

CHANROBLES PUBLISHING COMPANY

**SUPREME COURT
SECOND DIVISION**

**PAZ MARTIN JO and CESAR JO,
*Petitioners,***

-versus-

**G.R. No. 121605
February 2, 2000**

**NATIONAL LABOR RELATIONS
COMMISSION and PETER MEJILA,
*Respondents.***

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DECISION

QUISUMBING, J.:

This Petition for Certiorari seeks to set aside the Decision^[1] of National Labor Relations Commission (Fifth Division) promulgated on November 21, 1994, and its Resolution dated June 7, 1995, which denied petitioners' motion for reconsideration.

Private respondent Peter Mejila worked as barber on a piece rate basis at Dina's Barber Shop. In 1970, the owner, Dina Tan, sold the barbershop to petitioners Paz Martin Jo and Cesar Jo. All the employees, including private respondent, were absorbed by the new owners. The name of the barbershop was changed to Windfield Barber Shop.

The owners and the barbers shared in the earnings of the barber shop. The barbers got two-thirds (2/3) of the fee paid for every haircut or shaving job done, while one-third (1/3) went to the owners of the shop.

In 1977, petitioners designated private respondent as caretaker of the shop because the former caretaker became physically unfit. Private respondent's duties as caretaker, in addition to his being a barber, were: (1) to report to the owners of the barbershop whenever the air-conditioning units malfunctioned and/or whenever water or electric power supply was interrupted; (2) to call the laundry woman to wash dirty linen; (3) to recommend applicants for interview and hiring; (4) to attend to other needs of the shop. For this additional job, he was given an honorarium equivalent to one-third (1/3) of the net income of the shop.

When the building occupied by the shop was demolished in 1986, the barbershop closed. But soon a place nearby was rented by petitioners and the barbershop resumed operations as Cesar's Palace Barbershop and Massage Clinic. In this new location, private respondent continued to be a barber and caretaker, but with a fixed monthly honorarium as caretaker, to wit: from February 1986 to 1990 — P700; from February 1990 to March 1991 — P800; and from July 1992 — P1,300.

In November 1992, private respondent had an altercation with his co-barber, Jorge Tinoy. The bickerings, characterized by constant exchange of personal insults during working hours, became serious so that private respondent reported the matter to Atty. Allan Macaraya of the labor department. The labor official immediately summoned private respondent and petitioners to a conference. Upon investigation, it was found out that the dispute was not between private respondent and petitioners; rather, it was between the former and his fellow barber. Accordingly, Atty. Macaraya directed petitioner's counsel, Atty. Prudencio Abragan, to thresh out the problem.

During the mediation meeting held at Atty. Abragan's office a new twist was added. Despite the assurance that he was not being driven out as caretaker-barber, private respondent demanded payment for

several thousand pesos as his separation pay and other monetary benefits. In order to give the parties enough time to cool off, Atty. Abragan set another conference but private respondent did not appear in such meeting anymore.

Meanwhile, private respondent continued reporting for work at the barbershop. But, on January 2, 1993, he turned over the duplicate keys of the shop to the cashier and took away all his belongings therefrom. On January 8, 1993, he began working as a regular barber at the newly opened Goldilocks Barbershop also in Iligan City.

On January 12, 1993, private respondent filed a complaint^[2] for illegal dismissal with prayer for payment of separation pay, other monetary benefits, attorney's fees and damages. Significantly, the complaint did not seek reinstatement as a positive relief.

In a Decision dated June 15, 1993, the Labor Arbiter found that private respondent was an employee of petitioners, and that private respondent was not dismissed but had left his job voluntarily because of his misunderstanding with his co-worker.^[3] The Labor Arbiter dismissed the complaint, but ordered petitioners to pay private respondent his 13th month pay and attorney's fees.

Both parties appealed to the NLRC. In a Decision dated November 21, 1994, it set aside the labor arbiter's judgment. The NLRC sustained the labor arbiter's finding as to the existence of employer-employee relationship between petitioners and private respondent, but it ruled that private respondent was illegally dismissed. Hence, the petitioners were ordered to reinstate private respondent and pay the latter's backwages, 13th month pay, separation pay and attorney's fees, thus:

“For failure of respondents to observe due process before dismissing the complainant, We rule and hold that he was illegally terminated. Consequently, he should be reinstated and paid his backwages starting from January 1, 1993 up to the time of his reinstatement and payment of separation pay, should reinstatement not be feasible on account of a strained employer-employee relationship.

As complainant's income was mixed, (commission and caretaker), he becomes entitled to 13th month pay only in his capacity as caretaker at the last rate of pay given to him.

With respect to separation pay, even workers paid on commission are given separation pay as they are considered employees of the company. Complainant should be adjudged entitled to separation pay reckoned from 1970 up to the time he was dismissed on December 31, 1992 at one-half month pay of his earning as a barber; and as a caretaker the same should be reckoned from 1977 up to December 31, 1992.

As complainant has been assisted by counsel not only in the preparation of the complaint, position paper but in hearings before the Labor Arbiter a quo, attorney's fees equivalent to 10% of the money awards should likewise be paid to complainant.

WHEREFORE, the decision appealed from is Vacated and Set Aside and a new one entered in accordance with the above-findings and awards.

SO ORDERED.”^[4]

Its motion for reconsideration having been denied in a Resolution dated June 7, 1995, petitioners filed the instant petition.

The issues for resolution are as follows:

1. Whether or not there exists an employer-employee relationship between petitioners and private respondent.
2. Whether or not private respondent was dismissed from or had abandoned his employment.

Petitioners contend that public respondent gravely erred in declaring that private respondent was their employee. They claim that private respondent was their “partner in trade” whose compensation was based on a sharing arrangement per

haircut or shaving job done. They argue that private respondent's task as caretaker could be considered an employment because the chores are very minimal.

At the outset, we reiterate the doctrine that the existence of an employer-employee relationship is ultimately a question of fact and that the findings thereon by the labor arbiter and the NLRC shall be accorded not only respect but even finality when supported by ample evidence.^[5]

In determining the existence of an employer-employee relationship, the following elements are considered: (1) the selection and engagement of the workers; (2) power of dismissal; (3) the payment of wages by whatever means; and (4) the power to control the worker's conduct, with the latter assuming primacy in the overall consideration. The power of control refers to the existence of the power and not necessarily to the actual exercise thereof. It is not essential for the employer to actually supervise the performance of duties of the employee; it is enough that the employer has the right to wield that power.^[6]

Absent a clear showing that petitioners and private respondent had intended to pursue a relationship of industrial partnership, we entertain no doubt that private respondent was employed by petitioners as caretaker-barber. Initially, petitioners, as new owners of the barbershop, hired private respondent as barber by absorbing the latter in their employ. Undoubtedly, the services performed by private respondent as barber is related to, and in the pursuit of the principal business activity of petitioners. Later on, petitioners tapped private respondent to serve concurrently as caretaker of the shop. Certainly, petitioners had the power to dismiss private respondent being the ones who engaged the services of the latter. In fact, private respondent sued petitioners for illegal dismissal, albeit contested by the latter. As a caretaker, private respondent was paid by petitioners wages in the form of honorarium, originally, at the rate of one-third (1/3) of the shop's net income but subsequently pegged at a fixed amount per month. As a barber, private respondent earned two-thirds (2/3) of the fee paid per haircut or shaving job done. Furthermore, the following facts indubitably reveal that petitioners controlled private respondent's work performance, in that: (1) private

respondent had to inform petitioners of the things needed in the shop; (2). he could only recommend the hiring of barbers and masseuses, with petitioners having the final decision; (3) he had to be at the shop at 9:00 a.m. and could leave only at 9:00 p.m. because he was the one who opened and closed it, being the one entrusted with the key.^[7] These duties were complied with by private respondent upon instructions of petitioners. Moreover, such task was far from being negligible as claimed by petitioners. On the contrary, it was crucial to the business operation of petitioners as shown in the preceding discussion. Hence, there was enough basis to declare private respondent an employee of petitioners. Accordingly, there is no cogent reason to disturb the findings of the labor arbiter and NLRC on the existence of employer-employee relationship between herein private parties.

With regard to the second issue, jurisprudence has laid out the rules regarding abandonment as a just and valid ground for termination of employment. To constitute abandonment, there must be concurrence of the intention to abandon and some overt acts from which it may be inferred that the employee concerned has no more interest in working.^[8] In other words, there must be a clear, deliberate and unjustified refusal to resume employment and a clear intention to sever the employer-employee relationship on the part of the employee.^[9]

In the case at bar, the labor arbiter was convinced that private respondent was not dismissed but left his work on his own volition because he could no longer bear the incessant squabbles with his co-worker. Nevertheless, public respondent did not give credence to petitioners' claim that private respondent abandoned his job. On this score, public respondent gravely erred as hereunder discussed.

At the outset, we must stress that where the findings of the NLRC contradict those of the labor arbiter, the Court, in the exercise of its equity jurisdiction, may look into the records of the case and reexamine the questioned findings.^[10]

In this case, the following circumstances clearly manifest private respondent's intention to sever his ties with petitioners. First, private respondent even bragged to his co-workers his plan to quit his job at

Cesar's Palace Barbershop and Massage Clinic as borne out by the affidavit executed by his former co-workers.^[11] Second, he surrendered the shop's keys and took away all his things from the shop. Third, he did not report anymore to the shop without giving any valid and justifiable reason for his absence. Fourth, he immediately sought a regular employment in another barbershop, despite previous assurance that he could remain in petitioners' employ. Fifth, he filed a complaint for illegal dismissal without praying for reinstatement.

Moreover, public respondent's assertion that the institution of the complaint for illegal dismissal manifests private respondent's lack of intention to abandon his job^[12] is untenable. The rule that abandonment of work is inconsistent with the filing of a complaint for illegal dismissal is not applicable in this case. Such rule applies where the complainant seeks reinstatement as a relief. Corollarily, it has no application where the complainant does not pray for reinstatement and just asks for separation pay instead^[13] as in the present case. It goes without saying that the prayer for separation pay, being the alternative remedy to reinstatement,^[14] contradicts private respondent's stance. That he was illegally dismissed is belied by his own pleadings as well as contemporaneous conduct.

We are, therefore, constrained to agree with the findings of the Labor Arbiter that private respondent left his job voluntarily for reasons not attributable to petitioners. It was error and grave abuse of discretion for the NLRC to hold petitioners liable for illegal dismissal of private respondent.

WHEREFORE, the petition is **GRANTED**. The assailed Decision and Resolution of public respondent NLRC are reversed and set aside. The decision of the Labor Arbiter dated June 15, 1993, is hereby reinstated. No costs.

SO ORDERED.

Bellosillo, Mendoza, Buena and De Leon, Jr., JJ., concur.

[1] Penned by Commissioner Oscar M. Abella, and concurred by Presiding Commissioner Musib M. Buat and Commissioner Leon G. Gonzaga Jr.

- [2] Rollo, pp. 34-37.
- [3] *Id.*, at 60-61.
- [4] *Id.* at 84.
- [5] AFP Mutual Benefit Association Inc. vs. NLRC, 267 SCRA 47, 56 (1997); North Davao Mining Corp. vs. NLRC, 254 SCRA 721, 731 (1996); Inter-Orient Maritime Enterprises Inc. vs. NLRC. 235 SCRA 268, 277 (1994); Loadstar Shipping Co. Inc. vs. Gallo, 229 SCRA 654, 660 (1994); Great Pacific Life Assurance Corp. vs. NLRC, 187 SCRA 694, 699 (1990).
- [6] Equitable Banking Corporation vs. NLRC, 273 SCRA 352, 371 (1997); MAM Realty Development Corporation vs. NLRC, 244 SCRA 797, 800-801 (1995); Zannotte Shoes vs. NLRC, 241 SCRA 261, 265 (1995).
- [7] *Id.* at 56-58.
- [8] A Prime Security Services Inc. vs. NLRC, 220 SCRA 142, 145 (1993); Dagupan Bus Co. Inc. vs. NLRC, 191 SCRA 328, 331 (1990).
- [9] Tan vs. NLRC, 271 SCRA 216, 221 (1997); Cañete vs. NLRC, 250 SCRA 259, 267 (1995); Reno Foods Inc. vs. NLRC, 249 SCRA 379, 386 (1995); Santos vs. NLRC, 166 SCRA 759, 764 (1988); Velasco vs. Inciong, 164 SCRA 67, 74 (1988).
- [10] Industrial Timber Corporation vs. NLRC, 273 SCRA 200, 209 (1997); Magcalas vs. NLRC, 269 SCRA 453, 463 (1997).
- [11] Rollo, p. 61.
- [12] *Id.*, at 83.
- [13] A' Prime Security Services, Inc. vs. NLRC, *supra*, p. 145.
- [14] Bombase vs. NLRC, 245 SCRA 496, 500 (1995).