2020 Asia Employment Law Quarterly Review: as at end 31th December 2020	
Jurisdiction	Sri Lanka
	Updates
Date **17/12/2020**	**Title: <u>Tripartite Decision Re Payment of Wages Where Full Employment Impossible.</u>** **Wordings:** In May 2020, the Cabinet of Ministers approved a decision taken by a Tripartite Task Force - consisting of representatives of Employers Federation of Ceylon, some Labour Unions and the Government, (the Ministry of Skills Development, Employment and Labour Relations), - set up by the Minister of Labour to look into the effects of the Covid 19 pandemic on employment in Sri Lanka. The decision was made with a view to ensuring continuity of business while also ensuring job security. It was decided to implement the following scheme of payment where employers were unable to employ the whole workforce each day due to constraints consequent on the pandemic – in particular, compliance with directives of the Ministry of Health (regarding social distancing etc.) The features of this agreement were as follows - 1. The scheme will be applied to pro-rate wages in respect of employees who cannot be deployed at work simultaneously with others due to health restrictions – e.g., where Government guidelines dictate that only a given percentage (or number) of employees could be employed on a particular day. 2. It was initially to apply to monthly paid employees in all sectors, and to be limited in its application <u>for the months of May and June 2020.</u> 3. While being applicable to all sectors without exception, any employer who cannot afford to pay employees based on this scheme could make representations to the Commissioner General of Labour.

4. Only employees who reported for duty or those who could not do so due to restrictions imposed by employers due to health reasons are eligible to be considered under this scheme.

Nonetheless, employees unable to report for work to due to restrictions imposed by the authorities, could also be considered under this scheme and payments made on the basis that they have been 'benched'.

Employees who absent themselves from work despite being rostered and fail to provide acceptable reasons for their absence should be placed on no pay (in lieu of days of such absence).
Others who may provide satisfactory explanations, should be placed on leave, as appropriate.

5. According to the agreement reached, employers would apportion and pay wages for days worked based on the basic salary, and for the days not worked, (days "on the bench" without any work), wages will be apportioned and paid either at the rate of 50% of the basic wage or 50% of Rs 14,500/-, whichever is higher. It may be noted in this connection that the daily rate would be determined by dividing the monthly rate by either 30 or 26 – depending on whether the employee is covered by the "Shop and Office Act" or a decision of a Wages Board. The following is a clarification of the application of the scheme.

   Step 1. - To ascertain the daily rate at which employees who performed work should be paid the following method of calculation should be applied.

   a. Divide the Monthly basic salary by 30 or 26 days as the case may be.
   b. Thereafter, to arrive at the salary to be paid for the days, worked, multiply the daily rate by the number of days worked.

   Step 2. - To ascertain the daily rate at which employees who were "benched" have to be remunerated –

   a. divide Half the Basic Salary OR of Rs 14,500/-, (Rs. 7250) whichever is higher, by 30 / 26 days.
   b. Thereafter, to arrive at the salary to be paid for the days not worked, multiply the daily rate by the number of days not worked.

   Step 3. - To ascertain the Monthly salary to be paid to an employee, add the figures finally arrived at.

	The scheme was subsequently extended till 30th September and, with effect from 1st October, has been further extended until 31st December, for the Tourism Industry. "By a letter dated 17th of December a request was made by the Employers' Federation of Ceylon to the Minster of Labour for the extension of the period of the Tripartite Agreement up to the end of March for the Tourism Industry Employers in other sectors who/which wish to implement the scheme are obliged to inform the Commissioner General of Labour of the fact and of their concerns and provide, at the end of each month, all relevant details including names of workers employed/not employed and the details of payments made to each. These would be circulated among the members of the Task Force and if employees/ worker unions have any grievances/objections to raise, they could be communicated to the Commissioner General of Labour and could to be raised at a meeting of the Task Force. Colour: Red
02/10/2020	Title: **SC Appeal 228/2017 - Rodrigo v. Central Engineering Consultancy Bureau** Wordings: On 2nd October, the Supreme Court delivered a judgment in the above case interpreting Section 31B(5) of the Industrial Disputes Act which states as follows – "Where an application under subsection (1) is entertained by a Labour Tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under subsection (1)(a)" (which provides for an employee whose services have been terminated by his employer to apply for relief from a Labour Tribunal). The employee concerned (the applicant) had made an application to the Supreme Court alleging that by terminating his services the employer – a business undertaking owned by the Government and thus an 'organ of the State' – had violated his fundamental rights. He subsequently filed an application for relief to the Labour Tribunal as well

	In its answer to the application to the Labour Tribunal filed by the employee, the employer raised a preliminary objection based on section 31B(5) on the ground that the applicant having "first resorted to another legal remedy" was not entitled to seek any relief from the Labour Tribunal. The objection was upheld by both the Labour Tribunal and the High Court, following which the applicant appealed to the Supreme Court, which held as follows - a) It was clear that the first limb of the section which restricted an applicant's right to seek a remedy from any other forum "in respect of the matter to which that application relates" applied only where proceedings thereon had been taken and concluded and the matter finally determined by the Tribunal. b) There was no logical reason to think that the Legislature intended to apply one standard in the first limb of the section to limit the curtailment of an employee's right to maintain an action/application in another forum only to instances where he has previously had an application to the Tribunal finally determined; and to apply another and much harsher standard in the second limb of the section and deny an employee the right to maintain an application to the Labour Tribunal merely because he has commenced proceedings in another forum but has not yet received a determination from it. c) Further, the criteria upon which the second limb of section 31B(5) could be applied were the following – (i) the action/application by the workman in the court or other forum must cover the same or similar ground as the application to the Labour Tribunal and have the same or similar scope; (ii) the action/application by the workman in the court or other forum should seek the same or similar substantive reliefs as the application to the Labour Tribunal; (iii) both the action/application by the workman in the other forum and the workman's application to the Labour Tribunal should be decided upon the core issue of whether the termination of the workman's' services by the employer was done for good cause, according to the principles which are to be applied by the court or other forum; and (iv) there should not be a significant disparity between the procedure followed by the court or other forum and the procedure followed by a Labour Tribunal. The Court expressed the view that the second limb of section 31B (5) can be applied only if all these four criteria or, at least, a "sufficient number of them", (unspecified), are met, so as to satisfy the Labour Tribunal that there is no material disparity or divergence between the

	previous action/application made by the workman to a court or other forum and the subsequent application made by the same workman to the Labour Tribunal. As regards the particular case at hand, it was held that section 31B(5) did not apply and in this connection it was observed that while the employee's 'fundamental rights application' and his application to the Labour Tribunal sought similar substantive reliefs, the application to the Supreme Court and the application to the Labour Tribunal did not cover the same ground and did not have the same or similar scope in that one was a matter of public law where the focus was on whether the fundamental rights guaranteed by the Constitution had been violated by the State and the other of private law, in that the application was founded and confined within the employer – employee relationship. So also, the fundamental rights application would be decided by examining whether the employee had been subjected to unequal treatment or been denied the equal protection of the law or been made the victim of unreasonable or arbitrary or mala fide action by the employer and the termination of employment was only a part of the issue before the Court to be looked at in the context of the aforesaid matters. In the Labour Tribunal, on the other hand, the issue would be decided solely on the core issue of whether the termination of employment was just and equitable. Further, there was a significant disparity between the procedure followed by the Supreme Court on the one hand, and the Labour Tribunal on the other. In the case of the former, the employee would first have to be granted leave to proceed and would only thereafter proceed to full hearing – if at all; and, moreover the decision at both stages would be made on the basis of affidavits, documents and submissions. On the contrary, except where it dismissed an application on a preliminary issue of law, a Labour Tribunal had no authority to refuse to hear and determine an application and was obliged to do so. In conclusion, the Supreme Court stated that in the case under consideration, the proper course for the Labour Tribunal to have taken was to suspend its proceedings pending the conclusion of the proceedings in the Supreme Court, resume hearing thereafter and, when making a final determination, have regard to the outcome of the fundamental rights application – as provided in section 31(3) of the Industrial Disputes Act, which provides that: "Where an application under subsection (1) relates - (a) to any matter which, in the opinion of the tribunal, is similar to or identical with a matter constituting or included in an industrial dispute to which the employer to whom that application relates is a party and into which an inquiry under this Act is held, or (b) to any matter the facts affecting which are, in the opinion of the tribunal, facts affecting any proceedings under any other law, the tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the tribunal shall resume the proceedings upon that application and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law.]

	Colour: Amber
Endorsed on 18/01/ 21	Title : **Minimum Age for Employment to be Sixteen Years and Amending Bills** Wordings : Several Bills pertaining to amendment of (inter alia) certain employment law statutes are pending in Parliament. The statutes in question are the Shop and Office Employees (Regulation of Employment and Remuneration) Act, the Employment of Women Young Persons and Children Act (EWYPCA), the Factories Ordinance and the Minimum Wages (Indian Labour) Ordinance. All amendments to be made flow from the proposed amendment of the minimum age of employment to sixteen years from the presently prevailing age of fourteen years. Accordingly, appropriate amendments, (or repeals of sections rendered irrelevant or redundant), are to be made to relevant provisions in these statutes. It may also be mentioned that an exception to the rule that the minimum age of employment should be sixteen years is found in section 14 of the EWYPCA which provides that a child (to be defined as a person under the age of sixteen years, instead of the current fourteen years) may be employed :- a) by his parent or guardian in light agricultural or horticultural work or similar work carried on by member of the same family before the commencement of regular school hours or after the close of school hours; or b) in a school or other institution supervised by a public authority and imparting technical education or other training for the purpose of any trade or occupation. The Bills – which were pending at the end of the 4th Quarter 2020 – have been subsequently endorsed on 18th January 2021. Colour: Red
17/11/2020	Title : **Proposed Increase of Qualifying Age for Withdrawal of Monies in Individual Account/s of the Employees' Provident Fund**. Wordings:

	The general rule under the Employees' Provident Fund Act as it stands is that the monies lying to the credit of a member, (an employee on whose behalf contributions have had to be made as provided by the Act), shall be paid to him/her "as soon as may be practicable" after he/she has attained the age of 55 years in the case of males and 50 years in the case of females. This is subject to the proviso that the said member is not entitled to the such payment if, after attaining the stipulated age he/she continues to work in any "covered employment" - which term includes practically all employments - and will not be entitled to payment until he/she ceases to be in such employment. In the course of his speech in Parliament when presenting the national budget for the year 2021, the Prime Minister, who is also the Minister of Finance, mentioned that it was proposed to increase the said ages – which he referred to as the mandatory retirement age in the private sector - for both men and women to sixty years. Colour: Red Website: https://www.treasury.gov.lk/documents/budget/2021/budget_speech_en.pdf