SUPREME COURT
SECOND DIVISION

ROLANDO Y. TAN,
***Petitioner*,**

-versus-

G.R. No. 151228
August 15, 2002

LEOVIGILDO LAGRAMA and THE HONORABLE COURT OF APPEALS,
***Respondents*.**
x----------x

D E C I S I O N

MENDOZA, *J.*:

This is a Petition for Review on *Certiorari* of the Decision,[1] dated May 31, 2001, and the Resolution,[2] dated November 27, 2001, of the Court of Appeals in CA-G.R. SP. No. 63160, annulling the resolutions of the National Labor Relations Commission (NLRC) and reinstating the ruling of the Labor Arbiter which found petitioner Rolando Tan guilty of illegally dismissing private respondent Leovigildo Lagrama and ordering him to pay the latter the amount of P136,849.99 by way of separation pay, backwages, and damages.

The following are the facts.

Petitioner Rolando Tan is the president of Supreme Theater Corporation and the general manager of Crown and Empire Theaters in Butuan City. Private respondent Leovigildo Lagrama is a painter, making ad billboards and murals for the motion pictures shown at the Empress, Supreme, and Crown Theaters for more than 10 years, from September 1, 1988 to October 17, 1998.

On October 17, 1998, private respondent Lagrama was summoned by Tan and upbraided: "Nangihi na naman ka sulod sa imong drawinganan." ("You again urinated inside your work area.") When Lagrama asked what Tan was saying, Tan told him, "Ayaw daghang estorya. Dili ko gusto nga mo-drawing ka pa. Guikan karon, wala nay drawing. Gawas." ("Don't say anything further. I don't want you to draw anymore. From now on, no more drawing. Get out.")

Lagrama denied the charge against him. He claimed that he was not the only one who entered the drawing area and that, even if the charge was true, it was a minor infraction to warrant his dismissal. However, everytime he spoke, Tan shouted "Gawas" ("Get out"), leaving him with no other choice but to leave the premises.

Lagrama filed a complaint with the Sub-Regional Arbitration Branch No. X of the National Labor Relations Commission (NLRC) in Butuan City. He alleged that he had been illegally dismissed and sought reinvestigation and payment of 13th month pay, service incentive leave pay, salary differential, and damages.

Petitioner Tan denied that Lagrama was his employee. He asserted that Lagrama was an independent contractor who did his work according to his methods, while he (petitioner) was only interested in the result thereof. He cited the admission of Lagrama during the conferences before the Labor Arbiter that he was paid on a fixed piece-work basis, i.e., that he was paid for every painting turned out as ad billboard or mural for the pictures shown in the three theaters, on the basis of a "no mural/billboard drawn, no pay" policy. He submitted the affidavits of other cinema owners, an amusement park owner, and those supervising the construction of a church to prove that the services of Lagrama were contracted by them. He denied having dismissed Lagrama and alleged that it was the latter who refused to paint for him after he was scolded for his habits.

As no amicable settlement had been reached, Labor Arbiter Rogelio P. Legaspi directed the parties to file their position papers. On June 17, 1999, he rendered a decision, the dispositive portion of which reads:

> WHEREFORE, premises considered judgment is hereby ordered:
>
> 1. Declaring complainant's [Lagrama's] dismissal illegal; and
>
> 2. Ordering respondents [Tan] to pay complainant the following:
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> | | | |
> |---|---|---|
> | A. Separation Pay | — | P59,000.00 |
> | B. Backwages *(from 17 October 1998 to 17 June 1999)* | — | 47,200.00 |
> | C. 13th month pay (3 years) | — | 17,700.00 |
> | D. Service Incentive Leave Pay (3 years) | — | 2,949.99 |
> | E. Damages | — | 10,000.00 |
> | TOTAL | | P 136,849.99 |
>
> Complainant's other claims are dismissed for lack of merit.[3]

Petitioner Rolando Tan appealed to the NLRC Fifth Division, Cagayan de Oro City, which, on June 30, 2000, rendered a Decision[4] finding Lagrama to be an independent contractor, and for this reason reversing the decision of the Labor Arbiter.

Respondent Lagrama filed a motion for reconsideration, but it was denied for lack of merit by the NLRC in a resolution of September 29, 2000. He then filed a petition for *certiorari* under Rule 65 before the Court of Appeals.

The Court of Appeals found that petitioner exercised control over Lagrama's work by dictating the time when Lagrama should submit his billboards and murals and setting rules on the use of the work

area and rest room. Although it found that Lagrama did work for other cinema owners, the appeals court held it to be a mere sideline insufficient to prove that he was not an employee of Tan. The appeals court also found no evidence of any intention on the part of Lagrama to leave his job or sever his employment relationship with Tan. Accordingly, on May 31, 2001, the Court of Appeals rendered a decision, the dispositive portion of which reads:

> IN THE LIGHT OF ALL THE FOREGOING, the Petition is hereby GRANTED. The Resolutions of the Public Respondent issued on June 30, 2000 and September 29, 2000 are ANNULLED. The Decision of the Honorable Labor Arbiter Rogelio P. Legaspi on June 17, 1999 is hereby REINSTATED.

Petitioner moved for a reconsideration, but the Court of Appeals found no reason to reverse its decision and so denied his motion for lack of merit.[5] Hence, this petition for review on *certiorari* based on the following assignments of errors:

I. With all due respect, the decision of respondent Court of Appeals in CA-G.R. SP NO. 63160 is bereft of any finding that Public Respondent NLRC, 5th Division, had no jurisdiction or exceeded it or otherwise gravely abused its discretion in its Resolution of 30 June 2000 in NLRC CA-NO. M-004950-99.

II. With all due respect, respondent Court of Appeals, absent any positive finding on its part that the Resolution of 30 June 2000 of the NLRC is not supported by substantial evidence, is without authority to substitute its conclusion for that of said NLRC.

III. With all due respect, respondent Court of Appeals' discourse on "freelance artists and painters" in the decision in question is misplaced or has no factual or legal basis in the record.

IV. With all due respect, respondent Court of Appeals' opening statement in its decision as to "employment," "monthly salary of P1,475.00" and "work schedule from Monday to

Saturday, from 8:00 o'clock in the morning up to 5:00 o'clock in the afternoon" as "facts" is not supported by the evidence on record.

V. With all due respect, the case of Lambo, et al., vs. NLRC, et al., 317 SCRA 420 [G.R. No. 111042 October 26, 1999] relied upon by respondent Court of Appeals is not applicable to the peculiar circumstances of this case.[6]

The issues raised boil down to whether or not an employer-employee relationship existed between petitioner and private respondent, and whether petitioner is guilty of illegally dismissing private respondent. We find the answers to these issues to be in the affirmative.

I

In determining whether there is an employer-employee relationship, we have applied a "four-fold test," to wit: (1) whether the alleged employer has the power of selection and engagement of employees; (2) whether he has control of the employee with respect to the means and methods by which work is to be accomplished; (3) whether he has the power to dismiss; and (4) whether the employee was paid wages.[7] These elements of the employer-employee relationship are present in this case.

First. The existence in this case of the first element is undisputed. It was petitioner who engaged the services of Lagrama without the intervention of a third party. It is the existence of the second element, the power of control, that requires discussion here.

Of the four elements of the employer-employee relationship, the "control test" is the most important. Compared to an employee, an independent contractor is one who carries on a distinct and independent business and undertakes to perform the job, work, or service on its own account and under its own responsibility according to its own manner and method, free from the control and direction of the principal in all matters connected with the performance of the work except as to the results thereof.[8] Hence, while an independent contractor enjoys independence and freedom from the control and supervision of his principal, an employee is subject to the employer's

power to control the means and methods by which the employee's work is to be performed and accomplished.

In the case at bar, albeit petitioner Tan claims that private respondent Lagrama was an independent contractor and never his employee, the evidence shows that the latter performed his work as painter under the supervision and control of petitioner. Lagrama worked in a designated work area inside the Crown Theater of petitioner, for the use of which petitioner prescribed rules. The rules included the observance of cleanliness and hygiene and a prohibition against urinating in the work area and any place other than the toilet or the rest rooms.[9] Petitioner's control over Lagrama's work extended not only to the use of the work area, but also to the result of Lagrama's work, and the manner and means by which the work was to be accomplished.

Moreover, it would appear that petitioner not only provided the workplace, but supplied as well the materials used for the paintings, because he admitted that he paid Lagrama only for the latter's services.[10]

Private respondent Lagrama claimed that he worked daily, from 8 o'clock in the morning to 5 o'clock in the afternoon. Petitioner disputed this allegation and maintained that he paid Lagrama P1,475.00 per week for the murals for the three theaters which the latter usually finished in 3 to 4 days in one week.[11] Even assuming this to be true, the fact that Lagrama worked for at least 3 to 4 days a week proves regularity in his employment by petitioner.

Second. That petitioner had the right to hire and fire was admitted by him in his position paper submitted to the NLRC, the pertinent portions of which stated:

> Complainant did not know how to use the available comfort rooms or toilets in and about his work premises. He was urinating right at the place where he was working when it was so easy for him, as everybody else did and had he only wanted to, to go to the comfort rooms. But no, the complainant had to make a virtual urinal out of his work place! The place then

> stunk to high heavens, naturally, to the consternation of respondents and everyone who could smell the malodor.
>
> x x x

Given such circumstances, the respondents had every right, nay all the compelling reason, to fire him from his painting job upon discovery and his admission of such acts. Nonetheless, though thoroughly scolded, he was not fired. It was he who stopped to paint for respondents.[12]

By stating that he had the right to fire Lagrama, petitioner in effect acknowledged Lagrama to be his employee. For the right to hire and fire is another important element of the employer-employee relationship.[13] Indeed, the fact that, as petitioner himself said, he waited for Lagrama to report for work but the latter simply stopped reporting for work reinforces the conviction that Lagrama was indeed an employee of petitioner. For only an employee can nurture such an expectancy, the frustration of which, unless satisfactorily explained, can bring about some disciplinary action on the part of the employer.

Third. Payment of wages is one of the four factors to be considered in determining the existence of employer-employee relation. Wages are defined as "remuneration or earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the same, which is payable by an employer to an employee under a written or unwritten contract of employment for work done or to be done, or for services rendered or to be rendered."[14] That Lagrama worked for Tan on a fixed piece-work basis is of no moment. Payment by result is a method of compensation and does not define the essence of the relation."[15] It is a method of computing compensation, not a basis for determining the existence or absence of employer-employee relationship. One may be paid on the basis of results or time expended on the work, and may or may not acquire an employment status, depending on whether the elements of an employer-employee relationship are present or not.[16]

The Rules Implementing the Labor Code require every employer to pay his employees by means of payroll.[17] The payroll should show

among other things, the employee's rate of pay, deductions made, and the amount actually paid to the employee. In the case at bar, petitioner did not present the payroll to support his claim that Lagrama was not his employee, raising speculations whether his failure to do so proves that its presentation would be adverse to his case.[18]

The primary standard for determining regular employment is the reasonable connection between the particular activity performed by the employee in relation to the usual trade or business of the employer.[19] In this case, there is such a connection between the job of Lagrama painting billboards and murals and the business of petitioner. To let the people know what movie was to be shown in a movie theater requires billboards. Petitioner in fact admits that the billboards are important to his business.[20]

The fact that Lagrama was not reported as an employee to the SSS is not conclusive on the question of whether he was an employee of petitioner.[21] Otherwise, an employer would be rewarded for his failure or even neglect to perform his obligation.[22]

Neither does the fact that Lagrama painted for other persons affect or alter his employment relationship with petitioner. That he did so only during weekends has not been denied by petitioner. On the other hand, Samuel Villalba, for whom Lagrama had rendered service, admitted in a sworn statement that he was told by Lagrama that the latter worked for petitioner.[23]

Lagrama had been employed by petitioner since 1988. Under the law, therefore, he is deemed a regular employee and is thus entitled to security of tenure, as provided in Art. 279 of Labor Code:

> ART. 279. Security of Tenure. — In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary

> equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

This Court has held that if the employee has been performing the job for at least one year, even if not continuously but intermittently, the repeated and continuing need for its performance is sufficient evidence of the necessity, if not indispensability, of that activity to the business of his employer. Hence, the employment is also considered regular, although with respect only to such activity, and while such activity exists.[24]

It is claimed that Lagrama abandoned his work. There is no evidence to show this. Abandonment requires two elements: (1) the failure to report for work or absence without valid or justifiable reason, and (2) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor and being manifested by some overt acts.[25] Mere absence is not sufficient. What is more, the burden is on the employer to show a deliberate and unjustified refusal on the part of the employee to resume his employment without any intention of returning.[26] In the case at bar, the Court of Appeals correctly ruled:

> Neither do we agree that Petitioner abandoned his job. In order for abandonment to be a just and valid ground for dismissal, the employer must show, by clear proof, the intention of the employee to abandon his job.
>
> In the present recourse, the Private Respondent has not established clear proof of the intention of the Petitioner to abandon his job or to sever the employment relationship between him and the Private Respondent. On the contrary, it was Private Respondent who told Petitioner that he did not want the latter to draw for him and thereafter refused to give him work to do or any mural or billboard to paint or draw on.
>
> More, after the repeated refusal of the Private Respondent to give Petitioner murals or billboards to work on, the Petitioner filed, with the Sub-Regional Arbitration Branch No. X of the National Labor Relations Commission, a Complaint for “Illegal Dismissal and Money Claims.” Such act has, as the Supreme

Court declared, negate any intention to sever employment relationship.[27]

II

The second issue is whether private respondent Lagrama was illegally dismissed. To begin, the employer has the burden of proving the lawfulness of his employee's dismissal.[28] The validity of the charge must be clearly established in a manner consistent with due process. The Implementing Rules of the Labor Code[29] provide that no worker shall be dismissed except for a just or authorized cause provided by law and after due process. This provision has two aspects: (1) the legality of the act of dismissal, that is, dismissal under the grounds provided for under Article 282 of the Labor Code and (2) the legality in the manner of dismissal. The illegality of the act of dismissal constitutes discharge without just cause, while illegality in the manner of dismissal is dismissal without due process.[30]

In this case, by his refusal to give Lagrama work to do and ordering Lagrama to get out of his sight as the latter tried to explain his side, petitioner made it plain that Lagrama was dismissed. Urinating in a work place other than the one designated for the purpose by the employer constitutes violation of reasonable regulations intended to promote a healthy environment under Art. 282(1) of the Labor Code for purposes of terminating employment, but the same must be shown by evidence. Here there is no evidence that Lagrama did urinate in a place other than a rest room in the premises of his work.

Instead of ordering his reinstatement as provided in Art. 279 of the Labor Code, the Labor Arbiter found that the relationship between the employer and the employee has been so strained that the latter's reinstatement would no longer serve any purpose. The parties do not dispute this finding. Hence, the grant of separation pay in lieu of reinstatement is appropriate. This is of course in addition to the payment of backwages which, in accordance with the ruling in Bustamante vs. NLRC[31] should be computed from the time of Lagrama's dismissal up to the time of the finality of this decision, without any deduction or qualification.

The Bureau of Working Conditions[32] classifies workers paid by results into two groups, namely; (1) those whose time and performance is supervised by the employer, and (2) those whose time and performance is unsupervised by the employer. The first involves an element of control and supervision over the manner the work is to be performed, while the second does not. If a piece worker is supervised, there is an employer-employee relationship, as in this case. However, such an employee is not entitled to service incentive leave pay since, as pointed out in Makati Haberdashery vs. NLRC[33] and Mark Roche International vs. NLRC,[34] he is paid a fixed amount for work done, regardless of the time he spent in accomplishing such work.

WHEREFORE, based on the foregoing, the Petition is **DENIED** for lack of showing that the Court of Appeals committed any reversible error. The decision of the Court of Appeals, reversing the decision of the National Labor Relations Commission and reinstating the decision of the Labor Arbiter, is **AFFIRMED** with the **MODIFICATION** that the backwages and other benefits awarded to private respondent Leovigildo Lagrama should be computed from the time of his dismissal up to the time of the finality of this decision, without any deduction and qualification. However, the service incentive leave pay awarded to him is **DELETED.**

SO ORDERED.

Bellosillo, Quisumbing and Corona, *JJ.*, concur.

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[1] Per Justice Romeo J. Callejo, Sr. and concurred in by justice Renato C. Dacudao and Justice Perlita J. Tria Tirona.
[2] Id., Annex B; id., p. 57.
[3] CA Rollo, p. 61.
[4] Per Commissioner Oscar N. Abella and concurred in by Presiding Commissioner Salic B. Dumarpa and Commissioner Leon G. Gonzaga, Jr,
[5] Annex B of the Petition for Review on *Certiorari*; Rollo, p. 57.
[6] Petition, pp. 11-12; id., pp. 22-23.
[7] See Ramos vs. Court of Appeals, G.R. No. 124354, April 11, 2002; Santos vs. NLRC, 293 SCRA 113 (1998) citing Jimenez vs. NLRC, 256 SCRA 84 (1996); Sandigan Savings and Loan Bank, Inc. vs. NLRC, 254 SCRA 126 (1996); and

Viana vs. Al-Lagadan, 99 Phil 408 (1956); "Brotherhood" Labor Unity Movement of the Philippines vs. Zamora, 147 SCRA 49 (1987).

[8] De los Santos vs. NLRC, G.R. No. 121327, Dec. 20, 2001.
[9] Sworn Statement of Rolando Tan, p. 2; CA Rollo, p. 81.
[10] Id., pp. 1-3; id., pp. 164-166.
[11] Id., p. 2; id., p. 81.
[12] NLRC Position Paper for Respondent [Tan], pp. 2-3; Rollo, pp. 72-73 (underscoring supplied).
[13] See Ramos vs. Court of Appeals, 321 SCRA 584 (1999); Austria vs. NLRC, 312 SCRA 410 (1999).
[14] LABOR CODE, ART. 97 (f].
[15] Lambo, vs. NLRC, 317 SCRA 420 (1999) citing Villuga vs. NLRC, 225 SCRA 537 (1993).
[16] C.A. AZUCENA, EVERYONE'S LABOR CODE 59 (2000).
[17] Book III, Rule X, Sec. 6(a).
[18] REVISED RULES ON EVIDENCE, RULE 131, §3(e). See Villaruel vs. NLRC, 284 SCRA 399 (1998).
[19] Ganzon vs. NLRC, 321 SCRA 434 (1999); Bernardo vs. NLRC; 310 SCRA 186 (1999).
[20] NLRC Position Paper for Respondent [Tan], p. 4; Rollo, p. 74.
[21] Lambo vs. NLRC, 317 SCRA 420 (1999).
[22] See Santos vs. NLRC, 293 SCRA 113 (1998).
[23] CA Rollo, p. 167.
[24] Conti vs. NLRC, 271 SCRA 114 (1997) citing De Leon vs. NLRC, 176 SCRA 615 (1989).
[25] Hyatt Taxi Services Inc. vs. Catinoy, G.R. No. 143204, June 26, 2001 citing Mendoza vs. NLRC, 310 SCRA 846 (1999).
[26] Labor vs. NLRC, 248 SCRA 183 (1995).
[27] CA Decision, p. 10; Rollo, p. 53.
[28] EDI Staff Builders International, Inc. vs. Magsino, G.R. No. 139430, June 20, 2001 citing Farrol vs. Court of Appeals, 325 SCRA 331 (2000).
[29] Book V, Rule XXIII, §2 and, again, in Book VI, Rule I, §2.
[30] Shoemart, Inc. vs. NLRC, 176 SCRA 385 (1989).
[31] 265 SCRA 61 (1996).
[32] Letter of the Bureau of Working Conditions to the Law Firm of Nittoreda and Nasser, June 26, 1990 cited in 1 AZUCENA, THE LABOR CODE WITH COMMENTS AND CASES 321 (1992).
[33] 179 SCRA 448 (1989).
[34] 313 SCRA 356 (1999) citing Omnibus Rules Implementing The Labor Code, Bk. III, Rule V, §1(d).