

Temas de Direito do Trabalho

Especialmente convidado a colaborar para o maior brilhantismo dos debates dos temas de Direito do Trabalho num encontro dos mais renomados especialistas do mundo, entre os quais se alinha, certamente, o Prof. Célio Goyatá, professor titular desta disciplina na Faculdade de Direito da UFMG, apresentou trabalho com o qual pode demonstrar mais uma vez a sua cultura e competência e elevar o prestígio desta Faculdade dentro e fora do país.

Damos, a seguir, esse magnífico estudo do renomado mestre, no próprio texto inglês em que foi apresentado.

The Situation of the Worker in the Case of Sickness

by

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1 — We can, without the slightest doubt, say that in the matter of social security, we have made great progress in Brasil.

In fact, it is here convenient to recall that article nº 1229, insertion III of the Brazilian Code of Civil Law, promulgated in 1916 and made effective on 1st January 1917, rules that the employer may break the respective contract for a just cause which renders the employee unable to perform the service for which he was contracted. Thus, the worker was left without any assistance in case of sickness; he received no help either from his employer or from the State.

However, the Brazilian Code of Commercial Law, promulgated far back in 1850 by Emperor Dom Pedro II, in the period of the Brazilian Empire, and which still continues in effect, is, in its structural lines, more liberal than our Civil Code of Law, for article 79 of the former rules: if for reasons over which they have no control, agents or factors (shop-assistants, overseers, etc.) could not carry out the duties imposed by their job, they could leave off work without any loss of pay, so long as the absence from work did not exceed three months. Thus, according to the norm just referred to, business employees who became ill, could remain away from their jobs up to three months without any loss of salary.

However, with the advent of the first social laws of a character eminently favourable to labour, the above mentioned provisions of the Civil and Commercial Codes were no longer applied to wage earners.

2 — The first legislation on social insurance against old age and disability appeared in our country in 1923, Law n° 4682 of 24th January 1923, called the Eloy Chaves Law (named after the Federal Deputy by whom the respective Bill was introduced in our National Parliament) and which determined about the creation of a Retirement and Pension Fund by railway companies for the benefit of their employees.

As has been rightly pointed out by Professor Cesarino Junior, who is an expert on the subject, social legislation in our country only began in a decided and effective manner after the 1930 Revolution. In fact, it was this same great Brazilian master who made the following statement: "The Provisional Government, the formed under the rule of Getulio Vargas, created the Ministry of Work, Industry and Commerce, which really began the elaboration of our social laws".¹

Segadas Vianna, who has a deep knowledge of the evolution of Brazilian social laws, gives us the same information: The Revolution was successful, and shortly afterwards the Ministry of Work, Industry and Commerce was created and placed under the direction of clear-minded and intelligent Lindolpho Collor. Versed in the subject of social problems and following the same political orientation as Getulio Vargas, Collor hastened to carry out a series of legal measures destined to place our legislation in agreement with the stage of our social and economic development and with the labour laws in force in countries where the proletariat had more advantages.²

1. *Direito Social Brasileiro*. 6ª edição, São Paulo, 1970, 1º volume, pág. 79.

2. *Instituições de Direito do Trabalho*, com o concurso de Arnaldo Sussekind e Délio Maranhão, 6ª edição (revista e atualizada), 1974, Livraria Freitas Bastos S/A., Rio de Janeiro, 1º volume, pág. 52.

One may record that it was truly as a result of the liberal Revolution of 1930, that the development of our social and labour legislation began, the Federal Government having since then turned its full attention to the question of the social security of subordinate workers.

So, by Decree n° 21273 of 22nd May 1934, the Institute for Retirement and Pensions of Workers in Commerce was created; it was regulated by Decree n° 183 of 26th December 1934.

Decree n° 24615, of 9th July 1934, created the Institute for Retirement and Pensions of Bank Employees, which was regulated by Decree n° 54 of 12th September 1934.

On the other hand, Law n° 367 of 31st December 1936 created the Institute for Retirement and Pensions of Industry Workers, regulated by Decree n° 1918 of 27th August 1937 and which was subordinate, like all the other Institutes mentioned in this Report, to the Ministry of Work, Industry and Commerce.

The Institute for Retirement and Pensions of Navy Workers (1933) and for the Retirement and Pensions of Workers in Transport and Freights (1938), and others were also created.

In this phase of Brazilian social security, the objective of legislators was to link compulsory social insurance to the professional category of the subordinate worker.

The Institutes for Retirement and Pensions herein mentioned, granted to the workers insured by them the same benefits, rendered the same services, and in general lines, were administered in the same way. Except for some small difference or other, they were all alike in their constitution and mode of operation.

3 — In 1960 was promulgated Law n° 3807 of 26th August 1960; this ruled about the Organic Law of Brazilian Social Security and was regulated by Decree n° 48959-A of 19th September 1960, as a result of which the Brazilian social security systems were amalgamated and made uniform.

With his keen outlook on Brazilian social insurance, the eminent Professor Mozart Victor Russomano observes: "Therefore, the first great service that the so-called Organic Law

of Social Security rendered was the fact of making the norms of all the social security institutions uniform".³

Until 1966, Brazilian social security services were carried out by the Institutes for Retirement and Pensions according to their own legislation and to the norms established by the Organic Law of Social Security.

However, in 1966, by means of Law-Decree nº 72 of 21st November 1966, all six Institutes for Retirement and Pensions then in existence were united into one Institute, — The National Institute for Social Security (I.N.P.S.), which, from that date on, took the place of the Institute for Retirement and Pensions of Bank Employees the Institute of Workers in Commerce, of Workers in Transport and Freights, of Railway Workers, Civil Servants, and of Workers in Industry and in the Merchant Marine.

This represented a great step forward in the Brazilian social security system as pointed out by the expert Celso Barroso Leite. "In this way an old and persistent tendency became a reality, and Brazilian social security was taking an important step towards the rationalization of its administrative structure; this brought about the most varied advantages, the main one being the uniformity in the treatment given to beneficiaries and the economy made in administration costs".⁴

So, the National Institute of Social Security executes the Brazilian social security service according to the directives edited by the Organic Law of Social Security and to the instrumental norms laid down by the Consolidation of the Social Security Laws act which became effective through Decree nº 77077 of 24th January 1976.

4 — After having rapidly gone over the history of the evolution of Brazilian social security in accordance with the

3. Comentários à Lei Orgânica da Previdência Social, 2ª edição, (revista e atualizada), 1967, José Konfino, editor, Rio de Janeiro, 1º volume, pág. 17.

4. A Proteção Social no Brasil. LTr. Editora Limitada, S. Paulo, 1972, pág. 40.

laws in force in the country, let us now examine the position of the worker in case of sickness.

While he is ill, the National Institute of Social Security pays the sick worker a monthly sum called sick-pay.

The responsibility of paying the sick worker for the first days, and the responsibility of bearing the corresponding costs lies with his employer.

A statement from the doctor who is attending the sick worker is not enough to entitle the latter to receive sick-pay from the National Institute of Social Security. A doctor belonging to the medical staff of the Institute itself must examine him to decide whether he is or not fit to work.

To entitle the worker insured by the National Institute of Social Security to receive sick-pay, he must have worked and paid contributions to the I.N.P.S. for at least 12 months. However, this minimum period of 12 months is dispensed with whenever a worker who has worked and paid contributions for less than 12 months after the date he became covered by social security, is found to be the bearer of certain serious illnesses such as tuberculosis, Hansen's disease, cardiopathy, malign neoplasma, etc.

The amount of sick-pay to be received is worked out in the following way: 70% of the monthly benefit salary, plus 1% of this salary for each complete year of membership (that is, of activity covered by social security) up to a maximum of 20% of increase. Thus it becomes clear that sick-pay varies according to the length of time the insured worker has been covered by social security.

In no case, however, can the value of the sick-pay be less than 75% of the minimum wage in force in the locality where the sick beneficiary works.

In the month of December of each year, the insured worker who has been receiving sick-pay for over six months, receives, besides his normal monthly payment from the Institute, his so called yearly bonus, or 13th payment, which is calculated by dividing the total amount of sick-pay he received from the Institute by 12.

The sick-pay he receives from The National Institute of Social Security is discontinued automatically when the worker recovers and is declared fit for work by a doctor of the medical staff of the I.N.P.S.

Whenever a staff-doctor of the National Institute of Social Security, examines a worker who is on the sick-pay list and finds that the latter will not recover his health, sick-pay is in that case *ipso-facto* and *ipso-jure* changed to retirement for disability.

During the time he is receiving sick-pay, the worker is under the obligation of submitting to any medical examination the I.N.P.S. indicates, and must follow all the treatments recommended and supplied by the said Institute, with the exception of surgery which is optional.

5 — As has been shown, a disability pension is paid by the National Institute of Social Security to the insured worker who cannot work and who will probably never be able to do so again.

To entitle him to receive a disability pension the insured worker must have paid his contribution to the National Institute of Social Security for a minimum period of 12 months, unless he is found to be the bearer of a serious and incurable *malady* such as tuberculosis, cardiopathy, leprosy, cancer, etc., in which case there is no need to wait till the 12 months have elapsed.

The value of the disability pension is reached thus: 70% of the monthly benefit salary plus 1% for every complete year of work covered by social security up to the maximum of 30%.

Thus, as can be observed, the disability pension may reach up to 100% of the monthly benefit salary if the insured worker has completed 30 years of service.

It must be recorded here that sick-pay can only reach a maximum of 90% of the monthly benefit salary, because the increase of 1% for each year of professional activity can only go up to 20%.

Lastly, I wish to make clear that, according to the Brazilian social security system, a disability pension must not be lower than 90% of the regional minimum wage established for the place where the employment contract is fulfilled.

However, it must be pointed out that the aforementioned process of calculation is valid only for the worker who earns up to 10 times the wage-unit established by the Federal Government based on the current wages policy in force in the country. At present, 1977, the social security unit in Brasil is Cr\$ 877,70.

When the insured worker earns more than ten times the wage-unit, the value of the disability pension paid monthly to the beneficiary is worked out as follows:

a) one part of the payment is calculated taking as a basis 10 times the wage-unit;

b) another part is calculated on the amount that exceeds that limit (10 times the wage-unit), taking $1/30$ of it for each year (12 months of contribution); that is, whatever exceeds 10 times the wage-unit is divided by 30 and then multiplied by the number of years (12 months) of contribution above that limit up to the maximum of 80%. However, the total of the pension to be paid must on no account exceed 18 times the highest wage-unit.

It must be made clear in this Report, as relating to the subject here dealt with, that the disability pensioner of the National Institute of Social Security must submit to whatever medical examinations the Institute deems necessary and will, obviously, have to follow the treatments prescribed and supplied by the I.N.P.S. When the disability pensioner reaches the age of 55, these medical examinations and treatments can automatically be dispensed with.

In the month of December of each year, as a true Christmas bonus, the disability pensioner receives an extra month's pension, the 13th monthly payment of the year, from the National Institute of Social Security.

To complete the assistance given by the I.N.P.S. to a disability pensioner, whenever a medical examination is

needed that cannot be undergone in his place of residence, the Institute pays all travelling expenses of said pensioner to the locality where the examination can be made by doctors belonging to the medical staff of the I.N.P.S. The same occurs for a worker receiving sick-pay.

6 — By an express provision of the Consolidation of the Laws of Social Security Act (article 33), an insured worker who is receiving sick-pay is to be considered on leave by the enterprise.

Thus, during the period the worker is receiving sick-pay from the I.N.P.S., his contract will be considered suspended.

Labour tribunals, supported by legislative regulations on the institution of yearly paid holidays, have decided that if the worker receives sick-pay for a period exceeding 6 months, even if they are discontinued, loses said period not only as regards holidays but also as regards any Labour action.

We mean that if the absence of the worker who is receiving sick-pay lasts for a period not exceeding 6 months, even if discontinued, it cannot be discounted from his contract. It will not in any sense constitute a break when counting up the total time he has worked for the enterprise.

The Consolidation of the Labour Laws Act in a broader ruling than the Consolidation of Social Security Laws Act also states that: "While a worker is on the sick-pay list he is to be considered as being on unpaid leave during that period". (Art. 476 - C.L.T.).

7 — As regards disability pensions, we also have an express provision in article 475 of the Consolidation of the Labour Laws Act, *in verbis*: — the contract of the worker who is pensioned for disability will be held suspended during the period established by the social security laws for his pension to come into effect. § 1º — When he again becomes fit to work, the worker will be given the right to re-enter the position he held at the time he was pensioned off, giving the employer, however, the right to pay him compensation for breach of contract in accordance with the terms of articles

477 and 478, except when he has obtained permanence in the job, in which case compensation must be paid him in accordance with article 497.

§ 2º — If the employer has taken on someone to substitute the pensioner, he can rescind the former's contract without paying compensation so long as the temporary character of the job was made unquestionably clear at the signing of the contract".

As a matter of interest to this Report, it is at this stage opportune to make clear that, whether it is a question of sick-pay or of disability pensions, the value of the sum received by the beneficiary for his support will be readjusted every time the Federal Government alters the value of the minimum wage.

8 — We wish to point out that according to a provision of the Consolidation of Social Security Laws Act, the following norms must be observed whenever it is found that the worker pensioned off for disability is again fit for work: I — If the recovery occurs within 5 (five) years of the date when he first received his pension, or 3 (three) years counted from the date of the last sick-pay received, the pension will cease:

a) immediately, for the insured worker, whose rights will be assured by article 475 of the Consolidation of the Labour Laws Act, the certificate of ability given by the National Institute of Social Security serving him as a document for that purpose;

b) after the same number of months as were the years during which the sick-pay or retirement pension were drawn, in the case of domestic workers.

II — If, however, the recovery occurs after the periods mentioned in item I, or, if the recovery is not total, or if the insured worker is declared fit for work different from his usual former occupation, the disability pension will be kept on regardless of whether he returns to work:

a) in its full amount for 6 (six) months counted from the date it was found he had recovered his ability to work;

b) with a 50% (fifty per cent) reduction for the same period or time as the previous one and immediately following it;

c) with a reduction of $2/3$ (two thirds) also for a time similar to the first period and the subsequent one, at the end of which the disability pension will cease definitely. (Cf. Article 36 of the Consolidation of Social Security Laws Act).

As can be seen, the disability pension is not definitive and can be *jure quod est* revised by the National Institute of Social Security.

Lastly, I must point out that the retirement for disability of a worker who returns to his job will be cancelled.

9 — The worker who has received sick-pay from the National Institute of Social Security for more than 6 (six) months will lose the right to holidays during said period, according to the ruling of Article 133, n° IV of the Consolidation of Labour Laws Act.

10 — The cost of the Brazilian Social Security is covered according to the German system of triple contribution: — one contribution being made by the insured workers, one by the enterprises, and one by the Federal Union. As can be seen, the Federal Union also contributes one part: everyone pays a contribution towards the so-called insurance of all the people, or social security insurance.

At present, the insured workers contribute 8% (eight per cent) of their respective salaries, the enterprises contribute a sum equal to that paid in by their employees, and the Federal Union contributes a sum for the payment of personnel and for administration expenses incurred in running the social security service, as well as sums to cover any lack of funds.

11 — As has been specified in this Report, the social security of workers in urban areas is under the charge of the National Institute of Social Security.

Social Security in rural areas, still incipient in Brasil, is at present carried out by the Programme of Assistance to the

Rural Worker — PRO-RURAL — established by complementary Law nº 11 of 25th May 1971 and regulated by Decree nº 69919 of 25th January 1972.

The programme of PRO-RURAL is in its turn executed by the Fund for Assistance to the Rural Worker (FUNRURAL), running costs of which have their source in following contributions: 2% (two per cent) of the commercial value of the rural products, which must be paid by the producer himself when he industrializes his products or sells them direct to the consumer, or by the buyer or the consignee of the products; b) 2.4% (two point four per cent) of the pay sheet of the enterprises linked the general social security system (urban social security).

The services supplied by PRO-RURAL through FUNRURAL are the following: old age retirement pension, *disability retirement pension*, pension to the beneficiaries of the rural worker, funeral assistance, health service and social service.

12 — The workers insured by the National Institute of Social Security have a right to medical and hospital assistance, and pharmaceutical and dental assistance. This assistance is extended also to the family of the insured worker. In our country the advantages of social security service are extended to men and women without any difference. The treatment is the same for men and women in the field of social security, both enjoying the same rights.

13 — It is important to point out the position of the insured worker who is unemployed.

According to Brazilian social security legislation, after becoming unemployed, regardless of whether he is paying his contributions to the I.N.P.S., the worker will keep all his acquired rights which form what is called "period of grace".

Thus, the worker who has paid his contributions to the National Institute of Social Security for over 12 months, will have a period of grace of equal duration, i.e., for 12 months; the one who has contributed to the I.N.P.S. for more than

10 years (120 contributions), will have a 24 months' period of grace.

However, if the unemployed worker does not wish to avail himself of the period of grace, in the terms of Article 11 of the Consolidation of Social Security Laws Act, he can one month subsequent to the month of unemployment, request to be allowed to pay a double contribution which will put him in the position of "double-contributor", also known in Brazilian social security as "situation of the unemployed worker".

14 — Statistical data referring to the year 1972 already revealed that Brazilian urban social security, entrusted to the National Institute of Social Security, has a budget which that year was surpassed only by the budget of the Federal Union.

It is a sure fact that nowadays over three million persons monthly receive some sort of social assistance in money from the National Institute of Social Security, not to mention medical assistance in general.

The National Institute of Social Security is, undoubtedly, a great cloak that shelters and protects millions of Brazilian in our vast country.

15 — Before ending this Report, I must state that one of the most criticized points in our national social security programme is the compulsory payment, by the employer, of the wages corresponding to the first 15 days of absence from work because of sickness. The objection made is that the National Institute of Social Security should be responsible for payments to the sick worker from the 1st day of his absence from work, and not from the 16th day on, to which I fully agree. And why? Because not only the workers, but the employers too, pay contributions to Brazilian social security.

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