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A reforma trabalhista brasileira e o despedimento coletivo: modernização ou mercantilização?

Brazilian labor reform and collective dismissal: modernization or commodification?

La reforma laboral brasileña y el despido colectivo: modernización o mercantilización?

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RESUMO

A reforma trabalhista brasileira introduziu na CLT um novo artigo – o art. 477-A –, relativo à matéria do despedimento coletivo (ou dispensa coletiva), o qual suscita as maiores dúvidas no plano interpretativo e parece situar-se na contramão da evolução do direito laboral nos países da União Europeia (e também em Portugal), onde há muito existe uma diretiva que obriga a entidade empregadora que pretenda promover um despedimento coletivo a respeitar as pertinentes regras de índole procedimental, consultando e auscultando os representantes dos trabalhadores, negociando e dialogando com estes, antes de efetuar tal despedimento. O artigo conclui que esta norma é um bom exemplo de que flexibilizar nem sempre significa modernizar a legislação, antes, por vezes, significa apenas reduzir o trabalhador à condição de mercadoria, contrariando o princípio estruturante, há muito firmado pela OIT, segundo o qual "o trabalho não é uma mercadoria".

PALAVRAS-CHAVE: despedimento coletivo; negociação e consulta; procedimento; reforma trabalhista.

ABSTRACT

The Brazilian labor reform introduced a new article in the CLT - art. 477-A, which deals with collective termination (collective dismissal), which raises the greatest doubts on the interpretative plane and seems to be contrary to the evolution of labor law in the countries of the European Union (and also in Portugal), where for a long time there has been a directive that obliges the employer that intends to promote a collective dismissal to respect the pertinent procedural rules, consulting and listening to the representatives of the workers, negotiating and talking with them, before effecting such dismissal. The article concludes that this rule is a good

example of how flexibilizing does not always mean modernizing legislation, but sometimes it means only reducing the worker to the condition of merchandise, contrary to the ILO's long-established structuring principle that “work is not a commodity”.

KEYWORDS: collective dismissal; negotiation and consultation; procedure; reform.

RESUMEN

La reforma laboral brasileña introdujo en el Código de Trabajo un nuevo artículo - art. 477-A - en materia de despido colectivo (ERE - expediente de regulación de empleo), lo que plantea las cuestiones más importantes en el plan interpretativo y parece estar en la dirección opuesta de la evolución de la legislación laboral en la Unión Europea (y en Portugal) donde hay mucho que hay una política que requiere que el empleador que quiera promover un despido colectivo de respetar las normas pertinentes de carácter procedimental, consultoría y escuchando representantes de los trabajadores, negociando y dialogando con ellos, antes de hacer tal despido. El artículo concluye que esta norma es un buen ejemplo de que la flexibilidad no siempre significa modernizar la legislación, antes que, a veces, sólo significa reducir el trabajador a la condición de mercancía, en contra del principio estructurante, a largo firmado por la OIT, según el cual “el trabajo no es una mercancía”.

PALABRAS CLAVE: despido colectivo; negociación y consulta; procedimiento; reforma laboral.

INTRODUCTION: THE PROTECTION AGAINST THE ARBITRARY DISMISSAL OR WITH NO GROSS MISCONDUCT

Admittedly, the era of the new globalized, dynamic, innovative, and fiercely competitive economy follows the logic of the ephemeral, volatile, and unpredictable, and is incompatible with the ideal of “life-long employment” that somehow ruled the century. past. However, it is not inexorably true that the legal system must compromise with arbitrary dismissals, exempting the employer from justifying its extinguishing decision and exempting the latter from judicial scrutiny. It does not appear, therefore, that employment stability should be referred to the ark of useless rubbish, opting to enshrine the principle of free dismissal or *ad nutum*, according to which one is either free to hire or free to fire, allowing the employer to dismiss workers for any reason or even without a reason.

The *employment-at-will*[1] doctrine, according to which, "*men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se*"[2], undoubtedly represents the maximum degree of labor flexibility. It has, however, the serious inconvenience of opening its doors to the employer's discretion, instituting precariousness as an indelible trait of any and all labor relations. Moreover, that employment at will doctrine is clearly in breach of ILO Convention No. 158 (the requirement to motivate employer dismissal is contained in Article 4 of the Convention), as well as the Charter of Fundamental Rights of the European Union, whose art. 30 provides that all workers are entitled to protection against unjustified dismissal.

It would, therefore, be said that job security and protection against arbitrary dismissal are values to be safeguarded and promoted by the legal system – values, certainly not absolute, but also, we believe, not obsolete. Hence the Constitution of the Portuguese Republic (CRP) establishes, in its art. 53, that "workers are guaranteed job security and dismissals without gross misconduct or for political or ideological reasons". Hence, the Constitution of the Federative Republic of Brazil (CRFB) enshrines, as one of the workers' rights, the "employment relationship protected from arbitrary or unfair dismissal, under the terms of complementary law, which will provide for compensatory compensation, among other rights" (art. 7, item I)[3].

1 THE LEGAL FRAMEWORK (OR LACK OF IT): SO MUCH SEA BETWEEN PORTUGAL AND BRAZIL…

[1] which corresponds, in Brazilian terminology, to the so-called "open door rule" — as per, MANNRICH, Nelson. Collective waiver and prior collective bargaining: new guidelines. *Revista da Academia Nacional de Direito do Trabalho*, No. 19, 2011, p. 101.

[2] Cited and exemplarily supported by EPSTEIN, Richard A. In Defense of the Contract at Will. *University of Chicago Law Review*, vol. 51, 1984, p. 947 e ss.

[3] In Portugal, the term "despedimento" is used, while in Brazil "despedida" or "dispensa" is used. In any case, it is correct: the employer dismisses or fires a worker, that is, expels, banish them from the company, depriving them of the employment ("sends them away"); Workers cannot dismiss the employer, and at most may resign, leave the company, free themeselves from the bond of subordination ("they go away"). However, even though the Portuguese law already uses the term "dismissal", it till does not accept the figure of "firing", preferring to take refuge in more civilistic concepts (resolution, whistleblowing etc.). We believe that, without prejudice to technical rigor, it would be preferable to "work on" the terminology, making it more expressive.

It would thus appear that the constitutional pillars of both countries on this point are similar: the CRP prohibits dismissals without a gross misconduct or for political or ideological reasons, ensuring job security; CRFB censors/fights arbitrary or unfair dismissal, giving expression to the principle of continuity of employment[4]. However, if we descend from the hierarchical level and analyze the ordinary legislation in force in each of them, we soon find that there is today a huge ocean separating them. Indeed, the principle of causal or justified dismissal is now firmly established in Portugal, but already in Brazil, on the contrary, the thesis of acceptance of free or *ad nutum* dismissal ("empty denunciation", "unmotivated dismissal", "arbitrary farewell"). Below we will understand why.

The Brazilian constitutional standard that protects workers "against arbitrary dismissal or without a gross misconduct" has aroused heated doctrinal and jurisprudential debate, prevailing the understanding that there is no synonymy between arbitrary dismissal and unfair dismissal, that is, there will be unfair dismissals. They are not arbitrary because the employer's

[4] On the link between the principle of continuity of employment relationship and art. 7, item I, of the CRFB, vd., by all, FELICIANO, Guilherme Guimarães. *Curso Crítico de Direito do Trabalho* – Teoria Geral do Direito do Trabalho. São Paulo: Saraiva, 2013, p. 267-271. However, it is important to note that in Brazil the concept of "job stability" is traditionally more rigid and demanding than that of mere "protection against arbitrary dismissal", as the company's structural or economic reasons may justify dismissal (this will be a non-arbitrary dismissal). In case there is employment stability, business or economic reasons are not relevant, and dismissal is allowed only and if it is based on a guilty and serious act of the worker — by all, SOUTO MAIOR, Jorge. *Curso de Direito do Trabalho*: A Relação de Emprego, vol. II. São Paulo: LTr, 2008, p. 471-472, as well as the provisions of art. 492 of the CLT, concerning the so-called "ten-year stability". In this strong or almost absolute sense of "stability itself", as Pedro Paulo Manus writes, "the regime of stability means the legal system that guarantees the employee the maintenance of the job, as long as they fulfill their contractual obligations and wishes the maintenance of the bond that binds them to the employer" (MANUS, Pedro Paulo T.. *Direito do Trabalho*. 16. ed. São Paulo: Atlas, 2015, p. 166). Thus the mere protection against arbitrary dismissal would correspond to the so-called 'job security' but not, strictly speaking, to 'job security'. There are, in any case, other terms of "job stability", closer to the meaning of art. 53 of the CRP, such as, e.g. those advanced by José Augusto Rodrigues Pinto: "Loss of unilateral whistleblowing faculty motivated by the employer", blocking of their power to issue an empty whistleblow concerning the individual employment contract" (PINTO, José Augusto R. *Tratado de Direito Material do Trabalho*. LTr: São Paulo, 2007, p. 520). Also Amauri Mascaro Nascimento, who defines job stability as "the right of the worker to remain in employment, even against the will of the entrepreneur, as long as there is no relevant cause justifying their dismissal" (NASCIMENTO, Amauri M. *Curso de Direito do Trabalho*. 25. ed. São Paulo: Saraiva, 2010, p. 1184). This notion puts the emphasis on stability in the right to reintegration, but is compatible with the existence of "objective causes" of dismissal, in line with what is provided by the Portuguese legislation. For further developments, CARDOSO, Jair Aparecido. *A Estabilidade no Direito do Trabalho*. São Paulo: LTr, 2008.

extinguishing decision, although unfair, can be highly motivated, resulting in a reasonable and justified act, although not based on a disciplinary offense committed by a worker.

In this order, four types of dismissal should be distinguished: (i) dismissal for gross misconduct, disciplinary; ii) dismissal without a gross misconduct, but not arbitrary (based on technical, economic or financial reasons, in line with the provisions of article 165 of the CLT); iii) arbitrary, dismissal for no cause; iv) and lastly, abusive or discriminatory dismissal, which, more than unmotivated, is based on a misleading or bad cause.[5]

In the light of the constitutional provision in question, it would be argued that the principle of causal or justified dismissal, in force in Portugal and recommended by the ILO, would also prevail in Brazil. However, it turns out that: i) the right to an "employment relationship protected against arbitrary dismissal or without a gross misconduct" will be performed, according to art. 7, I, of the Brazilian Constitution, "under the terms of complementary law" (which, until today, more than thirty years later, has not yet emerged); ii) according to art. 10, I, of the Transitional Constitutional Provisions Act, until the complementary law referred to in art. 7, I, of the Constitution, "the protection referred to therein is limited to the increase, to four times, of the percentage provided for in art. 6, head and § 1, of Act No. 5107, from September 13, 1966"[6].

In view of the normative framework outlined above, and while the issue continues to be the subject of intense doctrinal debate in Brazil, the majority understanding that has been forged can be summed up in these polite words by Pedro Paulo Manus:

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[5] For developments in this regard, we allow ourselves to refer in particular to MANUS, Pedro Paulo T. *Despedida Arbitrária ou Sem Justa Causa*. São Paulo: Malheiros Editores, 1996; SILVA, Antônio A. *Proteção Contra a Dispensa na Nova Constituição*. 2. ed. São Paulo: LTr, 1992; ROMITA, Arion Sayon. *Despedida Arbitrária e Discriminatória.* Rio de Janeiro: Forense, 2008; SOUTO MAIOR, Jorge. Protection against arbitrary dismissal and application of ILO Convention 158*. Revista LTr*, São Paulo, 2004, p. 1323-1331, and HAZAN, Ellen (coord.). *A Proteção Constitucional Contra a Dispensa Arbitrária ou Sem Justa Causa*. Belo Horizonte: RTM, 2011.

[6] This is the diploma that established the so-called Working Time Guarantee Fund (FGTS), a law repealed and replaced by Act No. 7839/89, which was repealed and replaced by Act No. 8036/90. In essence, and for our purposes, the FGTS constitutes a bank deposit made by the employer on behalf of the employee and intended to form savings to the employee, which may be withdrawn in the circumstances provided for by law, especially if and when they are dismissed without a gross misconduct (in which case there will be a percentage increase on the amount deposited, under the legal terms, corresponding to 40%). About the FGTS, by all, MARTINS, Sérgio Pinto. *Manual do FGTS*. 5. ed., Saraiva: São Paulo, 2017. It is, moreover, one of the workers' rights provided for in art. 7 of the Federal Constitution (item III).

> In conclusion, currently, after the validity of art. 7 of the Federal Constitution and without the complementary law to which it refers, we have for the moment equated, for its effects, the dismissal without a gross misconduct and the arbitrary dismissal, resulting in both the FGTS fine paid at the rate of 40% on the amount of deposits in the linked account, as determined by art. 10, I, of the Transitional Constitutional Provisions Act. And the Constitution is expressed as to the temporality of this penalty, limiting it to the period until the enactment of the complementary law[7].

Of course, it can always be said, pursuant to Renato Rua de Almeida[8], that, In the event of dismissal, whether arbitrary or without a gross misconduct, the employer's unilateral act will be unlawful. And as Luciano Martinez points out[9], If we take the employment guarantee in a comprehensive sense, including the imposition of any disincentives to termination of the contract by employer, then the most classic of all employment guarantee formulas is precisely the 40% indemnity on the FGTS. But the legal sanction is so modest that, essentially, no one doubts that the FGTS came to liberalize the Brazilian labor market[10] and substantially mitigate the role of the traditional principle of continuity of employment:

> [...] by providing the frank unmotivated breach of the employment contract by corporate act; in short, the empty denouncement of the employment pact. The act of dismissal, in the new systematics, would no longer depend on a reason typified by law, considered reasonable to authorize the termination of the contract, regardless of the

[7] MANUS, Pedro Paulo T. *Despedida Arbitrária ou Sem Justa Causa*, cit., p. 56-57. In the same sense, MANNRICH, Nelson. Collective waiver and prior collective bargaining: new guidelines, cit., p. 103.

[8] The author correctly writes: "If there is no justification for collective and individual dismissals, that is, if an arbitrary dismissal or one without a gross misconduct occurs, the employer's unilateral act is unlawful" (ALMEIDA, Renato Rua de. Proteção contra a despedida arbitrária ou sem justa causa. *Revista do Tribunal Regional do Trabalho da 15.ª Região*, No. 40, 2012, p. 81).

[9] MARTINEZ, Luciano. *Curso de Direito do Trabalho.* 6. ed. São Paulo: Saraiva, 2015, p. 687-689. This always represents, in the words of Sérgio Torres Teixeira, a "measure of inhibition to the practice of dismissing" (TEIXEIRA, Sérgio T. *Nova Dinâmica da Reintegração Judicial no Emprego*. Recife: Federal University of Pernambuco, Recife Law School, 2004, p. 73-78).

[10] In a very critical sense about the historical role played by the FGTS, VIANA. Márcio Túlio. 70 years of CLT: a history of workers. Brasília: Superior Labor Court, 2013, pp. 105-111. It was, as Gabriela Neves Delgado points out, the figure that, still in the sixties of the last century, started the process of Brazilian labor flexibilization (a flexibilization, one would say, *avant la lettre*), removing security to the worker and greatly facilitating the dismissal (DELGADO, Gabriela N. *Direito Fundamental ao Trabalho Digno*. 2. ed. São Paulo: LTr, 2015, p. 175.

> employee's length of service: the employer's simple will would suffice (for this reason one also mentions the unmotivated dismissal, that is, without a relevant and typified legal cause, other than the potestative corporate prerogative). In other words, the reason for the breach of the contract required by the legal order is internal, intimate with the business will — it is simply the employer's exercise of discretion[11].

In a similar way to what we just said, Augusto César Leite de Carvalho[12] has asked: "Can the Brazilian businessman dismiss an employee without a specific cause? Here's how you answer:

> The answer would be, at first, in art. 7, I, of the Brazilian Constitution, which precludes the employment relationship against arbitrary dismissal or without a gross misconduct, but claims by a complementary law that would include compensatory compensation and, while such regulation does not ensue it, is regulated by provisions that (…) authorize the entrepreneur, not exactly to dismiss, but, and with an equal practical effect, to pay an indemnity equivalent to 40% of the balance in the FGTS employee's linked account, in cases dismissal without a gross misconduct.

And the author concludes:

> As a result, the constitutional protection is contradictory: the businessman, although under the rule of law supposedly inhibiting the dismissal, has the right to dismiss the employee unreasonably, provided that they pay the indemnity mentioned.

In Brazil, the right of the employer to terminate the employment contract, without

[11] DELGADO, Maurício Godinho. *Curso de Direito do Trabalho*. 17. ed., São Paulo: LTr, 2018, p. 1308. Of course, in a sense, as Arion Sayão Romita well points out, the expression "unmotivated dismissal" turns out to be erroneous and even an authentic *contradictio in terminis*, For there is no dismissal without reason, that is, the employer always knows why they dismiss the worker. Thus, "any voluntary act obeys motives, is motivated, whereas the irrational act is unmotivated (act of the insane, the inferior animal). The dismissal – employer's voluntary act, as a rational animal – is always motivated" ROMITA, Arion S. *Proscrição da Despedida Arbitrária.* São Paulo: LTr, 2011, p. 13). This is without prejudice to the existence of some specific cases of job stability in Brazil, some even with a backing in the Federal Constitution, such as those of the union leader and the pregnant worker, which will not be the object of our attention. For an overview on this, BELMONTE, Alexandre Agra. Employment protection in the 1988 Federal Constitution – stability, provisional guarantees, general protection against arbitrary or unfair dismissal and rights arising from contract termination. *Revista da Associação Brasileira de Advogados Trabalhistas – ABRAT,* No. 2, 2014, p. 11-55, and LEITE, Carlos Henrique B. A Proteção da Relação Empregatícia no Estado Democrático de Direito. In: REIS, Daniela M.; MELLO, Roberta D. de; COURA, Solange B. de C. (Org.). *Trabalho e Justiça Social:* um tributo a Maurício Godinho Delgado. São Paulo: LTr, 2013, p. 237-249.

[12] CARVALHO, Augusto C. L. *Garantia de Indenidade no Brasil* São Paulo: LTr, 2013, pp. 169-170.

having to give any reason or foundation, therefore appears as a kind of dogma, even if constitutional standards-principles indicate otherwise. As noted by Julia Lucena da Rocha Melo[13], in practice

> [...] it is based on the premise that the constituent legislature provides permission, at least on a transitional basis, although transience has lasted for more than two decades, unjustified dismissals, as well as those without technical, economic or financial causes, provided that a compensatory indemnity is paid.

Interestingly, it is this idea of empty whistleblowing, of unmotivated dismissal, of arbitrary dismissal, of total freedom to hire and to distract, of wide and almost unrestricted faculty to terminate the employment contract on the unilateral initiative of the employer. That is all that is often intended to be conveyed when dismissal is considered as an expression of a potestative right of the employing entity. See the following and enlightening excerpt from Amauri Mascaro Nascimento[14]:

> The theory that the dismissal of the employee is a potestative right of the employer has acquired some relevance, so much so that it is repeated in our time. Thus, the employer has the right to terminate the employment contract unilaterally, with or without cause, at their own discretion, because the legal act is of an absolute nature, without any opposition from either the employee or the public authority.

As commented by Leonardo Vieira Wandelli[15]:

> [...]the dominant understanding thus established as to the existence of an abstract right of the employer to arbitrary or unfair dismissal upon the payment of the indemnity paid, such prerogative is understood as a potestative right of a receptive nature.

Now, if potestative means arbitrary, unconditional power and without conditions that

[13] MELO, Jólia L. da R. *Abuso do Direito nas Dispensas sem Justa Causa e Arbitrárias.* Curitiba: Juruá, 2014, p. 207.

[14] NASCIMENTO, Amauri M. *Curso de Direito do Trabalho*, cit., p. 1132.

[15] WNADELLI, Leonardo V. *Despedida Abusiva* – o direito (do trabalho) em busca de uma nova racionalidade. São Paulo: LTr, 2004, p. 332.

tends to be unquestionable and irresistible, then many doctrinal voices are opposed to this potestative right attributed to the employer. See, for example, the following passage by Antonio Álvares de Silva[16]:

> To conceptualize dismissal as a merely potestative right, whereby the employer by unilateral act terminates the employment contract, is the same as recognizing in Labor Law the full principle of private autonomy and confusing it with Private Law, denying it its own autonomy gained through long years of struggles for its identity.

In a close sense, Amauri Mascaro Nascimento himself concludes[17]:

> It seems to me that any attempt to attribute to the act of dismissal of the employee the nature of the employer's potestative right is thoughtless. The employer cannot have absolute power, *erga omnes*, an unavoidable authority over the employee to dismiss them, without undesirably and unreasonably extending the notion of potestative law, which deserves limitations in itself.

And, in the same line of reasoning, so writes Maurício Godinho Delgado[18]:

> The criterion of unmotivated dismissal by business act, unfortunately, gives this modality of breach of the employment contract the legal status of mere exercise of a potestative power by the employer — thus a power close to absolute.

We understand and share the concerns expressed by the Brazilian doctrine regarding this point. We cannot, nevertheless, subscribe to these statements, since it seems to us that, with due respect, they fail the target. In technical and legal terms, the problem does not, in our view, lie in conceiving dismissal as a potestative right of the employer. The problem is, rather, in the employer's faculty of “empty whistleblowing” or “unmotivated dismissal” or “arbitrary dismissal” of the worker. And, we believe, this wide and very criticized faculty to dismiss the worker without cause without giving them any explanations – nonetheless, it should be noted that the employer wishing to dismiss without a gross misconduct must at

[16] SILVA, Antonio A. *Proteção Contra a Dispensa na Nova Constituição*, cit., p. 204.

[17] NASCIMENTO, Amauri M. *Curso de Direito do Trabalho*, cit., p. 1134.

[18] DELAGADO, Maurício G. *Curso de Direito do Trabalho*, cit., p. 1318.

least give the worker an advance notice of thirty days, proportional to the length of service, pursuant to art. 7, XXI, of the Federal Constitution[19] —, It is not to be confused with the qualification of dismissal as structurally corresponding to a potestative right of the employer. Let us analyze it thoroughly.

The two major modalities of subjective law, in the broad sense, are well-known. Civilistics has long sharpened these notions, separating the concept of subjective law in the strict sense or itself from the concept of potestative law: in the first case, and in the lesson of Orlando de Carvalho[20], we will have a concrete power situation that enables one person to want or demand certain positive or negative behavior from another — We will therefore have a power situation which is reversed by a duty situation, as is typically the case for credit rights (for example, in the wage credit that the worker holds in front of the employer); in the second case, we will have a concrete situation of power that allows a person, by an act of his will, with or without formalities, alone or integrated by an act of public authority – almost always by a court decision – to produce certain legal effects which are inevitably imposed on another person (we will therefore have a situation of power which has the opposite of a situation of suffering, of legal subjection).

However, in the case of dismissal/layoff, in the context of the termination or unilateral termination of the employment contract by the employer, it is clear that we are not facing any subjective right in the strict sense (the counterparty owes nothing), but rather a potestative right before an extinguishing potestative right[21], to which the counterparty is subject, having to bear the exercise of this right, as well as the production of its legal consequences. We wish to emphasize this point: the right of the employer to dismiss workers, if any, and under the conditions in which it exists, is always, structurally, an extinct potestative right of the legal-labor relationship, leaving nothing to the taxpayer (in this case, the worker), whether or not they desire, to suffer or endure the change in their legal sphere (in this case, termination of

[19] This advance notice, of course, acts as a limitation on the employer's power to dismiss (in this sense, by all, MAGANO, Octavio Bueno. *Primeiras Lições de Direito do Trabalho*. 3. ed., São Paulo: Revista dos Tribunais, 2003, p. 81).

[20] CARVALHO, Orlando de. *Teoria Geral do Direito Civil*. 3. ed., Coimbra: Coimbra Editora, 2012, p. 135 e ss.

[21] It is traditional to perform a classification here, as per the possible modalities of the legal effect that potestative law tends to produce, distinguishing between constitutive, modifying or extinguishing potestative rights.

employment and loss of employment).

And this takes place this way, as it should be noted, both in Portugal and in Brazil, regardless of the way the law regulates the dismissal, requires or not a gross misconduct for it, accepts or not the lawfulness of arbitrary dismissal etc. That means that, from a structural point of view, the right to dismiss, regardless of the manner in which the law welcomes and regulates it – accepts the law to the free termination of the employment contract or, instead, only allows the causal settlement of the contract – it is always technically translated into a potestative right of the employer and not into any subjective right in the strict sense.

In our view, therefore, the problem does not lie, contrary to what some suggest, in the apprehension of employer dismissal as the employer's potestative right, but in the latitude or breadth conferred on that same potestative right by the legal system. The problem lies, in order to continue to use civilistic terminology, in the secondary legal faculties encompassed by that potestative law, that is to say, in the set of powers or faculties in which its content or *licere* unfolds — what is lawful for the right holder to do, through and by virtue of such a mechanism[22]. The problem lies, as we reiterate, in the excessive latitude conferred on the right to dismiss in Brazil, in the fact that, at least in the prevailing view, the Brazilian order tends to accept even today, three decades after the approval of the Federal Constitution, that out of the set of powers or faculties in which the content of the right to dismiss is unfolded the faculty of "empty whistleblowing" is part of the contract or of the "unmotivated dismissal" by the worker.

In Portugal, the dismissal is a linked statement, "because the validity of the extinguishing act is conditional on the verification of certain reasons or causes that the law considers as justifications to the termination of employment"[23]. In Brazil, layoffs or dismissals do not appear to be a truly bound statement, since arbitrary or unfair dismissal is considered valid (even if not legally), and the employer may, in practice, freely terminate the employment contract, provided that one pays the fine equivalent to 40% of the amount of FGTS deposits (this of course, except in the case of abusive or discriminatory dismissal).

[22] On the notion of secondary legal faculties, CARVALHO, Orlando de. *Teoria Geral do Direito Civil*, cit., p. 142-143.

[23] MARTINS, Pedro F. *Cessação do Contrato de Trabalho*. 4. ed., Cascais: Principia, 2017, p. 147-148.

In any case, let it be repeated, it is always a potestative right of the employer we are caring for, but its scope may be more or less extended, its latitude wider or narrower, its license may be more or less extended and comprehensive. It should not be confused, therefore, with the potestative right to dismiss with the right to arbitrarily dismiss, since even in labor law such as Portuguese (or as the Brazilian jusconstitutional order), which reject unmotivated dismissal or *ad nutum*, the right dismissal, when it exists and in the manner in which it exists, always translating it into a potestative right of the employer.

Let it be reiterated: potestative law is not equivalent to law with absolute or unlimited character. Indeed, as civilists teach, potestative law is the product of standards that confer powers. Yet, the power of the employer to dismiss workers derives from the rules laying down the requirements for that purpose (whether or not it requires the motivation of the decision, whether or not to give notice, whether or not to establish prior procedural requirements etc.), rules which may be more or less permissive in this regard, but which as such do not deprive dismissal, if and when authorized, as per their nature of potestative law.

2 POTESTATIVE RIGHT TO DISMISS: THE WRONG TARGET

We therefore believe, for the reasons given above, that the enemy must be well identified: the enemy is not the potestative right to dismiss, for the simple reason that this right, when it exists — and as far as we know, no one radically rejects it, no one today holds that the worker is like the 'owner' of his job — it is always, in its structure, a potestative right; the enemy is the right to arbitrarily dismiss, without explanations, without justifications, without reason, namely "for no cause".

Therefore, and with the due respect, we cannot follow Renato Rua de Almeida[24], as shown below:

> Therefore, it can certainly be said that in Brazilian law the employer's right to dismiss the employee no longer exists, since dismissal without

[24] "The general regime of contemporary labor law on the protection of the employment relationship against unfair dismissal — comparative study between the Brazilian legislation and the Portuguese, Spanish and French legislations" (ALMEIDA, Renato Rua de. Separata da *Revista LTR — Legislação do Trabalho*, Mar. 2007, p. 8-9.

> just cause is unlawful for the damage caused by the loss of employment, which should be compensated.

The following has also been added up by the author:

> Certainly, because nowadays the provisional compensatory indemnity, represented by the indemnity equivalent to 40% of the deposits of the Service Guarantee Fund, is not sufficiently inhibiting the practice of the illicit act of dismissal without a gross misconduct and because there is no control before the employer's act of firing, which is when one has the feeling that the potestative right to dismiss still exists in Brazilian law.

As we have written above, we believe that these statements by the distinguished author presuppose that qualifying the right to dismiss as a potestative right would correspond to recognizing an almost absolute or unlimited right in the sphere of the employer. In our view, even when a gross misconduct (or other "objective causes") is required for a dismissal, even when demanding procedural requirements are laid down for it, even when generous indemnities are set in the event of unlawful dismissal, even when the right of the unlawfully dismissed worker to be reinstated is envisaged, even when all these conditions are fulfilled, nothing structurally changes as regards the legal nature of the right to dismiss: this remains an extinct potestative right of the employer – only, of course, a right whose secondary legal powers no longer include the possibility of arbitrarily (= without a cause) dismissing the worker. And this is the nerve of the matter, not the potestative character of law.

In a more recent text, Renato Rua de Almeida[25] was even more incisive, when he wrote:

> The protection of the employment relationship against arbitrary or unfair dismissal, cataloged in the Brazilian constitutional text as a fundamental right, implies that conceptually the employer no longer has the potestative right to dismiss.

And the author adds up that:

[25] ALMEIDA, Renato Rua de. Proteção contra a despedida arbitrária ou sem justa causa, cit., p. 81.

> The exercise of the employer's right to dismiss will only occur when the collective dismissal is not arbitrary or when the individual dismissal is due to the employee committing disciplinary or contractual misconduct.

On our end, we will only say: right, but in these cases where the worker is the subject of a non-arbitrary collective dismissal or an individual dismissal with a gross misconduct, the employer, by dismissing, conceptually exercises a potestative right.

The arbitrary, unmotivated *ad nutum* dismissal system was unequivocally rejected by the Constitutions of both the Portuguese and Brazilian countries. It is up to the Portuguese jurists to remain vigilant, so that the ordinary legislation does not empty the constitutional guarantee. Brazilian jurists, we believe, must intensify their efforts so that, after three decades, the complementary act provided for in art. 7, I, of the Federal Constitution is drafted and approved, in order for Brazilian workers to enjoy an effective protection against arbitrary dismissal or those without with no gross misconduct – since, until now, the omission of the ordinary legislator has prevailed, in practice, on the action of the constituent legislator, and what was intended (or at least announced) as transient is dangerously likely to become definitive[26]. This will not, however, "deconstruct" dismissal as the employer's potestative right, but rather modestly by restricting the scope of this (always subsisting) potestative right.

[26] In the words of Arion Sayão Romita, who express the majority doctrinal and jurisprudential understanding in this regard, "the measure adopted by the Transitional Constitutional Provisions Act (art. 10, item I) has apparently become permanent, because, while the complementary act referred to in art. 7, I, of the Constitution is not set forth, there will not be, under the Brazilian positive law, any protection against arbitrary dismissals". However, the author adds, it is urgent to remedy this legal vacuum, concluding: "The right to work, proclaimed as one of the social rights by art. 6 of the Constitution, can be fully recognized only after the positive law has enshrined the principle of the prohibition of arbitrary dismissals" (ROMITA, Arion S. *Despedida Arbitrária e Discriminatória*, cit., p. VII). However, Arion Sayão Romita understands that the supplementary law regulating the constitutional provision will sanction arbitrary or unfair dismissal with compensatory damages, in addition to other rights, but strangely maintains that "among these other rights, the reintegration will not be reintegrated, which excludes the payment of indemnity". And he concludes: "In Brazil, reintegration will be inadmissible" (ROMITA, Arion S. *Despedida Arbitrária e Discriminatória*, cit., p. 83-84). In the same sense, Amauri Mascaro Nascimento, author for whom stability and compensation would be "two opposing ideas", argues that compensation itself would be a "right attributed to the employer, not the employee", concluding that the complementary law provided for in art. 7, I, of the Constitution, "shall be able to provide for anything it wishes, except for that which attracts the right to dismiss, thus indemnifying" (NASCIMENTO, Amauri M. *Curso de Direito do Trabalho*, cit., p. 1178-1184). With the due respect, we have no valid grounds for sustaining these readings of the constitutional precept, a provision which we believe that does not enshrine the employer's right to dismiss,

In conclusion, we think it is imperative to focus on the target, that is, to define well what matters. What matters is to make it clear that the employer does not (and should not have) the right to dismiss the worker without a gross misconduct or arbitrarily[27]. Let us only give them the right to dismiss for a good cause or not arbitrarily — and let us acknowledge, without shyness or misunderstanding, that the latter is a potestative right.

3 ARBITRARY DISMISSAL OR ONE WITHOUT A GROSS MISCONDUCT AS A *CONTRA LEGEM* ACT

In short, and as far as the dismissal is concerned, the two countries' ordinances give, in practice, quite different answers, despite the apparent proximity of the provisions contained in arts. 53 of the CRP and 7, I of the CRFB. In Portugal, no cause dismissal is unlawful in the strong sense, being invalid and giving rise to the right to "interim wages" for workers, compensation for damages (especially moral damages) and, in principle, the reintegration of workers at their workplace. In Brazil, it would be said, dismissals for no cause are so mildly illicit that it even seems lawful, because the only consequence resulting to the employer is the payment of a modest and charged fine, corresponding to 40% of the employees deposits to the FGTS linked account. It is therefore, at most, a merely irregular *contra legem* dismissal act – since it is valid, effective and does not entitle workers towards reintegration.

In the light of the foregoing, and in the terminology of Portuguese law, it would perhaps be said that, as regards the effects, such dismissal would be valid but irregular. Indeed, there is no shortage in Brazil of those who uphold the lawfulness of arbitrary dismissal, in the light of the current order. The dominant narrative here seems to even conceive

provided that it compensates, but rather recognizes a key right for workers, the right not to be dismissed. arbitrarily or without a gross misconduct. In the precise words of Márcio Túlio Viana, “the purpose of the standard is not the guarantee of the right of contractual termination. Neither is the employer the primary recipient. What one wishes to protect is employment — and the subject of protection is the subordinate worker” (VIANA, Márcio Túlio. Right of Resistance. São Paulo: LTr, 1996, p. 396). Therefore, in our view, it will be up to the complementary law to determine the effects of illicit dismissal, and nothing prevents the legislator from combining reimbursement protection with reintegration protection, which are not mutually exclusive (as the Portuguese experience abundantly evidences).

[27] Regarding it, *vd*. still the valuable reflections of VIANA, Márcio Túlio. Trabalhando sem medo: alguns argumentos em defesa da Convenção n.º 158 da OIT. *Revista LTr*, vol. 72, 2008, p. 438-443.

dismissal without gross misconduct/unmotivated as an expression of a lawful act of the employer. In this sense, Sérgio Torres Teixeira[28] says:

> Once it is practiced in a normal manner, dismissal without a gross misconduct, that is, the one exercised in a regular way, as the right to dismiss even without a legitimate reason, according to the directives of the law, as a resilient act proves to be perfectly lawful, while the exercise of the law is legitimate. In this case, even when there is no gross misconduct specified in the law or other reason of disciplinary, technical, financial or economic nature, the dismissal proves to be valid in accordance with the Brazilian labor law, since the regularity of the exercise of the respective right presupposes the admissibility of the arbitrary or unfair dismissal without a gross misconduct, imposing on the legislature only a series of economic injunctions.

In the near sense, Gustavo Barbosa Garcia has also written that[29]:

> In the present case, what we have is the arbitrary or unfair breach of the employment contract, which is a fact that generates the right to compensation in favor of the employee, due to the loss of employment, but, that, at the same time, is not a wrongful or abusive act itself.

As for us, arbitrary or unfair dismissal may not be an "actual wrong" act, but certainly not a properly lawful act either. In this sense, what Renato Rua de Almeida has long taught is accurate. Thereby, we recall his words, which we have already transcribed above, and in this regard, we subscribe in full: "it is illicit".

We believe that it is important to clarify concepts. The fact that arbitrary or unfair dismissal is valid and effective, producing the extinguishing effect of the employment relationship intended by the employer, does not mean that it is legal in Brazil. As we have seen, the Federal Constitution protects workers against such arbitrary or unfair dismissals – these will therefore be dismissals *contra legem*, dismissals marked by the note of anti-juridicity. It is true that the Brazilian constitutional norm refers to complementary law. But, we believe, the illegality of dismissal without just cause or arbitrary part of the *estimated* standard. What the Constitution

[28] TEIXEIRA, Sérgio T. *Nova Dinâmica da Reintegração...*, cit., p. 113.

[29] GARCIA, Gustavo F. B. *Curso de Direito do Trabalho*. 10. ed., Rio de Janeiro: Forense, 2016, p. 842.

refers to complementary law is the respective *statute*, is the determination of the effects, the consequences of such unfair dismissals or arbitrary. In this regard, he writes, as we see it correctly, Jólia Lucena da Rocha Melo[30]:

> Dismissals without a gross misconduct or that are unjustified are constitutionally prohibited. The effectiveness of the standard subsists from its prediction, not depending on additions. What is dependent on complements is the secondary range of the sanction that the standard intends to see applied through the complementary legislation, which, to date, due to the constituent's wishes, has been limited to the payment of the fine on deposits collected on the FGTS.

Hence, strictly speaking, by making an arbitrary or unfair dismissal, the employer is not exercising any potestative right, but is practicing an unlawful act. The problem lies in the lax character of the sanction applied, that is, that these dismissals are merely irregular and not invalid, resulting in a very limited and indemnified amount of compensation to the dismissed worker, pursuant to art. 10, II, of the ADCT. As the reaction of the Brazilian legal system, in the face of these dismissals, is very weak and little energetic – the ordinance does not neutralize these dismissals, only monetizes them – these dismissals even seem legal and enable the feeling of corresponding to the exercise of a right, as Renato Rua de Almeida observes. But, strictly speaking, that is not the case. From our point of view, such dismissals are illegal/irregular, although modesty of the applicable sanction cannot prevent their widespread (rectius: trivialized) practice.

It is therefore urgent that the complementary act promised by the Federal Constitution be drafted. But, it seems obvious that only naïve people would assume that this would be soon. In fact, the Brazilian labor reform, approved by Act No. 13.467, from July 13, 2017, somehow did precisely the opposite.

4 THE NEW ART. 477-A OF CLT: DENYING THE OBVIOUS?

[30] MELO, Jólia L. da R. *Abuso do Direito nas Dispensas sem Justa Causa e Arbitrárias*, cit., p. 141-144 e 272.

In this regard, the legislator decided to innovate, in view of the 2017 labor reform, by adding to the CLT a new art. 477-A, with the following content:

> Individual, non-motivated dismissals or collective exemptions are equivalent for all purposes, and there is no need for prior authorization by a trade union entity or for the conclusion of a collective agreement or collective bargaining agreement for its implementation.[31]

It should be noted that prior to the reform and despite the total absence of any specific legal provision, Brazilian jurisprudence (especially on the occasion of the famous "Embraer case", which involved the dismissal of more than 4,000 workers) had not failed to establish parameters for regulating the collective dismissal, differentiating it from individual dismissal and emphasizing that prior information and negotiation with trade union structures was an indispensable procedural requirement for the validity of such collective dismissal[32].

For this reason, the intention of the legislator, when editing this new art. 477-A, is unequivocal and lies in the antipodes of that intended by the Brazilian Constitution: instead of fulfilling the constitutional task, distinguishing dismissals with a gross misconduct from non-arbitrary dismissals, based on economic, market, structural or technological reasons. Thus, by creating and regulating the figure of "collective dismissal", with its procedure and its effects, the new law seems to have as its objective, above all, hiding the figure of collective dismissal, perhaps even to deny its existence, making it dynamic. It has been settled a case-law that, in this regard, it has been able to lay down certain minimum rules for the protection of workers, at a time when workers are typically so unprotected and fragile as to lose their job. Indeed, by prescribing that individual and collective unmotivated dispensations are equated for all purposes, the legislator gives the message that, after all, collective dispensation would not have autonomy, but instead would translate into a set of individual dispensations, a mere sum

[31] On the distinction between the multiple and the collective dismissal, *vd*., *e.g,* CASSAR, Vólia B. *Direito do Trabalho*. 14. ed., São Paulo: Método, 2017, p. 1009; e GARCIA, Gustavo F. B. *Manual de Direito do Trabalho*. 10. ed., Salvador: Juspodium, 2018, p. 574-576. A figura da "dispensa plúrima" é desconhecida em Portugal.

[32] By all, ALMEIDA, Renato Rua de. Subsiste no Brasil o direito potestativo do empregador nas despedidas em massa? *Revista LTr*, n. 73, 2009, p. 391-393; e MANNRICH, Nelson. Dispensa coletiva e negociação coletiva prévia: novas diretrizes, cit., p. 99-122.

of these. And in any case, without the need for negotiation and prior inquiry with the affected workers and their collective representation structures.

Alongside dismissal with a gross misconduct (subjective cause, based on facts imputable to the worker, facts that substantiate the practice of a disciplinary offense), labor law must provide and regulate the modalities of dismissal for objective and non-arbitrary causes, that is, for reasons of the enterprise, for economic reasons, of a managerial nature, including, of course, the collective dismissal – a “faceless” dismissal, as opposed to just dismissal, which it is, by definition, a "face-off" dismissal.

That is, with this new art. 477, what is apparently intended above all is to emphasize dismissal as a “potestative right” and expression of a virtually absolute and almost uncontrollable power of the employer. It is contrary, let it be said, to everything or almost everything. From the outset, to the provisions of art. 7, item I, of the Citizen Constitution, which, on the contrary, was concerned with the protection of workers in the face of arbitrary dismissals or without a gross misconduct.[33] It goes against the provisions of ILO Convention No. 158, which clearly distinguishes dismissals based on the conduct of the workers based on the business needs of the enterprise, establishment or service (Article 4); and which expressly refers to dismissals for economic, technological, structural or similar reasons, binding the employer to provide the relevant workers' representatives with the relevant information in due time and to consult them on the measures to be taken in order to prevent or limit redundancies, as well as measures to mitigate the unfavorable effects of any dismissal on the workers concerned, including the possibility of reclassification to another job (Article 13). It goes against all developments in European law in this area, in particular Council Directive 98/59/EC from July 20, 1998, whose essential objective is to protect workers in the event of collective redundancies. Thus, in accordance with art. 2 of the Guideline, where they intend to make collective redundancies, employers undertake to consult workers' representatives in

[33] As noted by Grijalbo Fernandes Coutinho and Hugo Cavalcanti Melo Filho, “the ordinary legislator is not given to legislate in a sense diametrically opposed to constitutional rules,” and “quite unlike the inexplicable legislative omission regarding the regulation of constitutional precept for 30 years is the attempt to insert into an ordinary law the absolutely collident rule with the same preceptive” (COUTINHO, Grijalbo F. e MELO FILHO, Hugo C. A Unfairness of the Mass Dismissal of Workers Authorized by Act No. 13,467/2017. In: FELICIANO, Guilherme G.; TREVISO, Marco A. M. T .; SOURCES, Saul T. de C. (Org.). *Reforma Trabalhista:* visão, compreensão e crítica. São Paulo: LTR, 2017, p. 169-176 and p. 171).

good time with a view to reaching an agreement; and inquiries shall address at least the possibilities to prevent or reduce collective redundancies and the means of mitigating their consequences by using accompanying social measures, in particular to assist the reintegration or retraining of redundant workers.[34] And contrary to the jurisprudence that, despite the legal gap in relation to collective redundancies in Brazil, managed to establish a reasonable level of procedural protection for workers involved in this massive dismissal, which, as one could say, expressed a civilizational minimum decency in this matter, treating workers concerned as persons and not as disposable goods[35].

In fact, the so-called "labor" will certainly be a productive factor, to be combined with others in the whole company. But, before and above that, the workforce is people — it is just that, as someone once remarked, work does not exist, but what does exist is working people. "Work is not a commodity!" This is the fundamental principle stated in the famous Philadelphia Declaration, adopted by the 26th ILO Conference on May 10, 1944. This statement is, after all, the core normative foundation of Labor Law, meaning the dignity of work and of those who pay it over other considerations, including those concerning economic efficiency. And as Kant wrote[36], dignity is priceless:

> In the kingdom of purposes, everything has either a price or a dignity. When one thing has a price, it can be put instead as something equivalent; but when one thing is above all price, and therefore does not allow an equivalent item, then it has dignity.

[34] As is well known, the guidelines bind the Member States to which they are addressed as to the result to be achieved, but leave it to the national authorities to determine how and how to achieve them (Art. 288 of the Treaty on the functioning of European Union). The guidelines are intended to be transposed into the legal system of each Member State. This was done, in the Portuguese case, through the Labor Code (CT), whose arts. 359 to 366 establish the notion, procedure and effects of collective redundancies. The lack of promotion of negotiation with the workers' representative structure will imply the illegality of the respective dismissal, pursuant to art. 383 of the CT, with the inherent consequences (compensation for damage caused, payment of interim remuneration and reinstatement of the worker or replacement compensation, as provided for in arts. 389 to 392 of the CT). For developments in this regard, AMADO, João L. *A Cessação do Contrato de Trabalho* – Uma Perspectiva Luso-Brasileira. São Paulo: LTr, 2017, p. 101-105 e 115-135.

[35] This is why Augusto César Leite de Carvalho accurately observes that the new legal standard has "the evil in disguise to compromise this civilizing stage" formely reached (CARVALHO, Augusto C. L. de *Direito do Trabalh, Curso e Discurso*. 2. ed. São Paulo: LTr, 2018, p. 454.

[36] KANT, Immanuel. *Fundamentação da Metafísica dos Costumes*.Lisboa: Editions 70, 2007, p. 77.

The dismissal is certainly one of the forms of termination of the employment contract, a breach of the employment relationship by a unilateral initiative of the employer. This is what dismissal is all about, but it is much more than that. The dismissal, as Baylos Grau and Pérez Rey point out[37], is also an act of violence by the private power:

> [...] the company, by depriving a person of work, expels them from a socially and culturally decisive sphere, that is to say, from a complex situation in which they obtain rights of integration and participation in society through work, in culture, education and in the family. It creates a person with no social qualities, because their quality and the referents that give them security in their social life depend on the work.

Precisely because the dismissal translates — also translates — into an violent act by the employer/corporate power, knowing under what conditions such an act can be legitimately practiced by the employer and determining the consequences of the respective exercise in the sphere of the affected worker are two aspects of great relevance to the labor law. As the above authors point out, the violence of dismissal is a fact that has nevertheless been subjected to a process of "democratic civilization" by labor law — this power has been rationalized, conditioned, formalized, limited and procedured, through the requirement of compliance with a due process as an enabling requirement of the dismissal decision. Niklas Luhmann long ago said: "power is legitimized through the procedure".

We do not know how Brazilian doctrine and courts will interpret and apply this new art. 477-A of the CLT[38]. On our end, looking at the article added from the perspective of a Portuguese and European lawyer, we do not hesitate to consider this standard as one of the

[37] GRAU, Baylos; REY, Pérez. *El Despido o la Violencia del Poder Privado.* Madrid: Editorial Trotta, 2009, p. 44. In the near sense, Valdete Souto Severo writes: "We are as long as we work, so losing a work vacancy often also means losing references, contacts, friendships, environment, routine. It means losing part of yourself" (SEVERO, Valdete S. *O Dever de Motivação da Despedida na Ordem Jurídico-Constitucional Brasileira.* Porto Alegre: Livraria do Advogado, 2011, p. 12.

[38] In this sense, *vd.*, in special, NAHAS, Thereza Christina. Dispensa coletiva e o regime da Lei n. 13.467/2017 – um longo caminho a percorrer. In ARAÚJO, Adriane R. De; D'AMBROSO, Marcelo F. (coord.). *Democracia e Neoliberalismo:* o legado da Constituição de 1988 em tempos de crise. Salvador: Juspodium, 2018, p. 227-250, e ROCHA, Cláudio J. da. The collective dismissal of labor reform analyzed in the light of constitutional law and the theory of judicial precedent. In PORTO, Lorena V. and ROCHA, Claudio J. da (org.). Work: Dialogues and Criticism, Tribute to Professor Márcio Túlio Viana. São Paulo: LTR, 2018, p. 141-151.

most unfortunate of the Brazilian labor reform. A flexibilizing standard in the bad sense of the word, in the sense of a standard that exponentially broadens employers' powers and disregards the legitimate interests of workers affected by collective dismissal, to whom the word is not given, not even a word in advance[39]. It is certainly one of the standards that show, to the full, that flexibility does not mean, or not always means, modernizing. In this case, the Brazilian legislator is ostensibly distanced from what has been the hallmark of European Union law for decades, which has always been concerned with the procedural involvement of workers affected by a "mass layoff", forcing the employer to respect the information and inquiry requirements of such workers, forcing them, after all, to dialogue before striking the employees with the dismissal decision.

Because, let it be repeated, that is all it is and has always been about: not to require any kind of union authorization for the dismissal to take place, not to conclude any collective agreement or bargaining between the parties for that purpose, but, only the requirement of information, prior inquiry, negotiation, social dialogue within the company, as a legitimizing assumption of the corporate decision of collective dismissal. And this one acquired from the European law, also built on the Brazilian jurisprudential plan, especially through the action of the Superior Labor Court in the "Embraer case", seems to have been olympically ignored, if not ostensibly disregarded, by the 2017 labor reform. However, at least in this matter, it amounted to a clear social/civilizational backlash and anything but a modernizing reform.

That, of course, would harmonize with João Batista Brito Pereira[40], unless the terms of the new art. 477-A of CLT are not concluded, as they are contrary to the assumption of collective bargaining (not the prior union authorization or effective collective bargaining) for the legality of collective waiver. By the way, Augusto César Leite de Carvalho[41] also points to the deficient wording of the standard, as follows:

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[39] In a close sense, considering that the purpose of the standard is to "disproportionately boost the unilateral power of the employer in the world of work" and to conclude that the new precept is unconstitutional, DELGADO, Maurício Godinho. *Curso de Direito do Trabalho*, cit., p. 1328-1330.

[40] PEREIRA, João Batista B. Collective bargaining as an assumption of collective dismissal. In ARRUDA, Kátia Magalhães Arruda; ARANTES, Delaíde A. M. (org.). *A Centralidade do Trabalho e os Rumos da Legislação Trabalhista:* Tribute to Ministro João Oreste Dalazen. São Paulo: LTr, 2018, p. 145-158.

[41] CARVALHO, Augusto C. L. de. *Direito do Trabalho, Curso e Discurso*, cit., p. 454. In a close sense, underlining that the union's authorization was never required and that the standard should be interpreted as requiring prior

> [...] apparently disconnected, as consultation with the union does not serve to authorize the dismissal, and yet, what the jurisprudence is understanding to be required is not the conclusion of a collective agreement or convention, but the predisposition to collective bargaining (about the way and the effects of operating mass dismissal) which may or may not result in a collective labor agreement.

If so, then perhaps one may conclude that the new standard, contained in art. 477-A of the CLT, is both malicious and poorly worded, proving ultimately innocuous, since, strictly speaking, no one has previously conditioned the validity of the collective waiver to prior union authorization or the effective conclusion of a collective agreement for this purpose. And if so, then perhaps the case-law, which required prior information, consultation and negotiation with workers and their representatives, could withstand labor reform – which at this point would have turned out to be a genuine "gunpowder dry shot". We'll see…

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