SUPREME COURT
SECOND DIVISION

FRANCISCO U. NAGUSARA, MARQUITO L. PAMILARA, and DIOSCORO D. CRUZ,
***Petitioners*,**

-versus-

G.R. Nos. 117936-37
May 20, 1998

THE NATIONAL LABOR RELATIONS COMMISSION, LORENZO DY AND OTHERS, and ISAYAS AMURAO,
***Respondents*.**
x----------x

D E C I S I O N

PUNO, *J.*:

Petitioners Francisco U. Nagusara,[1] Marquito L. Pamilara and Dioscoro D. Cruz seek to annul the resolution of the National Labor Relations Commission (NLRC) dated December 27, 1991 and its order

dated September 29, 1994 in NLRC NCR Case No. 12-7287-82 & 12-7481-82.

On December 31, 1982, petitioners filed a complaint against respondent Lorenzo Dy for illegal dismissal, unfair labor practice and non-payment of overtime pay, legal holiday pay and premium pay for holiday and rest day.[2] The case was set for hearing on January 12, January 21 and February 2, 1983. As respondent Dy failed to appear on said dates, the evidence for petitioners was received ex parte. On February 28, 1983, Labor Arbiter Bienvenido V. Hermogenes rendered a decision finding that petitioners were illegally dismissed and ordered respondent Dy to reinstate them. The decision also awarded to petitioners backwages and other money claims.[3]

Respondent Dy filed with the NLRC a "Motion for Reconsideration, Set Aside Decision and/or Memorandum of Appeal" arguing that: (1) there was no proper service of summons, (2) there was no employer-employee relationship between him and petitioners, and (3) petitioners were not entitled to the relief prayed for in the complaint.[4] On December 27, 1984, the NLRC set aside the decision and remanded the case to the Labor Arbiter.[5]

On September 14, 1987, respondent Dy impleaded respondent Isayas Amurao as co-respondent in accordance with Articles 106, 107 and 109 of the Labor Code. Respondent Dy alleged that respondent Amurao was the real employer of petitioners because he was the one who hired them in fulfillment of his obligation to provide manpower for respondent Dy's construction project.[6]

On June 29, 1988, Labor Arbiter Felipe T. Garduque II issued a decision holding that the termination of petitioners' services was illegal. It, however, found petitioners' claim for overtime pay, legal holiday pay and premium pay for holiday and rest day to be unfounded.[7] The dispositive portion of the decision states:

> ACCORDINGLY, respondents Dynasty Steel works and/or Lorenzo Dy are hereby ordered to reinstate within ten (10) days from receipt hereof, herein complainants Francisco Nagasora, Marquito Pamilara and Dioscoro D. Cruz to their former positions without loss of seniority right and privileges but with

> one (1) year backwages at (P45.00, P38.00, P36.00 x 26 days), considering the nature of the business of respondent (construction business) which may not be continuous, with at least an additional one (1) month pay as separation pay in case respondent's business ceased operation.

All other money claims are hereby dismissed for lack of merit.[8]

On appeal, the NLRC set aside the decision of the Labor Arbiter. It dismissed the complaint on the ground that there was no employer-employee relationship between petitioners and respondent Dy. It held that respondent Dy was only an indirect employer of petitioners as they were actually employed by respondent Amurao whom respondent Dy sub-contracted to provide labor for his construction project. It also declared that petitioners were not illegally dismissed.[9] The dispositive portion of the resolution reads:

> WHEREFORE, let the decision appealed from be, as it is hereby, SET ASIDE and another one ENTERED dismissing the instant cases for lack of merit.[10]

Petitioners filed a Motion for Reconsideration but it was denied by the NLRC for lack of merit.[11]

Hence, this petition.

Petitioners and private respondents presented conflicting versions of the circumstances which led to the severance of petitioners' employment.

Petitioners alleged that in 1981, they were hired as carpenters by Dynasty Steel Works owned by respondent Dy. Dynasty was engaged in the business of making steel frames, windows, doors and other construction works. It was contracted by Solmac Marketing to construct its building in Balintawak, Caloocan City.

On November 25, 1982, petitioners went to the Social Security System (SSS) office to inquire about their benefits under the system. They were informed that they were not reported as employees either by

Dynasty or by respondent Dy. Petitioners filed a complaint against Dynasty and respondent Dy for violation of SSS laws and regulations.

On December 20, 1982, petitioners were prohibited from entering the work site at the Solmac compound. The security guard showed them an order/notice dated December 18, 1982 issued by respondent Dy instructing him not to allow petitioners to enter the premises as they were already dismissed from work. Petitioners sought the help of P/Cpl. Alexander Licuan of the Caloocan Police Department. P/Cpl. Licuan accompanied petitioners to the work site and inquired about the reason for the prohibition. Respondent Amurao who introduced himself as supervisor told P/Cpl. Licuan that petitioners' services were terminated upon the order of respondent Dy.

Traversing petitioners' allegations, respondent Dy claimed in his comment that petitioners were not his employees but that of respondent Amurao whom he sub-contracted to provide manpower for his construction project at the Solmac building.

Respondent Dy also denied that he terminated the services of petitioners. He alleged that sometime in December 1982, the owner of Solmac building caught petitioners drinking inside the company premises. Because of this, the owner sought the dismissal or transfer of petitioners. Heeding the owner's demand, respondent Amurao transferred petitioners to another project. Petitioners refused and instead filed a complaint for illegal dismissal against respondent Dy.

Respondent Amurao also filed his own comment stating that he and respondent Dy entered into a sub-contracting agreement whereby he undertook to supply the manpower for respondent Dy's construction project at Solmac building. To comply with his obligation, respondent Amurao engaged the services of about thirty men which include petitioners. Respondent Amurao stated that he had complete discretion in the selection, hiring and dismissal of said workers; that he had direct control and supervision over the performance of their work; and that any complaint against them were coursed through him.

Respondent Amurao, however, submitted that petitioners were project employees. Hence, they were no longer entitled to

reinstatement because the project for which they were hired has long been completed.

Before we resolve the issue of illegal dismissal, it is first necessary to determine whether petitioners were employees of respondent Dy.

The records reveal that there existed an employer-employee relationship between petitioners and respondent Dy. The individual Premium Certifications issued by the SSS on April 11, 1983 show that Dynasty Steel Works declared petitioners as its employees for the purpose of paying their premium. Dynasty paid petitioners' premium from August 1981 to November 1982.[12] Also, the payroll of Dynasty included petitioners.[13] These pieces of evidence sufficiently prove that petitioners were employees of respondent Dy. It would be preposterous for respondent Dy to report petitioners as employees of Dynasty, pay their SSS premium as well as their wages if it were not true that they were his employees.

Private respondents would like to make it appear that petitioners were employees of respondent Amurao who was supposedly sub-contracted by respondent Dy to provide labor for his construction project at Solmac. Such assertion, however, does not deserve credence because as observed by the Labor Arbiter:

> This Office is inclined to believe the claim of complainants that they were employees of respondent and not Isayas Amurao.
>
> Firstly, the alleged subcontract between respondent (Dy) and Isayas Amurao is questionable since the same was dated June 8, 1982, and was conformed by (sic) respondent Lorenzo Dy on June 11, 1982, around eight (8) months after complainants had started working in September or October, 1981.
>
> Secondly, the sworn statements and testimonies of respondent Lorenzo Dy and his witness, Isayas Amurao submitted and declared during the hearing of this case contain full of (sic) inconsistencies affecting their stand. The affidavits of the other complainants Pozon, Garcia and Lizarondo do not also deserve weight considering the fact that the same contradict their previous Sinumpaang Salaysay attached to their position paper.

> Lastly the other documentary evidences (sic) presented by complainants mostly relating to SSS outweigh those of respondent.[14]

We find that the supposed sub-contract between respondent Dy and respondent Amurao was merely a subterfuge to avoid respondent Dy's obligations to petitioners. The records show that respondent Amurao was not a legitimate job contractor engaged in the business of contracting out services to clients. A legitimate job contractor is one who: (1) carries on an independent business and undertakes the contract work on his own account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof; and (2) has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of his business.[15] Respondent Amurao did not satisfy both requirements. It appears, instead, that respondent Amurao was also an employee of respondent Dy who was tasked to screen and to supervise the workers at respondent Dy's construction project at Solmac. It is clear from the foregoing that petitioners were employees of respondent Dy.

We reject respondent Amurao's submission that petitioners were project employees. The principal test for determining whether an employee is a project employee or a regular employee is whether or not the project employee was assigned to carry out a specific project or undertaking, the duration and scope of which were specified at the time the employee was engaged for that project.[16] In the case at bar, it does not appear that respondent Dy informed petitioners at the time of their engagement about the specific project or undertaking for which they were hired, as well as the duration and scope of such project.[17] Besides, the records show that petitioners, as carpenters, were performing activities necessary or desirable in respondent Dy's business of making steel frames, windows, doors and other construction works. Petitioners should therefore be considered as regular employees under Article 280 of the Labor Code which states:

> Art. 280. Regular and Casual Employment. — The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.
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> x x x

We now go to the main issue of whether petitioners were illegally dismissed.

Respondent Dy stated in his comment that petitioners were not dismissed from work. Petitioners were allegedly caught by the owner of Solmac Marketing having a drinking spree inside the compound. Hence, respondent Amurao allegedly decided to transfer petitioners to another project, but petitioners opposed the transfer and filed a complaint for illegal dismissal against respondent Dy.

We are not convinced. Respondent Dy's allegation is self-serving and not supported by substantial evidence. In termination cases, the employer has the burden of proving that there was just cause for the employee's dismissal.[18] In this case, respondent Dy merely presented his own affidavit and that of respondent Amurao stating that petitioners were caught drinking within the premises by the owner of Solmac. He did not present any other witness to substantiate the statements contained in the affidavits. He did not even present as witness the owner of Solmac Marketing who allegedly caught petitioners drinking inside the compound.

Dismissal is the ultimate penalty that can be meted to an employee. For dismissal to be legal, it must be based on just cause which must be supported by clear and convincing evidence.[19] Respondent Dy failed to adduce clear and convincing evidence to support the legality of petitioners' dismissal.

Finally, we go to the reliefs that should be accorded to petitioners.

As a rule, employees who are illegally dismissed are entitled to backwages and reinstatement to their former position without loss of seniority rights. There are instances, however, where reinstatement is no longer viable as where the business of the employer has closed, or where the relations between the employer and the employee have been so severely strained that it is not advisable to order reinstatement, or where the employee decides not to be reinstated. In such events, the employer will instead be ordered to pay separation pay.[20]

The records show that Dynasty Steel Works ceased operating in May 1985.[21] The closure of Dynasty rendered impossible the reinstatement of petitioners. Hence, in lieu of reinstatement, respondent Dy should pay petitioners their separation pay in addition to their backwages computed from the time of their separation until the date of Dynasty's closure.[22]

All the other money claims of petitioners are dismissed for lack of sufficient evidence to support the same. We note the finding of Labor Arbiter Garduque:

> With respect to the claim of overtime, the same has not been established by clear and convincing evidence, and not even included in the computation of the then socio economic staff of this Office, and in the first decision dated February 28, 1993.
>
> The remaining claims of legal holiday pay and premium pay for holiday and rest day cannot also be granted although unrefuted by respondent but from Annex "H" to complainants' reply/comment to respondent's position paper, it discloses that complainants only worked up to six (6) days in a week.[23]

We find no cogent reason to disturb such finding as it is sustained by the evidence on record.

IN VIEW WHEREOF, the assailed Resolution and Order of the NLRC are **SET ASIDE**. Private respondent Lorenzo Dy is hereby

ordered to pay petitioners their **SEPARATION PAY** and **BACKWAGES**. No costs.

SO ORDERED.

Regalado, Melo, Mendoza and Martinez, *JJ.*, concur.

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[1] Sometimes spelled in the Records as "Nagasora."
[2] Original Records, p. 3.
[3] Original Records, pp. 34-37.
[4] Original Records, pp. 47-51.
[5] Original Records, pp. 124-127.
[6] Original Records, pp. 286-287.
[7] Annex "E" of the Petition, Rollo, pp. 104-111.
[8] At p. 111.
[9] Resolution penned by Commissioner Romeo B. Putong, Annex "A" of the Petition, Rollo, pp. 52-64.
[10] At p. 63.
[11] Annex "B" of the Petition, Rollo, pp. 65-66.
[12] Original Records, pp. 138-142.
[13] Original Records, p. 144.
[14] Decision penned by Labor Arbiter Felipe T. Garduque II, Annex "E" of the Petition, Rollo, pp. 104-111, at p. 109.
[15] Tiu vs. NLRC, 254 SCRA 1 (1996).
[16] ALU-TUCP vs. NLRC, 234 SCRA 678 (1994).
[17] See J & D.O. Aguilar Corp. vs. NLRC, 269 SCRA 596 (1997).
[18] Philippine Long Distance Telephone Co. vs. NLRC, G.R. No. 99030, July 31, 1997; JGB and Associates, Inc. vs. NLRC, 254 SCRA 457 (1996).
[19] Philippine Long Distance Telephone Co. vs. NLRC, G.R. No. 99030, July 31, 1997.
[20] Kingsize Manufacturing Corp. vs. NLRC, 238 SCRA 349 (1994).
[21] Annexes "4" and "5" of respondent Dy's Comment, Rollo, pp. 169-170.
[22] Pizza Inn/Consolidated Foods Corp. vs. NLRC, 162 SCRA 773 (1988).
[23] Rollo, pp. 110-111.
