


CLIENT NOTE

COVID-19: 3 DRASTIC
MEASURES FOR EMPLOYERS
TO CONSIDER



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Introduction

The novel coronavirus (COVID-19) pandemic has sent the world into a spate of panic and worry about disruption to life as we know it. The confirmation of the virus having spread to Zambia and the constant updates on the rising new cases of infection across the country instils a sense of hopelessness about the future. In the midst of this quagmire is the employer/employee relationship which is on the brink of collapse and for the first time in history, is arguably faced with novel challenges which will no doubt require novel solutions. Employers have already begun implementing some measures to cope with the situation. Some employees are working remotely from home or on a rotational basis, whilst others have taken forced leave but with full pay as required by the law. As employers manage the situation in its current phase however, considered thought must be given to a situation where the pandemic rolls out for a much longer period than is anticipated. If this happens, it will become

increasingly difficult for most employer/employee contractual obligations to be fulfilled and therefore, inevitable for employers to downsize and implement more drastic measures in order to ensure business continuity.

The article highlights three (3) possible drastic measures and their legal implications, which employers should cautiously consider.

1. State of Emergency

A state of emergency allows a state to “mobilise quickly and activate a menu of powers that they can use to respond to a crisis situation,” which it would otherwise not be entitled to do. For instance, the state would have power to take wide ranging measures such as restricting the movement of people with or without exception, or temporarily occupying premises for purposes of containment. Whether or not the Zambian government should take a leaf from other countries such as Spain, Mexico and some US states which have declared a state of emergency is beyond the scope of this article. However, it is undeniable that in the event that the government’s “Science-led Disease Outbreak Preparedness and Contingency Plan” fails and the need for a total ‘lockdown’ instead of a mere advisory “stay home” decree arises, the President will be left with no option but to invoke emergency powers as provided under Article 30 or 31 of the Constitution.

The Employment Code provides strict guidelines for the President to make regulations in the event of an emergency decree, which he considers necessary for securing the continued employment of employees and their conditions of service. In addition to the Employment Code, the Emergency Powers Act equally empowers the President, during a state of emergency, to make such regulations as appear necessary for securing inter alia, public safety and for maintaining supplies and services essential to the life of the country. Therefore, the exit options available to the employer/employee will be very limited in this situation as employers will not be able to lay-off their employees willy-nilly unless in a manner provided by the law. This

situation presents the most drastic measure that may be taken in the event of a “lockdown” or state of emergency, which employers must be prepared for. It remains to be seen whether the state will create a fund to cushion the impact of the pandemic on the employers/employees.

2. Salary Reduction, Unpaid Leave or Mutual Separation

If the current situation continues without a state of emergency being declared, employers may consider implementing salary cuts across the board in order to manage the situation. Where this measure equally becomes unsustainable in the long run, employers may consider having their employees placed on or continue with leave, but on an unpaid basis until the situation normalises.

Unlike forced leave which is provided for under the law, unpaid leave is not covered and therefore, purely a matter of contract between the parties. If salary deductions and unpaid leave are not tenable options for the employer/employee, the parties may consider mutually agreeing to terminate the contractual relationship. For the reason that the law does not specifically provide for these options, i.e. salary reduction, unpaid leave or mutual separation, the employer must ensure that the express consent of the employee is obtained before effecting either one of these measures. This is premised on the legal principle that if an employer alters or varies in any “adverse way” a basic condition(s) of employment without the consent of the



employee, then the contract of employment stands terminated and the employee is deemed to have been declared redundant and therefore, entitled to be paid a redundancy package. It may be helpful therefore, for employers to have without prejudice discussions with some of their “targeted” employees early on, before effecting these measures in order to avoid claims for constructive dismissal.

3. Termination by Redundancy or based on Operational Requirements

If the employer is unable to agree with the employee on the options available at (2) above or does not wish to explore them altogether, the employer may consider termination by redundancy or operational requirements. Legally, a redundancy occurs when the employer terminates the contract of employment wholly or partly due to the employer ceasing or diminishing the business.

A termination by redundancy may also occur where the requirement for the employee to carry out the work for which he/she was engaged has ceased or diminished. If the COVID pandemic rolls out for longer than is anticipated, employers may be forced to either cease their businesses or to lay-off some of their employees, giving rise to cases of redundancy. The Employment Code provides very strict guidelines on how to effect redundancies, which employers should adhere to in order to avoid additional claims for unlawful or wrongful termination. The Employment Code requires the employer to pay the redundancy package no later than the last day of duty, otherwise the employee will remain on the pay roll until fully paid.

Fortunately, employers that do not have the financial capacity to pay the redundancy package in a lumpsum have an option to pay it in installments subject to approval by the Labour Commissioner. Furthermore, strict guidelines are to be adhered to in the event that the employer wishes to fill the vacancy

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later on. The applicability of these provisions will be varied depending on the date of the contract of employment. Comparatively, (and in the absence of a state of emergency being declared), termination by redundancy is the most drastic measure to take as it is very costly to businesses (depending on the number of employees involved) and could be even more tragic for employees.

Termination based on Operational requirements

Apart from the employee’s capacity or conduct, it is legal for an employer to terminate a contract of employment on the basis of operational requirements. To give effect to this form of termination, the employer merely gives notice or makes payment in lieu of notice and discloses the reason for the termination accordingly. The Employment Code does not define “operational requirements.” Additionally, there is no judicial pronouncement as the Zambian courts have yet to be faced with such facts, as far as the author is aware. It is possible for the courts to interpret the term “operational requirements” as merely referring to a redundancy situation. Conversely, it is also arguable that the Employment Code uses the terms “operational requirements” and “redundancy” as being mutually exclusive, otherwise it would have sufficed to use one term throughout the Employment Code. It is the author’s view however, that termination on the basis of operational requirements provides a “perfect alternative” for the employer with no financial capacity to effect redundancy given that there is no judicial pronouncement yet. It will be interesting to see the courts’ interpretation of this form of termination post the COVID pandemic period.

Conclusion

The decision to take either one of these measures is purely a commercial one and entirely depends on the dynamics of each business, whilst taking into account the legal considerations.

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