

108th Session, Geneva, June 2019

Committee on the Application of Standards

Following the decisions made during the informal tripartite consultations on the working methods of the CAS in March 2019, governments appearing on the preliminary list of individual cases have now the opportunity, if they so wish, to supply on a purely voluntary basis, written information before the opening of the session of the Conference.

Information on the application of ratified Conventions supplied by governments on the preliminary list of individual cases

Brazil

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Brazil (ratification: 1952). The Government has provided the following written information.

Once again, it was with perplexity that Brazil heard the news that it has been mentioned in the preliminary list of countries that may be examined during the International Labour Conference in 2019.

To this end, as a general report, Brazil indicates below several issues that substantiate its dissatisfaction with the attitude of this International Labour Organization (ILO), especially because it is one of the countries that has ratified the most international labour conventions and seeks, enduringly, in line with domestic legislation, to give the highest degree of effectiveness to such instruments.

The Committee of Experts on the Application of Conventions and Recommendations

First, it should be emphasized that the ILO Committee of Experts, whose primary mission is to monitor the effective application of international labor agreements - within the scope of the various members of the organization - should heed the fact that the conventions may receive different interpretations when they are applied individually by countries, especially due to the need for harmony between the international text and domestic legislation.

Having said that, Brazil yet again reaffirms that it has not violated any of the provisions of ILO's Convention n. 98 when drafting Act No. 13.467, of 13 July 2017.

Prevalence of negotiation over legislation (articles 611-A and 611-B of the CLT)

As previously mentioned in the documents sent by Brazil to this organization, the provisions of articles 611-A and 611-B of the Consolidation of Labour Laws (CLT), brought to the legal

system through Act No. 13.467/2017, are in full harmony with the content of ILO Convention n. 98, especially with respect to article 4 of the aforementioned convention.

In this line of thought, built by the provisions mentioned above, Brazil aimed to increase the legal security of the collective instruments negotiated between workers and employers. To this end, it presented a list of labour rights that may be subject to collective bargaining. However, with the clear objective of safeguarding interests superior to collective bargaining, a specific provision was created whose list of topics cannot be included within the scope of collective clauses and also presents a series of rights enshrined in the 1988 Constitution of the Federative Republic of Brazil itself. It is, therefore, a modern legislation in the sense of demonstrating to social partners the scope of collective bargaining in a transparent manner.

The purpose of clarifying the matter that can be subject to collective bargaining perfectly respects all the content of ILO C. 98 and, even more significantly, confers a high degree of concreteness to the Constitution of the Federative Republic of Brazil of 1988, which, since its enactment, promoted collective bargaining and established the recognition of collective labour agreements and accords as a fundamental right of workers.

It is also important to emphasize that since the advent of Act No. 13.467/2017, the Judiciary, notably the Supreme Court of Brazil, has focused on several issues of that statute. However, no constitutional action was brought to the attention of the Supreme Court of Brazil on the issue of the prevalence of negotiation over legislation (articles 611-A and 611-B). In this regard, having passed through various constitutionality and conventionality judgments in the various committees of the Brazilian Parliament, and not having been dismissed under the Supreme Federal Court of Brazil, it is evident that such provisions are in line with the legal system and do not violate domestic and international laws. It is, above all, a democratic and sovereign action, whose main purpose is to enable collective, free and voluntary negotiations with legal certainty.

In terms of numbers of collective instruments, one should consider that the Mediator System, the system responsible for registering collective instruments negotiated by trade unions, demonstrates that collective negotiations continue to be conducted and registered in numbers approximating to those anterior to the advent of Act No. 13,467/2017. Specifically about the numbers, there was a total of 13,435 collective instruments signed in 2017, 11,234 in 2018 and 12,095 in 2019, taking into account the first quarter of each year. Therefore, if Brazil showed a drop of 16.38% in the 2017-2018 comparison, it showed an evolution of 7.11% in relation to the year 2018-2019.

The above finding, in turn, suggests that, although the regulatory framework requires a reasonable amount of time for the parties to get to know it and apply it in practice, negotiations did not experience an alarming decrease, as affirmed by those who are unaware of the actual data. In practice, therefore, articles 611-A and 611-B of Act No. 13,467/2017 did not represent an obstacle to the continuation of collective bargaining in Brazil.

The exception to the single paragraph of art. 444 of the CLT (individual negotiation)

At no time is Brazil unaware that the rule of negotiation has a collective character. However, after observing that a small portion of workers have greater bargaining power in relation to the employer, Act no. 13.467/2017 decided to entrust greater force to individual negotiations, only in these cases. In this sense, the worker with a higher educational level and who receives a monthly salary equal to or higher than twice the maximum limit of the social security benefits

of the Brazilian social security system, can stipulate contractual conditions that, in his view, are more advantageous for him.

On the other hand, as mentioned above, the possibility presented above reaches approximately 1.45% of the workers governed by CLT and 0.25% of the Brazilian population. Thus, despite the voices that argue that individual negotiation has replaced collective bargaining, this statement is not true. What was sought with the device, one can recall, was to grant a select group of workers, holders of a greater bargaining power, with the possibility of entering into negotiations that will meet their individual interests in a more fruitful way.

Regulation of Autonomous and self-employed workers (Article 442-B of the Labor Code)

As is the case for all provisions in Act n. 13467/2017, the core function of Article 442-B is to provide both self-employed and companies with legal certainty. In this field, the Brazilian Parliament, in perceiving the need to legislate on situations that have long existed in practice, understood that it would be advisable to regulate the situation concerning the self-employed, while excluding an employment relationship between the contracting parties.

It is obvious that Brazil's legislation has not distanced itself from the so-called principle of the primacy of reality. In this regard, it is not excluded that the competent authorities in Brazil can unveil genuine employment relationships beneath disguised service agreements. This is the reason why Brazil has enacted an ordinance by which full assurance is given that an employment relationship will be recognized where legal subordination between a professional and an employer exists. Once again, it is proved that the text of Act n. 13467/2017 has refined the view about the law while preserving the necessary legal certainty for all social actors.

Prevalence of collective accords over collective agreements (Article 620 of the Labor Code)

Another question raised by the Report of the Committee of Experts refers to the fact that Act n. 13467/2017 has introduced a rule in to order to reinforce collective bargaining by means of taking due account of specific circumstances surrounding the workers of a given category at the company-level. Such provision's intent has been, therefore, to allow for the prevalence of the specific conditions (collective accords) over the general conditions (collective agreements).

In this light, it cannot be overlooked that the collective accord is much closer to the day-to-day life of the workers at the company-level. Thus, the factual reality can be better translated by means of the collective accord, giving more density to the negotiated clauses.

All in all, it could be said that, instead of violating Article 4 of Convention n. 98, new Article 620 of the Labor Code is in full compliance with that international standard. Convention n. 98, beyond any doubt, affirms the need that measures for the promotion of collective bargaining be appropriate to the national conditions. Hence, the Brazilian Parliament, while abiding by Convention n. 98, acknowledged the specificity of the collective accords over the collective agreements.

Conclusions

Out of respect for ILO, Brazil has consistently provided detailed information on the substantive minutiae of a wide range of relevant provisions of Act n. 13467/2017.

In addition, as indicated in previous occasions, it should be underlined that internal issues of Brazil, with no bearing whatsoever on labour matters, cannot serve as a basis for requesting the

country to present explanations on a legislation that was extensively discussed in Parliament and that has been gradually implemented in the context of legal relations between workers and employers.

In this sense, the inclusion of Brazil in the preliminary list, for the second consecutive year, is unwarranted. Nonetheless, Brazil has demonstrated that Act n. 13.467/2017 did not infringe any international standards, in particular Convention n. 98.