity of the beneficiary and/or any title/designation provided by the beneficiary to the worker (for example, a person discharging the function or holding a designation such as CEO, manager and so on has been held to necessarily infer a relationship of employment under this test);
  - exclusivity of service;
  - the place where the services are rendered and the frequency of the provision of such services.
- Economic reality test:
  - the mode of payment of remuneration (for example, payments made as "salaries" on a fixed basis have been deemed to constitute an employment relationship, as opposed to payments by the job);
  - the payment of superannuation contributions (in limited instances) will usually constitute an employment relationship;
  - ownership of tools or equipment utilised in the production of goods or the provision of services (where the beneficiary of the services owns the tools or equipment).

Entitlement to statutory employment rights

All categories of employees are entitled to superannuation benefits under the Employees Provident Fund Act No 15 of 1958 (EPF) and, where applicable, the Payment of Gratuity Act No 12 of 1983 (Gratuity Act). The following laws also apply equally to all categories of employees:

- Industrial Disputes Act No 43 of 1950 and amendments to that Act.
- Workmen's Compensation Ordinance No 19 of 1934 and amendments to that Ordinance.
- Trade Union Ordinance No 14 of 1935 and amendments to that Ordinance.
- National Minimum Wages of Workers Act No 3 of 2016.
- Budgetary Relief Allowance Act No 4 of 2016.
- Inland Revenue Act No 24 of 2017.

The terms and conditions of employment for employees engaged in a shop or office will be governed by the Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 (SOEA), whereas wages boards have been declared by a Regulation of the Minister of Labour to decide which category of employees within specified industries will fall within their purview and regulates matters such as wages, holidays, leave and overtime which will be determined by way of a Regulation made under the Wages Board Ordinance No 27 of 1941 from time to time.

The Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 will apply where the employer and employee meet the requirements specified in the Act. The Maternity Benefits Ordinance No 32 of 1939 will apply where the employee is not covered by the SOEA, and the Factories Ordinance No 45 of 1942 provides for the safety and welfare of employees working in a factory.

Whilst the EPF and the Employees Trust Fund Act No 46 of 1980 apply across the board to all categories of employees (excluding domestic workers), an employee will only be entitled to a gratuity on the cessation of his or her services where his or her employer has employed 15 or more persons within a period of one-year prior to the date of cessation, and where such employee has been in continuous and uninterrupted employment for a period of five years or more.

Time periods

There is no specific legal regulation governing the time limits for which any category of employee can be employed. However, following case law precedent, where a fixed-term employee is continuously renewed for work under a series of separate fixed-term contracts without a break in service, that employee may be presumed in law to be a regular employee whose service cannot be confined to a fixed period, despite the provisions contained in the fixed-term contract. There is no prescribed number of times that a renewal must occur, but the general view is that the presumption of regular employment would set in after the second renewal.

RECRUITMENT

3. Are any grants or incentives available for employing people? Does any information/paperwork need to be filed with the authorities or given to new employees when employing people?

Grants or incentives

There are no specific grants or financial incentives available for employing people in Sri Lanka.

Filings

An employer recruiting new employee(s) must register the newly recruited employee(s) for both the Employee Provident Fund (EPF) and Employee Trust Fund (ETF). The EPF is registered with the Commissioner of Labour and maintained with the Central Bank of Sri Lanka, and the ETF is registered with and maintained by the Employees' Trust Fund Board. There are no specific tax registration/filing requirements for new employees.

BACKGROUND CHECKS

4. Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

There are no restrictions imposed by law on carrying out background checks. It is common to conduct background investigations, especially in the banking and financial sector or where extreme confidentiality is required. In such instances it is also common for the employer to request that the employee provides a "police clearance" as a pre-requisite for employment.

PERMISSION TO WORK

5. What prior approvals do foreign nationals require to work in your country?

Residence visa

Procedure for obtaining approval. All foreign nationals employed by Sri Lankan entities must obtain a work permit from the Department of Immigration and Emigration. It is the employer's obligation to obtain the relevant work permits for all foreign nationals employed by them, and to ensure that all foreign nationals engaged in their employment have the requisite work permits in force, which are renewed as appropriate.

When making an application for a work permit, the applicant employer must take the following steps. A request should be made to the relevant line Ministry, along with supporting documents, to obtain a letter of recommendation for the foreign national employee. Once the letter of recommendation is issued, the letter of recommendation and any supporting documents should be forwarded to the Ministry of Internal Affairs for approval. Where the employer company in which the foreign national will be employed is established with the approval of the Board of Investment of Sri Lanka (BOI), then the letter of recommendation should be obtained from the BOI (rather than the relevant line Ministry). In this instance, a request for the letter of recommendation should be made to the BOI, along with supporting documents, to obtain the letter of recommendation, which must then be forwarded to the Ministry of Internal Affairs for approval.

Once the application has been approved by the Ministry of Internal Affairs, the foreign national employee can enter into Sri Lanka on an entry clearance upon a request being made to the Department of Immigration and Emigration. Unlike when making requests for recommendations to line ministries, entities registered under the BOI are required to obtain recommendation letters from the BOI separately for the entry visa and then for the residence visa. At both instances the letters should be forwarded to the Ministry of Internal Affairs for approval.

The entry visa will be submitted by the Department of Immigration and Emigration to the embassy of the country in which the foreign national employee holds citizenship, so that the foreign national employee's passport can be stamped. Once the applicant enters Sri Lanka, the foreign national employee must submit an application to obtain a residence visa, along with supporting documents, to the Department of Immigration and Emigration to obtain a residence visa work permit, which will allow them to work in Sri Lanka.

Cost. The applicable government residence visa fee and tax for the work permit is LKR20,000.

Time frame. The application process in its entirety usually takes up to three months.

Sanctions. The work permit obtained can only be used by the foreign national employee to work within the company for which the permit was obtained. A work permit is generally valid for a period of one year. A new letter of recommendation must be obtained each time the work permit needs to be extended beyond the one-year period. The Immigrants and Emigrants Act provides that where a person knowingly employs a person who has entered, or remains in, Sri Lanka in contravention of the provisions of that Act, that person can be subject to a term of imprisonment for a period of not less than two years and not more than five years.

Permits

Procedure for obtaining approval. See above, *Residence visa*.

Cost. See above, *Residence visa*.

Time frame. See above, *Residence visa*.

Sanctions. See above, *Residence visa*.

RESTRICTIONS ON MANAGERS AND DIRECTORS

6. Are there any restrictions on who can be a manager or company director?

Age restrictions

A person under the age of 18 years is disqualified from being appointed a director. Additionally, the Shop and Office Employees (Regulation of Employment& Remuneration) Act No 19 of 1954, the Factories Ordinance No 45 of 1942, the Maternity Benefits Ordinance No 32 of 1939 and the Employment of Women, Young Persons and Children Act No 47 of 1956 regulate the employment of women, children and young persons depending on the nature of the work, the work location and the working time of the employment.

Nationality restrictions

There are no nationality restrictions on who can be employed as a manager or company director.

Other restrictions

The Companies Act No 7 of 2007 sets out the circumstances where a person will be disqualified from acting as a company director, which are as follows:

- A person who is an undischarged insolvent.
- A person who is, or would be, prohibited from being a director of, or being concerned or taking part in the promotion, formation or management of, a company under either the previous Companies Act or the current legislation.
- A person who has been adjudged to be of unsound mind.
- A person that is not a natural person.
- In relation to any particular company, a person who does not comply with any of the qualifications for directors contained in the articles of association of that company.

REGULATION OF THE EMPLOYMENT RELATIONSHIP

7. How is the employment relationship governed and regulated?

Written employment contract

The contract of employment does not have to be in writing to be legally binding. It may be created in writing or by word of mouth, or can be inferred through the conduct of the parties. However, for employees who fall under the scope of the Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 (that is, employees who work in shops or offices) the employer must provide the following, in writing, to the employee:

- Name of employee, designation and nature of employment.
- The grade to which the person is appointed (if any).
- Basic remuneration and scale of remuneration (if any).
- Whether remuneration is paid weekly, fortnightly or monthly.
- Cost of living allowance or any other allowance (if any).
- The period of probation or trial (if any), and the conditions governing that period of probation or trial.
- Conditions governing employment and dismissal.
- Normal hours of employment.
- Number of weekly holidays, annual holidays and casual and privilege leave (if any).
- Overtime rate payable.
- Provision of medical aid (if any).
- Conditions governing any provident, pension scheme or gratuity scheme applicable to the employment.
- Prospects of promotion.

Implied terms

Statutorily guaranteed minimum terms (such as minimum wage and holiday entitlements) and conditions and any arrangements arising from collective agreements are implied by law into the terms of employment. Further, common law implied terms, such as the employer's duty to be fair and reasonable, to indemnify for

authorised expenses, to provide work, and the employee's duty to act in good faith and to obey reasonable orders, are implied into the terms of employment.

Collective agreements

Collective agreements with trade unions or employee representatives are automatically binding on employers as the terms of the agreement become implied terms of the contract of employment between the parties. The amendment made to the Industrial Disputes Act No 43 of 1950 by Act No 56 of 1999 made it compulsory for the employer to bargain with a trade union which has in its membership not less than 40% of the employees on whose behalf the trade union seeks to bargain. Failure to adhere to this provision will result in the employer being liable to pay a fine not exceeding LKR20,000 if it is convicted of this offence after a summary trial before a magistrate.

8. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

The terms of employment cannot be unilaterally changed by the employer to less favourable terms unless the employee consents to such a revision.

MINIMUM WAGE

9. Is there a national (or regional) minimum wage?

Under the National Minimum Wage of Workers Act No 3 of 2016, the minimum monthly wage for all employees (irrespective of industry) is LKR10,000 and the minimum daily wage is LKR400.

In addition to the national minimum wage, all wages boards have fixed minimum wages payable in respect of various classes of workers. These wages have been fixed based on daily wages, monthly wages, piece rates or contract rates, depending on the type of work performed by each class or grade of worker. These rates are revised from time to time by way of regulations.

RESTRICTIONS ON WORKING TIME

10. Are there restrictions on working hours? Can an employee opt out on either an individual or collective basis?

Working hours

Under the Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 (SOEA) the normal working day for all shop and office employees cannot exceed nine hours on any day (inclusive of a one-hour meal break) and 45 hours in any week.

Rest breaks

A rest break must be given to employees on the days that they work eight hours or more. Employees are not entitled to a rest break on a shorter working day. Under the SOEA a one-hour rest break must be given between the hours 11.00am and 2.00pm where employees work during the daytime. The rest break for employees working during the night must be given between 7.00pm and 10.00pm.

Shift workers

Where employees work between the hours of 4.00pm and 6.00pm, an additional half-hour rest break must be given, and where employees commence work from 10.00pm or later, an additional half-hour rest break must be given every four hours. Where employees work for eight hours a day in residential hotels, clubs, theatres and other places of entertainment, the eight-hour working day can be spread over 11 hours with a continuous rest break of three hours during the working time (however, this is not available where the employee works for less than eight hours).

HOLIDAY ENTITLEMENT

11. Is there a minimum paid holiday entitlement?

Minimum paid holiday entitlement

Under the Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 (SOEA), an employee who works for not less than 28 hours (excluding overtime and rest breaks) in any one week must be allowed one-and-a-half days' paid holiday in that week or in the week immediately thereafter. Generally, this weekly holiday is provided as a half-day on Saturday and a full day on Sunday, although it is common for most establishments to also provide a full day's holiday on Saturday. Any employee who is required to work on a weekly holiday is entitled to payment at the overtime rate, which is calculated at one-and-a-half times the normal daily wage.

An employee falling under the SOEA is entitled to 14 days' annual leave with full pay for every completed year of service. The SOEA requires that not less than seven days must be taken on a consecutive basis. In respect of the first year of employment, an employee is entitled to proportionate in the succeeding year leave calculated on the following basis:

- 14 days' leave if employment commenced on or after 1 January but before 1 April.
- Ten days' leave if employment commenced on or after 1 April but before 1 July.
- Seven days' leave if employment commenced on or after 1 July but before 1 October.
- Four days' leave if employment commenced on or after 1 October but before 31 December.

An employee's entitlement to annual leave under law will not extend beyond 14 days, irrespective of the employee's tenure of service. However, certain employers permit unutilised annual leave to be carried forward to the succeeding year (although this is done by contractual or policy arrangement, or otherwise at the employer's discretion). Further, in respect of the year of termination, annual leave is calculated as follows:

- Where the employee has worked for a period of less than ten months during the year of termination, one day's annual leave for every month worked.
- Where the employee has worked for ten months or more during the year of termination, the full 14 days' annual leave.

The employee will also be entitled to all unutilised annual leave earned in the year immediately preceding the year of termination.

For employees in industries where wages boards have been set up, the respective wages boards provide for weekly leave and annual leave, which varies from industry to industry.

Public holidays

Employees falling under the SOEA are entitled to paid leave on all statutory holidays, which are presently as follows:

- Tamil Thai-Pongal Day.
- National Day.
- Milad-Un-Nabi (Holy Prophet's Birthday).
- Day Prior to Sinhala and Tamil New Year Day.
- Sinhala and Tamil New Year Day.

- May Day.
- Day Following Vesak Full Moon Poya Day.
- Christmas Day.

For employees of industries where wages boards have been set up, the respective wages boards provide for the entitlement to paid holidays on days declared to be statutory holidays, which varies from industry to industry.

On a strict application of the SOEA, the approval of the Commissioner of Labour is required for a shop and office employee to work on a statutory holiday. However, in practice, where an employee works on a statutory holiday, that employee is either granted an alternative holiday on any day before 31 December of that year, or is paid an extra day's wage.

All employees are entitled to a day of paid leave on a Full Moon Poya Day. However, an employee may be employed on that day provided that the employee is paid not less than one-and-a-half times the normal daily wage.

ILLNESS AND INJURY OF EMPLOYEES

12. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Can an employer recover any of the cost from the government?

Entitlement to paid time off

Under the Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954, employees are entitled to seven days' paid casual leave in any year, except during the first calendar year of employment. During the first calendar year of employment, the employee is entitled to one day's paid casual leave for every two months worked. Casual leave can only be taken by the employee for their own] private business purposes or because of their own illness.

Entitlement to unpaid time off

There is no automatic entitlement to unpaid time off, and this is at the absolute discretion of the employer.

Recovery of sick pay from the state

There is no provision to recover sick pay paid from the state.

STATUTORY RIGHTS OF PARENTS AND CARERS

13. What are the statutory rights of employees who are:

- **Parents (including maternity, paternity, surrogacy, adoption and parental rights, where applicable)?**
- **Carers (including those of disabled children and adult dependants)?**

Maternity rights

The Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 (SOEA) provides for paid maternity leave and benefits for female employees. Accordingly, 84 days' paid maternity leave is granted to female employees where the confinement results in the delivery of a live child, and 42 days' paid maternity leave where the confinement does not result in the delivery of a live child. An employee who has given notice to her employer that she is pregnant cannot be employed, or caused or permitted to be employed, in any work that may be injurious to her or her child during that notice period (this notice period must not exceed three months). In addition to the employee's right to full wages during maternity leave, the employee cannot be dismissed solely on the basis of her pregnancy or confinement or of any illness consequent to her pregnancy or confinement.

Under the Maternity Benefits Ordinance No 32 of 1939 (MBO), female employees are entitled to take 14 days' or two weeks' maternity leave prior to the confinement and 70 days or ten weeks after the birth. Where the confinement does not result in the delivery of a live child, the maternity leave is 28 days or 4 weeks following the confinement. If the maternity leave prior to the birth has not been taken, then that period of maternity leave must be added to the period of maternity leave taken after the confinement.

Paternity rights

There are no statutorily recognised paternity rights in Sri Lanka.

Surrogacy rights

There are no statutorily recognised surrogacy rights in Sri Lanka.

Adoption rights

The maternity benefits available under the SOEA and the MBO do not apply in situations of adoption and therefore there are no such provisions concerning adoption under Sri Lankan law.

Parental rights

Under the MBO, women nursing children who are less than one year old are entitled to nursing breaks during their hours of employment, which are in addition to the rest breaks provided by law.

Carers' rights

There are no statutorily recognised carers' rights in Sri Lanka.

CONTINUOUS PERIODS OF EMPLOYMENT

14. Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on what type of transfer?

Statutory rights created

Under the Payment of Gratuity Act No 12 of 1983, an employee will be entitled to a gratuity payment at the rate of half of one month's last drawn wage or salary for each year of completed service where the employment is terminated and both of the following conditions apply:

- Within the one-year period prior to the dismissal, the employer, at any time during that period, employed 15 or more people.
- The employee has had a continued and uninterrupted period of employment with the employer for at least five years.

This entitlement will be preserved where the employee is transferred to another entity that is a subsidiary, associate or affiliate entity of his original employer during the employee's contract of employment. Where an employee is transferred during employment as a result of an asset sale, the new employer may contractually employ the employee on a contractual assurance to recognise his or her tenure of service under the employee's previous employer as an unbroken continuation of service for all statutory purposes. This is at the employer's discretion, although it is common practice followed by local employers to recognise the tenure of service, and is generally a condition insisted upon in situations of asset/business transfers to other entities.

Consequences of a transfer of employee

Where transfers are lateral movements of employees within the same organisation, there is no termination of the employment contract and the same contract continues with same terms and conditions. These situations only give rise to a change in shareholding in the employer company, and the employer remains the same.

FIXED TERM, PART-TIME AND AGENCY WORKERS

15. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

Although in practice there are different categories of employment, such as regular employees, fixed-term employees, seasonal and casual employees, the employment laws apply equally to all categories alike.

In the case of fixed-term employees, the employment automatically ceases at the end of the contract period. Where a fixed-term contract is terminated prior to the expiry of the contract period and the employee challenges that termination as unjust, then the maximum amount that the employer will be liable to pay as result of a successful challenge will be the remuneration payable for the remainder of the contract period at the time of termination.

However, where a fixed-term contract is simply continuously extended by the employer without a break in service, then the law will presume that the employee is in fact a regular employee with the same entitlements in law as a regular employee. There is no prescribed number of times that a renewal must occur, but the general view is that the presumption of regular employment would set in after the second renewal.

DATA PROTECTION

16. Are there any requirements protecting employee privacy or personal data? If so, what are an employer's obligations?

Employees' data protection rights

There are no statutory rights concerning employees' data protection.

Employers' data protection obligations

There are no statutory obligations on the employer for the purposes of data protection.

DISCRIMINATION AND HARASSMENT

17. What protection do employees have from discrimination or harassment, and on what grounds?

Protection from discrimination

Sri Lankan employment laws do not expressly provide for protection from discrimination at the workplace. However, in practice, more established organisations (particularly multinational entities operating in Sri Lanka) adopt and implement internal policies and guidelines in relation to dealing with, among other things, discrimination in the workplace, equal opportunities, codes of conduct and whistleblowing.

Protection from harassment

Sexual harassment was introduced as an offence by way of an amendment to the Sri Lankan Penal Code in 1995, which provides that a person found guilty of sexual harassment will be punished with either:

- Imprisonment, with or without hard labour, up to a period of five years.
- The payment of a fine of up to LKR1 million.
- Imprisonment up to a period of five years and the payment of a fine.
- The payment of compensation of an amount determined by the court to the victim (the maximum sum a Magistrate can order to pay as compensation is LKR100,000).

An allegation of sexual harassment must be investigated by the employer, and disciplinary action must be taken where there is credible evidence to suggest the commission of such an offence. Additionally, the victim may also have recourse under the Penal Code by filing a complaint to the Police Department.

WHISTLEBLOWERS

18. Do whistleblowers have any protection?

The employment laws do not contain any provisions concerning whistleblowing or protection for whistleblowers. Any relevant provisions relating to whistleblowing, where they exist, will be contained in the employer's own organisational guidelines and internal policies.

TERMINATION OF EMPLOYMENT

19. What rights do employees have when their employment contract is terminated?

Notice periods

Notice periods, or payments in lieu of notice, for dismissal are typically stipulated in the contract of employment. However, where the provisions concerning notice periods, or payments in lieu of notice, are exercised by the employer during the course of an unjust dismissal, the employee can challenge that termination on the basis of unjust dismissal.

In the case of a dismissal on disciplinary grounds, the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (TEWA) makes it mandatory for the employer to inform the employee, in writing, of the reasons for the dismissal before the expiry of the second working day after the dismissal has taken place.

Severance payments

Employees can challenge a dismissal as an unjust dismissal and apply for a severance payment by filing an application, within six months of the dismissal, to the Termination Unit of the Labour Department under the TEWA (where the employees come within the purview of that Act) or to a Labour Tribunal under the Industrial Disputes Act No 43 of 1950 (IDA). TEWA will apply on the termination of services where the employer has employed 15 or more employees on average at any time during the six months preceding the termination of services of an employee. Further, TEWA does not apply to employees with less than one year's service, employees in the governmental authorities, employees specifically covered under collective agreements, employees retired with the attainment of the retirement age as stipulated in the contract of employment or where termination is on disciplinary grounds.

The quantum of compensation that may be awarded by the Commissioner of Labour (Commissioner) as a result of a successful application for unjust dismissal under the TEWA is regulated as follows, depending on the employee's length of service:

- Employee with one to five years' service: 2.5 months' salary paid as compensation for each year of service competed (capped at 12.5 months' salary).
- Employee with six to 14 years' service: 2 months' salary paid as compensation for each year of service competed (capped at 30.5 months' salary).
- Employee with 15 to 19 years' service: 1.5 months' salary paid as compensation for each year of service competed (capped at 38 months' salary).

- Employee with 20 to 24 years' service: 1 months' salary paid as compensation for each year of service competed (capped at 43 months' salary).
- Employee with 25 to 34 years' service: 0.5 months' salary paid as compensation for each year of service competed (capped at 48 months' salary).

The maximum severance payment that can be made under the above formula is LKR1.25 million.

Whilst the quantum of compensation that can be awarded by the Commissioner under the TEWA is regulated, the IDA confers wide discretionary powers on Labour Tribunals to grant the relief they consider to be "just and equitable" in the circumstances of the case, irrespective of any provisions contained in the contract of employment. Therefore, a Labour Tribunal's power to award compensation is not restricted by any formula, but is based entirely on the Labour Tribunal's discretion when considering the evidence placed before it.

Procedural requirements for dismissal

The dismissal process in Sri Lanka is governed by two principal statutes, the IDA and the TEWA. Under the IDA, any "workman" can refer any industrial dispute with an employer to the Commissioner for resolution by mediation, conciliation or, in limited circumstances, arbitration. The IDA defines a "workman" as any person who has entered into or works under a contract with an employer in any capacity, including apprenticeship, or a personal contract to execute any work or labour, and includes any person ordinarily employed under any contract (whether such person is or is not in employment at any particular time), and includes any person whose services have been terminated. The IDA also provides for workmen to make applications relating to unjust dismissals to Labour Tribunals set up under the IDA, which are empowered to order reinstatement with the back-payment of wages, or compensation in lieu of reinstatement and the back-payment of wages, in any quantum it deems "just and equitable" in the circumstances.

The TEWA exclusively relates to dismissals and is applicable to specific types of employment. The IDA applies to, and is available to, any aggrieved party coming within the definition of a "workman". Applications under the TEWA will only be permissible where the employer has employed 15 or more employees on average at any time during the six months preceding the termination of the services of an employee. Further, TEWA does not apply to employees with less than one year's service, employees whose services have been terminated on disciplinary grounds, employees in governmental authorities, employees specifically covered under collective agreements and employees retired with the attainment of the retirement age as stipulated in the contract of employment. Employees not falling within the purview of TEWA can make an application under the IDA Under both the TEWA and the IDA, an employee can only be dismissed in the following circumstances:

- With the employee's consent.
- With the prior approval of the Commissioner of Labour.
- For justifiable cause.

Dismissal for misconduct and unsatisfactory performance both come within the ambit of justifiable cause, which the employer must demonstrate in the event that the employee seeks to challenge the dismissal before the Commissioner or a Labour Tribunal.

Whilst there is no specific definition in either the TEWA or the IDA of what constitutes justifiable cause, case law has identified that the following types of conduct will constitute grounds for justifiable cause to dismiss on disciplinary grounds (these are not exhaustive):

- Persistent and unauthorised absence, or late arrival, or early departure.
- Gross negligence in the discharge of duties.
- Insubordination.
- Abusive/unruly behaviour.
- Dishonesty.
- Theft.
- Intoxication whilst at work.

An employer's loss of confidence in an employee has also been held to be a sufficient ground for dismissal, provided that it is coupled with a specific ground of misconduct as set out above. Even where a loss of confidence cannot be linked to a specific ground of misconduct, it is often pleaded by employers to persuade adjudicating forums that reinstatement is not a suitable remedy.

Case law has also identified the following as justifiable/valid grounds for dismissal on non-disciplinary grounds:

- Inefficiency, incompetence or unsatisfactory discharge of duties.
- Breach of contractual terms of employment.
- Conviction of an offence involving moral turpitude or involving imprisonment whilst in service.

The grounds for dismissal on disciplinary and non-disciplinary grounds are not exhaustive and largely depend on the facts and circumstances of each case. A key element in determining justifiable/valid dismissal is the employer's good faith. Judicial decisions have also held that probationers can be dismissed during their probation period without cause, provided that dismissal is not tainted with bad faith on the employer's part.

20. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection against dismissal

There is no protection against dismissal. However, the dismissal can be challenged by the employee as unjust before a Labour Tribunal under the Industrial Disputes Act No 43 of 1950, claiming re-instatement with the back-payment of wages, or compensation in lieu of reinstatement. In limited circumstances an employee may challenge the dismissal by way of an application to the Commissioner of Labour under the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (*see Question 19*).

Protected employees

A pregnant woman cannot be dismissed solely on the basis of her pregnancy or confinement. or of any illness consequent to her pregnancy or confinement.

REDUNDANCY/LAYOFF

21. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of redundancy/layoff

With the coming into operation of the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (TEWA), there is no little or no distinction between dismissal for cause or dismissal for reasons of redundancy, and the same principles for dismissal apply (*see Question 19*).

Procedural requirements

The collective effect of the TEWA and the Industrial Disputes Act No 43 of 1950 (IDA) is that an employment dismissal by way of redundancy or the making of a severance payment can only be done in the following circumstances:

- With the employee's consent (generally in the form of a resignation).
- With the prior written approval of the Commissioner of Labour (Commissioner).

The preferable option for the employer is to negotiate with the employee and enter into a mutual severance arrangement with the employee (that is, where the employee tenders his/her resignation on the payment of a severance payment as regulated by a severance agreement). Where that cannot be achieved, and the employer has employed 15 or more employees on average at any time during the six months preceding the making of the application, the employer can make an application to the Commissioner under the TEWA seeking the Commissioner's approval to dismiss the employee.

Applications to the Commissioner under the TEWA do not have to be in any prescribed format. However, the application should contain detailed information (with supporting documents where possible) on the basis upon which the employer is seeking the approval for dismissal. The application should be filed with the Commissioner with a copy served on the applicable employee. The Commissioner will investigate the matter, and where no settlement is reached, the matter will be fixed for further inquiry by way of either a trial process, or based on documents/information submitted by affidavits as may be mutually agreed upon by the parties or as otherwise directed by the Commissioner. Each party will be given an opportunity to cross-examine the documents/evidence provided by the other party.

Where the Commissioner's approval is sought for dismissal, the employer must demonstrate compelling grounds to justify why the employee(s) cannot be retained in service. Such compelling grounds generally include:

- The removal of the relevant job functions, generally in the course of a corporate restructure and/or where that work is no longer being carried out by the employer.
- Financial constraints of the employer, which mean that the employer can no longer maintain the relevant work functions (particularly where there is a risk that the employer's business may close).

Where the Commissioner gives approval for dismissal, the severance payment/compensation payable will be the same as the formula under the TEWA (*see Question 19*).

EMPLOYEE REPRESENTATION AND CONSULTATION

22. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? What does consultation require? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management representation

Employees are not automatically entitled to representation on the board or to take part in managerial decisions within the organisation. However, employees may establish employment councils, which can consult with the employer on the employees' behalf on certain employee grievances. Even where the interests of the employee are represented by a trade union, the trade union will have no say in the day-to-day management of the organisation.

Consultation

Trade unions and employee representatives may be consulted in the decision-making process on matters relating to employment. However, this is not a mandatory requirement.

Major transactions

Employee consultation is not required for major transactions.

23. What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

There are no remedies available (*see Question 22*).

Employee action

There are no relevant types of employee action applicable (*see Question 22*).

CONSEQUENCES OF A BUSINESS TRANSFER

24. Is there any statutory protection of employees on a business transfer?

Automatic transfer of employees

In the case of mere take-over/change in shareholding of the company, the status of the employees will not change as the employing entity will remain the same (although it may then form part of a different group of companies).

However, where the business of the employing entity is transferred to a different entity, the employees do not automatically transfer with the business. On the mutual agreement of the buyer of the business and the employees, the employees of the entity selling the business may be employed by the entity buying the business, generally on an undertaking provided by the buyer that the buyer will recognise their tenure of service with their previous employer as a continuing and uninterrupted service when calculating the employees' statutory entitlements.

Protection against dismissal

The mere transfer of the business will not automatically bring about a termination of employment of the employees. However, where the business of the employing entity is transferred to a different entity, the original employer must take one of the following measures:

- Enter into an arrangement with the new buyer of the business and the employees, for the buyer to take on the employment of the employees, generally with a requirement that the buyer will recognise the previous tenure of service under the selling employer as a continuous and uninterrupted service for statutory purposes.
- Enter into a negotiated severance arrangement with the employees.
- Make an application to the Commissioner of Labour seeking approval for the dismissal of the employees under the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (TEWA) and, where such approval is granted, compensation will be payable to the employees dismissed according to the provisions set out in the TEWA (*see Question 19*).

Harmonisation of employment terms

Harmonisation of employment terms is possible, but where that harmonisation creates less favourable terms of employment for the employees than they were previously employed under, the employees' consent will be required.

EMPLOYER AND PARENT COMPANY LIABILITY

25. Are there any circumstances in which:

- **An employer can be liable for the acts of its employees?**
- **A parent company can be liable for the acts of a subsidiary company's employees?**

Employer liability

An employer is legally responsible for the actions of its employees. However, this rule only applies if the employee is acting within the course and scope of employment, where the employer can be held vicariously liable for the actions or omissions of the employee.

Parent company liability

Sri Lankan company law is based on English law and recognises the limited liability of an incorporated entity. Therefore, the general rule is that a company has a separate and distinct legal personality from that of its parent company. However, in limited circumstances (most notably in situations of demonstrable fraud) an aggrieved party can request a court of law to pierce the corporate veil and hold the parent company and/or its officers, shareholders and/or directors liable.

EMPLOYER INSOLVENCY

26. What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

Employee rights on insolvency

Under the Termination of Employment of Workmen (Special Provisions) Act No 45 of 1971 (TEWA), if a business has been closed down and the requisite notice has not been given to either the employees or the Commissioner of Labour (Commissioner), the Commissioner has the power to investigate and inquire into that closure and to order the ex-employer to pay compensation to the employees concerned. This will be in addition to the rights of aggrieved employees to file an application to a Labour Tribunal under the Industrial Disputes Act No 43 of 1950.

If the business closure has taken place in contravention of the TEWA, the Commissioner can order the employer to pay the employees compensation as an alternative to reinstatement, any gratuity payments owed or any other benefit payable to employees.

Further, where the employer company is placed in liquidation, the superannuation benefits payable on account of the employees (that is, under the Employees Provident Fund Act No 15 of 1958 (EPF), the Employees Trust Fund Act No 46 of 1980 (ETF) and the Payment of Gratuity Act No 12 of 1983) will be the first charge on the assets of the company in liquidation, and where such assets are insufficient to settle those liabilities, the directors of the company can be held jointly and severally personally liable to meet any shortfall due.

State guarantee fund

Under the EPF and ETF, the funds to which employers must make contributions are maintained by the state. However, there is no separate state guarantee fund to protect the interests of employees in the event of the insolvency of the employer.

HEALTH AND SAFETY OBLIGATIONS

27. What are an employer's obligations regarding the health and safety of its employees?

The Shop and Office Employees (Regulation of Employment & Remuneration) Act No 19 of 1954 makes provision for sufficient and suitable lighting and ventilation at every part of the premises of a shop or office. Similar provision is made for sanitary conveniences and washing facilities, seats for female shop assistants and facilities for meals and resting. An employer cannot compel an employee to reside on the premises of a shop or office unless a permit in the prescribed form has been obtained from the Commissioner of Labour or the premises are a residential hotel. The Factories Ordinance No 45 of 1942 (FO) also makes provision for matters such as cleanliness, overcrowding, temperature control, ventilation, lighting facilities, drainage, sanitary facilities, medical supervision, the supply of wholesome drinking water, washing facilities, accommodation for clothing, facilities for resting for female workers and first aid facilities.

The FO and the Workmen's Compensation Ordinance No 19 of 1934 (WCO) mainly stipulate the employer's obligations regarding the health and safety of its employees. The FO and regulations made under it provide for the health, safety and welfare of factory workers. Safety measures must be taken in factories in relation to machinery, equipment and ancillaries operated in the factory, and with respect to the floor area, and amenities must be put in place to provide first aid and medical attention and sanitary facilities. Provisions relating to accidents, deaths, industrial diseases and working conditions are also contained in the FO.

TAXATION OF EMPLOYMENT INCOME

28. What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Foreign nationals

With effect from 1 April 2018, foreign national employees working in Sri Lanka are taxed at the tax rates applicable to residents in Sri Lanka, but they are taxed only on their Sri Lankan-sourced income. A tax-free allowance of LKR1,200,000 per annum is also available for these employees.

Nationals working abroad

Non-resident individuals rendering services outside Sri Lanka are only subject to income tax on the income received from Sri Lankan sources at the rates provided in *Question 29*.

29. What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

Rate of taxation on employment income

Income tax is levied on employment on employment income and income received from Sri-Lankan sources at the following progressive rates, depending on the amount of income earned (foreign national employees working in Sri Lanka are also entitled to a tax-free allowance of LKR1,200,000 per annum):

- Employment income not exceeding LKR600,000: taxed at a rate of 4%.
- Employment income of between LKR600,001 and LKR1,200,000: taxed at a rate of 8%.
- Employment income of between LKR1,200,001 and LKR1,800,000: taxed at a rate of 12%.
- Employment income of between LKR1,800,001 and LKR2,400,000: taxed at a rate of 16%.
- Employment income of between LKR2,400,001 and up to LKR3,000,000: taxed at a rate of 20%.

- Employment income above LKR3,000,000: taxed at a rate of 24%.

Social security contributions

Under the Employees Provident Fund Act No 15 of 1958 (EPF), the employer is required to contribute 12% of the employee's monthly earnings, and deduct and contribute 8% of each employee's salary, to the EPF Fund. Under the Employees Trust Fund Act No 46 of 1980 (ETF), the employer is also required to contribute a further 3% of each employee's monthly earnings to the ETF Fund on account of each employee.

The EPF and ETF provide that the calculation of these contributions must be based on the "total earnings" of the employee. This is supplemented by the Court of Appeal judgment in *Saifudeen Adamaly v Lawson Pest Control Limited* (*C.A. Writ Application No 770/1995, decided on 28 March 1996*) which held that all fixed allowances paid in cash should be included in the calculation of such superannuation benefits.

BONUSES

30. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded, whether generally or in particular sectors?

There is no obligation imposed by law on employers to pay bonuses. In general, unless expressly provided for in the employment contract, bonus payments are entirely at the discretion of the employer and largely depend on the employer's financial performance.

INTELLECTUAL PROPERTY (IP)

31. If employees create IP rights in the course of their employment, who owns the rights?

In the absence of any provision to the contrary, the ownership of an IP right created either under a contract of employment or a contract for services, which is created in the performance of that contract, is deemed to belong to the employer or the person who commissioned the services. Where the IP right is an industrial design that acquires a much greater value than the parties could have reasonably foreseen either at the time the contract was created, or the time the IP right was created, the creator of that industrial design will be entitled to equitable remuneration for that industrial design, which can either be agreed between the parties or fixed by the court in the absence of agreement between the parties.

Where an employee, whose contract of employment does not require him or her to engage in any creative activity, creates, in the course of his or her employment, an industrial design using data or means placed at his or her disposal by his or her employer, the ownership of that industrial design will be deemed to belong to the employer in the absence of any provision to the contrary in the contract of employment, subject to the right to equitable compensation for that industrial design.

RESTRAINT OF TRADE

32. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of activities

Restrictive covenants that generally take the form of non-solicitation and non-competition provisions that apply during employment can be included in contracts of employment, and will usually be enforceable.

Post-employment restrictive covenants

Courts of law are generally reluctant to uphold and enforce post-employment restrictive covenants contained in employment contracts. For such covenants to be enforceable, the employer must demonstrate that the restraint of trade is reasonable and necessary to protect the employer's proprietary interest. The restrictive covenant should be reasonable in both scope and duration. In circumstances where the employer has continued to provide consideration (generally in the form of a monetary payment) for the duration of the restrictive covenant, the courts have been more inclined to uphold these covenants.

RELOCATION OF EMPLOYEES

33. Can employers include mobility clauses in employment contracts, or take any other measures, to ensure that employees are obliged to relocate?

The general rule is that where an employment contract contains a mobility clause, this clause is enforceable. It is common for employment contracts to provide not only for a transfer of the place of work (either domestically or to a workplace overseas), but also to provide for the employee to be transferred to a subsidiary, associate or affiliate entity (whether or not that entity was in existence at the time that the employment contract was entered into).

Where an employment contract does not contain a mobility clause, a transfer can only be made with the employee's consent. Even in instances where the employment contract does contain a mobility clause, a proposed transfer should not be tainted with the employer's bad faith and should be carried out reasonably. For example, where the transfer is to a different city which is a considerable distance from the employee's place of residence, the employer must make arrangements for suitable lodging and/or travel at the employer's expense to show that the transfer is made in good faith.

PROPOSALS FOR REFORM

34. Are there any proposals to reform employment law in your jurisdiction?

In the absence of laws concerning data privacy and data protection for employees in Sri Lanka, there is opportunity for legislative and judicial development in these areas. For the same reason, the laws governing paternity care, surrogacy rights and carers' rights could also be reviewed and expanded upon.

ONLINE RESOURCES

Department of Labour

W *www.labourdept.gov.lk/index.php*

Description. This is the official website of the Department of Labour. The website contains detailed information relating to labour legislation and regulations, wages boards' decisions, and all employment-related services. The website is maintained by the Department of Labour and the information is official and up to date.

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