DE DIEGO & ASOCIADOS ABOGADOS

LaborNet No. 1061
Case Law. The Impact of Coronavirus on Industrial Relations. Section 223 bis of the Employment Contract Act in times of Covid-19. Emergency Aid Program for Employment and Production.

Dear All,

We would like to share this landmark decision of July 8, 2020 in the matter of Mareco, Julián Andrés et al v EXPRESO SINGER SA DE TRANSPORTE on interlocutory relief by a Labor Court in the Province of Misiones.

The most relevant aspects include:

- The decisions taken during the public health emergency as a result of the Covid-19 pandemic are mainly aimed at protecting people's health, imposing a stay-at-home order, social distancing, lockdown, which paralyzed the economic activity. Workers have been put in a critical situation.

- According to ILO estimates, some 25 million job positions will be lost around the world as a result of the Covid-19 pandemic.

Executive Order No. 297 of March 19, 2020 established the mandatory preventative social quarantine, which has been extended by different executive orders and eased or relaxed depending on how the health system was doing in each province.

Section 8 of Executive Order No. 297/2020 states that "during the mandatory preventative social quarantine" workers at the private sector will be entitled to collect their usual pay under the terms and conditions set forth in the regulation by the Department of Labor and Social Security.

Resolution No. 219/2020 by the Department of Labor was passed to regulate it. Section 1 states that "... the amounts paid shall be non-salary in nature except for contributions to the national health insurance system and the National Institute of Social Services for Pensioners and Retirees." This Resolution was repealed by Resolution No. 276/2020 with retroactive effects, so as Maddaloni explains all the amounts to be paid shall be salary in nature (Maddaloni, Osvaldo A., *El artículo 223 bis de la LCT en tiempos del coronavirus. ¿Excepción de suspender por falta o disminución de trabajo o fuerza mayor?,* Revista de Derecho Laboral Actualidad: Suplemento Digital: El impacto del coronavirus en las relaciones

laborales, 1st Revised Edition, Rubinzal Culzoni, Santa Fe, Dossier No 4, May 2020, RC D 1656/2020).

Executive Order No. 332/2020, as amended, created the Emergency Aid Program for Employment and Production (ATP, for its acronym in Spanish), offering the following benefits: a) Extended deadline or reduction of up to 95% of employers' contributions to the Argentine Integrated Pension System; b) Supplemental Wage: allowance paid by the National State to workers under employment relationship at the private sector, c) Zero-interest rate loan for persons who have joined the Simplified Scheme for Small Taxpayers and for the self-employed under the conditions set out by the Chief of Staff Office and the Central Bank of Argentina, within the scope of their jurisdiction, with 100% subsidy for the total financial cost; d) Integral Unemployment Benefit System: eligible workers under Acts No. 24013 and 25371 will get an unemployment benefit.

The Supplemental Wage is paid by ANSeS, amounts to 50% of workers' net salary in February 2020, and cannot be below one month's minimum wage or above two months' minimum wages or the total net salary for February 2020.

The Supplemental Wage is considered payment on account of wages or allowances payable in money under Section 223 bis of the Employment Contract Act No. 20744 (consolidated text 1976), as amended. This has been regulated by Resolutions No. 408/2020 and 558/2020 establishing that if employers pay wages and the abovementioned allowance in excess of the amount workers should have received, the payments in excess may be considered payment on account of wages for the following month.

Executive Order No. 329/2020 stipulated for the ban on work suspension due to force majeure or a lack of work or reduction in operations for a 60-day period, which was then extended by Executive Order No. 487/2020. Section 3 excluded "suspensions under Section 223 bis of the Employment Contract Act" from such prohibition.

On April 27, 2020 the Workers' General Confederation (CGT, for its acronym in Spanish) and the Argentine Industrial Union (UIA, for its acronym in Spanish) reached a framework agreement for suspensions under Section 223bis. Workers who cannot render services regularly shall be suspended with pay, and employers shall pay them a non-salary amount that cannot be below 75% of their net salary. This amount shall pay contributions under Acts No. 23660 and 23661 and union dues. Any agreement meeting these conditions or containing more favorable terms for workers shall be automatically approved by the enforcement authority. Otherwise, admissibility needs to be assessed. In turn, in the case of supplemental wage under Section 8 of Executive Order No. 376/20, ANSeS pays a portion –never below minimum wage- as a part of the abovementioned benefit, and employers must pay the remaining amount to reach the total.

As a result of this agreement, the Department of Labor issued Resolution No. 397/2020, as extended by Resolution No. 475/2020, establishing that joint requests made by unions with legal status and companies seeking to impose suspensions under Section 223 bis of the Employment Contract Act, in full accordance with the abovementioned framework agreement, submitting a list of the staff involved, shall be approved after the Enforcement Authority controls legality. The same criterion will apply to those cases where the agreement is more favorable to workers (Section 1). If the request is filed by a company under the same conditions, notice will be served to the union, and if within three days of submission there is no objection, it will be deemed to be accepted and therefore approved.

Objection means that negotiations will begin (Section 2). If the request does not fully meet the terms of the framework agreement, its terms will be subject to control by the Enforcement Authority. Executive Order No. 529/2020 excluded the maximum terms under the Employment Contract Act, which may be extended during lockdown.

Non-salary allowances shall pay contributions under Act No. 23660 (Social Health Care Scheme) and Act No. 23662 (Health Insurance System) in their entirety as well as the statutory union dues.

When in times of crisis employers opt for work suspension under Section 223 bis of the Employment Contract Act, they extend the suspension period under Sections 220 and 221 of the Employment Contract, whereby workers individually or their unions agree not to work during suspension for financial reasons under Section 219 of the Employment Contract Act, even when employers at their discretion pay a certain amount of money to partially compensate for wages during such period. The requirement for agreement validity is the approval by administrative authority. **So unless any fraudulent maneuver is duly proven, workers are not entitled to file any eventual claim seeking any difference between the amount earned and the salary they should have collected during suspension.**

Considering this agreement is a contract in nature, it is very important to observe the principles of good faith, collaboration and solidarity (Sections 62, 63 and 78 of the Employment Contract Act) and public order for labor and employment matters (Sections 959, 1061 and related provisions of the Civil and Commercial Code of Argentina; Section 12 of the Employment Contract Act). Therefore, those collective agreements that have been reached without the individual consent of the workers involved are deemed to be null and void… Those workers who take part directly in the agreement are notified upon execution and signature. For those who have not been directly involved, even though the agreement is approved, they must be served notice explicitly in accordance with Section 218 of the Employment Contract Act through a registered letter, notarial certificate or written communication preferably containing the number of Ministerial Resolution.

Even though unions bargain and reach many agreements of this kind, in order to represent workers –in accordance with Section 22 of Executive Order 467/88 regulating the Act on Unions [Ley de Asociaciones Sindicales] **they must have workers' consent to individual representation in writing.**

In the letters, workers deny having given their consent and what's more, they deny having been notified of the agreement. As the validity requirements for the agreement have not been duly met in accordance with Sections 223 bis and 218 of the Employment Contract Act, it cannot be enforced. It is worth mentioning at this point that wages are fully protected under emergency laws, namely Emergency Executive Order No. 297/2020, as amended, Resolutions 207/2020, 219/2020 and 279/2020.
In this scenario, Orsini points out that from a strictly theoretical perspective the emergency stay-at-home mandate undoubtedly suggests that **during mandatory lockdown there are contracts with forbidden subject matters (Section 40 of the Employment Contract Act) because the law or regulations** (Emergency Executive Order 297/2020, as amended; Resolution 207/2020 and 279/2020 by the Department of Labor) forbid to employ certain people (older adults over 60, pregnant women, people with certain underlying health conditions, workers with school-age children) or perform certain activities (those that are not "essential" under Section 6 of the Emergency Executive Order

No. 297/2020) and/or at certain times (during mandatory quarantine, until the school year is resumed).

Considering that the stay-at-home order has been imposed by the State as public order, **there is no other option but to ensure that workers will collect their wages**; Section 8 of the Emergency Executive Order 297/2020, as amended, follows not only our labor laws governing employment contracts of forbidden subject matter (whenever the temporary prohibition of the subject matter does not hinder the performance of the contract, like in this case, **the prohibition cannot affect workers' right to collect wages, Sections 42 and 43 of the Employment Contract Act) but also the fundamental principles of labor laws protecting workers (Article 14 bis of the National Constitution), social justice (Articles 75.19 of the National Constitution and Section 11 of the Employment Contract Act), workers' indemnity and hold harmless clauses, non-exposure to business risks,** because workers should not be liable for the financial consequences of a State decision aimed at protecting the wellbeing of society in general and workers' specific rights (Orsini, Juan Ignacio, "*Prohibición de trabajo y suspensiones concertadas (art. 223 bis, LCT) en el marco de la emergencia socio-laboral provocada por la pandemia COVID-19*", Rubinzal Culzoni, Cita: RC D 2316/2020). Please bear in mind the 95% reduction in employers' contributions. In other words, employers cannot evade their main responsibility, which is their obligation, and cannot share losses by passing their own business risks onto workers, who are not supposed to assume business risks.

The Court decision states that: "The Company is clearly undergoing a difficult situation, because it cannot perform its activity but it does not mean that it can pass all the costs of the State health decision on to workers. This is not the time to analyze the limits of the negotiation under the terms of Section 223 bis - because the general agreement has not been approved by the State, listing the workers involved, and because it does not comply with the guidelines of the framework agreement that Resolution 397/2020 took as a reference for approval. However, it is worth mentioning that the Employer's claim does not even reach that minimum standard. "The minimum guideline is 75% of salary, serving as a benchmark for agreements in the business (April 28, 2020) and restaurant (April 29, 2020) sectors, but this guideline may be improved under collective bargaining at sector, company or individual level, like in the case of the collective bargaining agreement for the metallurgical industry (April 28, 2020) or for some companies with 100% payment as "non-salary" amounts or total or partial employee pay. These agreements will not be impacted and are valid. On the other hand, there is no political or possibly legal margin to negotiate or approve an agreement for a rate below that of the CGT-UIA agreement, despite the fact that it has already been implemented at some companies and sectors. Here it will be necessary to take a step back or justify and adequately support the reasons for working below the rate agreed and stipulated in the Resolution. No. 397/ 2020 by the Department of Labor.

Naturally, the alternatives ("non-salary" amounts with or without reductions) once again challenge Sections 9 and 12 of the Employment Contract Act, and the strict system of inalienable rights to preserve the essential elements of the employment contract even against workers' will. And these agreements also include the possibility of resignation, but to be negotiated between the parties, with the control of the enforcement authority, through a special authorization system and, in most cases, with the involvement of the representative union and workers' individual agreements, within the framework of the exceptional, unforeseen, objective, temporary crisis and with special regulations that were created as a result of the pandemic. The essential thing is to explicitly describe the situation

of each company or branch, the reasons for the decision, the time frame, and the reasonable and absolutely necessary measure affecting fundamental rights as least as possible".

The general principle is that workers have the right to receive their regular usual pay both if they are working and if they are not. **Any agreement under Section 223 bis of the Employment Contract Act to be approved by the enforcement authority -Department of Labor-, must not impact workers' regular, usual, net salary.** The advantage for Employers, in addition to State aid, which can reach 50% wages, is that they will benefit because they will not be making employers' contributions except for Social Health Care contributions, amounting to nearly 30% of the payment they usually make, which is a significant savings rate. **In other words, with or without State aid, workers cannot receive less; in this case a non-salary payment, as explained for net salary".** (Marigo, Rubén, "*La pandemia. Despidos, suspensiones y el trabajo digno, en El COVID-19 y su impacto en las Relaciones Laborales en Argentina - Segunda Parte* Luis A. Raffaghelli [et al.], 1st edition. I,J editores, City of Buenos Aires, 2020 Cita: IJ-CMXVII-522).

To sum up, in response to workers' request, the Defendant said that it owed a portion of March wages and stated that in April and May workers had been paid the State supplemental wage only, claiming a general agreement under Section 223 bis, with the chambers of the sector, which was not approved or notified to the workers involved.

The Defendant did not have the agreement approval (it was not invoked) and considered that it had met its obligations, even though it clearly breached the salary warranty established **in the general labor laws and also in the emergency rules whereby workers must collect the same amount that in February 2020, an obligation that must be met.**

It is important to highlight that the principles and protective rules analyzed here -which are the pillars of our constitutional Labor and Employment Law- should in no way be relativized in times of economic and social emergency. Quite the contrary, it is precisely in such contexts that these principles gain major relevance, because - as the Supreme Court has clearly stated - workers, who are in the weakest position in any industrial relation, are the ones who should receive greater protection in times of crises" (Orsini, Juan Ignacio, "*Prohibición de trabajo y suspensiones concertadas (art. 223 bis, LCT) en el marco de la emergencia socio-laboral provocada por la pandemia COVID-19*", Rubinzal Culzoni, Cita: RC D 2316/2020).

Extraordinary times call for extraordinary measures, and therefore, the parties to any employment relationship and especially employers must spare no effort and show calm, tolerance, solidarity and cooperation, bearing in mind that the main goal is to care for the people first, and then business, providing special protection to workers, as enshrined in our Constitution".

As a result, the Judiciary in the Province of Misiones, issued this decision sustaining the Plaintiff's claim seeking interim relief, and ordered the Defendant Expreso Singer SA T to pay any outstanding amounts up to date for the balance of March wages, salaries for April, May and June, as well as the thirteenth salary (SAC) for the first half of the year 2020, until reaching an amount equal to February 2020 wages. **The amount to be paid to each worker will include those received as a supplemental wage for each period.** The deadline is within two days after notice of this decision; otherwise a daily penalty of ARS

2,000 will be applied to each day of delay (Section 804 of the Commercial and Civil Code) as well as the fine set forth in Section 188 of Labor Procedural Code.

Please do not hesitate to contact us for further information.

Best regards,

Natalia de Diego