

Unilateral termination of the employment contract due to late payment of wages and ERTes

27th April 2020

Concerning the Judgement issued by the No. 3 Albacete Labour Court, dated 28th October 2019

On October 28th 2019, No. 3 Albacete Labour Court ("JS") issued a ruling upholding the lawsuit filed by eight (8) workers against the company Automóviles Espejo, S.A, The claim was for recognition of the right to the indemnified termination of their respective employment contracts, in accordance with Article 50.1 b) of the Workers' Statute ("ET"), due to the existence of a business failure consisting of the continued delay in the timely performance of their salary obligations.

Given the usefulness of this statement in the context of the situation generated by Covid-19 and, in particular, from the legal-labour perspective, in view of the temporary employment regulation measures ("ERTes") that are being adopted by many companies to help overcome the contingencies arising from the slowdown in production and the restrictions attached to the declaration of the State of Alarm, a brief and succinct analysis of its main considerations is made below.

These are its key points:

a.- General framework of application: the right to receive one's salary punctually and the possible consequences of non-compliance

Among the basic rights of workers - stated in Article 4.2 f) of the ET - is expressly included the right to the *"timely receipt of agreed or legally established remuneration"*. This right is developed in Article 29.1 of the Legal Text, which, under the heading *"settlement and payment"*, provides the following:

"Settlement and payment of wages shall be made punctually and in writing at the agreed date and place or in accordance with custom. The period to which the payment of periodic and regular remuneration refers may not exceed one month".

Thus, the delay in the payment of the salary accrued on the due date and place generates, in accordance with the provisions of the third paragraph of the precept, a default interest of 10% of the amount due.

Additionally, when the delays in the payment of the salary occur continuously, that is, they are repeated over several periods of accrual, Article 50.1 b) of the ET empowers the worker to file a legal action for the termination of his employment contract with the right to receive the compensation provided for unfair dismissal.



b.- The controversy raised before No. 3 Labour Court Albacete.

The origin of the litigation brought before the Labour Court lay in the delays in the payment of the salaries of several workers incurred by the Company over a period of more than one year.

Likewise, after the lawsuit was filed, the Company applied an ERTE based on economic reasons, which led to the suspension of the contracts of several of the plaintiffs. Due to the continuous delays in the payment of the salary, the workers were interested in the indemnified termination of their respective work contracts, as well as the payment of the due salary amounts with the corresponding interest on arrears.

c.- The decision of the judge and the compilation of the jurisprudence of the Supreme Court dictated in the interpretation of article 50.1 b) of the ET: the assumptions so that the delay in the payment of salaries can base the extinction of the employment relationship at the request of the worker.

The JS upheld the claim, sentencing the company to pay the sums due plus the corresponding interest for late payment, plus the sentence to pay compensation for unfair dismissal, finding that the company's continuous delays complied with the assumptions declared by the Supreme Court's case law. Namely:

(i).- The existence of several delays in the payment of wages, regardless of whether these were caused by the employer.

The possibility of requesting the termination of the employment contract does not require the examination of the cause for the delays incurred, but the mere existence of the objective circumstance of the failure to comply with the salary obligations in time is sufficient.

Thus, the fact that the Company is in a delicate economic situation, or even in a situation of insolvency proceedings, does not imply an exoneration or reduction of liability, since if there is an economic situation that makes it impossible to comply with the company's duty to pay the salary on time, the Company may resort to the procedures for employment regulation or modification of the working conditions provided for in Articles 41, 47, 51 and 52 of the ET, and may not proceed unilaterally and against the will of the workers to defer compliance with their salary obligations.

(ii).- Seriousness of the non-compliance, which must be assessed in the light of objective circumstances consisting of *(i)* the persistence and continuity of the delays *(ii)* the amount of the sums due.

Both assumptions, which are evaluated jointly, have given rise to a profound case study in the different declarations of the Fourth Chamber of the Supreme Court. Thus, the production of delays in a period equal to or less than 3 months is not enough. On the contrary, if the existence of seriousness has been assessed, which could cover the termination of the employment relationship in the following cases:

- Delays produced in a period of 9 months with an average delay of 13 days;
- Delays produced in a period of 15 months with an average delay of 22 days;
- Delays over 14 months, between 3 and 28 days, with an average delay of 11 days.

Likewise, as a last point, it should be clarified that an income of the amounts owed after the filing of the lawsuit or even at the time of the judicial conciliation, would not enervate the worker's action, being able to continue with its exercise as a consequence of the damages caused by the delay in the reception of the salary. Consequently, the seriousness of the breach should not be assessed at the time of the trial, but at the time when the worker decided to contest the breach by the employer.

In the case brought before the JS, the delays were repeated throughout 2018, and the Company even proceeded to pay the amounts due in instalments, and this was independent of the fact that the negative economic situation could justify the company's action.

To a greater extent, the Company's liability was extended to the amounts owed accrued up to the date of termination of the employment relationship. However, with respect to the plaintiff workers who were affected by an ERTE after the filing of the lawsuit, the Company's liability is limited to the date of suspension of their respective employment contracts.

d.- Summary table

Requirements so that the delay in the payment of the salary can cause the indemnified termination of the work contract by will of the worker	
Corporate non-compliance	Regardless of the guilt of the employer or the existence of a negative economic situation - or even the adoption of an ERTE.
Severity of non-compliance	Continuous and persistent over time
	Amount of sums due

e.- Subsequent recommendations

The existence of cases of force majeure or economic causes that prevent the payment of wages on time must be immediately corrected with defensive measures by the companies; all this if they do not want to face extinctive lawsuits by those affected with the cost of the legally established compensation for unfair dismissal, apart from being condemned to the payment of unsatisfied wages with the not inconsiderable interest for default of 10% per year.

As the Judicial Doctrine teaches, the company must articulate or fully materialize the means or instruments that the employment law puts at its disposal to face possible situations of economic difficulty, particularly the recourse to deferment of payment of salaries, duly agreed with the Unions or the RLT and/or measures of ERTes, of a collective or individual nature, which are evident and obvious in a situation like the one that the Spanish business landscape is currently suffering.

You can see the full text of the above-mentioned judgment [here](#).

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