C.A. de Concepción

Concepción, January fifteenth, two thousand twenty-one.

IN VIEW OF:

In the case file RIT M-724 -2019, titled "ALVARO FELIPE ARREDONDO MONTOYA con PEDIDOS YA

CHILE SPA", followed before the Labor Court of

the judge in charge of said court,

Angela Hernandez

Gutiérrez, by judgment of October five, two thousand twenty, accepted the claim filed against PEDIDOS YA CHILE SPA.

He stated

that between the parties there existed an employment relationship for the

period from July 03, 2019 to May 15, 2020, being null and void and unjustified the dismissal of the plaintiff and ordered the payment of the

amounts of money corresponding to indemnity payments.

substitute for notice

The Company was also ordered to pay the following: prior salary, proportional holiday, remunerations during the period between the date of dismissal and the validation of the dismissal, with the interest and readjustments contemplated in Articles 63 and 173 of the Labor Code. It also ordered the payment of the social security contributions in the AFP indicated, in Fonasa and AFC Chile for the period worked, with each party having to pay its own costs.

The defendant filed an appeal for annulment against this decision, based on Article 477 of the Labor Code, for violation of Article 477 of the Labor Code.

of law, in connection with

with articles 7, 8, paragraph 1 and 3 of the Code of the

Labor, due to an erroneous application of them. He requests that the contested judgment be invalidated and that the corresponding replacement judgment be issued rejecting the claim due to the non-existence of the labor relationship.

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Declarado admisible el recurso, was proceeded.

a su view,

The attorneys of both parties argued in defense of their respective rights.

WITH THE RELATED AND CONSIDERING:

That the purpose of the appeal for annulment established in the Labor Code is, depending on the cause in question, to ensure respect for fundamental rights and guarantees, or to obtain

sentences in accordance with the law. Thus

is clear from the

Articles 477 and 478 of the aforementioned Code, which establish the grounds for such recourse, which, in addition, has an extraordinary nature that is evidenced, on the one hand, by the exceptional nature of the assumptions that make up each of the aforementioned grounds, in view of the purpose pursued by them, a situation that also determines a restricted scope of review by the higher courts. 2º.- That the defendant bases the appeal for nullity on the cause of nullity of article 477 of the Labor Code, that is,

infraccioń

of law that would have influenced the dispositive aspect of the ruling,

specifically insofar as it determines the existence of an employment relationship between the parties.

3º.- That, in support of the alleged defect, it is argued that

that the actor

dedujo claim for recognition of employment relationship

and collection

against him on the basis of a the services he provided as a deliveryman or "raider", which he did, in the concept of

of the plaintiff, under bond

of subordination

and dependence,

claim that it denies, since the

was civil in nature;

sin embargo, la sentencia acogió la tesis defendant

recognizing the effectiveness of the relationship

labor market based on the

facts that it considered to be established - which are not disputed in the

arbitrio-, subsumiendo this, en the article

7 and 8, paragraph

first, both of the Code

of Labor, being this exercise the

which is considered as constituting the alleged defect and infringing the aforementioned norms, by considering the following as concurrent

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requisitos de la relación labor

disubordination

and the

dependence, deviating from the regulation on the matter of the

Labor Code, legally forcing

a position

de facto

that does not fit in any way with the norms that regulate the

substantive law on the matter. To support his argument, he analyzes the facts given as true in the sentence and how they also fit in a relationship other than an employment relationship, such as the one between a doctor and his patient, or between a lawyer and his client.

In summary, it is estimated that

violates article

7 of the Code

from

Work when performing a false application

of the law, consisting of

in subsuming a series of established facts under standard

specific legal provisions.

It is infringed in his opinion,

the article

8, item

first of the Code

of Labor, because the analysis

of the link

of subordination

and dependence, must be carried out on the basis of the

elements that the labor legislation itself provides, reviewing whether or not

that relationship has

practical applicability

in a relationship of

work with the standards currently in force, which is a matter of

that is not

made in the ruling. Also

article is violated

3 of the Code of

Trabajo, to equiparar a technology platform

with a

company and establish the existence of an employment relationship between the parties without the actor being an integral part of the organization.

Finally, it refers to the fact that the alleged defect is important

an infringement

de ley que influye sustancialmente en lo

the judgment under appeal, inasmuch as, from

correct application has been made

of these legal norms,

the sentencer should have concluded

that the relationship

that

united

the parties to the lawsuit, was not one of an employment nature, and

Consequently, it should have rejected the claim in all its parts.

That, with respect to the only ground for nullity

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invoked by the appellant, that of Article 477 of the Labor Code, it should be pointed out that in her appeal she refers exclusively to the infringement of substantive law, which of course means that any question related to factual aspects must be excluded, since the erroneous or false application of the law implies that the appellant is not entitled to claim a violation of the law.

leave unchanged the facts established by the trial judge.

That, for the purposes of this cause of action, it is important to determine the facts that were taken as established in the judgment, in order to then determine whether there has indeed been an error of law in the application of the rules of *decision* and whether this substantially influenced the disposition of the judgment.

The judge, in the ninth ground of the sentence, established the following certain facts:

like

1. *"That the defendant Pedidos Ya, operates through an application or App, of the same name and its purpose is to intermediate in the dispatch of food, which is materialized through deliverymen or raiders."*
2. *"That the plaintiff rendered services for the defendant between July 03, 2019 to May 15, 2020, performing duties as a raider or delivery driver."*
3. *"That, in order to come to provide services for the Respondent, the*

*The actor had to go through a selection process, in which he had to*

*The defendant requested a series of information such as a background certificate, driver's résumé, among others.*

1. *"That, the services rendered by the plaintiff consisted of the*

*distribution of products purchased by third parties."*

1. *"For product delivery, the actor was required to wear a*

*uniform consisting of a jacket, backpack and T-shirts, all with the defendant's logo."*

1. *"The control that the defendant exercised over the plaintiff was*

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*materialized through qualifications."*

1. *"The actor rendered his services in shifts, which were*

*variable and determined by the application, i.e., the Respondent."*

1. *"The actor was not free to choose any shift nor to alter it, since the actor could only choose within the shifts proposed by the defendant, the latter drawing up the schedule of each shift and*

*assigning them according to the actor's qualification".*

1. *"Each delivery person is assigned a zone, which is determined by the respondent."*
2. *"The start of the workday was done by entering the connection site. Once entering the connection site, which corresponded to the delivery area, the actor had to activate his application so that it would*

*start assigning orders, thus controlling the actor."*

*the location of the*

1. *"The control of the day was carried out, in addition to the form.*

*The defendant was able to supervise the orders taken by the plaintiff, because if he refused to take an order, the defendant stopped assigning him to his duties for a certain period of time.*

1. *"The actor was not free to set the value of his cast."*
2. *"The actor was limited to making the distributions, assuming the*

*defendant the responsibility in the face of problems of this or inconveniences with customers."*

6º.- That, it is an undisputed issue both at doctrinal and jurisprudential level, that the essential elements of the labor relationship or that define the employment contract, are those of subordination and dependence, and the alienation, this derived from articles 7, 8 and 3 of the Labor Code. Therefore, in order to determine whether there was an infringement of the law, it is necessary to consider the concurrence or not of such elements, according to the undisputed facts of the judgment.

That, to this effect, we must bear in mind that the existence of a new productive reality, based on the provision of services through digital platforms, with technological innovations that even favor the establishment of digitalized control systems for the execution of such services, represent an apparent difficulty when determining the presence of the defining elements that allow us to conclude whether or not we are in the presence of a labor contractual relationship.

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Indeed, work through digital platforms poses new challenges to the law in the interpretation of labor relations, which are no longer performed in the traditional way, in offices, subject to schedules or through verbal instructions. The reality arising from e-commerce has adapted the delivery and transportation sectors to the services that link, through new forms of communication and payment, providers and end users.

In this context and as a natural consequence of the massification of new technologies, tools such as applications for smartphones and tablets have been incorporated into the world of work.

concepts such as control through geolocation and *cookies,*

the use of algorithms that probe into the habits of users, but at the same time people who, as in this case, fulfill the orders placed by customers.

Therefore, in order to determine whether the elements of an employment relationship are present, it is necessary to use the technique of indicia, identifying the favorable and contrary indications to the existence of an employment contract and deciding whether or not an employment relationship is present in the specific case.

The sentencing judge made

precisely such an exercise, as it is

The Court concluded that the relationship between the plaintiff and Pedidos Ya Chile was of an employment nature, as it considered that the essential elements of such a relationship, i.e. subordination and dependence, had been accredited.

The same is stated in its tenth and eleventh plea, as well as the

The reasoning in which it clearly explains the arguments on the basis of which it concludes in the operative part of the resolution.

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That, the above is nothing more than the application of one of the principles that informs the labor legal system, the primacy of reality, a postulate that is understood, as stated in the doctrine, as that axiom that, in case of discordance, is the principle of the primacy of reality.

between what happens in practice and what emerges from documents or agreements, it orders to give preference to the former, that is, to what happens in the field of facts (PLÁ RODRÍGUEZ, Américo, Los

principios del Derecho del Trabajo, Ediciones Depalma, 3ª Buenos Aires, Argentina, 1998, p. 14).

Edition,

We cannot ignore that the interpretative exercise of the Labor Court consists of determining the factual reality that prevails over the *nomen iuris* that the parties have given to the legal relationship, because contracts have the nature that derives from their content of obligations and not the one that one of the parties intends to impose. Thus, in order to qualify the labor nature or not of a relationship, particular care must be taken to examine whether the elements that give it such nature concur.

From this perspective, and in accordance with the facts established in the

judgment under appeal

-immovable on the basis of the grounds given-.

inevitably lead to the conclusion of the existence of an employment relationship between the parties.

The aforementioned conclusion cannot be defeated by the allegations made by the appellant, inasmuch as from such facts it is also possible to infer a civil relationship, as it would be the relationship between the patient and his doctor, or that of the lawyer with his client, specifically because in such relationships subordination and dependence, and alienation, are nonexistent. Such services are performed under the guidelines given by the professional himself, who works for himself, and the fruit of his services, as well as the risk of the same, are exclusively his own, not so in the case in question, as is derived from the factual circumstances accredited in the judgment.

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We must not forget that the employment relationship is often asymmetrical between the employer and the employee. On numerous occasions, the latter has to accept the conditions proposed by the former for hiring, which is why the protective and protective nature of the labor law is so important.

The branch of law obliges the sentencer to take particular care to ensure that his decisions tend to balance this relationship.

Therefore, when there is a controversy in the interpretation of a

applicable to the employment relationship, preference should be given to the rule that is more

in accordance with the interests of the worker. This principle is known as *in dubio pro operario*. The protective vision guarantees the full and effective enjoyment of workers' rights, safeguarding justice and equity in the relations between the parties.

(ASTUDILLO CONTRERAS, Omar,

"Rule of *in dubio pro operario* in

the evidentiary decision", Revista Laboral Chilena, Nº pp.86-89).

9-10, 2012,

The perspective proposed by the principles of the primacy of reality and *pro-worker,* leads us to conclude that the reasoning of the appealed Court is in accordance with the law. It is a fact that such principles not only set the guidelines for the creation of a fair and efficient order that duly ensures labor relations, but also serve to specify the framework for the application of labor law.

(PALOMO Velez, Rodrigo,

"The role of principles in the application

of Labor Law. Antecedentes conceptuales sobre el estado del Arte en Chile", in Revista Laboral Chilena, November 2007, p.69). 9º.- That the facts established in the appealed judgment, determine

thatthe

"raider"

does not organize itself

only the productive activity, nor

negotiates prices or conditions with the owners of the establishments it serves, nor does it receive its remuneration from the end customers; it has no real capacity to organize its work, and lacks the autonomy to do so.

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The "raider" was subject to the organizational guidelines set by the company and to perform his work he had to do it linked to the platform; this reveals an exercise of corporate power in relation to the way the service was provided and a control of its execution in real time, through the application and access to the area, which shows the requirement of dependence inherent to the employment relationship.

That, on the other hand, the alienation in its various aspects is also verified, since in order to carry out his services the plaintiff required the application or digital platform, as can be seen from the statement that in order to work he had to connect to it, this being an essential element for the service, which was provided by the company.

In the same way, the company assumed the risks of the activity developed from the platform, since, for example, if

any problem arose, Pedidos Ya Chile responded.

and not the delivery person,

The company was also responsible for the loss of a bad service, since it was provided under its name. On the other hand, it should not be forgotten that the plaintiff had to work with the company's uniform, and even a backpack, which included its logos.

It should also be considered that the benefits or patrimonial utility rendered by the deliveryman were passed on to the company, which was paid by the client for the value of the service and subsequently paid the raider, always for determined periods of time. Finally, the customer would contact the company, and the raider would only deliver what was ordered.

11º.- That, thus

the things, in accordance with the precepts of paragraph

In application of the aforementioned principle of the primacy of reality, already mentioned and invoked by the judge, together with the *pro-worker* principle, the existence of a labor relationship between the parties, and therefore, governed by the labor code, flows as an irrefutable conclusion, and that, upon its termination, without complying with the formalities established by said legal text, the claim must necessarily be accepted in the terms indicated in the judgment.

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12º.- That, according to the above reflections, the court a quo has not incurred in the infringement of law alleged by the appellant and, on the contrary, has made an adequate application of the legal rules to the situation under analysis and that the appellant considers infringed, reason for which the ground of nullity invoked does not

The final judgment in the case is therefore valid and cannot be annulled on the grounds that have been raised.

For these considerations, the legal provisions cited and in accordance with the provisions of Article 482 of the Labor Code, the appeal for annulment filed by the plaintiff's counsel against the final judgment of October 5, 1920, issued by the Labor Court of Concepción is rejected without costs, and consequently is not null and void.

Register, notify, insert in the virtual judicial folder and return.

Written by Alternate Minister, Jimena Cecilia Troncoso

Sáez.

Rol N° 395-2020. Labor-Collection.

Viviana Alexandra Iza Miranda MINISTER

Date: 15/01/2021 16:03:32 PM

Jimena Cecilia Troncoso Saez MINISTER(S)

Date: 15/01/2021 13:38:27 AM

Waldo Sergio Ortega Jarpa ATTORNEY-at-law

Date: 15/01/2021 10:21:21 am

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Pronounced by the Fourth Chamber of the A.C. of Concepcion, composed of Minister Viviana Alexandra Iza M., Alternate Minister Jimena Cecilia Troncoso S. and Member Attorney Waldo Sergio Ortega J. Concepcion, January fifteenth, two thousand twenty-one.

In Concepcion, on the fifteenth day of January, two thousand twenty-one, I notified the above resolution at the Clerk's Office by the Daily State.



This document has an electronic signature and its original can be validated at [http://verificadoc.pjud.cl](http://verificadoc.pjud.cl/) or in the processing of the case.

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