230 Phil. 430

FIRST DIVISION

[G.R. NO. 66598. December 19, 1986]

PHILIPPINE BANK OF COMMUNICATIONS,PETITIONER, VS. THE NATIONAL LABOR RELATIONS COMMISSION, HONORABLE ARBITER TEODORICO L. DOGELIO, AND RICARDO ORPIADA, RESPONDENTS.

D E C I S I O N

FELICIANO, J.:
Petitioner Philippine Bank of Communications and the Corporate Executive Search Inc. (CESI) entered into a letter agreement dated January 1976 under which CESI undertook to provide "Temporary] Services" to petitioner consisting of the "temporary services" of eleven (11) messengers. The contract period is described as being "from January 1976 —." The petitioner in turn undertook to pay a "daily service rate of PI 8," on a per person basis.

Attached to the letter agreement was a "List of Messengers assigned at Philippine Bank of Communications" which list included, as item no. 5 thereof, the name of private respondent Ricardo Orpiada.

Ricardo Orpiada was thus assigned to work with the petitioner bank. As such, he rendered services to the bank, within the preinises of the bank and alongside other people also rendering services to the bank. There was some question as to *when* Ricardo Orpiada commenced rendering services to the bank. As noted above, the letter agreement was dated *January 1976.* However, the position paper submitted by CESI to the National Labor Relations Commission stated that CESI hired Ricardo Orpiada on 25 June 1975 as a Tempo Service employee, and assigned him to work with the petitioner bank "as evidenced by the appointment memo issued to him on *25 June 1975* —." Be that as it may, on or about October 1976, the petitioner requested CESI to withdraw Orpiada's assignment because, in the allegation of the bank, Orpiada's services "were no longer needed."

On 29 October 1976, Orpiada instituted a complaint in the Department of Labor (now

Ministry of Labor and Employment) against the petitioner for illegal dismissal and failure to pay the 13th month pay provided for in Presidential Decree No. 851. This complaint was docketed as Case No. RO4-10-10184-76-E. After investigation, the Office of the Regional Director, Regional Office No. IV of the Department of Labor, issued an order dismissing Orpiada's complaint for failure of Mr, Orpiada to show the existence of an employer-employee relationship between the bank and himself.

Despite the foregoing order, Orpiada succeeded in having his complaint certified for compulsory arbitration in Case No. RB-IV-11187-77 entitled "Ricardo Orpiada, complainant, versus Philippine Bank of Communications, respondent." During the compulsory arbitration proceedings, CESI was brought into the picture as an additional respondent by the bank. Both the bank and CESI stoutly maintained that CESI (and not the bank) was the employer of Orpiada.

On 12 September 1977, respondent Labor Arbiter Dogelio rendered a decision in Case No. RB-IV-11187-77, the dispositive portion of which read as follows:

> "WHEREFORE, premises considered, respondent bank is hereby ordered to reinstate complainant to the same or equivalent position with full back wages and to pay the latter's 13th month pay for the year 1976."

On 26 October 1977, the bank appealed the decision of the Labor Arbiter to the respondent NLRC. More than six years later — and the record is silent on why the proceeding in the NLRC should have taken more than six years to resolve – the NLRC promulgated its decision affirming the award of the Labor Arbiter and stating as follows:

> "WHEREFORE, except for the modification reducing the complainant's back wages to two (2) years without qualification, the Decision appealed from is hereby AFFIRMED in all other respects."

Accordingly, on 2 April 1984, the bank filed the present petition for *certiorari* with this Court seeking to annul and set aside (a) the decision of respondent Labor Arbiter Dogelio dated 12 September 1977 in Labor Case No. RB-IV-1118-77 and (b) the decision of the NLRC promulgated on 29 December 1983 affirming with some modifications the decision of the Labor Arbiter. This Court granted a temporary restraining order on II April 1984.

The main issue as litigated by the parties in this case relates to whether or not an employer-employee relationship existed between the petitioner bank and private respondent Ricardo Orpiada.

The petitioner bank maintains that no employer-employee relationship was established between itself and Ricardo Orpiada and that Ricardo Orpiada was an employee of CESI and not of the bank. The bank documents its position by pointing to the following provisions of its letter agreement with CESI:

> ” 1. The individual/s you (i.e. CESI) will assign to us (i.e. petitioner) will be subject to our acceptance and will observe workdays, hours, and methods of work (sic); on the other hand, they will not be asked to perform job (sic) not normally related to the position/s for which Tempo Services were contracted.
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> “2. *Such individual/s will nevertheless remain your own employees and you will therefore, retain all liabilities arisingfrom the new Labor Code as amended, Social Security Act and other applicable Governmental decrees, rides and regulations,* provided that, on our part, we shall:
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> > a. Require your employee/s assigned to us to properly accomplish your daily time record, to faithfully reflect all hours worked in our behalf whether such work be within or beyond eight hours of any day.
> >
> > b. Notify you of any change in the work assignment or contract period affecting any of your employee/s assigned to us within 24 hours, after such change is made. x x x” (Italics and parentheses supplied)

The above language of the agreement between the bank and CESI is of course relevant and important as manifesting an intent to refrain from constituting an employer-employee relationship between the bank and the persons assigned or seconded to the bank by CESI. The extent to which the parties were successful in realizing their intent is another matter, one that is dependent upon applicable law and not merely upon the terms of their contract.

In the case of Viana vs. Al-Lagdan and Pica, 99 Phil. 408 (1956), this Court listed certain factors to be taken into account in determining the existence of an employer-employee relationship. These factors are:

” 1) The selection and engagement of the (putative) employee;

2) The payment of wages;

3) The power of dismissal; and

4) The power to control the (putative) employees’ conduct, although the latter is the most important element, x x x.” (99 Phil, at 411-412; parentheses supplied)

In the present case, Orpiada was not previously selected by the bank. Rather, Orpiada was assigned to work in the bank by CESI. Orpiada could not have found his way to the bank’s offices had he not been first hired by CESI and later assigned to work in the bank’s offices. The selection of Orpiada by CESI was, however, subject to the acceptance of the bank and the bank did accept him. As will be seen shortly, CESI had hired Orpiada from the outside world precisely for the purpose of assigning or seconding him to the bank.

With respect to the payment of Orpiada’s wages, the bank remitted to CESI amounts corresponding to the “daily service rate” of Orpiada and the others similarly assigned by CESI to the bank, and CESI paid to Orpiada and the others the wages pertaining to them. It is not clear from the record whether the amounts remitted to CESI included some factor for CESI’s fees; it seems safe to assume that CESI had required some amount in excess of the wages paid by CESI to Orpiada and the others to cover its own overhead expenses and provide some contribution to profit. The bank alleged that Orpiada did not appear in its payroll and this allegation was not denied by Orpiada. Indeed, the Labor Arbiter in Case No. RO4-184-76-B found that Orpiada was listed in the payroll of CESI, with CESI deducting amounts representing his Medicare and Social Security System premiums. A copy of the CESI payroll was presented, strangely enough, by Orpiada himself to Regional Office No. IV.

In respect of the power of dismissal, we note that the bank requested CESI to withdraw Orpiada’s assignment and that CESI did, in fact, withdraw such assignment. Upon such withdrawal from his assignment with the bank, Orpiada was also terminated by CESI. Indeed, it appears clear that Orpiada was hired by CESI specifically for assignment with the bank and that upon his withdrawal from such assignment upon ;^quest of the bank, Orpiada’s employment with CESI was also severed, until some other client of CESI showed up in the horizon to which Orpiada could once more be assigned. In the position paper dated August 5, 1977 submitted by CESI before the NLRC, CESI explained the relationship between itself and Orpiada in lucid terms:

> "5. That as Petitioner herein was very well aware of *from the very beginning, he was hired by Corporate Executive Search, Inc. as a temporary employee and as such, was being assigned to work with the latter 's client. Respondent herein; that the rationale behind his hiring was the existence of a service contract between Corporate Executive Search, Inc. and its client-company,* the Philippine Bank of Communications, the herein Respondent, and *that when this service contract was terminated, then the reason for his employment with Corporate Executive Search, Inc., ceased to exist and that therefore Corporate Executive Search, Inc. had no alternative but to discontinue his employment until another opportune time for his hiring would present itself,*
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> "6. That Petitioner was not given his I3th-month pay under P.D. 851, because Corporate Executive Search, Inc. gave the 13th-month pay for 1976 to its employees in December 1976, and since *the company had lost contact with the Petitioner by reason of his having ceased to be connected with it as of 22 October 1976,* he was not among those given the 13th-month pay." (Italics supplied)

Turning to the power to control Orpiada's conduct, it should be noted immediately that Orpiada performed his functions within the bank's premises, and not within the office premises of CESI. As such, Orpiada must have been subject to at least the same control and supervision that the bank exercises over any other person physically within its premises and rendering services to or for the bank, in other words, any employee or staff member of the bank. It seems unreasonable to suppose that the bank would have allowed Orpiada and the other persons assigned to the bank by CESI to remain within the bank's premises and there render services to the bank, without subjecting them to a substantial measure of control and supervision, whether in respect of the manner in which they discharged their functions, or in respect of the end results of their functions or activities, or both.

Application of the above factors in the specific context of this case appears to yield mixed results so far as concerns the existence of an employer-employee relationship between the bank and Orpiada. The second ("payment of wages") and third ("power of dismissal") factors suggest that the relevant relationship was that subsisting between CESJ and Orpiada, a relationship conceded by CESI to be one between employer and employee. Upon the other hand, the first ("selection and engagement") and fourth ("control of employee's conduct") factors indicate that some direct relationship did exist between Orpiada and the bank and that such relationship may be assimilated to employment. Perhaps the most important

circumstance which emerges from an examination of the facts of the tri-lateral relationship between the bank, CESI and Orpiada is that the employer-employee relationship between CESI and Orpiada was established precisely in anticipation of, and for the very purpose of making possible, the secondment of Orpiada to the bank. It is therefore necessary to confront the task of determining the appropriate characterization of the relationship between the bank and CESI: was that relationship one of employer and job (independent) contractor or one of employer and "labor-only" contractor?

Articles 106 and 107 of the Labor Code of the Philippines (Presidential Decree No. 442, as amended) provides as follows:

> ART. 106. *Contractor or subcontractor.* — Whenever an employer enters into a contract with another person for the performance of the former's work, the employees of the contractor and of the latter's subcontractor, if any, shall be paid in accordance with the provisions in this Code.
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> In the event that the contractor or sub-contractor fails to pay the wages of his employees in accordance with this Code, *the employer shall bejointlv and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him.*
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> The Secretary of Labor may, by appropriate regulations, restrict or prohibit the contracting out oflaborto protect the rights of workers established under this Code. In so prohibiting or restricting, he may make appropriate distinction between *labor-only contracting* and *job contracting* as well as differentiations within these types of contracting and determine *who among the parties involved shall be considered the employer for purposes of this Code, to prevent any violation or circumvention of any provisions of this Code.*
>
> There is *"labor-only*" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. *In such cases, the person or intermediary shall be considered merely as an agent of the employer* who shall *be responsible to the workers in the same manner and extent as if the latter were*

directly employed by him.

ART. 107. *Indirect employer.* –The provisions of the immediately preceding Article shall likewise apply to any person, partnership, association or corporation which, not being an employer, contracts with an independent contractor for the performance of any work, task, job or project. (Italics supplied)

Under the general rule set out in the first and second paragraphs of Article 106, an employer who enters into a contract with a contractor for the performance of work for the employer, does not thereby create an employer-employee relationship between himself and the employees of the contractor. Thus, the employees of the contractor remain the. contractor's employees and his alone. Nonetheless, when a contractor fails to pay the wages of his employees in accordance with the Labor Code, the employer who contracted out the job to the contractor becomes jointly and severally liable with his contractor to the employees of the latter "to the extent of the work performed under the contract" as if such employer were the employer of the contractor's employees. The law itself, in other words, establishes an employer-employee relationship between the employer and the job contractor's employees for a limited purpose, i.e., in order to ensure that the latter get paid the wages due to them.

A similar situation obtains where there is "labor only" contracting. The "labor-only" contractor — i.e. "the person or intermediary" — is considered "merely as an agent of the employer." The employer is made by the statute responsible to the employees of the "labor only" contractor *as if such employees had been directly employed by the employer.* Thus, where "labor only" contracting exists iria given case, the statute itself implies or establishes an employer-employee relationship between the employer (the owner of the project) and the employees of the "labor only" contractor, this time for a comprehensive purpose: "employer for purposes of this Code, to prevent *any violation or circumvention of any provision of this Code"* The law in effect holds both the employer and the "labor-only" contractor responsible to the latter's employees for the more effective safeguarding of the employees' rights under the Labor Code.

Both the petitioner bank and CESI have insisted that CESI was not a "labor only" contractor. Section 9 of Rule VIII of Book III entitled "Conditions of Employment," of the Omnibus Rules Implementing the Labor Code provides as follows:

> Sec. 9. *Labor-only contracting.* — (a) Any person *who undertakes to supply workers to an employer* shall be *deemed to be engaged in labor-only* contracting where such person:
>
> (1) Does not have substantial capital or investment in the form of tools, equipment, machineries, work premises and other materials; and
>
> (2) The workers recruited and placed by such person are performing activities which are directly related to the principal business or operations of the employer in which workers are habitually employed.
>
> (b) *Labor-only contracting as defined herein is hereby prohibited* and the person acting as contractor shall be considered merely as an agent or intermediary of *the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him.*
>
> (c) For cases not falling under this Article, the Secretary of Labor shall determine through appropriate orders whether or not the contracting out of labor is permissible in the light of the circumstances of each case and after considering the operating needs of the employer and the rights of the workers involved. In such case, he may prescribe conditions and restrictions to insure the protection and welfare of the workers. (Italics supplied)

In contrast, job contracting contracting out a particular job to an independent contractor is defined by the Implementing Rules as follows:

> Sec. 8. *Job contracting.* — There is job contracting permissible under the Code if the following conditions are met:
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> (1) The contractor 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) The contractor 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. (Italics supplied)

The bank and CESI urge that CESI is not properly regarded as a "labor-only" contractor upon the ground that CESI is possessed of substantial capital or investment in the form of office equipment, tools and trained service personnel.

We are unable to agree with the bank and CESI on this score. The definition of "labor-only" contracting in Rule VIII, Book III of the Implementing Rules must be read in conjunction with the definition of job contracting given in Section 8 of the same Rules. The undertaking given by CESI in favor of the bank was not the performance of a specific job — for instance, the carnage and delivery of documents and parcels to the addresses thereof. There appear to be many companies today which perform this discrete service, companies with their own personnel who pick up documents and packages from the offices of a client or customer, and who deliver such materials utilizing their own

delivery vans or motorcycles to the addresses. In the present case, the undertaking of CESI was to provide its client — the bank — *with a certain number of persons able to carry out the work of messengers.* Such undertaking of CESI was complied with when the requisite number of persons were assigned or seconded to the petitioner bank. Orpiada utilized the premises and office equipment of the bank and not those of CESI. Messengerial work — the delivery of documents to designated persons whether within or Without the bank premises — is of course directly related to the day-to-day operations of the bank. Section 9(2) quoted above does not require for its applicability that the petitioner must be engaged in the delivery of items as a distinct and separate line of business.

Succinctly put, CESI is not a parcel delivery company: as its name indicates, it is a recruitment and placement corporation placing bodies, as it were, in different client companies for longer or shorter periods of time. It is this factor that, to our mind, distinguishes this case from *American President Lines v. Clave et al.,*114 SCRA 826 (1982) if indeed such distinguishing away is needed.

The bank urged that the letter agreement entered into with CESI was designed to enable the bank to obtain the temporary services of people necessary to enable the bank to cope with peak loads, to replace temporary workers who were out on vacation or sick leave, and to handle specialized work. There is, of course, nothing illegal about hiring persons to carry out "a specific project or undertaking the completion or termination of which [was] determined at the time of the engagement of [the] employee, or where the work or service

to be performed is seasonal in nature and the employment is for the duration of the season" (Article 281, Labor Code). The letter agreement itself, however, merely required CESI to furnish the bank with eleven (II) messengers for "a contract period from January 19, 1976 —."The eleven (11) messengers were thus supposed to render "temporary" services for an indefinite or unstated period of time. Ricardo Orpiada himself was assigned to the bank's offices from 25 June 1975 and rendered services to the bank until sometime in October 1976, or a period of about sixteen months. Under the Labor Code, however, any employee who has rendered at least one year of service, whether such service is continuous or not, shall be considered a regular employee (Article 281, Second paragraph). Assuming, therefore, that Orpiada could properly be regarded as a casual (as distinguished from a regular) employee of the bank, he became entitled to be regarded as a regular employee of the bank, as soon as he had completed one year of service to the bank. Employers may not terminate the service of a regular employee except for a just cause or when authorized under the Labor Code (Article 280, Labor Code). It is not difficult to see that to uphold the contractual arrangement between the bank and CESI would in effect be to permit employers to avoid the necessity of hiring regular or permanent employees and to enable them to keep their employees indefinitely on a temporary or casual status, thus to deny them security of tenure in their jobs. Article 106 of the Labor Code is precisely designed to prevent such a result.

We hold that, in the circumstances of this case, CESI was engaged in "labor-only" contracting vis-a-vis the petitioner bank and in respect of Ricardo Orpiada, and that consequently, the petitioner bank is liable to Orpiada as if Orpiada had been directly employed not only by CESI but also by the bank. It may well be that the bank may in turn proceed against CESI to obtain reimbursement of, or some contribution to, the amounts which the bank will have to pay to Orpiada; but this it is not necessary to determine here.

WHEREFORE, the petition for *certiorari* is DENIED and the decision promulgated on 29 December 1983 of the National Labor Relations Commission is AFFIRMED. The Temporary Restraining Order issued by this Court on 11 April 1984 is hereby lifted. Costs against petitioner.

SO ORDERED.

Yap (Chairman), Narvasa, Melencio-Herrera, and *Cruz, JJ.,* concur.

Date created: November 19, 2014