

DVS CONSTRUCTION SUPPLIES AND SERVICES / SAMUEL M. SIOTE, OWNER-CONTRACTOR, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION, SEVENTH DIVISION, CEBU CITY, GREGGY YAPE, ANTHON...

Ponente: QUIJANO-PADILLA, J.

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QUIJANO-PADILLA, J.:

This is a petition for certiorari[1] filed under Rule 65 of the Rules of Court, seeking the annulment of (1) the Decision[2] dated September 30, 2013 (“assailed Decision”) and (2) the Resolution[3] dated November 28, 2013 (“assailed Resolution”) of the National Labor Relations Commission - 7th Division (NLRC) in NLRC Case No. VAC-08-000469-2013. The assailed Decision awarded herein private respondents' claims for 13[th] month pay, salary differentials, overtime pay, and service incentive leave pay (SILP); meanwhile, the assailed Resolution denied petitioner's Motion for Reconsideration.

The antecedent facts as aptly summarized by the NLRC are as follows:

“Complainants (herein respondents) alleged that they were hired by xxx Samuel Siote (herein petitioner), as laborers, to perform manual jobs and other work necessary and desirable in its contracting and subcontracting business. They were assigned at the Ayala Village, Avida Scapes North Point, Talisay City, Negros Occidental, a construction undertaking subcontracted by respondent Samuel Siote from the general contractor, Makati Development Corporation, which, in turn, had a main contract with Ayala Land, Inc., a corporation engaged in land development and construction. At the time of their engagement on various dates, in the years 2010, 2011 and 2012, complainants were immediately directed to do their respective work without signing any contract. Except for complainants Joseph Sicaten and Jonard Mahusay who worked as helpers and were receiving P180.00 per day, all other complainants who were working as masons were paid P200.00 per day, which was later increased to P265.00 per day on October 2012 until the termination of their services on January 31, 2013. On top of their wages, however, they were given P50.00 allowance, per day, but they were not paid service incentive leave pay, overtime pay differential for three days per week at three hours per day, premium pay on rest days and holidays and night shift differentials for four days in a month from 10:00 p.m. to 3:00 a.m. during the period of their employment.

Complainants (herein respondents) rendered uninterrupted and continued services over a period of one to two and a half years, making them already regular employees of respondent (herein petitioner). However, on January 31, 2013, respondent Siote made an announcement that the construction work was already nearing completion and that those who were still willing to work should sign a contract and those who would not sign would not be given work. For their refusal to sign a prepared contract fixing their period of employment, they were told that they could no longer be admitted back to work, despite the availability of work, and that they should find people who could help them because he has his own legal counsel to help him. Subsequently, Siote recruited new workers to replace complainants and instructed the security guards to ban their entry to respondent's premises. Aggrieved, they filed the instant complaint.

Respondent DVS (herein petitioner), for its part, alleged that complainants (herein respondents) are project

workers who do not enjoy security of tenure and are not entitled to separation pay. They were paid their wages and labor benefits in accordance with law, and that they are not entitled to their money claims.

Respondent (herein petitioner), further, averred that it is a subcontractor that supplies labor, machineries and tools for the development of Avida Village project at Ayala North Point in Talisay City, Negros Occidental. The main contractor of the project is Makati Development Corporation (MDC). The works to be done are divided into various phases. MDC subcontracted the project to four other subcontractors, one of which is, herein, respondent DVS owned by respondent Samuel Siote. The subcontractors were prequalified and DVS was found to have sufficient capital and had the capability and experience to do the job. To implement the project, DVS had to hire numerous workers, who were assigned to different phases of work. Every phase of the project had certain specification and duration. In this connection, respondent and complainants entered into an agreement known as "The Workers and Subcontractors Agreement". When the Avida Village project was finished, respondent submitted the necessary report to the Department of Labor and Employment."^[4]

In his Decision^[5] dated July 8, 2013, Labor Arbiter Romulo Sumalinog found for herein petitioner and dismissed private respondents' complaint. He ruled that private respondents Yape, et al. were project employees, that there was no illegal dismissal, and that they were duly paid their wages and benefits in accordance with law. The decretal portion of his Decision reads:

"WHEREFORE, premises considered, we are constrained to render a DISMISSAL of the instant case for obvious lack of merit.

SO ORDERED."^[6]

On appeal^[7] to the NLRC, private respondents contended that the Labor Arbiter erred when he declared them as project employees and not as regular employees of herein petitioner. They also argued on the failure of the Labor Arbiter to award their money claims and emphasized on petitioner's failure to prove payment of their 13th month pay, minimum wage, overtime pay, holiday pay, premium pay and SILP.

On September 30, 2013, the NLRC rendered its assailed Decision^[8], affirming the finding of the Labor Arbiter that private respondents were project employees and that they were not illegally dismissed but awarding them their claim for 13th month pay and SILP. In addition, respondents Sicaten, Mahusay and Lindayao, who worked as helpers, were awarded their claim for wage differentials and overtime pay. Save for these monetary claims, all other claims of private respondents were denied.

The assailed Decision of the NLRC held:

"WHEREFORE, premises considered, the decision dated 08 July 2013 is, hereby, AFFIRMED WITH MODIFICATION. Complainants are, hereby, declared as project employees of respondent DVS Construction Supplies and Services/Samuel M. Siote, whose employment were terminated due to project completion. However, respondents are ordered to pay complainant salary differentials, 13th month pay and service incentive leave pay in the total amount of PESOS: Three Hundred Thirteen Thousand Sixty Five and 96/100 (P313,065.96).

SO ORDERED."^[9]

Aggrieved by the grant of some monetary awards to private respondents, petitioner DVS/Siote sought for the reconsideration^[10] of the Decision, attaching therein documentary evidence of payment of respondents' 13th month pay, but this motion was denied in NLRC's assailed Resolution.^[11]

Hence, this petition,^[12] which raised the following issues to be resolved by the Court, thus:

"I

WHETHER OR NOT THE NATIONAL LABOR RELATIONS COMMISSION, SEVENTH DIVISION COMMITTED GRAVE AND SERIOUS ERRORS IN ITS FINDING OF FACTS AND APPRECIATION OF EVIDENCE WHICH IF NOT CORRECT WOULD CAUSE GRAVE OR IRREPARABLE DAMAGE OR INJURY ON THE PETITIONER.

II

WHETHER OR NOT THE DECISION OF THE HONORABLE NATIONAL LABOR RELATIONS COMMISSION, SEVENTH DIVISION IS CONTRARY TO LAW AND JURISPRUDENCE.

III

WHETHER OR NOT THE NATIONAL LABOR RELATIONS COMMISSION, SEVENTH DIVISION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR IN EXCESS OF JURISDICTION IN RENDERING THE ASSAILED DECISION.”[13]

Petitioner DVS/Siote mainly questions the award of 13th month pay and SILP to all private respondents and the award of salary differential and overtime pay to private respondents Sicaten, Mahusay, Lindayao. Petitioner contends that the 13[th] month pay for the years 2011 and 2012 had already been paid to private respondents, and that they are not entitled to a 13[th] month pay for the years 2010 and 2013. Petitioner argues that the work for the year 2010 started on December 1, 2010, hence private respondents cannot be entitled to any 13[th] month pay for that year. Meanwhile, the work for 2013 ended on January 31, 2013, thus petitioner insists that private respondents are not also entitled to any 13[th] month pay in 2013.

Anent the payment of SILP, petitioner DVS/Siote maintains that private respondents did not work for DVS for the whole year, hence, they could not be entitled to SILP.

On the wage differentials and overtime pay awarded to the three helpers (respondents Sicaten, Mahusay and Lindayao), petitioner DVS/Siote argues that the awards did not have basis for respondents Sicaten, Mahusay and Lindayao who were paid with minimum wage and had not shown proof that they rendered overtime work.

We find the petition partly meritorious.

This case is raised under Rule 65 of the Rules of Court via a petition for certiorari. It assails the Decision of the NLRC for being rendered with grave abuse of discretion amounting to lack or in excess of jurisdiction.

In *Cocomangas Hotel Beach Resort v. Visca*,^[14] the Supreme Court decreed the limit and scope of a certiorari action filed before the Court of Appeals assailing a Decision of the NLRC, it held, thus:

The extent of judicial review by certiorari of decisions or resolutions of the NLRC, as exercised previously by this Court and now by the CA, is described in *Zarate, Jr. v. Olegario*, thus:

The rule is settled that the original and exclusive jurisdiction of this Court to review a decision of respondent NLRC (or Executive Labor Arbiter as in this case) in a petition for certiorari under Rule 65 does not normally include an inquiry into the correctness of its evaluation of the evidence. Errors of judgment, as distinguished from errors of jurisdiction, are not within the province of a special civil action for certiorari, which is merely confined to issues of jurisdiction or grave abuse of discretion. It is thus incumbent upon petitioner to satisfactorily establish that respondent Commission or executive labor arbiter acted capriciously and whimsically in total disregard of evidence material to or even decisive of the controversy, in order that the extraordinary writ of certiorari will lie. By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, and it must be shown that the discretion was exercised arbitrarily or despotically. For certiorari to lie, there must be capricious, arbitrary and whimsical exercise of power, the very antithesis of the judicial prerogative in accordance with centuries of both civil law

and common law traditions. (Emphasis original)

The CA, therefore, can take cognizance of a petition for certiorari if it finds that the NLRC, in its assailed decision or resolution, committed grave abuse of discretion by capriciously, whimsically, or arbitrarily disregarding evidence which is material to or decisive of the controversy. The CA cannot make this determination without looking into the evidence presented by the parties. The appellate court needs to evaluate the materiality or significance of the evidence, which is alleged to have been capriciously, whimsically, or arbitrarily disregarded by the NLRC, in relation to all other evidence on record.

In the case at bar, after a judicious review of the records, We rule that the NLRC failed to consider the evidence of payment of the 13th month pay for the years 2011 and 2012 and that it erred in its computation of SILP and its award for overtime pay. We, however, affirm its award of 13th month pay for the years 2010 and 2013 and its award of salary differentials in favor of respondents Sicaten, Mahusay and Lindayao.

The 13th Month Pay for the years 2011 and 2012 were duly paid to and received by all private respondents.

In its Motion for Reconsideration of the assailed Decision of the NLRC, petitioner argued that the 13th month pay for the years 2011 and 2012 were already paid to and received by herein private respondents. Petitioner attached in its Motion its 13th month pay payroll for 2011 and 2012.[15]

The NLRC, however, did not give any consideration to these pieces of evidence presented by petitioner and held in its assailed Resolution, to wit:

“It bears emphasizing that the evidence submitted by respondents (herein petitioner) on appeal were only the payrolls attached to the Memorandum of Appeal, which provided no minute trace of compliance with the payment of 13th month pay. If, indeed, respondents have paid complainants' 13th month pay as they claim, why did they withhold the 13th month pay payrolls at the earliest opportunity that they had before the Labor Arbiter, to disprove complainants' allegation of non-payment? xxxx”[16]

Clearly, the NLRC worked on surmises and conjectures when it did not reconsider its decision as regards the payment of 13th month pay for the years 2011 and 2012. We note that the 13th month pay payrolls for the said years were already attached to petitioner's Motion for Reconsideration, but these were not considered.

A perusal of the said 13th month pay payrolls[17] reveals that, indeed, all the respondents received their respective 13th month pay. We note that only respondents Sicaten and Mendoza were not included in the 2011 13th month pay payroll considering that they were not yet working with the petitioner in that year. In the 2012 13th month pay payroll, the same reflects that all the private respondents received their 13th month pay for that year.

Accordingly, the 13th month pay for the years 2011 and 2012 awarded by the NLRC to the private respondents concerned must, therefore, be deleted. Awarding the same to them would be tantamount to unjust enrichment to the prejudice of herein petitioner.

The 13th Month Pay for the years 2010 and 2013 must be paid to private respondents who were employed in those years.

Petitioner DVS/Siote argues that it could not be liable for payment of 13th month pay for the year 2010 because the contract and work of the private respondents started only on December 1, 2010. As regards the payment of

13[th] month pay for the year 2013, petitioner argues that respondents could not be entitled to such benefit because their work ended on January 31, 2013.

The 13th-month pay mandated by Presidential Decree (P.D.) No. 851 represents an additional income based on wage but not part of the wage. It is equivalent to one-twelfth (1/12) of the total basic salary earned by an employee within a calendar year. All rank-and-file employees, regardless of their designation or employment status and irrespective of the method by which their wages are paid, are entitled to this benefit, provided that they have worked for at least one month during the calendar year. If the employee worked for only a portion of the year, the 13th-month pay is computed pro rata.[18]

The respondents who were awarded their 13[th] month pay for the year 2010 were respondents Babor, Laborte, Mahusay, Selacio, Magsipok, Antonio, Magbanua, Maden, and Lindayao. The said respondents alleged in their position paper that they were hired as workers even earlier than December 2010. Petitioner, however, countered this allegation by referring to its Workers and Subcontractor Agreement[19] which stated therein that the work on Avida Village Project started only in December 1, 2010.

We cannot, however, give due weight and credence to this Workers and Subcontractor Agreement as evidence of the commencement of work by the concerned respondents because it would appear that this agreement was belatedly executed, it appearing that it was notarized on a later date.

The dates of employment, as presented by herein respondents, remain un rebutted as petitioner DVS/Siote failed to present any concrete and reliable evidence to prove the contrary. As such, We hold as controlling NLRC's finding on the period of employment of all private respondents.

Absent any evidence of payment of the 13[th] month pay for the year 2010, We, thus, hold that the above-named respondents who were employed even before December 2010 are entitled to their 2010 13[th] month pay since they have worked for at least one month during that calendar year.

As regards the payment of 13[th] month pay for the year 2013, all the private respondents are entitled to the benefit. Petitioner DVS/Siote admits that private respondents worked until January 31, 2013, as such, having worked for a month within a calendar year, respondents are clearly entitled to their 2013 13[th] month pay.

Having worked for only a portion of the year in 2010 and in 2013, the private respondents concerned would receive a 13[th] month pay computed pro rata.

After a review on the award of 13[th] month pay for the years 2010 and 2013, We hold that the NLRC correctly computed the respective 13[th] month pay awarded to the private respondents for the said years.

The SILP awarded to the respondents must be recomputed.

Jurisprudence has decreed that "the clear policy of the Labor Code is to grant service incentive leave pay to workers in all establishments, subject to a few exceptions. Section 2, Rule V, Book III of the Implementing Rules and Regulations provides that "[e]very employee who has rendered at least one year of service shall be entitled to a yearly service incentive leave of five days with pay." Service incentive leave is a right which accrues to every employee who has served "within 12 months, whether continuous or broken reckoned from the date the employee started working, including authorized absences and paid regular holidays unless the working days in the establishment as a matter of practice or policy, or that provided in the employment contracts, is less than 12 months, in which case said period shall be considered as one year." It is also "commutable to its money equivalent if not used or exhausted at the end of the year." In other words, an employee who has served for one year is

entitled to it. He may use it as leave days or he may collect its monetary value.”[20]

Accordingly, those who are entitled to service incentive leave of five days with pay are the employees who have rendered one year of service with their employer. But an employee may opt not to use his leave days, and when such is the case, he may collect its monetary value.

In cases where an employee demands for the monetary value of his service incentive leave or his SILP, it is incumbent upon the employer to prove that the employee has used-up all his leave days in order for the employer not to grant the same.

And for failure of petitioner to present any evidence which shows that respondents have used-up all their leaves, We affirm the NLRC in awarding SILP to herein respondents.

However, We deem it necessary to correct the computation of the SILP. We note that the NLRC awarded SILP to all the private respondents right at the start of their employment, which should not be the case. It must be noted that this benefit accrues only after the lapse of one year of service with the employer. Hence, the SILP awarded to private respondents must be computed only after the lapse of one year from the date they were employed.

We take for instance respondent Narciso Babor[21] who was employed on September 20, 2010. His entitlement to SILP begins after a year from his employment, that is, on September 20, 2011. Consequently, he started receiving the benefit on September 20, 2011, and his SILP from September 20, 2011 to December 31, 2011 is computed pro rata.

In this light, recomputation must be made on the amounts of SILP granted to the private respondents, which must accrue only after one year from the date of their employment.

With this in mind, the SILP awarded to respondent Joseph Siciten must be deleted considering that his employment did not reach a year as he was employed only on March 12, 2012 and the project ended on January 31, 2013.

The Salary Differentials awarded to respondents Siciten, Mahusay, and Lindayao are affirmed, but the Overtime Pay awarded to them must be deleted.

The payroll presented by petitioner DVS/Siote reveals that respondents Siciten, Mahusay, and Lindayao, being helpers, received only a total of P230.00 per day, clearly they were paid below the minimum wage prevailing during the period of their employment.

Hence, We find no error in the NLRC's grant of wage differentials in favor of respondents Siciten, Mahusay, and Lindayao who worked as helpers.

We, however, delete the awards constituting overtime pay granted to the three respondents concerned. We note that the NLRC awarded the overtime pay to the said respondents based merely on their unsubstantiated allegation that they rendered overtime three days a week at three hours per day. It is grave error on the part of NLRC to sweepingly award an overtime pay equivalent to nine hours per week from the time the concerned respondents were employed up to the end of the project without sufficient factual basis.

Jurisprudence is consistent in holding that the claim for overtime pay must be substantiated with concrete proof that additional service beyond the normal working hours and days had indeed been rendered.[22] In the absence of such proof, We cannot affirm its grant.

Summary

1) All awards of 13[th] month pay corresponding to the years 2011 and 2012 are deleted considering that all private respondents concerned already received the benefit.

2) The following respondents are entitled to their 2010 13[th] month pay computed pro rata from the date of their employment up to December 31, 2010:

Narciso Babor Roger Laborte

Jonard Mahusay Anthony Selacio

Rey Magsipok Leopoldo Antonio

Aaron Magbanua Ariel Maden

Rolly Boy Lindayao

3) All private respondents are entitled to their 2013 13[th] month pay computed pro rata from January 1, 2013 to January 31, 2013.

4) The SILP awarded to the respondents must be recomputed bearing in mind that the same accrues only after one year from the date of their employment. However, the SILP awarded respondent Joseph Sicaten is deleted because he had not rendered at least one year of service.

5) The award of Salary Differentials to respondents Joseph Sicaten, Jonard Mahusay, and Rolly Boy Lindayao is affirmed.

6) The award of Overtime Pay to respondents Joseph Sicaten, Jonard Mahusay, and Rolly Boy Lindayao is deleted.

WHEREFORE, the petition is **PARTLY GRANTED**. The assailed Decision and Resolution dated September 30, 2013 and November 28, 2013, respectively, of the NLRC in NLRC Case No. VAC-08-000469-2013 are **AFFIRMED** with the following **MODIFICATIONS**:

1) All awards of 13[th] month pay corresponding to the years 2011 and 2012 are **DELETED**;

2.) The SILP awarded to all respondents must be recomputed. The award of SILP accrues only after one year from the date of their employment;

3) The award of SILP to respondent Joseph Sicaten is **DELETED**;

4) The award of Overtime Pay to respondents Joseph Sicaten, Jonard Mahusay, and Rolly Boy Lindayao is **DELETED**.

Further, this case is hereby **REMANDED** to the Labor Arbiter for the recomputation of the monetary awards herein granted to the private respondents. The total monetary award to each private respondent shall bear interest at the rate of six percent (6%) per annum from the date of this Decision until such monetary award is fully satisfied.

SO ORDERED.

ORIGINAL SIGNED

Hernando, J., Chairperson, and Azcarraga-Jacob, J., concur.

[1] Rollo, pp. 7-24.

[2] Rollo, pp. 248-260.

[3] Rollo, pp. 287-289.

[4] Rollo, pp. 249-250.

[5] Rollo, pp.218-234.

[6] Rollo, p. 234.

[7] Rollo, pp. 235-242.

[8] Supra, note 1.

[9] Rollo, p. 260.

[10] Rollo, pp. 261-285.

[11]Supra, note 2.

[12] Rollo, pp. 300-316.

[13] Rollo, p. 305.

[14] G.R. No. 167045, August 29, 2008.

[15] Rollo, Annexes “1”, “1-A”, “2”, “2-A”, “2-B”, “2-C”, “2-D”, pp. 267-273.

[16] Rollo, p. 288.

[17] Supra, note 14.

[18] Central Azucarera de Tarlac v. Central Azucarera de Tarlac Labor Union-NLU, G.R. No. 188949, July 26, 2010.

[19] Rollo, Annexes “1” and “2”, pp. 44-49.

[20] Fernandez v. NLRC, G.R. No. 105892, January 28, 1998.

[21] Rollo, p. 255.

[22] Pigcaulan v. Security and Credit Investigation, Inc., G.R. No. 173648, January 16, 2012; Labadan v. Forest Hills Academy, et al., G.R. No. 172295, December 23, 2008.

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