Plot 6662 Mberere Road Olympia Ext. | P O Box 31941 Lusaka. | Tel: +260 211 295969 | Fax: +260 211 295781
Cell: +260 950 655898 | Email: info@zfe.co.zm; zfemployers@gmail.com | www.zfe.co.zm

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ZFE INTERPRETATION OF THE EMPLOYMENT CODE (EXEMPTION) REGULATIONS, SI NO. 48 OF 2020

SUMMARY OF INTERPRETATION AND RECOMMENDATIONS

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
1.	**Section 36 – Annual leave**	**All employees**	• Paid leave is a basic right of employment. By longstanding (customary) practice in the country, it is at a minimum of two working days a month, pro-rated as required. • "Protected workers" under the Minimum Wages Orders of 2011 (non-management, non-unionized, private sector) continue to have express statutory provision for paid leave. • For all others, employers must make provisions for the same under their conditions of service. That may include an annual leave schedule, for ease of administration. • What is no longer required by law is commutation of all accrued untaken days every 12 months. • **Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 paid leave conditions of service.**
2.	**Section 37 – Annual leave benefits**	**All employees**	• Employers must provide a commutation formula in their conditions of service. The customary minimum is basic pay per working day.

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
			• State whether and to what extent commutation during the course of employment is possible. • If you have "protected workers", ensure you adhere to any holiday allowance provision in the applicable Minimum Wages Order. • **Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 paid leave conditions of service and commutation policy.**
3.	**Section 48 – Forced leave**	**An employer assessed by an authorized officer to be in financial distress based on the guiding principles set out in the Schedule to the SI.**	• "Forced leave" is a temporary, involuntary, leave of employees due to the special needs of the employer. Those needs may be due to economic conditions at the specific employer or in the economy as a whole. It is used as an alternative to immediate redundancies or liquidation. • Section 48 did not introduce forced leave. It recognized the fact that it is an existent practice in Zambia. • Section 48 has no detail on how to manage forced leave, besides the requirement for a minimum of basic pay. **Create conditions of service to manage it. Those should include selection criteria, maximum duration and accrual of other benefits (subject to the law).** • **If you need to use the exemption from paying basic pay, submit to the Office of the Labour Commissioner all the documents identified in the "guiding principles" in the Schedule to the SI. Without obtaining that exemption, you will be bound to pay basic pay.**
4.	**Section 54(1)(b) and (c) – Severance pay in the form of gratuity for**	**a. Expatriate employee; and** **b. Employee in "management".**	• Note that the various forms of severance pay under section 54 apply to all types of employees except those identified in subsection (3). Those are employees on long-term contracts, probation, temporary and casual contracts.

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
	fixed term contracts		• In contrast, the exemptions to section 54 under SI No. 48 of 2020 are extremely limited, both in terms of scope and application. That leaves the continued obligation to pay gratuity (and all other severance payments indicated) to employees un-exempted from section 54 extremely wide. For instance, seasonal workers are clearly not exempted from the entitlement to gratuity. • Only expatriate workers and management employees are exempt from paragraphs (b) and (c) of subsection (1) of section 54. This means that: (a) all other fixed term contract employees who are not temporary, probationary, casual or long-term remain entitled to gratuity at the minimum rate of 25% of accumulated basic pay under that contract; and (b) employers of those un-exempted employees will have to continue to suffer the ambiguities of paragraph (b) and its reference to either gratuity *or* retirement benefits. • Be pragmatic about that ambiguity. The ultimate intention was to provide a terminal benefit to fixed term contract employees that is comparable to pension for permanent workers. By general practice, such a terminal benefit is gratuity. Focus on the fact that both paragraphs (b) and (c) highlight gratuity. • **Subject to any rights already accrued by your employees, you can revert back to your pre-ECA 2019 gratuity conditions for expatriates and management employees to whom section 54 applies.** • **Be fair and pragmatic. Benefits better than statutory minimums increase recruitment and retention prospects. Additionally, the controversy surrounding casualization will not end. Gratuity was made mandatory in the first place to prevent employers using fixed term contracts as a means of avoiding pension obligations for permanent**

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
			workers. To the extent that you can, try to still provide a terminal benefit to your fixed term contract employees who have now been exempted from section 54(1)(b) and (c).
5.	**Section 55(2) – Notice period and consultative process for a valid redundancy**	**An employer assessed by an authorized officer to be in financial distress based on the guiding principles set out in the Schedule to the SI, or under circumstances warranting immediate termination of employment.**	• Section 55(2) applies to all redundancies, regardless of whether it is only one or many employees to be affected. Without obtaining the SI No. 48 of 2020 exemption, you will be bound to give notice and conduct the required consultations. • The cumulative notice and consultation period under section 55(2) is 60 days, not 90 days. • The exemption under SI No. 48 of 2020 has two avenues: financial distress, and the "*circumstances warranting immediate termination of employment.*" Both are to be assessed by the Labour Commissioner, but only the first has set criteria in the Schedule to the SI. • If you need to use the financial distress avenue, submit to the Office of the Labour Commissioner all the documents identified in the "guiding principles" in the Schedule to the SI. • **If you need to use the circumstantial avenue, seek our advice first. There appears to be no criteria to guide the Labour Commissioner on how to make such an assessment. Under administrative law, that means he is only bound to act reasonably.** • **If you are unable to pay the redundancy package by the last date of service as required by subsection (3) of section 55, ensure you make as early an application as possible for an exemption from that obligation under section 56.** Exemption from the notice period under subsection (2) of section 55 will not exempt employers from the requirements of subsection (3). Without that section 56 exemption, you will be

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
			required to keep employees on payroll with full pay until full payment of their benefits. • Also note that if you start recruiting again once the situation improves, you will be bound to comply with section 57.
6.	**Section 73 – Gratuity for long-term contracts**	**a. Expatriate employee;** **b. Employee in management with a written contract providing for gratuity;** **c. Employee in the agricultural sector; and** **d. Employee in the domestic sector.**	• Note the definition of "long-term contract" under section 3. It is a fixed duration contract for a specific task or for in excess of twelve months' duration. The application of section 73 and hence this exemption is limited to such contracts. • The exemptions of expatriates and agricultural sector from section 73 are absolute. • The exemption of management employees from section 73 is conditional (compared to the absolute exemption from section 54(1)(b) and (c)). Provide for gratuity in a management employee's contract. How you do so is not regulated, but you must do so. Otherwise, section 73 will apply by default. • The exemption of the "domestic sector" is something of a red herring. If it refers to domestic workers, such workers do not include commercial cleaners. Equally, stakeholders are reluctant to take a definitive position on whether the ECA 2019 overrides the Minimum Wages (Domestic Workers) Order of 2011 (which actually does provide for a severance pay). Depending on duration of engagement, the provisions of the ECA 2019 on written contracts apply to domestic workers as they do with all others. • **Subject to any rights already accrued by your employees, you can revert back to your pre-ECA 2019 gratuity conditions in the manner permitted by SI No. 48 of 2020 for employees exempted from section 73.** • **Be fair and pragmatic. Benefits better than statutory minimums increase recruitment and retention prospects. Additionally, the controversy surrounding casualization will**

	PROVISION	EXEMPTION	INTERPRETATION / RECOMMENDATION
			not end. Gratuity was made mandatory in the first place to prevent employers using fixed term contracts as a means of avoiding pension obligations for permanent workers. To the extent that you can, try to still provide a terminal benefit to your long-term contract employees who have now been exempted from section 73.
7.	**Section 75 – Overtime**	**a. Expatriate employee; and** **b. Employee in "management".**	• The exemption of these two categories of workers from section 75 is absolute. Nevertheless, where the expatriate is not a manager, they are still covered by the Minimum Wages Orders and the requirement thereunder for overtime pay. • The absolute exemption of expatriates and management employees from section 75 does not mean that there are no longer any statutory controls on the working hours of such workers. They are still protected by sections 74, 76 and 77. 48 hours remains the standard weekly working hours applicable for all employees except watchpersons in this country. For them, the maximum is 60 hours. • **Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 conditions of service that differentiated between management and non-management workers in relation to the eligibility for overtime pay.** • **Employers tended to expressly provide within the conditions of service that managers were ineligible because their wages already catered for the possibility of overtime. If you had not put that in your conditions of service then, do so now for clarity.**

DETAILED INTERPRETATION OF THE EMPLOYMENT CODE (EXEMPTION) REGULATIONS, SI NO. 48 OF 2020

DETAILED ZFE INTERPRETATION OF THE EMPLOYMENT CODE (EXEMPTION) REGULATIONS, SI NO. 48 OF 2020

1. BACKGROUND

1.1 The one-year transition period for the conditions of service that were "materially inconsistent" with the Employment Code Act No. 3 of 2019 (ECA 2019) ended on May 12, 2020. On May 13, 2020, the Honorable Minister of Labor and Social Security Mrs. Joyce Nonde Simukoko, MP, officially launched the Act.

1.2 As the end of the transition period neared, employers redoubled their efforts to get the Ministry of Labor and Social Security (MLSS) to make concessions on the ECA 2019 due to its financial ramifications on an already costly business environment. The economic impact of the COVID-19 pandemic on the country and globally added more momentum to those efforts. MLSS gradually acceded to these calls through a series of Tripartite Consultative Labor Council (TCLC) meetings and resolutions. In accordance with the Industrial and Labor Relations Act Cap 269, ZFE is the sole employers' representative on the TCLC. We lobbied hard in those meetings to obtain the best possible outcome for you our members.

1.3 The first such TCLC meeting was held on March 26, 2020. Among the resolutions of this meeting was a window for the hardest hit employers to obtain exemption from section 48. That section requires the payment of a minimum of basic pay for employees sent on forced leave. In light of the mandatory nature of the Act as provided for under section 15, such an exemption could only be legitimated pursuant to subsection (2) of section 2 of the Act. The provision states:

> *(2) The Minister may, after consultation with the Tripartite Consultative Labor Council, by statutory instrument, exempt any person or class of persons or any trade, industry or undertaking from any of the provisions of this Act.*

1.4 It is this provision that led to the subsequent TCLC meeting on May 7, 2020. The agenda for that meeting, as discussed in our Special Advisory Note of May 8, 2020, expanded the list of exemptions the Minister would consult the TCLC over before promulgating Exemption Regulations. That consultation is the basis of Statutory Instrument (SI) No. 48 of 2020. The key objective of this particular meeting was for the TCLC to consider the hardest hit employers and, "*propose strategies that target employers in distress particularly without exempting entire sectors as there may be employers that are able to meet the full employee obligations"* during the COVID-19 outbreak.

1.5 However, the measures to be discussed were not just about employers currently facing crises. The measures would equally be about, firstly, balancing the interests of workers, Government and employers. Secondly, the measures needed to be forward-looking to foster the resilience of the local economy post-pandemic. This was in recognition of the tremendous financial cost of compliance with the ECA 2019. It was probably also why there are in fact some sector-wide exemptions in SI No. 48 of 2020.

1.6 TCLC agreed that all remedial measures to be undertaken had to be in line with the

7th National Development Plan and Vision 2030. Significantly, the measures would only be the first concrete step to a more wholesome review of the ECA 2019. It was important to move quickly to beat the end of the ECA's transition period for the most urgent of exemptions.

1.7 The background to SI No. 48 of 2020 is of critical importance in understanding its scope and possible drafting errors resultant from the rush to have the SI promulgated in time. We have already received concerns about its confusing meaning when considered at face value. Moreover, we have seen all manner of interpretations from various parties that merely add to the confusion because of the interpreters' lack of utilization of the fundamental principles of statutory interpretation.

1.8 For instance, it appears that the complete exemption of all employees from sections 36 and 37 means that employees are no longer entitled to paid leave under the law. It is not that simple. Obliterating annual leave was not the "mischief" sought to be addressed through SI No. 48 of 2020 because it is one of the basic rights of employment that the ECA 2019 was intended to protect. As the Supreme Court indicated when construing an anomalous provision in the repealed Employment Act Cap 268, a plain and literal interpretation will be rejected when it flies in the face of established legal principles. The purposive approach will be used instead. Moreover, the Minimum Wages and Conditions of Employment Orders of 2011 are still in full effect. They do provide for paid leave.

1.9 The tools of statutory interpretation used in this opinion are discussed in the next section. It is followed by a detailed examination of each of the exemptions under SI No. 48 of 2020 using the context of the TCLC discussions to determine the mischief sought to be addressed by each exemption. We then looked carefully at the fact that three categories of employees' conditions of service now exist: pre-ECA 2019, pre-SI No. 48 of 2020, and post-SI No. 48 of 2020. Employers need to harmonize those differing conditions of service to avoid breaching section 5 on discrimination, but without thereby triggering section 55(1)(c) on redundancy caused by unilateral adverse alteration of conditions of service.

1.10 Please note that due to the rules on computation of time for SIs, SI No. 48 of 2020 took effect on **May 13, 2020.** That was the same date the ECA 2019 took full legal effect. It therefore took such effect subject to the exemptions set out in SI No. 48 of 2020.

1.11 This opinion does not constitute legal advice and does not purport to create a legal relationship in any way. Due to its intended diverse audience, it minimized the citation of the legal authorities and principles it was based on, in favor of a more practical explanation. Employers are advised to carefully read the ECA 2019 in its entirety, together with SI No. 48 of 2020, to appreciate the full effect of the legislation as modified by SI No. 48 of 2020. Members should also seek our comprehensive specialist advice for any particular situation that may arise for them.

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2. TOOLS OF STATUTORY INTERPRETATION AND THE *TRAVAUX PREPARATOIRES*

2.1 The Constitutional Court of Zambia in the seminal judgment of ***Ngala and Chulu v Anti-Corruption Commission (2018)*** reaffirmed the following tools of statutory interpretation that we found instructive for this opinion.

(a) Words used in legislation must be given their plain and ordinary meaning, i.e. the literal interpretation.

(b) Where the literal interpretation results in absurdity or where it is not possible to decipher what the Legislature intended from the words used in the statute itself, the purposive rule of interpretation is resorted to. The objective of the purposive rule is to, "*put upon the language of the Legislature a rational meaning.*"

(c) The starting point in determining which of the two rules to apply is the statutory provision in question, read in its entirety and in the context of the entire statute. No single provision should be isolated from the other provisions bearing on the subject matter. This is necessary to give effect to the greater purpose of the legislation.

(d) As part of purposive interpretation, the mischief that the Legislature intended to correct can be deciphered from the genesis, rationale and context of the provision and the legislation generally. One important source of this information is the *travaux preparatoires* or preparatory documents. Those documents will show what the Legislature envisioned as the mischief and how it was to be addressed.

(e) The modern approach is to combine the literal and purposive methods so as to ascertain the true or legal meaning of the enactment, "*by considering the meaning of the words used… in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.*" In other words, the meaning of any one provision is influenced by the letter and spirit of the legislation, read in its entirety.

2.2 The history of the ECA 2019 is long and complicated. The development of the Act began through the Zambia Labor Law Reform Issues Paper 2013 (the 2013 Issues Paper). The 2013 Issues Paper was the result of a research project and tripartite consultations into the shortcomings of the Zambian labor laws and how those could be addressed. Over time, the social partners through the TCLC went beyond the dated 2013 Issues Paper into prevailing industrial relations practice. By the time the draft Labor Code Bill (the precursor to the Employment Code Bill No. 3 of 2019) was adopted by the TCLC in 2017, it was markedly different from the recommendations in the 2013 Issues Paper.

2.3 Unfortunately, the drafters of the Employment Code Bill No. 3 of 2019 decided to take the legislation backward to the 2013 Issues Paper, as well as to add provisions that had simply never been in contemplation by any of the social partners (e.g. sections 36 and 37). ZFE lobbied hard to revert to what the TCLC had agreed on as more progressive law as the Bill progressed through the National Assembly. That lobbying yielded some valuable results, but not on some critical issues such as the

paid leave provisions that were finally addressed in SI No. 48 of 2020.

2.4 The net effect is that the 2013 Issues Paper remains a significant part of the *travaux preparatoires* to refer to in interpreting the ECA 2019. Conversely, the preparatory documents for SI No. 48 of 2020 arguably are:

- the minutes of the Special TCLC Meeting held on March 26, 2020. Since those have yet to be formally adopted, the details on the meeting can be obtained from ZFE's Advisory Note of March 30, 2020 and the MLSS proposed agenda for the Special TCLC Meeting to be held on May 7, 2020;
- the agenda proposed by MLSS for the Special TCLC Meeting of May 7, 2020; and
- the ZFE Special Advisory Note of May 8, 2020.

2.5 These *travaux preparatoires* identify the "mischiefs" SI No. 48 of 2020 was intended to address. They operate in the "wider legislative purpose" of the ECA 2019 as discussed in the 2013 Issues Paper. We will refer to all those documents in discussing the exemptions under the SI.

3. THE EMPLOYMENT CODE (EXEMPTION) REGULATIONS, SI NO. 48 OF 2020

3.1 Preliminary points

3.1.1 The SI was issued pursuant to section 2(2) of the ECA 2019. That provision requires the consultation of the TCLC by the Minister before she can issue regulations to exempt, "*any person or class of persons or any trade, industry or undertaking from any of the provisions*" of the Act. Accordingly, SI No. 48 of 2020 has a range of targets for its exemptions, from employees generally, to management and expatriate workers, to employers facing financial difficulties.

3.1.2 SIs are subject to the Act under which they were issued. It follows that there was no need for SI No. 48 of 2020 to list out definitions of all its terms. Most of the terms are defined by section 3 of the ECA 2019 and apply to the extent permitted by context. Any term not defined therein will be interpreted using the ordinary English dictionary meaning of the term.

3.1.3 The one term expressly defined by the SI is "management". SI No. 48 of 2020 cross-references the definition of that term in the Industrial and Labor Relations Act, Cap 269 (ILRA). That definition is:

> *"Management" in relation to an employee, means a person-*
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> *(a) who is the head of an institution or undertaking and has authority to hire, suspend, promote or demote an employee of the institution or undertaking;*
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> *(b) who is the head of a department in an institution or undertaking and has authority in the financial, operational, human resource, security or policy matters of the institution or undertaking;*
>
> *(c) with decision-making authority in the financial, operational, personnel*

or policy matters of an institution or undertaking and who represents and negotiates on behalf of the institution or undertaking in collective bargaining or negotiations with trade union; or

(d) with written institutional authority to perform the functions referred to in paragraphs (a), (b) or (c).

3.1.4 In our understanding of the ILRA definition, a "manager" is an officer of the employer who has the power to make decisions that affect the employer in relation to its finances, operations, human resources, security or policy. It is important to understand the context in which this definition is being used under SI No. 48 of 2020.

3.1.5 Firstly, the definition is used under the ILRA to delineate the ineligibility to unionize. It is often supplemented by additional categories of "management" under recognition agreements. For instance, it is common practice to exclude from unionization human resources personnel, and any staff who report directly to the Chief Executive Officer. Some recognition agreements simply add such personnel to the agreement's definition of "management". That practice is wholly inapplicable in relation to SI No. 48 of 2020. It is strictly the express definition under the ILRA that will determine whether an employer can utilize the exemptions intended for "management" under the SI for any particular employee.

3.1.6 Secondly, the practice by some employers to classify some employees as "management", usually for the purposes of rendering those employees ineligible for unionization, is equally inapplicable under the SI (as well as under the ILRA itself). The job title of an employee is irrelevant. What matters is the substantive position they have in the undertaking.

3.1.7 Another issue to be remembered in interpreting SI No. 48 of 2020 is section 127 of the ECA 2019. It provides:

> *Where a contract of employment, collective agreement or other written law provides conditions more favorable to the employee, the contract, agreement or other written law shall prevail to the extent of the favorable conditions.*

3.1.8 The principal among those "other laws" are the Minimum Wages and Conditions of Employment Orders of 2011, as amended in 2012 and 2018. They continue to be effective notwithstanding the repeal of the Minimum Wages and Conditions of Employment Act Cap 276 by the ECA 2019. That is pursuant to the Interpretation and General Provisions Act Cap 2.

3.1.9 The Minimum Wages Orders apply to "protected workers", being non-unionized, non-management employees in the private sector. "Management" for the purposes of the Orders is only defined under the Shop Workers Order. That Order also references the definition in the ILRA. The General Order has no express definition. That means an ordinary English dictionary meaning will apply. Such meanings are along the same lines as the definition under the ILRA.

It follows that regardless of which legislation is being considered among SI No. 48 of 2020 and the Minimum Wages Orders, "employees in management" are identified the same way.

3.1.10 The effect of the continued application of the Minimum Wages Orders in light of section 127 of the ECA 2019 is that employers of "protected workers" have to create blended conditions of service that have the best of both pieces of legislation. For instance, section 41 of the ECA 2019 provides far more extensive provisions on maternity leave than the Minimum Wages Orders. Nonetheless, the General and Shop Workers' Orders have one element that is more beneficial for protected workers: the duration of paid maternity leave. Protected workers are hence entitled to section 41 of the ECA 2019, as read with the longer duration under the Minimum Wages Orders.

3.1.11 The Minimum Wages Orders are even more significant now with the exemption of all employees from sections 36 and 37 of the ECA 2019 on paid leave. The Orders' provisions on leave were already more beneficial than the convoluted provisions of section 36. They now appear to be the sole statutory provisions on paid leave.

3.1.12 A final point to note is that the ECA 2019 is in full force. It has only been modified in its scope of application pursuant to section 2(2). That does not rise to the level of an amendment, because that can only be done by Parliament. This status means that the fight for a full review of the Act is far from over. We can nonetheless appreciate the progress made. The complete exemption from application of controversial sections such as 36 and 37 is an indication that the Government is finally acknowledging the substance of the concerns we have been raising since the Employment Code Bill was before the National Assembly.

3.2 Section 36 – Annual leave

3.2.1 Exemption: Employee

3.2.2 TCLC rationale

3.2.2.1 Employers' conditions of service can address the administration of leave. That includes allowing the carrying forward of leave days into subsequent twelve-month periods.

3.2.3 ZFE Interpretation

3.2.3.1 ZFE did submit during the TCLC consultative meeting on May 7, 2020 that the Minimum Wages Orders of 2011 already provided some guidance on the provision of paid leave. Admittedly, the Orders only apply to "protected workers". Nevertheless, the administration of paid leave was so well-entrenched in conditions of service due to the existence of it since at least the 1960s (through the repealed Employment Act Cap 268), that employers already had comprehensive conditions of service that were functioning well enough for them. As we had stressed throughout the process of enacting Bill No. 3 of 2019, paid leave conditions of service weren't "broke" and did not need to be fixed.

We maintained that those set under the Employment Act Cap 268 could merely be replicated under the ECA 2019.

3.2.3.2 The apparent vacuum created by the exemption of all employees from section 36 does not mean that the "spirit" of paid leave is not still in the ECA 2019. The written law may have been modified, but paid leave at a minimum of two days a month can still be considered to have the weight of custom. Zambia is an active proponent of the International Labor Organization (ILO) Decent Work Agenda. Paid leave is an inherent part of that Agenda.

3.2.3.3 Now, while Zambia does not appear to have ratified ILO Convention No. 132 on Holidays with Pay (Revised), 1970, it can be seen that many of the provisions of the Convention have been domesticated in Zambian law for decades through the repealed Employment Act Cap 268 and the series of Minimum Wages Orders. These include minimum period per year, protection of wages while on annual leave, non-deduction from annual leave of leave for reasons such as illness and maternity, commutation of accrued days upon termination of employment, and the employer's prerogative to determine a suitable time for the employee to take their leave.

3.2.3.4 The ILO explains the importance of paid leave for both parties to the employment relationship as follows:

> *For employers, paid annual leave preserves workers' human capital because it provides a period of rest and recovery that enables them to remain healthy. It can therefore contribute towards reducing absenteeism. Moreover, providing leave can enhance workers' motivation. For workers, paid leave is more than just a means to regenerate their own human resources: it promotes their well-being in general.*

3.2.3.5 Paid leave being part of the health and wellbeing of employees was echoed in the 2013 Issues Paper. It was considered an essential element of the "modest minimum floor of basic rights" for all workers. Equally, following the ILO's reasoning above, it is an essential part of the "health and wellness" human resources policies that the ECA 2019 under section 95 requires all employers to have. Paid leave is therefore within the "greater purpose" of the ECA 2019 as a whole.

3.2.3.6 Our considered view is hence that it would be absurd to conclude that the exemption of all employees from section 36 of the ECA 2019 means that employers are free to decide not to grant employees paid leave (or even less than the standard minimum of two working days). The centrality of leave to the health, wellbeing and productivity of workers makes paid leave too important a benefit to have been casually eliminated by subsequent legislation. Those who follow Court judgments will recall a recent landmark judgment espousing that very principle.

3.2.3.7 All "protected workers" remain expressly entitled to paid leave at a minimum of two working days a month under the Minimum Wages Orders. Take note that whereas casual and temporary employees were expressly excluded from section 36, they are not under the Minimum Wages. Any employee who meets the arbitrary description of "protected worker" under the Orders is covered. It is irrelevant whether their exact job title is mentioned under the Orders. What will be considered is the closest job title to the nature of the work they do.

3.2.3.8 Non-protected workers are impliedly covered by the manifest intention of SI No. 48 of 2020 regarding annual leave, and by the customary term of employment with the same objective. That is, not the elimination of a basic employment right, but the elimination of the excessive descriptive detail that the ECA 2019 was imposing on employers in relation to an inherently administrative matter for employers. The purpose of law is to *pres*cribe, not *des*cribe. The exemption of employees from section 36 was hence to give employers the latitude they need to administer paid leave in the most efficient way for them in light of the peculiarities of their business.

3.2.4 **ZFE Recommendation**

3.2.4.1 There was one part of section 36 that had administrative value: the annual leave plan. **Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 paid leave conditions of service** and consider whether such a plan could help in the orderly administration of leave.

3.2.4.2 Provide for a minimum of two working days per month, pro-rated as required, and accruing from date of hire. Eligibility to take such leave differs, but is generally only after six months of service. Have a clear policy on whether and to what extent carrying days forward into subsequent years is possible. You may include a forfeiture clause, but it must be restrictively worded to apply only when an employee through their own volition decided not to utilize their accrued leave. If the employer is the reason the employee could not go on leave, forfeiture cannot apply.

3.3 **Section 37 – Annual leave benefit**

3.3.1 **Exemption: Employee**

3.3.2 **TCLC rationale**

3.3.2.1 The 2013 Issues Paper proposed a commutation formula in line with Tripartite submissions. Unfortunately, section 37 cast it as an "annual leave benefits formula", which was ambiguous. Adding to the difficulty was the printing error in the Fifth Schedule on the way the commutation formula was structured.

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3.3.3 **ZFE Interpretation**

3.3.3.1 This exemption is relatively straight forward. ZFE's position at the May 7, 2020 TCLC consultative meeting was that employers already have commutation policies in their conditions of service. The elimination of section 37 and the Fifth Schedule that was attached to it would hence not leave a gap in employee rights. We can add that the maintenance of paid leave as a benefit inherently means that commutation of untaken accrued days must equally continue, at the very least upon termination or expiration of the employment contract. It is optional during the course of employment.

3.3.3.2 Employers may wish to know that the commutation formula in the 2013 Issues Paper, which had been recommended by MLSS itself, was based on basic pay. The formula was ***(No. of leave days x Basic salary) / 26 days***. The social partners unanimously agreed to maintain this formula during the adoption process of the draft Labor Code Bill in 2017. It was important to stress through the law that the objective of accruing paid leave was rest, not profit. The substitution of basic pay with full pay was unilaterally done by the drafters of the Employment Code Bill against that principle. The complete exemption from application of section 37 and the Fifth Schedule is a welcome acceptance of the social partners' consensus on the matter.

3.3.3.3 We will only add that even if section 37 were retained, we were not of the view that it provided an additional benefit similar to the "holiday allowance" of the Minimum Wages Orders. On a thorough interpretation, it did in fact provide for a commutation formula. When coupled with the section 36 requirement that no leave days be carried forward into subsequent twelve-month periods, it presented a significant added cost to labor. The blanket exemption from section 37 is therefore also a vital component of the long-term economic resilience that the TCLC was aiming for.

3.3.4 **ZFE Recommendation**

3.3.4.1 **Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 paid leave conditions of service.** Commutation of leave days should be using a formula based on "wages", being remuneration "*however designated or calculated*". The customary minimum is basic pay per working day. State whether and to what extent commutation during the course of employment is possible. If you have "protected workers", ensure you adhere to any holiday allowance provision in the applicable Minimum Wages Order.

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3.4 Section 48 – Forced leave

3.4.1 Exemption: Employer assessed by an authorized officer to be in financial distress based on the guiding principles set out in the Schedule to the SI.

3.4.2 TCLC rationale

3.4.2.1 Some employers have been severely hit by the COVID-19 pandemic and are completely unable to comply with section 48 that entitles employees on forced leave to receive a minimum of basic pay. Such employers can apply to the Office of the Labour Commissioner for exemption from section 48. The application must be supported by financial documentation such as quarterly tax returns, documentation on the suspension or reduction of business, cash-flow projections, previous audited financial statements, and payrolls showing the extent of liability.

3.4.2.2 ZFE made the detailed submissions on the appropriate documentation to guide the Labor Commissioner on assessing an employer's financial inability to pay basic pay during forced leave.

3.4.3 ZFE Interpretation

3.4.3.1 Section 48 has little detail about the concept of "forced leave". What it provides is that if an employer *is* to send its employees on "forced leave", *then* such forced leave must be at a minimum of basic pay. The section also empowers the Minister of Labor to "*prescribe the circumstances under which an employee is required to be sent on forced leave*".

3.4.3.2 The lack of detail on the concept of "forced leave" should not confuse employers about its nature. It is not "suspension", nor is it requiring employees who may otherwise be unwilling, to take their accrued paid leave. In other countries, the term "furlough" is used. It can be seen that the following description of "furlough" is the same as of "forced leave".

> *Basically, a furlough is defined as a temporary leave of employees due to special needs of a company or employer, which may be due to economic conditions at the specific employer or in the economy as a whole. These involuntary furloughs may be short or long term, and many of those affected may seek other temporary employment during that time… Companies use them during recessions as an alternative to lay-offs, because it allows them to bring workers back quickly when the economy starts to heal. The length of the leave varies, depending on how long the downturn lasts.*

3.4.3.3 We are accustomed to hearing about forced leave from the mining sector whenever a mine activates a care and maintenance program. It can happen for any employer facing a sudden business disruption that it needs time to readjust for, to avoid the worst-case scenario of

redundancies or liquidation.

3.4.3.4 The pre-existing practice of "forced leave" means it is nothing new in the country. "*Where an employer sends an employee on forced leave…*" is an indication that the ECA 2019 has not introduced the practice, only recognized its existence. The lack of detail on the concept under section 48 means that it remains mainly a creation of conditions of service. That is why subsection (1) of section 48 provides for the employer *deciding* to send employees on forced leave. It is presumed that the employer has already made provision for it in its conditions of service. What subsection (1) does is marginally modify such conditions of service. It is up to employers to have conditions of service that "fill in the blanks" for all the other details.

3.4.3.5 In countries that allow for "furloughs", there is often no guarantee that a furloughed employee will receive any benefits. It is left to each employer to decide what they can afford under those dire circumstances. Comparatively, the greater purpose of the ECA 2019 is to guarantee some minimum rights for employees. In the context of section 48, it guarantees a minimum of basic pay.

3.4.3.6 As much as the Minister of Labor has the power to issue an SI under subsection (2) of section 48 to, "*prescribe the circumstances under which an employee is required to be sent on forced leave*", that does not equate to prescribing the conditions of forced leave once it has been effected. During the consultative process for the draft Labor Code Bill, TCLC had agreed on a detailed set of provisions to guide employers on forced leave. By the time the Bill No. 3 of 2019 had reached the National Assembly, those details had been replaced with a window for the Minister to issue an SI. Unfortunately, the language supporting that window is not as permissive as it should be. That leaves it to employers to craft conditions of service as appropriate, subject to subsection (1).

3.4.4 **ZFE Recommendation**

3.4.4.1 Employers should have conditions of service that cover the possibility of forced leave. It does not matter what your business is. The economic effects of the COVID-19 pandemic are a warning to all employers to always have contingencies in case of unexpected disruptions. If you do not have some now, work on creating them. If you have already sent some employees on forced leave, ensure you and they are clear on some terms.

3.4.4.2 For such conditions of service, we recommend mirroring the employer's redundancy conditions of service in relation to selection criteria and circumstances under which forced leave will be considered. Provide a limited timeframe, sufficient for the employer to determine whether the operations can be saved. Granted, when circumstances such as the pandemic occur, it is difficult to project how long the business disruption

will be. Still, forced leave – especially when basic pay is exempted – should not, in fairness to both sides, continue in perpetuity.

3.4.4.3 Be clear on other entitlements (subject to the law) such as the accrual of leave, access to medical schemes, and the effect of forced leave on terminal benefits computation. Retain the discretion on whether the employer will opt for forced leave or redundancy. That truly is a "management" decision. Until, of course, section 48(2) is effected.

3.4.4.4 For employers who need to use the Exemption Regulations now, the "guiding principles" under the Schedule to the SI are meant principally for the Labor Commissioner. Through them, the employer will understand what documentation they need to submit for the Labor Commissioner to be appropriately "guided". Due to the use of the conjunctive "and" in the list, all of the listed principles and documents must be considered. None are mutually exclusive.

3.5 **<u>Section 55(2) – Redundancy</u>, specifically the notice periods and consultative process for effecting termination by redundancy.**

3.5.1 **Exemption: Employer assessed by an authorized officer to be in financial distress based on the guiding principles set out in the Schedule to the SI, or under circumstances warranting immediate termination of employment.**

3.5.2 **TCLC rationale**

3.5.2.1 The TCLC appreciated that the total notice period of sixty days under the ECA 2019 before a redundancy could be effected would only make bad situations worse for the hardest hit employers. If the employer already could not afford basic pay for even one month of forced leave, they certainly could not afford full pay for two months pending the effective date of the redundancy.

3.5.2.2 ZFE made the detailed submissions on the appropriate documentation to guide the Labor Commissioner on assessing an employer's financial inability to pay employees during the statutory notice periods.

3.5.3 **ZFE Interpretation**

3.5.3.1 Section 55(2) has three elements for a valid redundancy procedure:

(i) notice to the Labor Commissioner not less than 60 days prior to the effective date of the redundancy, to be provided with such details as the grounds for the redundancy, the employees to be affected, the period within which the redundancy is to be effected, and the nature of the redundancy package;

(ii) notice of not less than 30 days to the employee or their representative of the impending redundancies and the period within which they will be carried out; and

(iii) an opportunity for the affected employee or their representative

to consult on the measures to be taken to minimize the redundancy and its adverse effects on the employee.

3.5.3.2 We begin by dispelling some misinterpretations of section 55(2) itself. Firstly, the provision applies to a single as well as multiple redundancies. The language of section 55 itself and the mischief it was intended to address, being to prevent any redundancy being conducted unsupervised by the Labor Commissioner, mean that all redundancies are subject to all its terms.

3.5.3.3 Secondly, the respective notice periods of 30 and 60 days are not consecutive. They are concurrent. The 60 days are expressly "*prior to effecting*" the redundancy. The 30 days are implicitly the same because the notice is of "*the impending redundancy*". It is equally implied from the nature of notice of termination generally. Such notice will end on the effective date of the termination. It follows that the ultimate date of effective redundancy is the date you need to count backwards from for each of the notice periods. Doing so leads to a cumulative total of 60 days, not 90 days. Those 60 days are the minimum required by law. If the employer wants to give more, they can.

3.5.3.4 Regarding the SI No. 48 of 2020 exemption to section 55(2), there are two avenues to this exemption. The first is the "financial distress" to be determined by the Office of the Labor Commissioner using the "guiding principles" set out in the Schedule to the SI. We explained those principles in relation to section 48 above.

3.5.3.5 The second, which is alternative to the first, is, "*Employer assessed by an authorized officer to be… under circumstances warranting immediate termination of contract of employment*." The question is, what will that authorized officer use for the assessment, since the guiding principles appear limited to the assessment of financial distress? Additionally, how quickly would the assessment be made in light of the express immediacy of the circumstances?

3.5.4 **ZFE Recommendation**

3.5.4.1 Using the first avenue of financial distress assessed by the Labor Commissioner is relatively straight forward. Compile and submit the documents identified in the guiding principles set out in the Schedule to the Regulations.

3.5.4.2 Conversely, tread carefully when attempting to use the alternative of the "*circumstances warranting immediate termination*". Without stated criteria for that determination, the Labor Commissioner under administrative law is only required to act reasonably. We cannot theorize on what such circumstances can be. If you encounter some that do not seem to fall within the financial distress test set out in the guiding principles, please do consult us before taking any action.

3.5.4.3 If you are unable to pay the redundancy package by the last date of service as required by subsection (3) of section 55, ensure you make as early an application as possible for an exemption from that under section 56. Exemption pursuant to SI No. 48 of 2020 from the notice period under subsection (2) of section 55 will not exempt employers from the requirements of subsection (3). Without that section 56 exemption, you will be required to keep employees on payroll with full pay until full payment of their benefits.

3.5.4.4 Also note that if you start recruiting again once the situation improves, you will be bound to comply with section 57. It provides that:

> *Where, within nine months from the date when the notice of termination of employment under section 55 takes effect, the circumstances leading to the redundancy of an employee have changed and an employer wishes to fill a vacancy occasioned by that redundancy, the employer shall offer a contract of employment, in respect of the vacancy, to the employee previously declared redundant, before considering any other applicant.*

Note how this obligation is tied to when the notice of redundancy took effect. A successful application for exemption from section 55(2) will bring that effective date forward.

3.6 Sections 54 (1) (b) and (c) and 73 - Gratuity

3.6.1 Sections:

(i) Section 54 (1) (b) and (c) – Severance pay, specifically gratuity requirements for employees on fixed term contracts except long-term contracts, probation, temporary and casual contracts.

(ii) Section 73 – Gratuity for long-term contracts.

3.6.2 Exemptions:

(ii) Section 54 (1) (b) and (c):

a. Expatriate employee; and
b. Employee in management.

(iii) Section 73:

a. Expatriate employee;
b. Employee in management with a written contract providing for gratuity;
c. Employee in the agricultural sector; and
d. Employee in the domestic sector.

3.6.3 TCLC rationale

3.6.3.1 The TCLC was initially focused on exemptions to section 73. ZFE pointed out that the ECA 2019 has two sources of the obligation to pay gratuity: section 54 and section 73. Section 54 is in fact of much wider application

than section 73. Section 73 is limited to "long-term contracts". Section 3 defines these as fixed duration contracts for a specific task or for in excess of twelve months' duration. Conversely, section 54 applies to all types of fixed term contracts except temporary, casual, probationary and long-term.

3.6.3.2 Together, the two sections imposed the obligation to pay a gratuity of twenty-five percent of accumulated basic pay earned under that contract to almost all fixed term contract employees. Only excepted were those with the most transitory forms of contract (temporary, casual and probationary). This presented a substantial cost to employers well before COVID-19 affected businesses.

3.6.3.3 The TCLC hence made some concessions in relation to positions whose holders were considered able to negotiate their own conditions of service, being management and expatriates. TCLC also considered the agricultural and domestic sectors, and gave some, albeit more limited, concessions in relation to them. Other positions discussed but ultimately not exempted were apprentices and those of the tourism and hospitality sector.

3.6.4 **ZFE Interpretation**

3.6.4.1 The challenge in the way the exemptions were ultimately couched under SI No. 48 of 2020 is the discrepancies between the exemptions from section 54 and those from section 73. For instance, we highlighted to the TCLC the stress our members in the agricultural sector were facing with the requirement for gratuity under section 54 for their seasonal workers. Unfortunately, it was only from section 73 that the agricultural sector was exempted. The ECA 2019 itself makes an express distinction between seasonal and long-term contracts, so there is no way the section 73 exemption of the agricultural sector can be implicitly extended to section 54.

3.6.4.2 Only expatriate workers and management employees are exempt from paragraphs (b) and (c) of subsection (1) of section 54. This means that:

(a) all other fixed term contract employees who are not temporary, probationary, casual or long-term are entitled to gratuity under section 54 at the rate of 25% of accumulated basic pay earned under that contract; and

(b) employers of those un-exempted employees will have to continue to suffer the ambiguities of paragraph (b) and its reference to either gratuity *or* retirement benefits.

3.6.4.3 In relation to (b) above, we have had several queries from our members regarding section 54(1)(b) and (c). The summary of our interpretation is, that on a purposive interpretation of the two paragraphs in the context of the 2013 Issues Paper and section 73, the ultimate intention

of section 54 was to give fixed term workers the security of a terminal benefit. Paragraph (c) is almost a duplication of paragraph (b), showing the emphasis on gratuity as the chosen terminal benefit.

3.6.4.4 It is possible that "retirement benefits" could have been inserted into paragraph (b) along the same lines as the retirement benefits options of the Minimum Wages Orders. Still, there remains the blatant absurdity of the option of retirement benefits or gratuity for expiration or termination, versus the exclusive provision of gratuity for termination. Permanent contracts expire at retirement, but paragraph (b) is expressly limited to fixed duration contracts. Our recommendation on how to apply this is below.

3.6.4.5 In comparison, the exemptions to section 73 are much more extensive, albeit less in consonance with the reality of the labor structure of the economic sectors in Zambia. If a worker is needed for an extended period, they are most likely already under a permanent contract. Indeed, that is the very purpose of the criminalization of casualization under section 7 of the Act. It follows that exempting a long-term contract worker in agriculture from gratuity does little to help our agricultural sector members with the prohibitive cost of gratuity for seasonal workers. They have a large group of seasonal workers covered by section 54 and not by section 73.

3.6.4.6 Similarly, the exemption of the "domestic sector" from section 73 is something of a red herring. If it refers to domestic workers, such workers do not include commercial cleaners. Moreover, stakeholders are reluctant to take a definitive position on whether the ECA 2019 overrides the Minimum Wages (Domestic Workers) Order of 2011 (which actually does provide for a severance pay). Depending on duration of engagement, the provisions of the ECA 2019 on written contracts apply to domestic workers as they do with all others. Still, do any employers give their domestic workers long-term contracts, in writing, and duly attested by a Labor Officer?

3.6.4.7 The complete exemption of expatriates from gratuity is, to some employers, quite welcome. We had received queries from members on whether they could agree with their expatriates on foregoing gratuity in favor of maintaining their monthly wage. Those employers were struggling to accommodate the 25% gratuity on top of the wage bill and had tried to compromise with their expatriates on a monthly reduction to facilitate the terminal benefit. For those members, SI No. 48 of 2020 now allows that agreement.

3.6.4.8 For management employees, conversely, there is a patent disconnection between management workers covered by section 54 and those covered by section 73. If they have a long-term contract, there must be provision for gratuity in it. If there is not, section 73 will apply by default. If they

have any other type of fixed term contract, the employer can exclude gratuity completely.

3.6.5 **The (un)Constitutional argument**

3.6.5.1 There is an argument that the exemptions from gratuity under SI No. 48 of 2020 are unconstitutional. The argument is premised on the language in Part XIV of the Republican Constitution, as amended by Act No. 2 of 2016. Our short answer to this is, that the assertion is equally based on a misinterpretation of the law.

3.6.5.2 The Constitutional Court judgment in ***Ngala and Chulu v ACC (2018)*** was based on Part XIV. We released an advisory note to members based on that judgment on March 13, 2018. It was about the alleged "right to gratuity" that had become quite contentious for some employers. At that time, there was no statute that provided for gratuity. We reiterated therein what we had been saying since the Constitutional amendments were enacted in 2016: Part XIV applies only to employees in the public sector.

3.6.5.3 In 2016, we argued that the provision under Article 187(1) that, "*An employee, including a public officer and Constitutional office holder…"* must be interpreted using the *noscitur a sociis* principle of statutory interpretation. That is, a word is known by the company it keeps. In this case, the general word "employee" is limited in its scope by the specific words that follow it, being "public officer and Constitutional office holder". "Employee" under Part XIV of the Constitution is therefore not as generic as it is in the ECA 2019. It is limited to employees similar to public officers and Constitutional office holders. That is, employees in the public service.

3.6.5.4 The Court in ***Ngala and Chulu v ACC (2018)*** arrived at the same conclusion, albeit from a different angle. Due to the context of the case, it looked at the *travaux preparatoires* of the 2016 Constitution amendment, being the Report of the Technical Committee on Drafting the Zambian Constitution (2012). The Report unequivocally stated that the intended beneficiaries of the proposed Constitutional right to a pension benefit were officers in the public service.

3.6.5.5 For the purposes of the Constitution, "public service" is composed of employees whose, "*emoluments and expenses are a charge on the Consolidated Fund or other prescribed public fund*." It is thus our considered view that only those employees can claim a "right to gratuity" under the Constitution. Not the private sector, and not even parastatal organizations that earn income independently of the Consolidated Fund (National Treasury) or statutory funds, which they use to pay their employees' emoluments.

3.6.5.6 The right to a pension benefit under the Constitution has historically

always been restricted to public officers. If it was intended to be universal, that would have been unequivocally stated, and it would have been under the Bill of Rights. Again, there is a presumption against drastic changes to established fundamental law. The presumption can only be defeated through express provision to the contrary.

3.6.5.7 Still, even for public service employees, some elements of the Constitutional Court's judgment in ***Ngala and Another v ACC (2018)*** raised doubt about a "right" to gratuity under Part XIV. It is for those employees to consider going back to the Constitutional Court to challenge SI No. 48 of 2020. Since the overwhelming majority of our members are not "public service", we maintain the Consitutionality of SI No. 48 of 2020's exemptions from gratuity.

3.6.6 **ZFE Recommendation**

3.6.6.1 Employers should not engage in an overly technical argument about what sort of terminal benefit they can give a fixed term contract worker under section 54(1)(b) and (c). By longstanding employment practice that had been codified by the ECA 2019, gratuity is generally for fixed term contracts, and retirement benefits for permanent contracts. What employers can focus on is considering whether the language of the ECA 2019 is permissive enough to allow for a contributory scheme for that 25% gratuity so that the financial burden on them is lessened.

3.6.6.2 The 2013 Issues Paper supported the criminalization of casualization on the basis that employers were allegedly using fixed term employment contracts to avoid the pension benefit costs of permanent contracts. That "mischief" was partly addressed by entitling fixed term contract workers to gratuity. Proposals for gratuity were at 100% from the labor movement, and 50% from the Government. Employers bargained as hard as they could and were able to bring it down to the enacted 25%. Even that has proved to be prohibitively high, but the principle remains sound. Award a worker for their service.

3.6.6.3 To that end, inasmuch as there are exemptions of various workers from either section 54 or section 73 or both, please consider whether some form of terminal benefit can be sustainably given to them. This is not only about fair employment practices. This is about being pragmatic. Benefits better than statutory minimums increase recruitment and retention prospects. Additionally, the controversy surrounding casualization will not end. Do not feed the flames by reverting to the use of fixed term contracts (when legitimate under section 7) for the purposes of avoiding the cost of terminal benefits.

3.6.6.4 For fixed term workers not exempted from section 54 or 73 by the ECA 2019 itself or by SI No. 48 of 2020, gratuity remains at 25% of accumulated basic pay earned up to the date the fixed term contract expires or is terminated.

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3.7 **Section 75 – Overtime**

3.7.1 **Exemption: Expatriate employee and employee in management.**

3.7.2 **TCLC rationale**

3.7.2.1 There has since the enactment of the ECA 2019 been controversy over granting management employees overtime pay. The nature of the position inherently requires the availability for work well beyond the normal working hours. That was why management workers had higher remuneration. To require overtime pay in addition to wages that already had such pay integrated into them added to the financial costs of compliance with the ECA 2019.

3.7.2.2 Management and expatriate employees had the ability to negotiate better conditions of service for themselves than the statutory minimums. It was hence unnecessarily burdensome to leave section 75 as it was.

3.7.3 **ZFE Interpretation**

3.7.3.1 The exemption of management and expatriates from section 75 is absolute. That does not mean that there are no longer any statutory controls on the working hours of managers and expatriates. They are still protected by sections 74, 76 and 77. Where the expatriate is not a manager, they are also covered by the Minimum Wages Orders. 48 hours remains the standard weekly working hours applicable for all employees except watchpersons in this country. For them, the maximum is 60 hours.

3.7.4 **ZFE Recommendation**

3.7.4.1 Subject to any rights already accrued by your employees, revert back to your pre-ECA 2019 conditions of service that differentiated between management and non-management workers in relation to the eligibility for overtime pay.

3.7.4.2 Employers tended to expressly provide within the conditions of service that managers were ineligible for overtime pay because their wages already catered for the possibility of overtime. If you had not put that in your conditions of service then, do so now so that there are no misunderstandings.

4. YOU ALREADY CHANGED YOUR CONDITIONS OF SERVICE – WHAT NOW?

4.1 SI No. 48 of 2020 only came into effect on May 13, 2020, one full year after the commencement of the ECA 2019 on May 13, 2019. Some employers waited for the end of the transition period allowed by the Act before fully implementing the ECA. The delay was unexpectedly fortunate. Others have been progressively

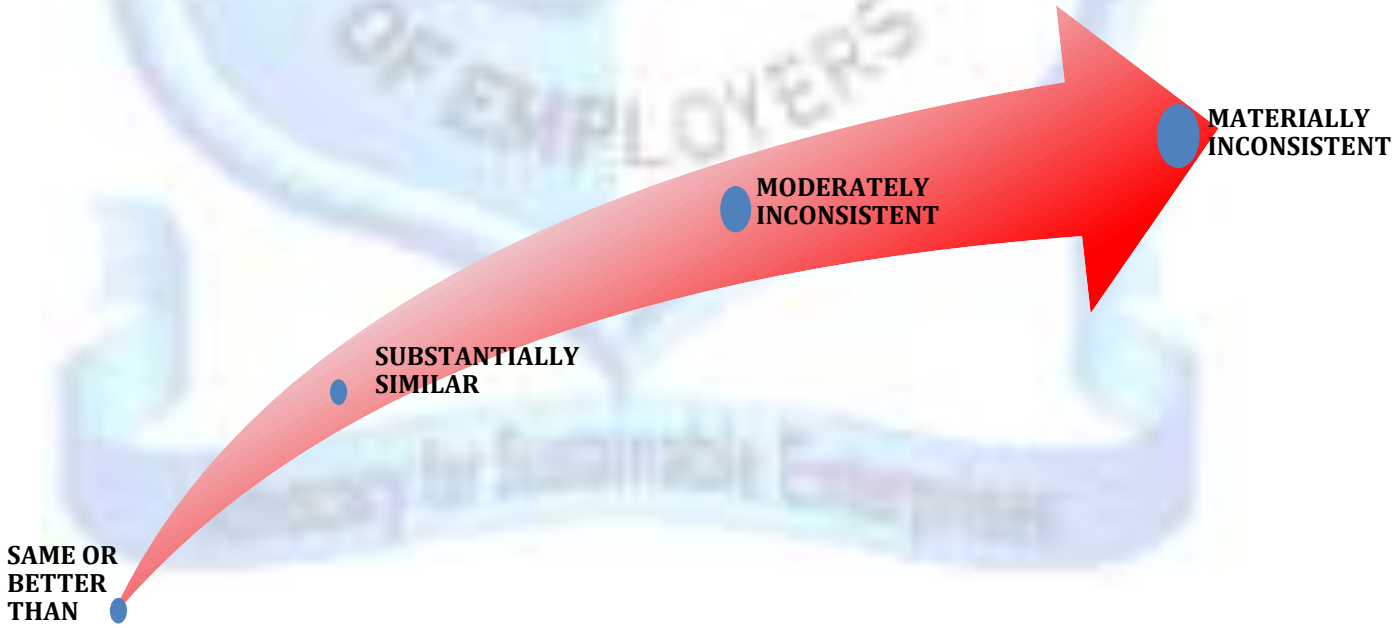
implementing changes since May 13, 2019. Whichever group an employer fell into, they probably entered into new employment contracts between May 13, 2019 and May 12, 2020. Determining whether you as an employer can take advantage of SI No. 48 of 2020 depends on whether each individual employee you have had accrued rights under the ECA 2019 before SI No. 48 took effect.

4.2 Understanding any accrual leads to the next challenge: ensuring compliance with section 5. That section prohibits discrimination in any employment practice, including conditions of service. The Supreme Court has defined "discrimination" in the context of employment to mean treating similarly circumstanced employees differently.

4.3 In cases where employers waited for the transition period to end for their existing employment contracts but had to implement the ECA 2019 for the new employment contracts started between May 13, 2019 and May 12, 2020, and *then* had more new contracts under a modified set of obligations after May 13, 2020 because of SI No. 48 of 2020, there may be a serious question of inconsistency among conditions of service for employees who may otherwise be similarly circumstanced. That inconsistency was permitted by the ECA 2019 itself during the transition period. It is not any longer. Employers therefore need to act quickly to harmonize their conditions of service. The following discussion covers the main issues to consider in doing so.

4.4 **The transition period under the Fourth Schedule**

4.4.1 We begin with the ECA 2019 as it was upon enactment in 2019. The Fourth Schedule of the Act allowed for a transition period of one year from date of commencement. That transition was limited to contracts of employment existent on May 12, 2019 and, within those contracts, to those conditions of service that were "materially inconsistent" with particular provisions of the ECA 2019. It was <u>not</u> a blanket transition period. Whether the transition period applied regarding any one employee depended on whether any one condition of



service in a pre-existing contract reached the far end of the scale:

4.4.2 We reiterate: the transition period was about individual contracts, not general conditions of service. If X Ltd had standard general conditions of service that were in some respects materially inconsistent with the ECA 2019, the company would have the transition period for an employee hired on or before May 12, 2019, and not for an employee hired on May 13, 2019 onwards. The result was different conditions of service among employees whose contracts could have been separated by just one day.

4.4.3 There is no definition of "materially inconsistent" under the ECA 2019. Using a plain and literal interpretation, the term means "significantly different". That made determining whether the transition period applied a highly quantitative one. For instance, a benefit that many employers thought was "materially inconsistent" with their pre-existing contracts of employment was gratuity at 25% of cumulative basic pay earned under that contract. Before concluding on "material inconsistency", however, they needed to compare with the ECA 2019 both their formula and the real value of the gratuity they were already providing, if any. Some had consolidated pay, with a gratuity of one or two months' pay per completed year of service, pro-rated if necessary. The ECA 2019 formula is at basic pay, the illustrated formula at full pay. Apples and oranges. Whether there was sufficient difference between the two in real terms for the transition period to apply needed to be computed on an individual basis.

4.4.4 Assuming an employer could prove true "material inconsistency", they now have three categories of employees to consider in the context of harmonizing conditions of service under the ECA 2019 as modified by SI No. 48 of 2020. The category in which an employee falls affects the rights that accrued to them, and consequently the steps an employer must take if they wish to change their conditions of service.

Category	Status under the ECA 2019	Accrual of ECA 2019 benefits
A. Those whose contracts of employment commenced before May 13, 2019.	Subject to the transition period under the Fourth Schedule of the ECA 2019, if and to what extent the employer chose to use it.	Dependent upon when the employer started implementing each materially inconsistent provision. Some employers may have done so in the phased approach we had recommended.
B. Those whose contracts of employment commenced between May 13, 2019 and May	Immediate full application.	The full set of benefits of the ECA 2019 as it was upon commencement.

Category	Status under the ECA 2019	Accrual of ECA 2019 benefits
12, 2020.		
C. Those whose employment contracts commenced on or after May 13, 2020.	Immediate full application of SI No. 48 of 2020.	The full set of benefits of the ECA 2019 as it is now, modified by SI No. 48 of 2020.

4.5 **Accrued and contingent rights**

4.5.1 Protection of rights accrued under a law is often considered in the context of the repeal of that law. SI No. 48 of 2020 is not a repealing law. Some have described it as a mere "suspension" of some obligations under the ECA 2019. It is an apt description. The effect of that suspension is akin to a "temporary repeal" of the provisions the SI has exemptions on. To that end, whether and to what extent the law applies retrospectively is a critical part of understanding how employers who already changed their conditions of service pre-SI No. 48 of 2020 can apply the Exemption Regulations.

4.5.2 In summary, the law on retrospection is as follows.

- **Criminal offences:** retrospective application prohibited by Article 18 of the Bill of Rights.
- **Procedures and practice of Courts** e.g. deadlines to file claims**:** automatic retrospective application.
- **Substantive rights:** only retrospectively affected if the law expressly states so. If the law is silent, only substantive rights **accrued** before the legislation became effective are protected.

4.5.3 An accrued right cannot be taken away without consent or a law that expressly takes it away. What makes it "accrued" as opposed to "abstract" or "contingent"? For an employment contract, we can consider a right accrued if:

(a) the law or the contract had guaranteed it unconditionally; or

(b) the law or the contract had guaranteed it subject to some conditions that had been fulfilled before the repeal; or

(c) it was in the contemplation of the parties at all material times (especially when the contract was formed or consensually amended) that the accrual of the right would occur.

4.5.4 The last test applies in both simple and complex ways. It can be a question of what the parties were contemplating about the facts of the employment relationship at material times such as when they created the employment contract or when they amended it. Alternatively, it can be about what law was

operative at such material times.

4.5.5 In that regard, the Supreme Court has affirmed that, "*the presumption is that the parties intend to contract with reference to the law as existing at the time when the contract is made*". That presumption is the basis of the "irrevocable option" we have heard about recently in relation to the retirement age. Unless the parties expressly or implicitly intended to contract using the law as it would change over time, what applies is the law as it was at the time of contracting or consensual amendment.

4.5.6 At the risk of confusing you, that does not necessarily mean you are stuck with the law as it was in 1994 when you hired that employee! The point of the discussion above is to highlight how much care must be taken on this matter. Accrual depends on the language of the law or contract and the precedent set by the employer in relation to other similarly circumstanced employees. Sometimes, the language is not as straight forward as "you are entitled to X at Y formula". It may be "as provided for by law". It could be further complicated by "as provided for by law as amended from time to time".

4.5.7 We can illustrate accrual on a very general level with the SI No. 48 of 2020 exemptions to section 55(2) and section 73. Section 73 is a straight forward accrual as identified in (a) above. Long-term employment contracts falling under Category B (commenced between May 13, 2019 to May 12, 2020) will automatically have it, but it really depends on the facts for Category A employees (pre-May 13, 2019). Conversely, section 55(2) is generally abstract to all Categories. It is not in contemplation of any employer or employee that redundancy will happen. It is a remote contingency only, like medical discharge or summary dismissal.

4.5.8 Ultimately, you need to carefully assess each case, each contract, and each applicable law to determine what accrued and is untouchable without consent, and what evolved with time because it was abstract or contingent. Neither can be arbitrarily determined. When you have made that determination with reasonable certainty, then you will know how that accrual, if any, can be changed.

4.6 What constitutes "consent" to amend conditions of service?

4.6.1 The consequence of not obtaining an employee's consent to a detrimental change to their conditions of service is redundancy under section 55(1)(c):

> "*An employer is considered to have terminated a contract of employment of an employee by reason of redundancy if the termination is wholly or in part due to… an adverse alteration of the employee's conditions of service which the employee has not consented to.*"

4.6.2 Guidance on what constitutes genuine "consent" for the purposes of section 55(1)(c) can be obtained from earlier case law on the unilateral variation of conditions of service. While some elements of those decisions have been overridden by section 55(1)(c), the overall principle remains good law. In

National Milling Company Limited v Simaata and Others (2000), the Supreme Court explained that true consent can only be confirmed if the party who has suffered the variation of conditions of service had, "*prior and real opportunity…to affirm the contract with those precise variations.*" That "real opportunity" is only given when the full effect of variations is known by the employee in advance of the change.

4.6.3 For instance, many employers had consolidated pay. With the introduction under section 92 of mandatory housing provision for non-protected workers, and gratuity under section 54 or 73, employers were considering disaggregating the salary in order to factor in such benefits without increasing the gross wage. The "real opportunity" for employees to choose whether to accept that did not come from only discussing those particular changes. Basic pay is the foundation of the formula for all terminal benefits, including death benefits, redundancy, and medical discharge. If the employee did not know that those other benefits, contingent as they are, would also be affected and how, they did not genuinely consent to the disaggregation for housing and gratuity purposes.

4.6.4 If you have the unfortunate situation of inconsistent conditions of service among various employees solely because of the start date of their employment contract, or you had already made changes to accommodate the ECA 2019 before May 13, 2020, the best thing to do is speak with your employees again. You may be considering business survival measures. Or you are only concerned with adherence to section 5. In any event, please also consult us before taking any actions that are not expressly and unequivocally already consented to by the employees through their existing conditions of service. Even in such cases, err on the side of caution and seek express consent for any significant change.

5. CONCLUSION

5.1 SI No. 48 of 2020 was promulgated in the context of the current economic crisis caused by the COVID-19 pandemic. It nonetheless also has the long-term objective of sustainability of employers in the country. COVID-19 is not mentioned anywhere in the SI – if you have other reasons to use its exemptions, please do. Do not forget that the ultimate goal of SI No. 48 of 2020 was not to deprive employees of basic rights. It was to help employers sustain the provision of such basic rights.

5.2 Employers must continue to be extremely mindful of compliance to the ECA 2019 as a whole. The exemptions are not as comprehensive as hoped, and the enforcement powers of the Labor Commissioner under the Act remain extensive. Please always bear in mind sections 10(5) and 130 to 134, as well as the broad powers of inspection under section 10(1) and Part X.

5.3 Remember the purpose of annual leave and how beneficial it is to *both* parties to an employment relationship. The exact words may be missing from the ECA 2019 but the spirit is still strong – in customary employment practice, in the human resources policies required by the Act, in the Minimum Wages Orders, and in the ILO Decent Work Agenda. A minimum of two working days a month, pro-rated as required.

5.4 As you consider implementing the easing of gratuity requirements, remember that fixed term contracts remain a strong indicator of the offense of casualization under section 7. It is also to your advantage to offer better than statutory minimum benefits.

5.5 Finally, be very cautious about accrued rights as you move towards harmonizing your conditions of service or making any changes for any other reason. Full and informed consent is critical. Such consent can only be given when the employee understands the complete effect of any variations on both current and contingent entitlements.

We sincerely thank you our members and our social partners in the Government and labor movement for the progress we have made in reforming the ECA 2019. The work is far from over. Still, we must appreciate every success, regardless of how small.

We remain open to our members for consultation on the issues raised in this opinion and on our work generally.

Yours faithfully,
ZAMBIA FEDERATION OF EMPLOYERS

Harrington Chibanda
EXECUTIVE DIRECTOR

Grace Samui
Counsel