SUPREME COURT
SECOND DIVISION

PHILIPPINE TELEGRAPH & TELEPHONE CORPORATION and DELIA OFICIAL,
***Petitioners*,**

-versus-

G.R. No. 147002
April 15, 2005

NATIONAL LABOR RELATIONS COMMISSION, AGNES BAYAO and MILDRED CASTILLO,
***Respondents*.**
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D E C I S I O N

CALLEJO, SR., *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the 1997 Revised Rules of Civil Procedure from the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 57551, affirming the decision of the National Labor Relations Commission (NLRC), and the Resolution dated February 2, 2001 denying the motion for reconsideration thereof.

The antecedents are as follows:

Agnes Bayao and Mildred Castillo were hired by the Philippine Telegraph & Telephone Corporation (PT&T) in November 1991 and August 1995, respectively, both as account executives stationed in Baguio City.

Both Bayao and Castillo received a Memorandum[2] dated May 21, 1998 coming from Ma. Elenita V. Del Rosario, Vice-President of the Commercial Operations Group (COG) of PT&T, inviting them to consider a two to three-month assignment to the provinces of Rizal and Laguna in view of PT&T's expansion in the aforesaid area. Bayao and Castillo refused the offer, on the ground that the transfer would entail additional expense on their part and there were no clear guidelines and procedures for its implementation.

Meanwhile, the expansion project of PT&T failed to materialize due to lack of capital. PT&T realized that it needed to undertake measures against losses to prevent the company from going bankrupt, particularly by reducing its workforce from 2,500 to 900 employees. Pursuant thereto, it implemented a Voluntary Staff Reduction Program (VSRP) which was availed of by 478 employees. Failing to attain its target, PT&T implemented an extended VSRP, but still not enough employees availed of the program.

PT&T decided to implement a temporary retrenchment of some employees dubbed as Temporary Staff Reduction Program (TSRP) lasting for not more than five and a half (5½) months, to commence from September 1, 1998 to February 15, 1999. Pursuant to the program, affected employees would receive financial assistance equivalent to 15 days salary and a loan equivalent to two months salary chargeable to the account of the employee concerned.

Bayao and Castillo received a Letter[3] from Del Rosario, dated August 21, 1998, informing them that the cumulative net losses of PT&T for the last four years had reached P293.4 million and that they were among the employees affected by the TSRP.

When Bayao and Castillo reported for work on September 2, 1998, they were informed that the position of account executive no longer existed; in its stead, the positions of Service Account Representatives (SAR) and Service Account Specialists (SAS) were created per COG

Bulletin Order No. 98-014 effective August 21, 1998, and had already been filled up. The said COG Bulletin Order No. 98-014 reads:

> As part of the Organization Streamlining of the OM Efficiency Moves Program: For a more Responsive and Responsible Organization Structure. COG announces the new Service Account Representatives (SAR), and Service Account Specialists (SAS). This will collapse and replace the Account Executive positions outside of NCR, effective immediately. Account Executive functions and positions in NCR will be retained.
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> In view of new responsibilities entrusted to the COG, such as full-blown account management functions which includes collections for agencies, Dials Plus and Data subscribers, as well as PT&T COG's new role as PWI's distributor of pager products and services, the need to re-define positions and responsibilities is imperative.
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> Please see attached for the list of SARs and SASs and their areas of coverage.

Responsibilities

The SAR and SAS positions, are created based on the responsibilities and criteria below, and will replace and enhance former AE positions in the provinces:

1. SAR – Responsible for account management and collection from agencies, DIALS Plus and data subscribers; assists SAS from time to time with PWI documentation and other activities:

    * Maintains monthly minimum of P80,000 (net of agency commission) and 10 equivalent accounts, where a Metro agency or Dials Plus subscriber = 1 account, while a MTPCO account (due to distance) = 2 accounts.

    * The SAR reports directly to the District or Zone head in his/her area.

* Note: In Cebu which has several data subscribers, collector/s under Credit and Collection will be maintained.

2. SAS – Responsible for contracting agencies, payphone site location, Dials Plus subscribers and management of Direct Sales agents (DSA) which will comprise the sales force of PWI pagers and other services.[4]

That same day, September 2, 1998, Bayao and Castillo promptly filed a complaint for illegal dismissal with the NLRC, Regional Arbitration Branch, Cordillera Administrative Region, against PT&T and Delia Oficial in her capacity as manager for Baguio City.

In the interim, Del Rosario sent a Letter dated October 26, 1998 to both Bayao and Castillo in this language:

> In our previous written communications, you have been informed that you are a part of the Temporary Staff Reduction Program (TSRP) being implemented by management for a period of five and a half (5½) months in order to help ease the severe financial problems of the company.
>
> You are well aware that the certified bargaining representative of the rank-and-file employees, PT&T Progressive Workers Union-NAFLU-KMU (the Union) in the Notice of Strike filed before the National Conciliation and Mediation Board (NCMB), raised as one of the grounds thereof the TSRP implemented by management.
>
> The notice of strike culminated in the signing of an agreement between the management and the Union wherein it was agreed among others that the eighty (80) employees who would not be recalled will be paid the following:
>
> x x x
>
> "2. The grant of financial assistance equivalent to one and one half month inclusive of the one half month

pay previously offered by management to the 80 employees who will be separated;

"3. The payment of separation pay for every year of service to the 80 employees to be identified by the union, and shall be paid under the same terms and conditions as provided under the extended VSRP."

While you are not part of the bargaining unit, management is extending to you the same separation package under S.O. No. 98-15 and NCMB Agreement between management and the union dated 30 September 1998, provided we receive a formal letter from you applying for the Staff Reduction Program package. Please submit said letter on or before 15 November 1998. Payments shall be released only upon receipt of said letter.

Your separation from the company is effective on 31 August 1998. (Please see attached guidelines for details.)

It really pains us to separate you from the company but it is a necessary measure we have to take to ensure the survival of the company.[5]

On March 31, 1999, Labor Arbiter Monroe C. Tabingan rendered a Decision in favor of Bayao and Castillo, the dispositive portion of which reads:

WHEREFORE, premises all duly considered, it is hereby found that the Complainants were constructively dismissed. In view thereof, the Respondent is hereby ordered to:

1. Reinstate the said complainants to their former position without loss of seniority rights and benefits;

2. Pay their full backwages from the time of their dismissal to their actual reinstatement, or on payroll, with legal rate of interest thereon until the same shall have been fully paid, computed as of even date at

SIXTY THOUSAND NINE HUNDRED PESOS (P60,900.00) each;

3. Pay to each of the complainant the amount of TWENTY THOUSAND PESOS (P20,000.00) as and by way of exemplary damages;

4. Pay to each of the complainant the amount of SIX THOUSAND PESOS (P6,000.00) as and by way of indemnity for failure of the respondent to observe due process; and

5. Pay an attorney's fee equivalent to 10% of the total monetary award.

SO ORDERED.[6]

PT&T and Oficial interposed their appeal to the NLRC. On October 12, 1999, the NLRC issued its Resolution[7] dismissing the appeal and affirmed the decision of the Labor Arbiter, deleting, however, the award of legal interest, exemplary damages, indemnity and attorney's fees for lack of merit. PT&T and Oficial filed a motion for partial reconsideration, but the same was denied.[8] The matter was elevated to the CA by way of a petition for certiorari.

On July 31, 2000, the CA issued its Decision[9] dismissing the petition and affirmed the findings of the NLRC. The CA declared that there was no valid ground for retrenchment, considering that when Bayao and Castillo returned, their positions were already filled up; at the same time, PT&T did not inform its employees and the Department of Labor and Employment (DOLE) of the scheduled retrenchment at least one month before its implementation. A motion for reconsideration was filed, but the same was denied by the CA.[10]

Hence this petition.

PT&T and Delia Oficial, now as petitioners, raise the following as errors:

A. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN NOT REVIEWING THE CORRUPTED FINDINGS OF THE NLRC AND THE LABOR ARBITER DECLARING HEREIN PRIVATE RESPONDENTS TO HAVE BEEN ACTUALLY, EFFECTIVELY AND CONSTRUCTIVELY DISMISSED.

B. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN NOT REVIEWING THE DEBASED FINDINGS OF THE NLRC AND THE LABOR ARBITER DECLARING THE RETRENCHMENT PROGRAM ILLEGAL.

C. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN CONCLUDING THAT THE THIRTY (30) DAYS NOTICE TO THE DEPARTMENT OF LABOR AND EMPLOYMENT AND TO THE EMPLOYEES AFFECTED IS ALSO REQUIRED EVEN IN A CASE OF TEMPORARY RETRENCHMENT.

D. WHETHER OR NOT THE HONORABLE COURT OF APPEALS ERRED IN NOT DELETING THE AWARD FOR BACKWAGES DESPITE ITS CLEAR PRONOUNCEMENT THAT RESPONDENTS WERE NOT ABLE TO PROVE BAD FAITH ON THE PART OF PETITIONERS IN DISMISSING THEM FROM THE SERVICE.[11]

The threshold issue to be resolved in the present recourse is whether or not the retrenchment program implemented by petitioner PT&T is valid.

Retrenchment has been defined as the termination of employment initiated by the employer through no fault of the employees and without prejudice to the latter, resorted by management during periods of business recession, industrial depression, or seasonal fluctuations, or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant for a new production program or the introduction of new methods or more efficient machinery, or of automation.[12] It is a management prerogative resorted to by an

employer to avoid or minimize business losses which is consistently recognized by the Court.[13]

Article 283 of the Labor Code lays down the conditions for its exercise, to wit:

> Art. 283. Closure of establishment and reduction of personnel. – The employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Department of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least one (1) month pay or to at least his one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or to at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.
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> From the foregoing, in order that retrenchment due to serious business losses may be validly exercised, the following requisites must concur: (a) necessity of the retrenchment to prevent losses, and proof of such losses; (b) written notice to the employees and to the DOLE at least one (1) month prior to the intended date of retrenchment; and (c) payment of separation pay equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher.[14]

Under the first requisite, it is imperative and incumbent on the part of the employer to sufficiently and convincingly establish business reverses of the kind or in the amount that would justify

retrenchment.[15] To justify retrenchment, the employer must prove serious business losses, as not all business losses suffered by an employer would justify retrenchment under the aforesaid Article 283.[16] The loss referred to in the said provision cannot be of just any kind or amount, otherwise, a company could easily feign excuses to suit its whims and prejudices or to rid itself of unwanted employees.[17] As consistently held by this Court, to guard against abuse, any claim of actual or potential business losses must satisfy the following established standards, to wit; (a) the losses incurred are substantial and not de minimis; (b) the losses are actual or reasonably imminent; (c) the retrenchment is reasonably necessary and is likely to be effective in preventing the expected losses; and (d) the alleged losses, if already incurred, or the expected imminent losses sought to be forestalled are proven by sufficient and convincing evidence.[18]

The Court has previously ruled that financial statements audited by independent external auditors constitute the normal method of proof of the profit and loss performance of a company.[19]

In this case, to prove that the company incurred losses, the petitioners presented its audited financial statements for the corporate fiscal years 1996 to 1998[20] and emphasized that, in the October 20, 1998 Audit Report prepared by SGV & Co., the auditing firm declared that petitioner PT&T incurred a substantial loss of about P558 million for the fiscal year ending June 30, 1998, resulting to a total deficit of about P574 million as of the same date; and that petitioner PT&T even negotiated with its creditors for the suspension of payments of its outstanding balances until the completion of an acceptable restructuring plan.[21]

Based on the financial statements submitted, petitioner PT&T suffered a net loss of P40,780,017 in 1995[22] and P85,423,641 in 1996, posted a net income of P1,491,532 in 1997, and again suffered a net loss of P557,892,627 in 1998.[23] The foregoing clearly indicates that the petitioner PT&T sufficiently complied with its burden to prove that it incurred substantial losses as to warrant the exercise of the extreme measure of retrenchment to prevent the company from totally going under.

While an employer may have a valid ground for implementing a retrenchment program, it is not excused from complying with the required written notice served both to the employee concerned and the DOLE at least one month prior to the intended date of retrenchment.[24] The purpose of this requirement is not only to give employees some time to prepare for the eventual loss of their jobs and their corresponding income, look for other employment and ease the impact of the loss of their jobs[25] but also to give the DOLE the opportunity to ascertain the verity of the alleged cause of termination.[26]

In the case at bar, the memorandum of Del Rosario, the vice-president of the COG, to respondents Bayao and Castillo informing the latter that they were included in the TSRP to be implemented effective September 1, 1998 was dated August 21, 1998. The said memorandum was received by Castillo on August 24, 1998 and Bayao on August 26, 1998.[27] The respondents had barely two weeks' notice of the intended retrenchment program. Clearly then, the one-month notice rule was not complied with. At the same time, the petitioners never showed that any notice of the retrenchment was sent to the DOLE.

The petitioners insist that the one-month notice requirement does not apply in this situation, as the retrenchment involved was merely temporary and not permanent. They aver that this has been recognized by this Court, and quote Sebuguero vs. NLRC[28] in this manner:

> Article 283 speaks of a permanent retrenchment as opposed to a temporary lay-off as is the case here. There is no specific provision of law which treats of a temporary retrenchment or lay-off and provides for the requisites in effecting it or a period or duration therefor.[29]

The petitioners' adherence to the above pronouncement of the Court is misplaced. The particular issue involved in the said decision was the duration of the period of temporary lay-off, and not the compliance with the one month notice requirement. Reading the entire paragraph of the quoted portion of the decision would readily show what it was referring to, thus:

> This provision, however, speaks of a permanent retrenchment as opposed to a temporary lay-off as is the case here. There is no specific provision of law which treats of a temporary retrenchment or lay-off and provides for the requisites in effecting it or a period or duration therefor. These employees cannot forever be temporarily laid-off. To remedy this situation or fill the hiatus, Article 286 may be applied but only by analogy to set a specific period that employees may remain temporarily laid-off or in floating status. Six months is the period set by law that the operation of a business or undertaking may be suspended thereby suspending the employment of the employees concerned. The temporary lay-off wherein the employees likewise cease to work should also not last longer than six months. After six months, the employees should either be recalled to work or permanently retrenched following the requirements of the law, and that failing to comply with this would be tantamount to dismissing the employees and the employer would thus be liable for such dismissal.[30]

Nowhere can it be found in Sebuguero that the one month notice may be dispensed with. On the contrary, the Court, speaking through now Chief Justice Hilario G. Davide, Jr., emphasized the mandatory nature of the said notice, to wit:

> The requirement of notice to both the employees concerned and the Department of Labor and Employment (DOLE) is mandatory and must be written and given at least one month before the intended date of retrenchment. In this case, it is undisputed that the petitioners were given notice of the temporary lay-off. There is, however, no evidence that any written notice to permanently retrench them was given at least one month prior to the date of the intended retrenchment. The NLRC found that GTI conveyed to the petitioners the impossibility of recalling them due to the continued unavailability of work. But what the law requires is a written notice to the employees concerned and that requirement is mandatory. The notice must also be given at least one month in advance of the intended date of retrenchment to enable the employees to look for other means of employment and therefore

> to ease the impact of the loss of their jobs and the corresponding income. That they were already on temporary lay-off at the time notice should have been given to them is not an excuse to forego the one-month written notice because by this time, their lay-off is to become permanent and they were definitely losing their employment.[31]

The Court further emphasized therein that –

> There is also nothing in the records to prove that a written notice was ever given to the DOLE as required by law. GTI's position paper, offer of exhibits, Comment to the Petition, and Memorandum in this case do not mention of any such written notice. The law requires two notices – one to the employee/s concerned and another to the DOLE – not just one. The notice to the DOLE is essential because the right to retrench is not an absolute prerogative of an employer but is subject to the requirement of law that retrenchment be done to prevent losses. The DOLE is the agency that will determine whether the planned retrenchment is justified and adequately supported by facts.[32]

Interestingly enough, the evidence on record indicates that respondents Bayao and Castillo were not merely temporarily laid-off. The October 26, 1998 Letter of Del Rosario addressed to the respondents clearly stated that the latter were to be considered separated from the company effective August 31, 1998 and that they were each being extended a separation package.[33] In the said letter, Del Rosario even showed signs of consoling the respondents stating that: "It really pains us to separate you from the company but it is a necessary measure we have to take to ensure the survival of the company."[34]

It must be stressed, however, that compliance with the one-month notice rule is mandatory regardless of whether the retrenchment is temporary or permanent. This is so because Article 283 itself does not speak of temporary or permanent retrenchment; hence, there is no need to qualify the term. *Ubi lex non distinguit nec nos distinguere debemus* (when the law does not distinguish, we must not distinguish).

However, the employer's failure to comply with the one month notice requirement prior to retrenchment does not render the termination illegal; it merely renders the same defective, entitling the dismissed employee to payment of indemnity in the form of nominal damages.[35] Based on prevailing jurisprudence, the amount of indemnity is pegged at P30,000.00.[36]

Finally, since petitioner PT&T was able to establish that it incurred serious business losses, justifying the retrenchment, the final requisite is the payment of separation pay. Pursuant to Section 283 of the Labor Code, as amended, the retrenchment having been effected due to serious business losses, respondents Bayao and Castillo are each entitled to one month pay or to at least one-half month pay for every year of service, whichever is higher. A fraction of at least six months shall be considered one whole year.

IN LIGHT OF ALL THE FOREGOING, the petition is partially granted. The Decision of the Court of Appeals in CA-G.R. SP No. 57551 is **MODIFIED**. The petitioners are **ORDERED**, jointly and severally, to pay to respondents Agnes Bayao and Mildred Castillo (a) an amount equivalent to one-half (1/2) month of their respective pay for every year of service, with the understanding that a fraction of at least six (6) months shall be considered one (1) whole year, as separation pay; and (b) P30,000.00 by way of nominal damages. No costs.

SO ORDERED.

Puno, *J.*, *(Chairman)*, Tinga, and Chico-Nazario, *JJ.*, concur.
Austria-Martinez, *J.*, no part.

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[1] Penned by Associate Justice Elvi John S. Asuncion, with Associate Justices Ma. Alicia Austria-Martinez (now an Associate Justice of the Supreme Court) and Portia Aliño-Hormachuelos, concurring.
[2] Rollo, pp. 113-114.
[3] Records, pp. 61-62.
[4] Id. at 131.

[5] Id. at 117-118.
[6] Id. at 140-141.
[7] Id. at 348-359.
[8] Id. at 420-422.
[9] Rollo, pp. 47-52.
[10] Id. at 67.
[11] Id. at 18.
[12] Tanjuan vs. Philippine Postal Savings Bank, Inc., G.R. No. 155278, 16 September 2003, 411 SCRA 168.
[13] Bogo-Medellin Sugarcane Planters Association, Inc. vs. NLRC, G.R. No. 97846, 25 September 1998, 296 SCRA 108.
[14] Tanjuan vs. Philippine Postal Savings Bank, Inc., supra.
[15] Ibid.
[16] Bogo-Medellin Sugarcane Planters Association, Inc. vs. NLRC, supra.
[17] EMCO Plywood Corporation vs. Abelgas, G.R. No. 148532, 14 April 2004, 427 SCRA 496.
[18] Tanjuan vs. Philippine Postal Savings Bank, Inc., supra.
[19] Bogo-Medellin Sugarcane Planters Association, Inc. vs. NLRC, supra, citing Saballa vs. NLRC, G.R. Nos. 102472-84, 22 August 1996, 260 SCRA 697; and Del Mar Domestic Enterprises vs. NLRC, G.R. No. 108731, 10 December 1997, 282 SCRA 602.
[20] Records, pp. 63-116.
[21] Id. at 64.
[22] Id. at 84.
[23] Id. at 66.
[24] NDC-Guthrie Plantations, Inc. vs. NLRC, G.R. No. 110740, 9 August 2001, 362 SCRA 416.
[25] Ibid.
[26] EMCO Plywood Corporation vs. Abelgas, supra.
[27] Records, pp. 61-62.
[28] G.R. No. 115394, 27 September 1995, 248 SCRA 532.
[29] Rollo, p. 36.
[30] Supra at note 28.
[31] Id. at 545.
[32] Id. at 545-546.
[33] Records, pp. 117-118.
[34] Ibid.
[35] Agabon vs. NLRC, G.R. No. 158693, 17 November 2004.
[36] Ibid.