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THE EXTENSION OF THE POWER TO DEROGATE *IN PEJUS* BY COLLECTIVE LABOUR AGREEMENT IN BRAZIL

The 2017 Labor Law Reform introduced into the Brazilian labor system the possibility of a collective agreement reducing or revoking employment rights guaranteed by the Labour Code (the *Consolidação das Leis Trabalhistas* - CLT) or by other infra-constitutional labor laws[1]. The main jurisprudential understanding prior to the 2017 Reform was that only collective bargaining rules *in mellius*, that is, the one that expand labor rights, would prevail over the law. The criterion for resolving conflicts between negotiated and legislated norms was the most favorable norm.

Brazilian Federal Supreme Court (*Supremo Tribunal Federal* - STF) judgments, however, had challenged the most favorable norm criterion even before 2017 by allowing a reduction or suppression of employment rights through collective bargaining, however, at the same time, establishing two conditions for *in pejus* collective bargaining: that the collective agreement did not transact rights of absolute unavailability and that other rights were granted as compensation for the losses[2].

In 2022, a milestone was created in Labor by a decision that changed the panorama of the flexibility of labor standards through collective bargaining. In the Extraordinary Appeal # 1.121.633-GO, the STF, unanimously, deemed constitutional the issue of employment rights being negotiated *in pejus* and recognized the « constitutionality of the matter under debate ». Based on this, the general repercussion of the STF was thus stated:

> ... the controversy regarding the validity of a collective labor rule that limits or reduces labor rights has a constitutional nature and undeniable relevance from a social, economic or legal point of view, in addition to transcending the subjective interests of the case, since the correct interpretation of the art. 7, XXVI, of the Federal Constitution is a recurring theme in the Brazilian labor courts and has generated insecurity regarding the validity and scope of what was agreed upon in conventions and collective agreements in view of the norms provided for in the Consolidation of Labor Laws, in the light of the

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1 A. V. M Gomes, « What is Collective Bargaining for? Brazilian Labor Law Reforms under ILO Scrutiny », *International Labor Rights Case Law journal*, vol. 5, 2019, p. 47.

2 See STF, RE 590,415 - Theme 152 - and RE 895,759 of the STF website: https://portal.stf.jus.br/jurisprudencia/

> aforementioned constitutional precept, which gives rise to the recognition of the general repercussion[3].

The case concerned a mining company in the state of Goiás, questioning the decision of the Superior Labor Court (TST), which had ruled out the application of a collective norm on the suppression of payment for hours *in itinere*[4]. At the judgment, the TST understood that the payment should be made because the mining company was in a difficult-to-access location, with working hours incompatible with public transport schedules. The Extraordinary Appeal filed with the STF recognized the validity of the collective agreement norm.

The STF understanding was that collective agreements that reduce or revoke employment rights are valid, provided that a minimum civilizing level is ensured for the worker, even though, the thesis originally proposed by the Minister-Rapporteur in the plenary was defeated. The minister had established a very simple suggestion: collective bargaining that alters *in pejus* or revokes rights provided for in the legislation, is valid, unless it confronts a right of absolute unavailability guaranteed in the Federal Constitution. That is, what was not provided for in the Constitution, in this original suggestion, would not prevail over *in pejus* collective bargaining.

After debates and hearing of the other Ministers and the various entities that participated as *amicus curie*, the original suggestion of the Minister Rapporteur, which had an inconsistency liable to legal uncertainty, was changed to « as long as absolutely unavailable rights are respected ». The Court, by a majority, granted the extraordinary appeal. Unanimously, on June 2, 2022, the following thesis was established:

> Collective agreements are constitutional when considering the negotiated sector adequacy, agree on limitations or removals of labor rights, regardless of the specified explanation of compensatory advantages, provided that absolutely unavailable rights are respected[5].

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3 Translation by the authors. In Portuguese: « (...) a controvérsia referente à validade de norma coletiva de trabalho que limita ou reduz direitos trabalhistas possui natureza constitucional e inegável relevância do ponto de vista social, econômico ou jurídico, além de transcender os interesses subjetivos da causa, já que a correta interpretação do art. 7º, XXVI, da Constituição Federal é tema recorrente nos tribunais trabalhistas brasileiros e tem gerado insegurança quanto à validade e alcance do pactuado em convenções e acordos coletivos em face das normas previstas na Consolidação das Leis Trabalhistas, à luz do citado preceito constitucional, o que dá ensejo ao reconhecimento da repercussão geral ». STF, Plenário Virtual: https://portal.stf.jus.br/jurisprudenciaRepercussao/verPronunciamento.asp? pronunciamento=8147527

4 Hours *in intinere* (on the way) were guaranteed as an employment right by CLT Article 58: « § 2 The time spent by the employee to the place of work and for his return, by any means of transport, will not be computed in the working day, except when, in the case of a place of difficult access or not served by public transport, the employer provides the driving ». This norm was revoked by 2017 Reform.

5 Translation by the authors. In Portuguese: « São constitucionais os acordos e as convenções coletivos que, ao considerarem a adequação setorial negociada, pactuam limitações ou afastamentos de direitos trabalhistas, independentemente da explicitação especificada de vantagens compensatórias, desde que respeitados os direitos absolutamente indisponíveis ». STF. Tema 1046 - Validade de norma coletiva de trabalho que limita ou restringe direito trabalhista não assegurado constitucionalmente : https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5415427&numeroProcesso=1121633&classeProcesso=ARE&numeroTema=1046

The wording of the thesis deserves to be analyzed in detail to understand what differs from previous decisions of the STF[6]. From a first reading, the definition of the legal scope of the norms established through collective bargaining appears to be very broad. It is possible to better. understand the decision considering the positions of Minister Gilmar Mendes, rapporteur of the process, and Minister Rosa Weber, who, together with Minister Edson Fachin, diverged from the majority position. Their positions differ from the wining vote not only in relation to the interpretation of Article 7 of the 1988 Federal Constitution, but also on the role of collective bargaining.

For the rapporteur, Article 7º of the Federal Constitution indicates the passage from a paternalistic State to a State that respects and encourages the normative force of contracts. The Rapporteur interprets Collective Labor Law as an autonomous and distinct branch from Individual Labour Law or Employment Law, and therefore, governed by principles and rules different from Individual Labour Law. The main argument used by the Rapporteur is that collective bargaining is different from bilateral negotiation because there is no hypo sufficient party, and therefore, it can be based on the general principle of contracts. His vote reiterated the understanding of Minister Teori Zavascki in the STF judgment of RE 590.415 about respect for the principle that guides compliance with contracts - the *pacta sunt servanda* -, as well as the principle of business loyalty.

The wining thesis ensures that norms created through collective bargaining prevail over legislated employment rights when: a) they promote a higher standard of law for workers compared to state norms; and b) transact labor rights of relative unavailability on a sector-by-sector basis. The conceptualization of labor rights of relative unavailability, however, is vague, at the judge's discretion, defined as portions of the law that, if violated, do not reach the minimum acceptable level. This level is established in constitutional norms, norms derived from international human rights treaties and infra-constitutional norms that ensure minimum guarantees of citizenship[7].

An important difference between the 2022 decision and previous ones is that there is no requirement to « explain compensatory advantages to the right in collective bargaining » that has been reduced or revoked. As stated in the 2022 ruling, the STF considered collective bargaining that agreed on reduction or suppression of labor rights to be constitutional, regardless of the specified explanation of compensatory advantages. The Rapporteur justified the unnecessary explanation of compensatory advantages, in view of the recognition of applicability of the theory of the comparison of collective bargaining agreements as a whole[8] by the STF. The current understanding of the STF, therefore, is that there is no obligation to institute a compensatory clause for a collective bargaining that revokes or reduces a right to be valid. It is possible to make a one-off negotiation in which the worker does not receive any compensation in exchange for the flexibility of a

6 Especially in RE 590.415-SC (Theme 152) and RE 895.759-PE.

7 STF, Plenário Virtual: https://portal.stf.jus.br/jurisprudenciaRepercussao/verPronunciamento.asp?pronunciamento= 8147527

8 In Portuguese, *teoria do conglobamento*. « According to the *teoria do conglobamento*, in the event of a conflict between what was established in the Collective Agreement and other normative instrument, the most favorable to the employee, as a whole or in its entirety, must prevail. By the theory, there should be no fractionation. That is, it is not possible to simply choose the best items from each regulation and put them together ». (TST, 2019): https://www.tst.jus.br/-/direito-garantido-teoria-do-conglobamento

legislated employment right. The most recent understanding of the STF is in line with the 2017 Labour Reform, which included paragraph 2 of CLT article 611-A, providing that « the lack of express indication of reciprocal counterparts in a collective agreement or collective labor agreement will not lead to its nullity because it does not characterize a vice of the legal business ».

We consider that the decision adopts a sense of collective bargaining as a process of dialogue and self-composition of labor conflicts[9], to a certain extent, empty of content, since in general it can be used to reduce or revoke rights guaranteed by labor law. This understanding is contrary to the one exposed by the ILO Committee of Experts, which, analyzing CLT articles 611-A and B introduced by the Labour Reform, affirms that collective bargaining should lead to the improvement of workers' social condition[10].

Furthermore, the decision of the STF does not end the conceptual embarrassment regarding the definition of what are rights of absolute unavailability - the ones that cannot be reduced or revoked by collective bargaining. It was expected that the decision would bring legal certainty to collective bargaining and resolve ambiguities regarding the matters that could be transacted between the parties. However, the decision does not envisage an answer to this question. The criteria for defining labor standards that ensure minimum guarantees of citizenship, are still not well defined. Basically, the question concerns the limits of workers' autonomy in the employment relationship, or, in other words, the limits of the contractual freedom of workers and employers, as well as the demarcations of the power of self-regulation in an employment relationship.

In conclusion, the position adopted by the STF is objectionable for two reasons. First, the criterion for defining rights that are endowed with absolute unavailability is extremely vague and imprecise. As a result, there are different assessments and divergent interpretations of the expression « absolutely unavailable rights ». Second, collective bargaining is not essentially a means of making workers' rights more flexible; but rather a fundamental right of workers to improve their social condition. Workers' fundamental rights guaranteed by the Federal Constitution and the rights provided for in the infra-constitutional legislation that materialize these rights, are labor rights that cannot be subject of *in pejus* collective bargaining. Listing these « absolutely unavailable rights » rights is not a case-by-case response, in which the solution will be different for each crisis. On the contrary, it is based on the material limits established by the fundamental rights themselves. These rights form the core of social rights as they concern the dignity of the worker and as such should preclude any possibility of negotiations over them.

9 Translation of the Portuguese term « Autocomposiçao », when the parties involved in the conflict work together to reach a decision.

10 A. V. M. Gomes, « What is Collective Bargaining for? Brazilian Labor Law Reforms under ILO Scrutiny », *op. cit.*