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The importance and legal steps to deal with repatriation. How to treat those executives who come back to their home country after an international assignment

Dear All,

Here we will analyze the importance and legal steps for repatriating Expats. How to treat those Executives who return to their home country after an international assignment?

Let's go over the matter of Machado de Villafañe, Tomás Antonio v General Motors de Argentina SRL on employment termination.

- The Executive claimed reparation for damages, lost profit and emotional distress based on the abusive exercise of the Employer's right to change working conditions (*ius variandi*) when ordering him to return to his home country after an international assignment of three years (Florida, USA).
- His claim was based on discrepancies in the calculation of severance pay for constructive discharge because some items were not deemed to be salary in nature: Living Cost Allowance, school fees, tax refunds and company car.
- The Plaintiff also stated that he was discriminated against when he returned to Argentina because he was paid less than their colleagues at the Company. It is worth mentioning that he was repatriated in the agreed term with his consent after a 3-year international assignment.

- He claimed that his job category, duties and salaries were reduced. He sought the application of penalty under Section 2 of Act No. 25323, damages for emotional distress, and alternatively salary discrepancies for non-payment of Living Cost Allowance, housing, company car and penalty under Section 1 of Act No. 25323.

I.- Background information

The Plaintiff worked at the Legal Affairs Division of the Company when he was offered an international assignment. He claimed ill-treatment and poor working conditions when he returned to Argentina, demotion as compared with his duties abroad, salary reduction as a result of his repatriation because he no longer collected items that were paid during assignment in the US.

In relation to the circumstances under which the Plaintiff was assigned to Miramar offices in Florida (USA), the Lower Court assessed the documents where payments were itemized –in addition to pay stubs- submitted by the Plaintiff together with the complaint, whose authenticity was acknowledged by Mr. José Vale (HR regional VP for Latin America, Africa and Middle East) through a letter rogatory where he explained that such documents were not prepared by the Defendant directly but by a contractor for administrative matters, something that did not turn them invalid; quite the contrary, because the employer was ultimately responsible for pay stub preparation and content.

The Defendant explained that the Plaintiff was Assistant General Counsel for Latin America, Africa and Middle East and also Global Transactions Leader.

His international assignment was an opportunity for growth and learning, a professional experience that matched a specific need at the host company.

The Industrial Relations Manager explained that the international assignment policy was exhaustively regulated by the company and IPS (International Service Personnel).

The report about the Plaintiff's tax and social security situation prepared by Deloitte & Co. SRL when his international assignment was decided showed that the Company asked for a report for a 3-year assignment.

All the positions held at the Company, the assignment in the US, the Plaintiff's work in the offices there, his transfer and repatriation to Argentina meant that the Plaintiff knew first-hand about the surrounding circumstances and matched the tax and social security status report prepared by Deloitte.

It was concluded then that the Plaintiff returned to Argentina as agreed, and the Employer did not change his working conditions arbitrarily (*ius variandi*).

Sometimes executives keep the same title but are promoted with a different territorial scope –e.g. regional level, see page 1408. The Plaintiff returned from the US to hold the position of Legal Affairs Director and as compared to the title held in the US he was demoted here in Argentina. He had to report to Carmen Araujo whereas in the US Araujo was his colleague. He explained that he was given an office in a small conference room, with a desktop computer, without windows, without furniture. A witness explained that the Plaintiff was his boss and she met with him in such conference room, next to the cafeteria, so there was no confidentiality, and the other directors had closed offices, with large desks, with a small meeting room, windows, comfortable furniture, and the witness knew all about this because she had participated in the layout of the new offices when they moved there.

The analysis of these testimonies (section 384 of the Civil and Commercial Code of Procedure of Argentina) matched the description of the Plaintiff's working conditions, position and functions, and the environment and physical office, and the treatment given by his line manager, so it can be concluded that the Defendant damaged the Executive, who considered that he was constructively discharged (Sections 242, 243 and related provisions of the Employment Contract Act). Then severance pay under Section 245 did not contain emotional distress as a result of indecent, humiliating treatment and workplace violence in its broadest sense. When comparing salaries, both directors were expats and the Executive performed equal tasks in a similar position –Legal Affairs Director- collected a salary lower than that paid to Directors at other divisions even with shorter length of service than his, as showed in Exhibit II, so it can be concluded that there was salary discrimination under Section 81 of the Employment Contract Act.

The Plaintiff sought to include the Living Cost Allowance in the basis for calculation, whose salary nature was not accepted by the Lower Court as stated in the Recitals of the Ruling, even though the judgment awarded salary discrepancies for the same item, and both parties appealed.

This item was intended to protect Expat's purchasing power while working abroad, and covered the difference between the cost of goods and services in the home country and the cost of goods and services in the host country, which the Defendant determined according to its own index based on its internal rules establishing the contractual conditions for international assignments (IPS Handbook).

The witness, Araujo Perez, described the system of compensation and allowances, financial aid to avoid any economic damage against the Expat and his family, whose aim was to keep his lifestyle in the home country whereas Trucco explained that the Expat collected his entire salary in Argentina, a cost of living difference between Argentina and the home country and expenses for housing, schooling for his children, car, health insurance and social security contributions in the home country.

Even though the Defendant had to pay this item while the employee worked abroad, there was no good reason to disregard the salary nature of a payment paid as a result of the employment contract – Section 103 of the Employment Contract Act. When the Plaintiff was repatriated, the Defendant did not have to continue paying the Living Cost Allowance because this was an item intended to be paid while the employee was working abroad precisely to compensate for any difference in the cost of living between the home and the host countries, so the Plaintiff was not entitled to collect it once he returned to Argentina. This is a benefit with a clearly defined objective: protect employees' purchasing power.

Then the Defendant was in part right because even though the Living Cost Allowance was salary in nature, the judgment awarded salary discrepancies, as claimed by the Plaintiff, until repatriation.

II. Legal treatment for benefits collected abroad

Rent and schooling:

As to the payment of rent abroad, the Plaintiff was not right; the Company paid the rent as a result of the international assignment (see Section 105 of the Employment Contract Act) as well as the school costs for the Expat's children, which the Court deemed to be fringe benefits.

According to the precedent "Pérez, Aníbal v Disco SA" September 1, 2009 (Judgment 332:2043), any payment collected by employees in exchange for his work is deemed to be salary, whichever the name given.

Therefore, the expenses covered by the Company –housing and schooling- were in principle payment in kind, salary in nature, as determined by the Lower Court in relation to the rent, and the same criterion should be followed for school fees and their inclusion in the calculation of the Expat's highest compensation in order to determine severance pay.

Refund of Taxes paid abroad:

The Plaintiff insisted in the salary nature of the tax refund that the Defendant paid while on assignment.

During assignment, the Plaintiff did not pay taxes in Argentina and paid taxes in the host country, and such taxes were paid directly by the Company without deducting the respective amounts from the Expat's salary.

The amount paid to the Tax Authority, deducted and paid directly by the Company, should be paid by the Executive through deduction or withholding, so the decision taken by the Employer to pay them was a benefit for the Plaintiff within the broadest scope of the definition of salary under Section 103 of the Employment Contract Act, so the appeal was sustained and this item should be included in the calculation.

Car:

The Defendant's appeal against the Lower Court decision to consider car use as payment in kind was not sustained.

Remember that the Employee could freely use the car provided by the Company for professional purposes on workdays but also in his free time without rendering accounts; that is the reason why this item could be deemed to be "income" in exchange for work under the employment contract under the terms of Section 103 of Act No. 20744, and the item "company car" should be included in the calculation of his monthly compensation (see "Alen, José Fabián v Wyeth S.A. on employment termination" SD. 84.747)

The truth is that during employment the Plaintiff was assigned just one car, and when he was transferred to the US with his family the Company provided two cars temporarily.

Considering that the car provided by the Company was used for both professional and personal purposes, the salary nature only applied to the proportional personal use while the business use (Sections 64, 76 and related provisions of the Employment Contract Act) was not salary in nature (see Panel II, "Lucero, Humberto v YPF SA on employment termination", SD 95.480 December 20, 2007; Panel I, among others, "Reboredo Sergio Daniel v Bumeran.com Argentina SA on employment termination", SD 86.950, August 30, 2011). The Lower Court ruling awarded ARS 2,000 per month for this item and the Court of Appeals sustained it.

The Court of Appeals took the same exchange rate than the Lower Court.

Allowances:

Contrary to the Plaintiff's claim, it was not admissible to add the Living Cost Allowance to his total compensation because the Executive was entitled to collect this Allowance during the international assignment, and not upon return to his home country.

In order to draw the necessary comparison to determine his highest, regular, usual compensation in the last year worked, it is imperative to revise the amounts paid abroad according to the detailed information provided (expressed in US dollars).

Consequently, it is convenient to take the salary that the Executive earned in Argentina upon his return, as explained.

Please do not hesitate to contact us for further information.

Best regards,

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