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Introduction

Last year, the 2020 Argentina chapter in *Global Legal Insights – Employment & Labour Law* highlighted the difficulty of taking a moment to review and analyse the evolution and development that may have taken place during 2019 in labour legislation and the tendencies of the jurisprudence of the Labor Courts.

At the time (May 2020), we were fully inside the COVID-19 pandemic and consequently all the efforts and concerns were focused on the analysis on what was going to happen to our lives and fundamentally, to take the necessary measures to prevent contagion and to strengthen the health structure, so as not to jeopardise the healthcare sector as a result of COVID-19.

As of March 21st, 2020, the Argentine Government imposed a very strong and persistent measure of compulsory social isolation which, to a greater or lesser extent, is still currently in force.

This measure, which has been socially defined as "eternal quarantine", has certainly helped to avoid a collapse of the health system, but has also been one of the reasons for the closure of many companies, mainly small and medium-sized ones, and the loss of around 4 million jobs between formal and informal employment, and discontinuous or occasional jobs. The loss of employment had a dramatic impact on the poverty index, which, according to the official reports, rose to 42% in December 2020.

Notwithstanding the fact that the National Government provided (and continues to grant) economic aid to the companies most affected by the pandemic and the quarantine, this assistance was not sufficiently relevant to protect employment.

Far from it, and although since March 30th, 2020 the National Executive Power, by means of a Decree that has already been extended 21 times, prohibits private sector companies from terminating their employees without cause, unemployment rose to 13% according to the official index; although the real forecast for 2021 places unemployment at approximately 20% of the economically active population; all of which implies that more than 2 million people today are looking for a job in Argentina, with a projection to worsen towards the end of the year.

The aforementioned "eternal quarantine", imposed by the National Government to control the risk of contagion due to the incessant circulation of COVID-19, presented new challenges for the legal advisors in general and especially, once again, for lawyers specialised in Labor Law.

Because of the gross reduction or in many cases the closure of the activity of companies, the requirement for labour advice was very demanding during most of 2020 and continues to be the case.

From the very beginning of the quarantine, companies began to explore different scenarios of salary and social security cuttings in order to absorb and compensate the reduction of their turnover.

The first legal queries were around alternatives to produce dismissals without cause, voluntary retirement plans, suspension of employment contracts, leave without pay, granting of vacations, and agreements to reduce working hours with a proportional salary decrease, among many other ideas with greater or lesser legal support and contingency or of stronger or bigger impact on the management of human resources.

In the context of economic crisis and within the necessary analysis of the range of potential actions aimed to neutralise said aggressive impact, the response personally adopted included labour counselling, which focused on proposing legal structures that would allow not only a quick neutralisation or absorption of the impact, but also the ability to sustain legal solidity in the future.

Thus, the suggested schemes were mainly analysed, designed and based on prudent and creative parameters, which would make it possible to reduce the labour cost immediately, but without losing sight of the fact that any legal strategy decision must always be made with sufficient legal seriousness to be able to defend itself with strong wording against eventual legal claims before a Court.

As it has happened in many countries, in Argentina, during the pandemic, companies have faced the most stressful and complex legal and human resources management challenges of their history, not only because of the impact on the corporate business but also because of the absolute restriction imposed by the Argentine National Government against the normal exercise of the rights and powers granted to the employer by the law.

It is clear that in a context of an occupational emergency scenario such as the one that has been declared over a year ago, it is essential to preserve employment. It is also true that corporate business is the central key to maintain employment. And evidently, without being able to fully dispose with the fundamental tools that allow the employer to organise and manage a company, the goal of preserving employment only shows the failure demonstrated by the statistics and indexes already mentioned.

The year 2020 was marked, as far as the new legislation scenario is concerned, by the following regulations:

(i) Prohibition of dismissals without cause, Decree No. 329/2020: the decision of the National Executive Power to prohibit dismissals without cause of employees defined at the outset a very drastic – and possibly unconstitutional – measure in the context of labour relations in the Argentine Republic. One of the fundamental principles underpinning the legal structure of labour relations between a private employer and a worker in Argentina is that of "relative stability".

This principle states that the employer has the right to terminate the employment relationship at any time, without the need to have a cause to do so. Unjustified dismissal only grants the employee the right to collect the severance payment established by law for such termination, which is basically equivalent to the amount of one month of the employee's salary for the number of years of services performed for the same employer.

Notwithstanding the scenario of an extreme health emergency, this authorises the Executive Power to provide for restrictions to the exercise of rights (in this case, certain powers of the employer); the long duration of such prohibition of dismissals may ground the aforementioned unconstitutionality.

(ii) The enactment of the Telework Law No. 27,555: although this law enshrined a positive step forward in the necessary modernisation of labour relations and the regulations governing them, the law has received very serious questioning from almost all sectors.

While the unions have argued that the law does not provide sufficient protection for workers against possible abuses by the employer and because of the psychophysical damage that may be caused by remote work, the law has also received very serious criticism from the employer sector, not only because of the restrictive content of some of its provisions, but mainly because of the unjustified urgency and the scarce legislative debate that the law has undergone until its enactment. Furthermore, it is claimed that this regulation, far from motivating the generation of employment, has frustrated any expectation in that sense.

Beyond the discussions and questioning that each regime deserves, the regulations issued during the emergency have stood out for their technical legislative deficiency.

This deficiency has unfortunately been a common feature of most of the decrees and resolutions issued during the last year. Perhaps because of that haste or perhaps due to the fact that many provisions of a labour nature are the result, in their latest version, of a negotiation of interests in many cases opposed to each other, the regulations end up generating a level of conflict and controversy that the law itself should avoid, rather than provoke.

The terms and main aspects of each of these regulations, which have been the main focus of attention during the unforgettable year of 2020, will be analysed below.

Review of new legislation

As pointed out above, the year 2020 stood out for the enactment of emergency regulations.

At least, the emergency scenario has been propitious to sanction the law of teleworking, which with successes and failures, virtues and defects, has made it possible to generate a regulation for a modality of work that will surely mark a very relevant future way for executing a labour relationship.

Prohibition of dismissals. Decree No. 329/2020

On March 31st, 2020, Decree No. 329/2020 of the National Executive Power was published in the Official Gazette. This regulation, among other provisions, prohibits dismissals without cause or due to *force majeure* of employees of the private sector.

The Decree establishes that dismissals without cause notified in violation of such prohibition will have no legal effect, so that the workers will have the right to claim their immediate reinstallation to their labour position in the company.

At the time the prohibition of dismissals was set, Decree No. 34/2019 (Official Gazette 12/13/2019) was also in force in Argentina. This provision established that in the event of dismissal without cause, the employer must pay the worker an aggravated indemnity equal to 100% of the indemnities that the latter was entitled to receive due to such termination scenario.

It is worth mentioning that as aggravated indemnity does not apply with respect to workers who have started working for the company as from December 14th, 2019, the prohibition of dismissals without cause and due to *force majeure* does not apply to them either; and it also does not apply, according to a recent regulation, to employees of the construction industry, who have a special legal regime different from that of the Employment Contract Law.

As pointed out above, the measure prohibiting dismissals without cause did not succeed in retaining the source of employment and in fact, the reports of private consulting firms on employment matters agree that between March 2020 and March 2021, approximately 400,000 registered private sector jobs have been terminated in Argentina.

The reality of the companies evidenced then that despite the aforementioned prohibition, several sectors of activity such as commerce, tourism and hotels, and medium and long distance transportation, had to seek alternative mechanisms to carry out redundancies.

In this context, the alternative of termination of employment contracts was fundamentally framed by voluntary retirement plans whereby, within a global proposal to all the employees or to certain groups, the employer grants the personnel that voluntarily decides to adhere to the plan, an extraordinary gratification of a minimum amount equivalent to the severance payment that such employee would have received in a scenario of dismissal without cause.

In order to make the proposal more attractive, such final bonus normally provides for an amount even higher than the severance package due to termination without cause and, eventually, health coverage for four to six months from the date of termination of the employment relationship.

Currently, the aggravated severance payment for dismissal without cause only covers up to a maximum of AR$ 500,000 (US$ 5,000), so that a voluntary retirement scheme, which until last month should ultimately include severance payments and an additional 100%, presents an alternative to reduce comparative costs.

The prohibition of dismissals without cause set out by Decree No. 329/2020 was accompanied by another measure as aggressive and restrictive as the previous one.

Decree No. 329/2020 also prohibited the employer from unilaterally arranging suspensions due to *force majeure* or for economic reasons; suspensions that would have allowed the employer in the *force majeure* scenario given by the pandemic, to unilaterally impose, either directly or after filing a proceeding before the Ministry of Labor, the suspension of employment contracts for up to 75 days in a year, without the right to remuneration for the personnel.

In order to mitigate the salary and social security costs for employers, Decree No. 329/2020 encouraged companies and labour unions to negotiate agreements for the suspension of personnel, pursuant to the terms of Article 223 *bis* of the Employment Contract Law.

This suspension mechanism allows, within the framework of a previous negotiation with the union (for employees covered by collective bargaining agreements) and directly with the hierarchical personnel (excluded from collective bargaining), agreements providing for the suspension of the work performance, and during such period of suspension, the payment to the personnel of a non-wage sum of money, equivalent to a percentage of the usual monthly salary. These agreements must in all cases be submitted to the Labor Office for approval.

Beyond the suspension agreements and as what occurred globally, employees who, due to the nature of their duties, were able to continue working from their homes, have been doing so since March 2020 and continue to do so with some discontinuous presence, as at the time of writing this chapter.

The generalisation of remote work encouraged national legislators to dust off the Telework projects of law submitted to the National Congress within the last 10 or 15 years and in record time the National Congress enacted Law No. 27,555 of the Legal Regime of Telework.

Beyond the discussions and criticisms that deserved this decision of the Legislative Power, both for the unnecessary haste for the debate as well as for the specific content of the law, in the following section the main areas of the Telework Law and its regulation will be outlined in detail.

Telework Law

The Telework Law No. 27,555 (hereinafter, the "TL") was published in the Official Gazette on August 14th, 2020 and after a transition period, it came into force on April 1st, 2021. The main guidelines of this law are as follows:

1. Concept and scope: telework comprises the work activity performed "totally or partially" outside the employer's premises, as long as information and communication technologies are used to execute that activity.
   The TL governs any agreed teleworking scheme, even in those cases in which the provision of remote work for only a few hours per week is foreseen in advance.
   The only scenario in which the TL does not apply is that in which the work is performed occasionally from the employee's home (or elsewhere), due to an exceptional event or reason. In turn, the employee's performance at the establishment of a client of the employer does not fall under the contractual qualification made by the TL.
2. Working day: the general principle applies in terms of working time, so that teleworking must respect the maximum period of time of the respective working day established by law or by the respective collective bargaining agreement ("CBA"). In the general regime, the legal working day in Argentina is eight hours per day or 48 hours a week; beyond this, many CBAs establish a shorter working day, according to the activity.
   There is no obstacle to agreeing on a flexible scheme of discontinuous hours, as long as the legal maximum periods of time allowed are respected, as well as the 12-hour rest period between the end of one workday and the beginning of the next, and the 35-hour weekly rest period.
3. Right to digital disconnection: the teleworker has the right not to be contacted outside his working day and to disconnect from his devices outside his working day and during leave periods. Also, "*the employer shall not require the employee to perform tasks, or send communications, by any means, outside the working day*".
   This prohibition for the employer to send communications to the employee outside the working day does not apply when the activity of the company is carried out in different time zones or when there is "some objective reason". Beyond the ambiguity of this last expression, it could be interpreted that the local employer's communications must be limited to those that cannot be postponed. In any case, the employer has the right not to respond to such communication until the beginning of the following working day.
   Good practices in human resources management will impose respect for the legal working day and the appropriate balance between work and rest, so that beyond the right to digital disconnection, it seems unlikely that this rule could generate legal disputes.
4. Care tasks: the law enshrines the right of the worker to impose a working day schedule that is compatible with his or her personal care situation of children under 13 years of age or disabled persons or "senior citizens" who live with the employee and require specific assistance. The employee may also interrupt the workday to provide such assistance. Any conduct by the employer that violates these rights will be presumed to be discriminatory.
   This is one of the rules that has been questioned by the companies, as it is considered that it hinders the normal exercise of the employer's power of organisation and management and for eventually creating a scenario of discrimination with respect to the face-to-face personnel who do not have the right to interrupt the working day or to impose a working day schedule adapted to their family situation.
   Teleworking is a mode of service that promotes family co-responsibility, so that it seems appropriate to provide that in practice, the teleworker will actually interrupt his service when he has to take care of his child under 13 years or adults or disabled persons who live with him.
   Beyond my opinion on the "harmless" nature of the right of interruption, the rule provides for a hypothetical scenario of a change in working hours that effectively may risk the efficiency of the teleworking modality.

Indeed, for example, in a usual scenario of the birth of a child, the teleworker will have, under the terms of this provision, the right to claim the employer a change in the regime of working hours or their schedules. The employer cannot on legal grounds refuse to implement this modification because if he did so, he would enter into a case of discrimination, or in a breach of such seriousness as to enable the scenario of constructive dismissal of the worker.

5. Reversibility: the TL provides that "*[t]he acceptance given by the employee in a presence-based modality to move to a teleworking type of work, may be revoked by the same at any time of the relationship. In such a case, the employer must grant him tasks in the establishment in which he had previously provided them, or failing that, in the closest to the domicile of the dependent, in which those functions can be provided. Unless for justified reasons it is impossible to comply with such duty...*".

   A proper analysis of this provision and the true scope of the right of reversibility requires distinguishing the different scenarios in which its application could take place.

   5.1. Current employment contracts: those who today telework in a forced manner at the behest of the obligation of isolation and who until March 30th, 2020 did so in a presence-based modality (at least predominantly), will have the right to resume the usual mechanics of work in the offices of the company. The employer cannot in any way unilaterally impose teleworking as a modality (total or partial) of service.

   Now, if as a result of an agreement of modification of working conditions, those workers (before 100% face-to-face) agree with their employer a total or partial scheme of teleworking, under the terms of the rule, they may in the future impose the return to the face-to-face scheme, in whole or in part. This is the only scenario that regulates the rule because there is no other framework within which it could be verified an assumption of "reversibility".

   Even in this hypothesis of requesting the return to on-site work, the employer could find arguments for rejection in the terms of the regulation itself, which exempt him from the obligation to provide effective employment in the establishment, when "justified reasons" prevent him from fulfilling such duty.

   The regulation also clarified that the worker who performed in the past face-to-face tasks and then agreed with his employer the provision in telework, may request the return to the presentiality (in whole or in part) only as long as he has some "reasonable and supervening" reason. The employer must grant the presential position in a period that may not exceed 30 calendar days.

   5.2. New employment contracts: the so-called right of reversibility is not applicable to employment contracts that foresee as an essential condition a mixed scheme of performance, alternating face-to-face and remote work; nor, of course, a 100% remote scheme. Since the rule only provides for the right to reversibility and not the right to claim face-to-face work when telework was initially agreed, it is clear that if the employment relationship began partially or totally in telework, the employee will not have the right to claim that the service is performed in the establishment of the company. Such a requirement will depend on the agreement with the employer to achieve effectiveness.

6. Work elements: the employer must provide the employee with "the equipment -hardware and software-, the work tools and the necessary support for the performance of the tasks...", or compensate the employee for the use of his own tools.

   The determination of the work tools to be provided by the employer to the employee will be subject to regulations or to collective bargaining; and in the absence of these,

to the good practices defined by the employer. In principle, it seems evident that a computer and an ergonomic chair will be some of the elements that the employer will be responsible for, either by direct provision or through pertinent economic compensation.

7. Higher connectivity expenses: the teleworker is entitled to compensation for "the higher costs of connectivity and consumption of services to be faced". Collective bargaining or regulation will determine the guidelines for such compensation.
   While it is to be expected that the regulation will also confirm the non-wage nature of such compensation, clarification to that effect is not necessary, as long as the compensation is set on the basis of a prudent estimate of the "increased expenses".
   All the expenses that the employer assumes in the framework of the provision of teleworking tools is advised to absorb in order for the employee to be able to telework will not affect the nature of the employee's wages; this is even without the need to submit receipts. Notwithstanding the breadth of the rule, it will always be convenient to maintain reasonable standards in determining the amount allocated to such expenses.
8. Transnational services: when the telework service is performed outside the country for a local employer, the applicable legislation will be that of the place of execution of the tasks or the Argentine legislation, depending on which is the most favourable rule for the worker. The hiring of foreigners not residing in Argentina will require the prior authorisation of the Ministry of Labor and the collective bargaining agreements must establish a maximum limit for such hiring.
   This provision constitutes one of the most controversial aspects of the TL because it is repugnant to any basic principle of freedom of contract and is absolutely inconsistent with the territoriality principle contained in the substantive legislation, by virtue of which the labour law is only applicable when the performance is executed in the Argentine Republic.
9. Other provisions: in addition to the above provisions, the law also contains provisions relating to: (i) equal treatment between face-to-face and telework workers; (ii) training; (iii) collective rights and union representation; (iv) health and safety; (v) control systems and right to privacy; and (vi) registration of software and registration of the teleworker, all of which do not deserve special analysis in this chapter, either because they are abstract or overabundant matter in merit of the current regulations in Individual and Collective Labor Law, or because they constitute aspects of a procedural or formal nature that do not require special attention.
   Perhaps, if there had been sufficient parliamentary debate, it would have been understood that the TL was not born to regulate remote work during the quarantine or for the "new normality", but to offer a modality of work adjusted to modern times, to provide greater opportunities for formal employment for sectors and territories that find it difficult to access quality jobs, to protect the environment by promoting that more workers provide functions from their homes or from places away from large urban conglomerates. These are some of the opportunities that a restrictive legislation with such a bad legislative technique as the one enacted will surely not achieve.

Law No. 27.580. Ratification of ILO Convention No. 190

On December 15th, 2020 Law No. 27.580 was published in the Official Gazette of the Nation, which approves Convention 190 on the elimination of violence and harassment in the world of work, adopted by the General Conference of the International Labor Organization ("ILO") on June 21st, 2019.

The Law made Argentina the third country in the world to ratify the document, which covers not only actions that take place in the physical work space, but also communications related to this area, particularly those that take place through information and communication technologies.

Convention 190 affirms that violence and harassment in the world of work "may constitute a violation or abuse of human rights, and that violence and harassment are a threat to equal opportunity", while recognising that women are the most exposed to violence and harassment at work, particularly those who are in more vulnerable situations, perform night work or are migrants.

Case law review

The most relevant jurisprudential cases in the last 12 months were fundamentally marked by the conflicts generated by the suspension of employment contracts and by the cases of dismissals produced during the validity of the prohibition imposed by Decree No. 329/2020.

The implementing legislation, as mentioned above, while prohibiting dismissals without cause, enabled companies and unions to enter into agreements for the suspension of personnel, in order to mitigate the adverse economic effects generated by the pandemic and the so-called "eternal quarantine".

It was from the execution of these agreements and the cases of dismissals against the prohibition that a long list of lawsuits followed, namely:

i. workers who claimed the right to be excluded from the personal framework of application of the respective suspension agreements because they were at risk of being infected by COVID-19. Most of the rulings issued declared the right of such employees to receive the salary differences accrued as a consequence of their incorrect inclusion in the respective agreements;
ii. cases in which the employee filed for the nullity of the agreement entered into between the company and the union, based on the lack of ratification of the agreement by the personnel delegates and the employees included in the agreements;
iii. cases in which risk personnel who, during the pandemic, were notified by the company of the granting of annual vacations, requested the Court to order the company to annul such imposition of vacations, due to the impossibility of these workers to enjoy their vacations during the pandemic;
iv. claims for nullity of dismissals for cause and reinstatement in the workplace, in the face of termination scenarios notified on the basis of a generic breach, which clearly did not comply with the legal requirements to proceed with such type of dismissal;
v. claims for nullity of termination of employment contracts notified by the employer during the probationary period, which were almost equally rejected by the courts; and
vi. claims made by platform service providers (Uber, Rappi, etc.) who, in view of the company's decision to disable them from the service, raised before the courts their status as employees in a relationship of dependence and the argument that such deactivation implied a dismissal without cause prohibited by Decree No. 329/2020.

As pointed out earlier in the chapter, in many cases, the main cause of judicial conflicts is the deficient legislative technique, whether the inaccuracies in the wording of the law or the spaces not covered by it are due to the lack of capacity of the legislator at the time of drafting it or to the conflict of opposed interests that cause difficulties of interpretation and application.

As it can be seen in the preceding detail, one of the reasons that triggered legal claims was the discussion as to whether or not the termination of employment contracts entered into for an indefinite term during the three-month trial period was included in the prohibition of dismissals provided for by Decree No. 329/2020.

Since this specific issue was not clearly stated by the Decree and without any of the drafters of said norm having noticed with the necessary immediacy the lack of clarity of the norm, only

after almost four months, when a new extension decree established that the prohibition does not apply to employment contracts entered into after July 28th, 2020, hundreds of lawsuits were filed by workers who had been dismissed during the trial period in the interpretation that the prohibition did not apply to the dismissals produced during that period.

A similar deficiency in the legislative technique is also found today in the drafting of the TL; to such an extent that it is being discussed in all labour lawyers' forums whether the TL has already entered into force or not, either totally or partially, and whether it will only be applicable and enforceable when the pandemic and the eternal quarantine cease to restrict presentiality.

There are certainly basic aspects that a law must cover (such as their entry into force) and that should not generate such a level of confusion and lack of certainty in the interpretation of the text. The legislative deficiency generates legal unpredictability, which opens the door to judicial conflicts and to finally aggravate the labour cost or the loss of employment.

It is time for legislators to open their eyes more when drafting laws or to notice sooner rather than later the errors or omissions in which they incur, in order to correct them as soon as possible.

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With more than 25 years of experience within the labour legal field, Federico initiated his professional career at ENTel en liquidación and joined the labour area of Beccar Varela law firm in 1992. In November 2001, he entered M. & M. Bomchil, where he had been a partner until his departure in February 2018. His practice focuses on corporate employment law advice, including the prevention and resolution of complex individual disputes, the designing of salary schemes and hiring structures, the defence of clients both at the administrative and judicial stage and the personal and active involvement in salary negotiations with unions, collective bargaining and union conflicts.

Federico was a professor of Employment Law at the University of Economics at the Catholic University of Argentina in 2005, has been a speaker in numerous conferences both in Argentina and abroad, and an assiduous writer of articles and comments on labour law in graphic media.

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