DE DIEGO & ASOCIADOS
ABOGADOS

Labornet No. 1319

Expatriates who return to Argentina to a lower-level position The Court has ruled that the salary the Plaintiff earned in Chile should have been kept with the increase that he also received in Argentina because it is vested right.

Dear All,

In the matter of "ZOCCHI, ADRIAN ABEL v ODFJELL TERMINALS TAGSA SA et al on Employment Termination" dated September 30, 2020, the Executive was promoted to General Manager based in Chile, and then removed from this position in Chile with the promise that he would be relocated to Argentina to a similar senior position, which did not happen. When he returned to Argentina he was granted a leave of absence to resettle and once the leave was over he was appointed to the same previous position he had held before the international assignment, without the compensation or benefits he used to receive, such as reimbursement for car expenses, and he continued working in this position until termination. He claims that in addition to the salary he continued receiving in Argentina, he should add US$10,000 for salary in Chile and US$10,000 for additional benefits, such as top-level housing with all expenses paid, club membership, cellphone for personal use, car expenses and expenses for family trips, personal expenses on the credit card paid by the Company.

The Co-Defendant is a Norwegian citizen, without residence in Argentina but residing in Brazil, where he works for another company.

The Executive has worked for a long time for a subsidiary of the Norwegian company and returned to Argentina to a lower-level position, which was the same he held before his international assignment: Deputy Commercial Manager.

His international assignment from Argentina to Chile was agreed in Argentina, and even though the contract was made in Chile, it had been discussed, negotiated, agreed and accepted in Argentina. During his assignment in Chile he was granted housing and car, whose expenses were covered by the Chilean Company, in addition to plane tickets for him and his family. During his employment in Argentina, the Company paid for fuel expenses per kilometer and parking fees with the respective supporting receipts. All these payments were directly deposited into the Plaintiff's salary account, so they were included in his compensation. Upon his return he continued working for Tagsa at the same lower-level position he had held before expatriation.

The Argentine subsidiary continued paying salaries in Argentina and making statutory social security contributions while he worked in Chile. So even though his contract with Terquim Chile was terminated in accordance with Chilean labor law, Section 3 of the Argentine Employment Contract Act (LCT) establishes that "This Act shall govern all the aspects related to the validity, rights and duties of the parties, whether the employment contract has been entered into in Argentina or abroad, so long as it is mainly executed in Argentina", so the Court must interpret how it applies in this case.

It is then inferred that there was one and only employment agreement that was performed in two countries. Note that the Executive had worked for around 19 years under an employment contract agreed in Argentina and promoted at the Chilean subsidiary; he worked 6 or 7 years in Chile while he was paid his salary in Argentina as well.

In other words, his contract in Argentina had never been interrupted since his start date until termination. While he was assigned to Chile, where he was also paid his salary, he continued to collect his salary in Argentina. Before moving to Chile and upon his return to Argentina he held the position of Deputy Manager. In Chile he was temporarily promoted to General Manager and collected salary in legal tender plus payments in kind such as housing, car, cellphone, which was not specified in the contract offered to the Court.

Therefore, considering that these Companies belonged to the same Business Group and this is a case of "international assignment" where the Executive was transferred to Chile, as agreed in Argentina with the involvement of senior managers and the Regional Manager, which the Plaintiff himself recognized, this Court finds that there is one and only employment relationship, where the contract had not been suspended but transferred to a subsidiary of the same Business Group Terquim in Chile, as agreed with the Plaintiff. When he returned to Argentina, he returned to his position before termination. In other words, the employment contract was transferred as agreed and accepted by the Plaintiff (Section 229 LCT).

Consequently, the contract with the Chilean Company was agreed in Argentina -no matter where the paper document was actually signed- and this is a case where work is performed in two territories. The original employment contract was made with the Argentine Company in Argentina and the contract with the Chilean subsidiary was also made in Argentina for the Plaintiff to work in Chile, so based on the prevailing scholars' opinions, in those cases where work is done in different territories the applicable law is that of the main place of performance, and in case of doubt, the most favorable law to employees should be applied (Section 9 LCT). (Juan Carlos Fernández Madrid -Tratado Práctico de Derecho del Trabajo, Volume I, LA LEY, page 479, Buenos Aires, 1992- quoting Justo López) Therefore, in this case considering that the main place where the employment contract was performed was Argentina, then Act No. 20744 should apply, and this is what the Court sustains.

It is worth mentioning that there is another precendent, "Bardessono, Guillermo v HSBC Bank" (case file 17534/2012), whereby Panel II of the National Labor Court of Appeals resolved that: "(...) work is performed at different productive units belonging to the same Business Group, the employee is initially hired by one of the companies of the Group and then given a job offer to work at a foreign subsidiary, without terminating the original contract and with the possibility of returning to the home country... Therefore in cases like this the provisions of Act No 20744 should be applicable for the transfer of personnel (Sections 229 and related provisions). The employment contract was executed in Argentina, initially performed here and then temporarily transferred abroad but the assignment was made in Argentina (Section 3 LCT)..."

In addition, there are precedents whereby "Under Labor Law, this situation with multinational corporations or business groups... is not new, and they may be held liable for fraudulent hiring (Section 31 LCT) when the multinational business group appears disguised as different legal entities in each of the countries where it does business but in fact it is one and only corporation and the employee works for different subsidiaries or different companies of the same group. Even if there is no fraudulent maneuver, subsidiaries are liable for the obligations of the other companies of the same Group or for the entire Group, as derived from the employment contract (see Juan Carlos Fernández Madrid, TP de D del Tr., Vol 1 page 942 Ed. 1989)", because employment is agreed with the whole Group (Panel II, National Labor Court of Appeals in re Tommasi v Air Plus Argentina).

On the one hand, the Argentine Employment Contract Act applies because the original contract has never been interrupted, was executed and mainly performed in Argentina in accordance with Section 9 LCT and on the other, given that the "international assignment" -the term used by the Plaintiff in his complaint- was negotiated, agreed or accepted in Argentina, there is no doubt about the application of Act No. 20744.

Then the negotiation to put an end to employment between Terquim and the Plaintiff in Chile under the foreign law as a settlement agreement ("convenio de finiquito") cannot be resolved under the terms of Act No. 20744. Indeed, although this instrument is similar to that under Section 241 LCT, it is irrelevant to decide this case because the employment contract was transferred according to Section 229 of the LCT, and the amount received by the Plaintiff as a result of the negotiation that he himself recognized should be taken as payment on account (Section 260 LCT) (page 23 and 32).

So the severance pay received by the Plaintiff as a result of the employment termination should be taken as payment on account.

In order to determine the amount of the compensation accrued, it is relevant to consider that the Plaintiff continued to collect his salary in Argentina during the international assignment and in Chile his compensation was way higher because he held a higher job position, and when he returned to Argentina, he returned to a lower-level position with lower functions and a significantly lower salary. Based on the constitutional principles of salary protection (Section 14 bis National Constitution), this is inadmissible.

Indeed, the fair compensation referred to in Section 14 bis of the National Constitution (CN) means that workers' salaries cannot be frozen or reduced to protect decent and equitable working conditions, in accordance with constitutional provisions under Section 114 LCT, and this is the case when an employee is promoted and paid better and then returns to a low paying position after expatriation is over.

Under Section 14 bis CN and based on the principle of substance over form and employees' protection (precedents Vizotti, MIlone and others by the Supreme Court) it is inadmissible for the Plaintiff to receive a salary below the amount he used to collect (vested right).

In cases like this when the employee returns to his previous lower-level position, he should be given agreed pay rises to compensate for any depreciation or pay cut to his detriment, in accordance with his vested rights and labor public order (Sections 7 and 12 of Act No 20744).

Although the ruling that is cited below deals with exempted employees and pay rises for workers under collective bargaining agreement, this Court finds it convenient to apply it to the case under discussion.

In the matter of Fernandez Estrella v Sanatorio Güemez the Supreme Court of Justice concluded that it is not fair or equitable to grant raises to workers under collective bargaining agreement, and not to exempted employees.

So, in order to compensate for any salary loss, the Plaintiff should have been granted higher salary than the one for his previous position to keep the income he earned at his last position before returning to Argentina. This is what this Court sustains. After revising the Plaintiff's pay stubs, this Court finds that his compensation in Chile was equal to his salary in Argentina during the year with the inclusion of the item under the heading "future increases".

With regard to non-salary benefits granted in Chile, and taking into account the hiring method and the fact that the Plaintiff's complaint does not expressly state that the parties had formally agreed on the payment of family, personal and other expenses, other precedent indicates as follows: "... given the special characteristics of expatriation, the items paid to employees under international assignment are intended to cover for temporary services abroad and cannot be included in their regular compensation. In this case, the effects of the employment contract between the employee and the company were suspended until the end of the employment relationship, and therefore severance pay should be calculated based on the salary the employee should have earned at the local subsidiary upon termination with HSBC Bank Internacional Ltd. The Court finds that not all the payments the Plaintiff received abroad were salary in nature, and the benefits were intended to help keep the same standard of living abroad, in Britain, temporarily under the provisions of Section. 103 bis of Act No. 20744..." Naturally, an entity or group that decides to transfer an employee to another country should bear the cost of adequate housing... The company also promised to provide him with an annual compensation to travel ... From this perspective, based on the power conferred by Section 56 of Act No. 20744 and given ... his last compensation in Britain of L 5,960.50 ... which according to the current exchange rate ... equals to ARS 31,948.28 ... " (National Labor Court of Appeals Panel II in re Bardessono Guillermo v HSBC BANK case file 17534/2012).

In addition, the complaint on page 33 states that the amount of the fringe benefits he received in Chile is fair reasonable compensation since he received two salaries, one in Chile and one in Argentina, for his position of General Manager at the time of the employment termination.

Consequently, in the light of the prevailing case law on non-salary items -rule that has been repeatedly applied- and the reasonableness and standard parameters for executive salaries at the time of the employment termination, within the framework of Sections 56 LO, 56 LCT and 114 LCT, this Court determines the Plaintiff's compensation.

With regard to the amounts that were not paid in Argentina, compensating for fuel expenses per kilometer and parking fees with the respective supporting receipts, they were all deposited into his salary account.

As to the rate for general pay rises, considering that the relationship between the parties is governed by the contract, the Executive received even more than the rest of the staff, while working in Chile, with a salary in Chile and a salary for Deputy Manager in Argentina, under the heading "payment on account for future increases", this Court finds that this amount has been duly and fairly absorbed.

All in all, the salary that should have been kept as vested right is the one that he earned for his position in Chile with the increase that he also received in Argentina, which is reasonable for the managerial position and the duties he held at the time of the employment termination.

Any claim for incorrect registration for the eventual payment of salaries in kind is inadmissible because these items were intended to help keep the same lifestyle, with or without fringe benefits, and were not paid off the books or in breach of any tax system or without adequate registration.

The Court rules that penalties under Section 1 Act No. 25323 should not be awarded because there is no incorrect registration or irregularity for payments in kind or lower-level salary.

On the other hand, the Tax Authority (AFIP) reported that statutory social security contributions were duly made for the entire employment in Argentina and Chile, where contributions were also paid to the Chilean Social Security Fund (Caja Previsional Chilena) during the international assignment, so no fraudulent maneuver has been made with payments off the books.

The truth is that based on the information reported by the Co-Defendant in Brazil and the Argentine subsidiaries there is no indication of any fraudulent maneuver, tax evasion or payment off the books for the Plaintiff's salary in breach of any labor or social security laws. Therefore, considering the adequate registration of the employment relationship, this Court finds that there has not been any unlawful conduct or anomaly in violation of the rights of the Plaintiff or any third party involved. Based on this factual situation, the provisions of the last part of Section 54 and 274 of Act No. 19550 are not applicable, and the joint and several liability claimed is inadmissible.

Please do not hesitate to contact us for further information.

Best regards,

Natalia de Diego