

CHANROBLES PUBLISHING COMPANY

**SUPREME COURT
FIRST DIVISION**

**TOMAS LAO CONSTRUCTION, LVM
CONSTRUCTION CORPORATION,
THOMAS and JAMES DEVELOPERS
(PHIL.), INC.,**

Petitioners,

-versus-

**G.R. No. 116781
September 5, 1997**

**NATIONAL LABOR RELATIONS
COMMISSION, MARIO O. LABENDIA,
SR., ROBERTO LABENDIA, NARCISO
ADAN, FLORENCIO GOMEZ, ERNESTO
BAGATSOLON, SALVADOR BABON,
PATERNO BISNAR, CIPRIANO
BERNALES, ANGEL MABULAY, SR.,
LEO SURIGAO, and ROQUE MORILLO,**

Respondents.

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DECISION

BELLOSILLO, J.:

From October to December 1990 private respondents individually filed complaints for illegal dismissal against petitioners with the National Labor Relations Commission Regional Arbitration Branch

No. VIII (NLRC-RAB VIII), Tacloban City. Alleging that they were hired for various periods as construction workers in different capacities they described their contractual terms as follows: (a) Roberto Labendia, general construction foreman, from 1971 to 17 October 1990 at P3,700/month; (b) Narciso Adan, tireman, from October 1981 to November 1990 at P75.00/day; (c) Florencio Gomez, welder, from July 1983 to July 1990 at P60.00/day; (d) Ernesto Bagatsolon, leadman/checker, from June 1982 to October 1990 at P2,800/month; (e) Salvador Babon, clerk/timekeeper/paymaster, from June 1982 to October 1990 at P3,200/month; (f) Paterno Bisnar, road grader operator, from January 1979 to October 1990 at P105/day; (g) Cipriano Bernales, instrument man, from February 1980 to November 1990 at P3,200/month; (h) Angel Mabulay, Sr., dump truck driver, from August 1974 to October 1990 at P90/day; (i) Leo Surigao, payloader operator, from March 1975 to January 1978 at P100/day; (j) Mario Labendia, Sr. surveyor/foreman, from August 1971 to July 1990 at P2,900/month; and, (k) Roque Morillo, company watchman, from August 1983 to October 1990 at P3,200/month.^[1]

Within the periods of their respective employment, they alternately worked for petitioners Tomas Lao Corporation (TLC), Thomas and James Developers (T&J) and LVM Construction Corporation (LVM), altogether informally referred to as the “Lao Group of Companies,” the three (3) entities comprising a business conglomerate exclusively controlled and managed by members of the Lao family.

TLC, T&J and LVM are engaged in the construction of public roads and bridges. Under joint venture agreements they entered into among each other, they would undertake their projects either simultaneously or successively so that, whenever necessary, they would lease tools and equipment to one another. Each one would also allow the utilization of their employees by the other two (2). With this arrangement, workers were transferred whenever necessary to on-going projects of the same company or of the others, or were rehired after the completion of the project or project phase to which they were assigned. Soon after, however, TLC ceased its operations^[2] while T&J and LVM stayed on.

Sometime in 1989 Andres Lao, Managing Director of LVM and President of T&J,^[3] issued a Memorandum^[4] requiring all workers

and company personnel to sign employment contract forms and clearances which were issued on 1 July 1989 but antedated 10 January 1989. These were to be used allegedly for audit purposes pursuant to a joint venture agreement between LVM and T&J. To ensure compliance with the directive, the company ordered the withholding of the salary of any employee who refused to sign. Quite notably, the contracts expressly described the construction workers as project employees whose employments were for a definite period, i.e., upon the expiration of the contract period or the completion of the project for which the workers was hired.

Except for Florencio Gomez^[5] all private respondents refused to sign contending that this scheme was designed by their employer to downgrade their status from regular employees to mere project employees. Resultantly, their salaries were withheld. They were also required to explain why their services should not be terminated for violating company rules and warned that failure to satisfactorily explain would be construed as “disinterest” in continued employment with the company. Since the workers stood firm in their refusal to comply with the directives their services were terminated.

NLRC RAB VIII dismissed the complaints lodged before it, finding that private respondents were project employees whose employments could be terminated upon completion of the projects or project phase for which they were hired. It upheld petitioners’ contention that the execution of their employment contracts was to forestall the eventuality of being compelled to pay the workers their salaries even if there was no more work to be done due to the completion of the projects or project phases. The labor court however granted each employee a separation pay of P6,435.00 computed at one-half (1/2) month salary for every year of service, uniformly rounded at five (5) years.^[6]

The decision of Labor Arbiter Gabino A. Velasquez, Jr., was reversed on appeal by the Fourth Division of the National Labor Relations Commission (NLRC) of Cebu City which found that private respondents were regular employees who were dismissed without just cause and denied due process. The NLRC also overruled the fixing by the Labor Arbiter of the term of employment of complainants uniformly at five (5) years since the periods of employment of the

construction workers as alleged in their complaints were never refuted by petitioners. In granting monetary awards to complainants, NLRC disregarded the veil of corporate fiction and treated the three (3) corporations as forming only one entity on the basis of the admission of petitioners that “the three (3) operated as one (1), intermingling and commingling all its resources, including manpower facility.”^[7]

Petitioners now lay their cause before us and assign the following errors: (a) NLRC erred in classifying the employees as regular instead of project employees; (b) assuming that the workers were regular employees, NLRC failed to consider that they were terminated for cause; (c) assuming further that the employees were illegally dismissed, NLRC erred in awarding back wages in excess of three (3) years; and, (d) assuming finally that the decision is correct, NLRC erred when it pierced the veil of corporate personality of petitioner-corporations.

The main thrust of petitioners’ expostulation is that respondents have no valid cause to complain about their employment contracts since these documents merely formalized their status as project employees. They cite Policy Instruction No. 20 of the Department of Labor which defines project employees as those employed in connection with a particular construction project, adding that the ruling in *Sandoval Shipyards, Inc. vs. NLRC*^[8] applies squarely to the instant case because there the Court declared that the employment of project employees is co-terminous with the completion of the project regardless of the number of projects in which they have worked. And as their employment is one for a definite period, they are not entitled to separation pay nor is their employer required to obtain clearance from the Secretary of Labor in connection with their termination. Petitioners thus argue that their dismissal from the service of private respondents was legal since the projects for which they were hired had already been completed. As additional ground, they claim that Mario Labendia and Roberto Labendia had absented themselves without leave giving management no choice but to sever their employment.

We are not convinced. The principal test in determining whether particular employees are “project employees” distinguished from

“regular employees” is whether the “project employees” are assigned to carry out “specific project or undertaking,” the duration (and scope) of which are specified at the time the employees are engaged for the project. “Project” in the realm of business and industry refers to a particular job or undertaking that is within the regular or usual business of employer, but which is distinct and separate and identifiable as such from the undertakings of the company. Such job or undertaking begins and ends at determined or determinable times.^[9]

While it may be allowed that in the instant case the workers were initially hired for specific projects or undertakings of the company and hence can be classified as project employees. the repeated re-hiring and the continuing need for their services over a long span of time (the shortest, at seven [7] years) have undeniably made them regular employees. Thus, we held that where the employment of project employees is extended long after the supposed project has been finished, the employees are removed from the scope of project employees and considered regular employees.^[10]

While length of time may not be a controlling test for project employment, it can be a strong factor in determining whether the employee was hired for a specific undertaking or in fact tasked to perform functions which are vital, necessary and indispensable to the usual business or trade of the employer. In the case at bar, private respondents had already gone through the status of project employees. But their employments became non-coterminous with specific projects when they started to be continuously re-hired due to the demands of petitioners’ business and were re-engaged for many more projects without interruption. We note petitioners’ own admission —

These construction projects have been prosecuted by either of the three petitioners, either individually or in a joint venture with one another. Likewise, these construction projects have been prosecuted by either of the three petitioners, either simultaneously, one construction project overlapping another and/or one project commencing immediately after another project has been completed or terminated. Perhaps because of their capacity to prosecute government projects and their good

record and performance, at least one of the three petitioners had an on-going construction project and/or one of the three petitioners' construction project overlapped that of another.^[11]

The denial by petitioners of the existence of a work pool in the company because their projects were not continuous is amply belied by petitioners themselves who admit that —

All the employees of either of the three petitioners were actually assigned to a particular project to remain in said project until the completion or termination of that project. However, after the completion of that particular project or when their services are no longer needed in the project or particular phase of the project where they were assigned, they were transferred and rehired in another on-going project.^[12]

A work pool may exist although the workers in the pool do not receive salaries and are free to seek other employment during temporary breaks in the business, provided that the worker shall be available when called to report for a project. Although primarily applicable to regular seasonal workers, this set-up can likewise be applied to project workers insofar as the effect of temporary cessation of work is concerned. This is beneficial to both the employer and employee for it prevents the unjust situation of “coddling labor at the expense of capital” and at the same time enables the workers to attain the status of regular employees. Clearly, the continuous rehiring of the same set of employees within the framework of the Lao Group of Companies is strongly indicative that private respondents were an integral part of a work pool from which petitioners drew its workers for its various projects.

In a final attempt to convince the Court that private respondents were indeed project employees, petitioners point out that the workers were not regularly maintained in the payroll and were free to offer their services to other companies when there were no on-going projects. This argument however cannot defeat the workers' status of regularity. We apply by analogy the case of *Industrial-Commercial-Agricultural Workers Organization vs. CIR*^[13] which deals with regular seasonal employees. There we held —

That during the temporary layoff the laborers are free to seek other employment is natural, since the laborers are not being paid, yet must find means of support. A period during which the Central is forced to suspend or cease operation for a time should not mean starvation for employees and their families (Emphasis supplied).

Truly, the cessation of construction activities at the end of every project is a foreseeable suspension of work. Of course, no compensation can be demanded from the employer because the stoppage of operations at the end of a project and before the start of a new one is regular and expected by both parties to the labor relations. Similar to the case of regular seasonal employees, the employment relation is not severed by merely being suspended.^[14] The employees are, strictly speaking, not separated from services but merely on leave of absence without pay until they are reemployed.^[15] Thus we cannot affirm the argument that non-payment of salary or non-inclusion in the payroll and the opportunity to seek other employment denote project employment.

Contrary to petitioners' assertion, our ruling in Sandoval Shipyards is inapplicable considering the special circumstances attendant to the present case. In Sandoval, the hiring of construction workers, unlike in the instant case, was intermittent and not continuous for the "shipyard merely accepts contracts for shipbuilding or for repair of vessels from third parties and, only on occasions when it has work contract of this nature that it hires workers to do the job which, needless to say, lasts only for less than a year or longer."^[16]

Moreover, if private respondents were indeed employed as "project employees," petitioners should have submitted a report of termination to the nearest public employment office every time their employment was terminated due to completion of each construction project.^[17] The records show that they did not. Policy Instruction No. 20 is explicit that employers of project employees are exempted from the clearance requirement but not from the submission of termination report. We have consistently held that failure of the employer to file termination reports after every project completion proves that the employees are not project employees.^[18] Nowhere in the New Labor Code is it provided that the reportorial requirement is

dispensed with. The fact is that Department Order No. 19 superseding Policy Instruction No. 20 expressly provides that the report of termination is one of the indicators of project employment.^[19]

We agree with the NLRC that the execution of the project employment contracts was “farcical.”^[20] Obviously, the contracts were a scheme of petitioners to prevent respondents from being considered as regular employees. It imposed time frames into an otherwise flexible employment period of private respondents some of whom were employed as far back as 1969. Clearly, here was an attempt to circumvent labor laws on tenurial security. Settled is the rule that when periods have been imposed to preclude the acquisition of tenurial security by the employee, they should be struck down as contrary to public morals, good customs or public order.^[21] Worth noting is that petitioners had engaged in various joint venture agreements in the past without having to draft project employment contracts. That they would require execution of employment contracts and waivers at this point, ostensibly to be used for audit purposes, is a suspect excuse, considering that petitioners enforced the directive by withholding the salary of any employee who spurned the order.

We likewise reject petitioners’ justification in re-hiring private respondents i.e., that it is much cheaper and economical to re-hire or re-employ the same workers than to train a new set of employees. It is precisely because of this cost-saving benefit to the employer that the law deems it fair that the employees be given a regular status. We need not belabor this point.

The NLRC was correct in finding that the workers were illegally dismissed. The rule is that in effecting a valid dismissal, the mandatory requirements of substantive and procedural due process must be strictly complied with. These were wanting in the present case. Private respondents were dismissed allegedly because of insubordination or blatant refusal to comply with a lawful directive of their employer. But willful disobedience of the employer’s lawful orders as a just cause for the dismissal of the employees envisages the concurrence of at least two (2) requisites: (a) the employee’s assailed conduct must have been willful or intentional, the willfulness being characterized by a wrongful and perverse attitude; and, (b) the order

violated must have been reasonable, lawful, made known to the employee and must pertain to the duties which he has been engaged to discharge.^[22] The refusal of private respondents was willful but not in the sense of plain and perverse insubordination. It was dictated by necessity and justifiable reasons — for what appeared to be an innocent memorandum was actually a veiled attempt to deny them their rightful status as regular employees. The workers therefore had no option but to disobey the directive which they deemed unreasonable and unlawful because it would result in their being downsized to mere project workers. This act of self-preservation should not merit them the extreme penalty of dismissal.

The allegation of petitioners that private respondents are guilty of abandonment of duty is without merit. The elements of abandonment are: (a) failure to report for work or absence without valid or justifiable reason, and, (b) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor manifested by some overt acts.^[23] In this case, private respondents Roberto Labendia and Mario Labendia were forced to leave their respective duties because their salaries were withheld. They could not simply sit idly and allow their families to starve. They had to seek employment elsewhere, albeit temporarily, in order to survive. On the other hand, it would be the height of injustice to validate abandonment in this particular case as a ground for dismissal of respondents thereby making petitioners benefit from a gross and unjust situation which they themselves created.^[24] Private respondents did not intend to sever ties with petitioner and permanently abandon their jobs; otherwise, they would not have filed this complaint for illegal dismissal.^[25]

Petitioners submit that since private respondents were only project employees, they are not entitled to security of tenure. This is incorrect. In *Archbuild Masters and Construction, Inc. vs. NLRC*^[26] we held —

A project employee hired for a specific task also enjoys security of tenure. A termination of his employment must be for a lawful cause and must be done in a manner which affords him the proper notice and hearing. To allow employers to exercise their prerogative to terminate a project worker's employment based

on gratuitous assertions of project completion would destroy the constitutionally protected right of labor to security of tenure (Emphasis supplied).

The burden of proving that an employee has been lawfully dismissed therefore lies with the employer. In the case at bar, the assertions of petitioners were self-serving and insufficient to substantiate their claim of proximate project completion. The services of the employees were terminated not because of contract expiration but as sanction for their refusal to sign the project employment forms and quitclaims.

Finding that the dismissal was without just cause, we find it unnecessary to dwell on the non-observance of procedural due process. Suffice it to state that private respondents were not priorly notified of their impending dismissal and that they were not provided ample opportunity to defend themselves.

Petitioners charge as erroneous the grant to private respondents by NLRC of back wages in excess of three (3) years or, in the alternative, to an award of separation pay if reinstatement is no longer feasible.

We disagree. Since the illegal dismissal was made in 1990 or after the effectivity of the amendatory provision of RA No. 6715 on 21 March 1989, private respondents' back wages should be computed on the basis of Art. 279 of the Labor Code which states that "(a)n employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full back wages, 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."

Conformably with our ruling in *Bustamante vs. NLRC*^[27] the illegally dismissed employees are entitled to full back wages, undiminished by earnings derived elsewhere during the period of their illegal dismissal. In the event that reinstatement is no longer feasible, back wages shall be computed from the time of illegal termination until the time of the finality of the decision.^[28] The award shall be based on the documents submitted by private respondents, i.e. affidavits, SSS and Medicare documents, since petitioners failed to adduce competent

evidence to the contrary. The separation pay shall be equivalent to “at least one (1) month salary or to one (1) month salary for every year of service, whichever is higher, a fraction of at least six (6) months being considered as one whole year.”^[29]

Finally, public respondent NLRC did not err in disregarding the veil of separate corporate personality and holding petitioners jointly and severally liable for private respondents’ back wages and separation pay. The records disclose that the three (3) corporations were in fact substantially owned and controlled by members of the Lao family composed of Lao Hian Beng alias Tomas Lao, Chiu Siok Lian (wife of Tomas Lao), Andrew C. Lao, Lao Y. Heng, Vicente Lao Chua, Lao E. Tin, Emmanuel Lao and Ismaelita Maluto. A majority of the outstanding shares of stock in LVM and T&J is owned by the Lao family. T&J is 100% owned by the Laos as reflected in its Articles of Incorporation. The Lao Group of Companies therefore is a closed corporation where the incorporators and directors belong to a single family. Lao Hian Beng is the same Tomas Lao who owns Tomas Lao Corporation and is the majority stockholder of T&J. Andrew C. Lao is the Managing Director of LVM Construction, and President and Managing Director of the Lao Group of Companies. Petitioners are engaged in the same line of business under one management and use the same equipment including manpower services. Where it appears that [three] business enterprises are owned, conducted and controlled by the same parties, both law and equity will, when necessary to protect the rights of third persons, disregard the legal fiction that the [three] corporations are distinct entities, and treat them as identical.^[30]

Consonant with our earlier ruling,^[31] we hold that the liability of petitioners extends to the responsible officers acting in the interest of the corporations. In view of the peculiar circumstances of this case, we disregard the separate personalities of the three (3) corporations and at the same time declare the members of the corporations jointly and severally liable with the corporations for the monetary awards due to private respondents. It should always be borne in mind that the fiction of law that a corporation as a juridical entity has a distinct and separate personality was envisaged for convenience and to serve justice; therefore it should not be used as a subterfuge to commit injustice and circumvent labor laws.

WHEREFORE, the Petition is **DENIED** and the decision of the National Labor Relations Commission dated 05 August 1994 is **AFFIRMED**. Petitioners are ordered to reinstate private respondents to their former positions without loss of seniority rights and other privileges with full back wages, inclusive of allowances, computed from the time compensation was withheld up to the time of actual reinstatement. In the event that reinstatement is no longer feasible, petitioners are directed to pay private respondents separation pay equivalent to one month salary for every year of service, a fraction of at least six (6) months being considered one (1) year in the computation thereof, and full back wages computed from the time compensation was withheld until the finality of this decision. All other claims of the parties are **DISMISSED** for lack of merit. Costs against petitioners.

SO ORDERED.

Vitug, Kapunan and Hermosissima, Jr., JJ., concur.

- [1] Records, pp. 1-11.
- [2] Petition does not allege the exact date TLC retired from the business.
- [3] Some documents show that Tomas Lao is the Managing Director of T&J and Liaison Officer of LVM.
- [4] Annex "A," Records, p. 183.
- [5] He claimed he signed the contract and quitclaim due to "coercion" and his dire economic necessity. Nonetheless he was dismissed on 15 July 1990.
- [6] See Decision of Labor Arbiter Gabino A. Velasquez, Jr., NLRC RAB VIII, Tacloban City, Records, p. 410.
- [7] Decision of the Fourth Division, NLRC, Cebu City, composed of Commissioners I. E. Canissa, B.S. Batunan and A.B. Canete, p. 11; Rollo, p. 925.
- [8] G.R. Nos. 65689 & 66119, 31 May 1985, 136 SCRA 674.
- [9] ALU-TUCP vs. NLRC, G.R. No. 109902, 2 August 1994, 234 SCRA 678.
- [10] Phesco, Inc. vs. NLRC, G.R. Nos. 104444-49, 17 December 1994, 239 SCRA 446; Capitol Industrial Construction Groups vs. NLRC, G.R. No. 105359, 22 April 1993, 221 SCRA 469.
- [11] Petition, p. 9; Rollo, p. 10.
- [12] Petition, p. 10; Rollo, p. 11.
- [13] No. L-21465, 31 March 1966, 16 SCRA 562, 567-568.
- [14] Manila Hotel Co. vs. CIR, No. L-18873, 30 September 1963, 9 SCRA 186.
- [15] Ibid.

- [16] See Note 8.
- [17] Magante vs. NLRC, G.R. No. 74969, 7 May 1990, 185 SCRA 21.
- [18] Ochoco vs. NLRC, No. L-56363, 24 February 1983, 120 SCRA 774; Magante vs. NLRC, G.R. No. 74969, 7 May 1990, 185 SCRA 21; Capitol Industrial Construction Corporation vs. NLRC, G.R. No. 105359, 22 April 1993, 221 SCRA 469; Aurora Land Projects Corporation vs. NLRC, G.R. No. 114733, 2 January 1997.
- [19] Sec. 2.2 (e), Department Order No. 19, 1 April 1993.
- [20] Decision, p. 16, Rollo, p. 923.
- [21] Samson vs. NLRC, G.R. No. 113166, 1 February 1996, 253 SCRA 124; Caramol vs. NLRC, G.R. No. 102973, 24 August 1993, 225 SCRA 582 (1993).
- [22] Manebo vs. NLRC, G.R. No. 107721, 10 January 1994, 229 SCRA 240.
- [23] De Ysasi III vs. NLRC, G.R. No. 104599, 11 March 1994, 231 SCRA 173; Bonotan vs. NLRC, G.R. No. 104321, 25 October 1995, 237 SCRA 717.
- [24] Toogue vs. NLRC, G.R. No. 112334, 18 November 1994, 238 SCRA 241.
- [25] Jackson Building Condominium Corporation vs. NLRC, G.R. No. 111515, 14 July 1995, 246 SCRA 329.
- [26] G.R. No. 108142, 26 December 1995, 251 SCRA 491, 492.
- [27] G.R. No. 111651, 28 November 1996.
- [28] Ibid.
- [29] Sec. 4 (b), Book VI, Omnibus Rules Implementing the Labor Code.
- [30] Claparols vs. CIR, No. L-30822, 31 July 1975, 65 SCRA 622.
- [31] Indino vs. NLRC, G.R. No. 80352, 29 September 1989, 178 SCRA 177, citing La Campana Coffee Factory, Inc., vs. Kaisahan ng mga Manggagawa sa La Campana (KKM), 93 Phil. 160 (1953).