

MERCURY DRUG CO., INC., PETITIONER, VS. NARDO DAYAO, ET AL., RESPONDENTS.

G.R. No. L-30452. September 30, 1982

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

This is a petition for review on certiorari of the decision of the Court of Industrial Relations dated March 30, 1968 in Case No. 1926-V and the Resolution of the Court en banc dated July 6, 1968 denying two separate motions for reconsideration filed by petitioners and respondents.

The factual background of Case No. 1926-V is summarized by the respondent Court of Industrial Relations as follows:

"This is a verified petition dated March 17, 1964 which was subsequently amended on July 31, 1964 filed by Nardo Dayao and 70 others against Mercury Drug Co., Inc., and/or Mariano Que, President & General Manager, and Mercury Drug Co., Inc., Employees Association praying, with respect to respondent corporation and its president and general manager: 1) payment of their unpaid back wages for work done on Sundays and legal holidays plus 25% additional compensation from date of their employment up to June 30, 1962; 2) payment of extra compensation on work done at night; 3) reinstatement of Januario Referente and Oscar Echalar to their former positions with back salaries; and, as against the respondent union, for its disestablishment and the refund of all monies it had collected from petitioners.

"In separate motions, respondent management and respondent union move to dismiss, the first on the ground that:

"I. The petition states no cause of action.

"II. This Court has no jurisdiction over the subject of the claims of petitioners Januario Referente and Oscar Echalar.

"III . There is another action pending between the same parties, namely, Mercury Drug Co., Inc., and/or Mariano Que and Nardo Dayao.

while on the other hand, the second alleges that this Court has no jurisdiction over the acts complained of against the respondent union.

"For reasons stated in the Order dated March 24, 1965, this Court resolved the motions to dismiss, as follows:

"1 . Ground No. 1 of management's motion to dismiss was denied for lack of merit.

"2 . Its second ground was found meritorious and, accordingly Januario Referente and Oscar Echalar were dropped as party petitioners in this case.

"3 . The third ground was denied, holding that there still exists the employer-employee relationship between Nardo Dayao and the management.

"4 . With respect to the fourth ground, the Court held that on the basis of Section 7-A of C.A. No. 444, as amended by R.A. No. 1993, 'it can be safely said that, counting backward the three (3) year prescriptive period from the date of the filing of the instant petition - March 20, 1964 - all of petitioners' claims have not yet prescribed.'

"5. In so far as respondent union's motion is concerned, the Court held that 'petitioners' cause of action against the respondent Association should be dismissed without prejudice to the refiling of the same as an unfair labor practice case.'

"Only the respondent management moved to reconsider the Order of March 24, 1965 but the same was denied by the Court en banc in a resolution dated August 26, 1965. Respondent submitted an answer to the amended petition which was subsequently amended on January 6, 1966, containing some admissions and some denials of the material averments of the amended petition. By way of affirmative and special defenses, respondents alleged that petitioners have no cause of action against Mariano Que because their employer is respondent Mercury Drug Company, Inc., an existing corporation which has a separate and distinct personality from its incorporators, stockholders and/or officers; that the company being a service enterprise is excluded from the coverage of the Eight Hour Labor Law, as amended; that no court has the power to set wages, rates of pay, hours of employment or other conditions of employment to the extent of disregarding an agreement thereon between the respondent company and the petitioners, and of fixing night differential wages; that the petitioners were fully paid for services rendered under the terms and conditions of the individual contracts of employment; that the petition having been verified by only three of the petitioners without showing that the others authorized the inclusion of their names as petitioners does not confer jurisdiction to this Court; that there is no employer-employee relationship between management and petitioner Nardo Dayao and that his claim has been released and/or barred by another action; and that petitioners' claims accruing before March 20, 1961 have prescribed." (Annex "P", pp. 110-112, rollo).

After hearing on the merits, the respondent court rendered its decision. The dispositive portion of the March 30, 1968 decision reads:

"IN VIEW OF THE FOREGOING, the Court hereby resolves that:

"1 . The claim of the petitioners for payment of backwages corresponding to the first four hours work rendered on every other Sunday and first four hours on legal holidays should be denied for lack of merit.

"2 . Respondent Mercury Drug Company, Inc., is hereby ordered to pay the sixty-nine (69) petitioners:

"(a) An additional sum equivalent to 25% of their respective basic or regular salaries for services rendered on Sundays and legal holidays during the period from March 20, 1961 up to June 30, 1962; and

"(b) Another additional sum or premium equivalent to 25% of their respective basic or regular salaries for nighttime services rendered from March 20, 1961 up to June 30, 1962.

"3 . Petitioners' petition to convert them to monthly employees should be, as it is hereby, denied for lack of merit.

"4 . Respondent Mariano Que, being an officer and acted only as an agent in behalf of the respondent corporation, should be absolved from the money claims of herein petitioners whose employer, according to the pleadings and evidence, is the Mercury Drug Company, Inc.

"To expedite the computation of the money award, the Chief Court Examiner or his authorized representative is hereby directed to proceed to the office of the respondent corporation at Bambang Street, Sta. Cruz, Manila, the latter to make available to said employee its records, like time records, payrolls and other pertinent papers, and compute the money claims awarded in this decision and, upon the completion thereof, to submit his report as soon as possible for further disposition of the Court."

Not satisfied with the decision, the respondents filed a motion for its reconsideration. The motion for reconsideration, was however, denied by the Court en banc in its Resolution dated July 6, 1968.

Petitioner Mercury Drug Company, Inc., assigned the following errors in this petition:

I

RESPONDENT CIR ERRED IN DECLARING THE CONTRACTS OF EMPLOYMENT, EXHIBITS "A" AND "B", NULL AND VOID AS BEING CONTRARY TO PUBLIC POLICY AND IN SUSTAINING, ACCORDINGLY, PRIVATE RESPONDENTS' CLAIMS FOR 25% SUNDAY AND LEGAL HOLIDAY PREMIUMS BECAUSE SUCH DECLARATION AND AWARD ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, THUS INFRINGING UPON THE CARDINAL RIGHTS OF THE PETITIONER; AND ALSO BECAUSE THE VALIDITY OF SAID CONTRACTS OF EMPLOYMENT HAS NOT BEEN RAISED.

II

RESPONDENT CIR ERRED IN SUSTAINING PRIVATE RESPONDENTS' CLAIMS FOR NIGHTTIME WORK PREMIUMS NOT ONLY BECAUSE OF THE DECLARED POLICY ON COLLECTIVE BARGAINING FREEDOM EXPRESSED IN REPUBLIC ACT 875 AND THE EXPRESS PROHIBITION IN SECTION 7 OF SAID STATUTE, BUT ALSO BECAUSE OF THE WAIVER OF SAID CLAIMS AND THE TOTAL ABSENCE OF EVIDENCE THEREON.

III

RESPONDENT CIR ERRED IN MAKING AWARDS IN FAVOR OF THE PRIVATE RESPONDENTS WHO NEITHER GAVE EVIDENCE NOR EVEN APPEARED TO SHOW THEIR INTEREST.

Three issues are discussed by the petitioner in its first assignment of error. The first issue refers to its allegation that the respondent Court erred in declaring the contracts of employment null and void and contrary to law. This allegation is premised upon the following finding of the respondent court:

"But the Court finds merit in the claim for the payment of additional compensation for work done on Sundays and holidays. While an employer may compel his employees to perform service on such days, the law nevertheless imposes upon him the obligation to pay his employees at least 25% additional of their basic of regular salaries.

"No person, firm or corporation business establishment or place of center of labor shall compel an employee or laborer to work during Sundays and legal holidays unless he is paid an additional sum of at least twenty-five per centum of his regular remuneration: PROVIDED, HOWEVER, That this prohibition shall not apply to public utilities performing some public service such as supplying gas, electricity, power, water, or providing means of transportation or communication." (Section 4, C. A. No. 444) (Underlined supplied)

Although a service enterprise, respondent company's employees are within the coverage of C. A. No. 444, as amended known as the Eight Hour Labor Law, for they do not fall within the category or class of employees or laborers excluded from its provisions. (Section 2, *ibid*)

"The Court is not impressed by the argument that under the contracts of employment the petitioners are not entitled to such claim for the reason that the same are contrary to law. Payment of extra or additional pay for services rendered during Sundays and legal holidays is mandated by law. Even assuming that the petitioners had agreed to work on Sundays and legal holidays without any further consideration than their monthly salaries, they are not barred nevertheless from claiming what is due them, because such agreement is contrary to public policy and is declared null and void by law.

"Any agreement or contract between employer and the laborer or employee contrary to the provisions of this Act shall be null and void ab initio."

"Under the cited statutory provision, the petitioners are justified to receive additional amount equivalent to 25% of their respective basic or regular sala-ries for work done on Sundays and legal holidays for the period from March 20, 1961 to June 30, 1962." (Decision, pp. 119-120, rollo)

From a perusal of the foregoing statements of the respondent court, it can be seen readily that the petitioner-company based its arguments in its first assignment of error on the wrong premise. The contracts of employment signed by the private respondents are on a standard form, an example of which is that of private respondent Nardo Dayao quoted hereunder:

"Mercury Drug Co., Inc.
1580 Bambang, Manila

October 30, 1959

Mr. Nardo Dayao

1015 Sta. Catalina

Rizal Ave., Exten .

Dear Mr. Dayao:

You are hereby appointed as Checker, in the Checking Department of MERCURY DRUG CO., INC., effective July 1, 1959 and you shall receive an annual compensation the amount of Two Thousand four hundred pesos only (P2,400.00), that includes the additional compensation for work on Sundays and legal holidays.

Your firm being a Service Enterprise, you will be required to perform work every day in a year as follows:

8 Hours work on regular days and all special Holidays that may be declared but with the 25% additional compensation;

4 Hours work on every other Sundays of the month;

For any work performed in excess of the hours as above mentioned, you shall be paid 25% additional compensation per hour.

This appointment may be terminated without notice for cause and without cause upon thirty days written notice.

This supersedes your appointment of July 1, 1959.

Very truly yours,

MERCURY DRUG CO., INC.

(Sgd .) MARIANO QUE
General Manager

ACCEPTED WITH FULL CONFORMITY:

(Sgd .) NARDO DAYPO"
(EXHS. "A" and "1")
(Decision, pp. 114-115, rollo)

These contracts were not declared by the respondent court null and void in their entirety. The respondent court, on

the basis of the conflicting evidence presented by the parties, in effect: 1) rejected the theory of the petitioner company that the 25% additional compensation claimed by the private respondents for the four-hour work they rendered during Sundays and legal holidays provided in their contracts of employment were covered by the private respondents' respective monthly salaries; 2) gave credence to private respondents', (Nardo Dayao, Ernesto Talampas and Josias Federico) testimonies that the 25% additional compensation was not included in the private respondents' respective monthly salaries and 3) ruled that any agreement in a contract of employment which would exclude the 25% additional compensation for work done during Sundays and holidays is null and void as mandated by law.

On the second issue, the petitioner-company reiterated its stand that under the respective contracts of employment of the private respondents, the subject 25% additional compensation had already been included in the latter's respective monthly salaries. This contention is based on the testimony of its lone witness, Mr. Jacinto Concepcion and pertinent exhibits. Thus:

"Exhibit A shows that for the period of October 30, 1960, the annual compensation of private respondent Nardo Dayao, including the additional compensation for the work he renders during the first four (4) hours on every other Sunday and on the eight (8) Legal Holidays at the time was P2 ,400.00 or P200.00 per month. These amounts did not represent basic salary only, but they represented the basic daily wage of Nardo Dayao considered to be in the amount of P7.36 x 305 ordinary working days at the time or in the total amount of P2 ,244.80. So plus the amount of P156.40 which is the equivalent of the Sunday and Legal Holiday rate at P9.20 (basic rate of P7.36 plus 25% thereof or P1.84) x 17, the latter figure representing 13 Sundays and 4 Legal Holidays of 8 hours each. x x x

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"That the required minimum 25% Sunday and Legal Holiday additional compensation was paid to and received by the employees for the work they rendered on every other Sunday and on the eight Legal Holidays for the period October, 1959 to June 30, 1962 is further corroborated by Exhibits 5, 6, 8, 9 and 9-A and the testimony of Mr. Jacinto Concepcion thereon." (Brief for the Petitioner, pp. 24, 27).

The aforesaid computations were not given credence by the respondent court. In fact the same computations were not even mentioned in the court's decision which shows that the court found such computations incredible. The computations, supposedly patterned after the WAS Interpretative Bulletin No. 2 of the Department Labor demonstrated in Exhibits "6", "7", "8", "9", and "9-A", miserably failed to show the exact and correct annual salary as stated in the respective contracts of employment of the respondent employees. The figures arrived at in each case did not tally with the annual salaries on the employees' contracts of employment, the difference varying from P1.20 to as much as P14.40 always against the interest of the employees. The petitioner's defense consists of mathematical computations made after the filing of the case in order to explain a clear attempt to make its employees work without the extra compensation provided by law on Sundays and legal holidays.

In not giving weight to the evidence of the petitioner-company, the respondent court sustained the private respondents' evidence to the effect that their 25% additional compensation for work done on Sundays and Legal Holidays were not included in their respective monthly salaries. The private respondents presented evidence through the testimonies of Nardo Dayao, Ernesto Talampas, and Josias Federico who are themselves among the employees who filed the case for unfair labor practice in the respondent court and are private respondents herein. The petitioner-company's contention that the respondent court's conclusion on the issue of the 25% additional compensation for work done on Sundays and legal holidays during the first four hours that the private respondents had to work under their respective contracts of employment was not supported by substantial evidence is, therefore, unfounded. Much less do We find any grave abuse of discretion on the part of the respondent court in

its interpretation of the employment contract's provision on salaries. In view of the controlling doctrine that a grave abuse of discretion must be shown in order to warrant our disturbing the findings of the respondent court, the reversal of the court's findings on this matter is unwarranted. (*Sanchez vs. Court of Industrial Relations*, 27 SCRA 490).

The last issue raised in the first assignment of error refers to a procedural matter. The petitioner-company contends that the question as to whether or not the contracts of employment were null and void was not put in issue, hence, the respondent court pursuant to the Rules of Court should have refrained from ruling that such contracts of employment were null and void. In this connection We restate our finding that the respondent court did not declare the contracts of employment null and void in their entirety. Only the objectionable features violative of law were nullified. But even granting that the Court of Industrial Relations declared the contracts of employment wholly void, it could do so notwithstanding the procedural objection. In *Sanchez v. Court of Industrial Relations*, *supra*, this Court speaking through then Justice, now Chief Justice Enrique M. Fernando, stated:

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"Moreover, petitioners appear to be oblivious of the statutory mandate that respondent Court in the hearing, investigation and determination of any question or controversy and in the exercise of any of its duties or powers is to act 'according to justice and equity and substantial merits of the case, without regard to technicalities or legal forms and shall not be bound by any technical rules of legal evidence' informing its mind 'in such manner as it may deem just and equitable.' Again, this Court has invariably accorded the most hospitable scope to the breadth and amplitude with which such provision is couched. So it has been from the earliest case decided in 1939 to a 1967 decision."

Two issues are raised in the second assignment of error by the petitioner-company. The first hinges on the jurisdiction of the respondent court to award additional compensation for nighttime work. Petitioner wants Us to re-examine Our rulings on the question of nighttime work. It contends that the respondent court has no jurisdiction to award additional compensation for nighttime work because of the declared policy on freedom of collective bargaining expressed in Republic Act 875 and the express prohibition in Section 7 of the said statute. A re-examination of the decisions on nighttime pay differential was the focus of attention in *Rheem of the Philippines, Inc. et al. v. Ferrer, et al* (19 SCRA 130). The earliest cases cited by the petitioner-company, *Naric v. Naric Workers Union*, L-12075, May 29, 1959 and *Philippine Engineers' Syndicate v. Bautista*, L-16440, February 29, 1964, were discussed lengthily. Thus -

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"2 . On the claim for night differentials, no extended discussion is necessary. To be read as controlling here is *Philippine Engineers' Syndicate, Inc. vs. Hon. Jose S. Bautista, et al.*, L-16440, February 29, 1964, where this Court, speaking thru Mr. Chief Justice Cesar Bengzon, declared –

""Only one issue is raised: whether or not upon the enactment of Republic Act 875, the CIR lost its jurisdiction over claims for additional compensation for regular night work. Petitioner says that this Act reduced the jurisdiction of respondent court and limited it to specific cases which this Court has defined as: 'x x x (1) when the labor dispute affects an industry which is indispensable to the national interest and is so certified by the President to the industrial court (Sec. 10, Republic Act 875); (2) when the controversy refers to minimum wage under the Minimum Wage Law (Republic Act 602); (3) when it involves hours of employment under the Eight-Hour Labor Law (Commonwealth Act 444) and (4) when it involves an unfair labor practice [Sec. 5(a), Republic Act 875]', [*Paflu, et al. vs. Tan, et al.*, 52 Off. Gaz, No. 13, 5836].

"Petitioner insists that respondents' case falls in none of these categories because as held in two previous cases,

night work is not overtime but regular work; and that respondent court's authority to try the case cannot be implied from its 'general jurisdiction and broad powers' under Commonwealth Act 103 because Republic Act 875 precisely curbed such powers limiting them to certain specific litigations, beyond which it is not permitted to act.

"We believe petitioner to be in error. Its position collides with our ruling in the Naric case [National Rice & Corn Corp. (NARIC) vs. NARIC Workers' Union, et al., G.R. No. L-12075, May 29, 1959] where we held:

"While it is true that this Court made the above comment in the aforementioned case, it does not intend to convey the idea that work done at night cannot also be an overtime work. The comment only served to emphasize that the demand which the Shell Company made upon its laborers is not merely overtime work but night work and so there was need to differentiate night work from daytime work. In fact, the company contended that there was no law that required the payment of additional compensation for night work unlike an overtime work which is covered by Commonwealth Act No. 444 (Eight-Hour Labor Law). And this Court in that case said that while there was no law actually requiring payment of additional compensation for night work, the industrial court has the power to determine the wages that night workers should receive under Commonwealth Act No. 103, and so it justified the additional compensation in the Shell case for 'hygienic, medical, moral, cultural and sociological reasons.'"

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True, in Paflu, et al. vs. Tan, et al., supra, and in a series of cases thereafter, We held that the broad powers conferred by Commonwealth Act 103 on the CIR may have been curtailed by Republic Act 875 which limited them to the four categories therein expressed in line with the public policy of allowing settlement of industrial disputes via the collective bargaining process; but We find no cogent reason for concluding that a suit of this nature for extra compensation for night work falls outside the domain of the industrial court. Withal, the record does not show that the employer-employee relation between the 65 respondents and the petitioner had ceased.

After the passage of Republic Act 875, this Court has not only upheld the industrial court's assumption of jurisdiction over cases for salary differentials and overtime pay [Chua Workers Union (NLU) vs. City Automotive Co., et al., G.R. No. L-11655, April 29, 1959; Prisco vs. CIR, et al., G.R. No. L-13806, May 23, 1960] or for payment of additional compensation for work rendered on Sundays and holidays and for night work [Nassco vs. Almin, et al., G.R. No. L-9055, November 28, 1958; Detective & Protective Bureau, Inc. vs. Felipe Guevara, et al., G.R. No. L-8738, May 31, 1957] but has also supported such court's ruling that work performed at night should be paid more than work done at daytime, and that if that work is done beyond the worker's regular hours of duty, he should also be paid additional compensation for overtime work. [Naric vs. Naric Workers' Union, et al., G.R. No. L-12075, May 29, 1959, citing Shell Co. vs. National Labor Union, 81 Phil. 315]. Besides, to hold that this case for extra compensation now falls beyond the powers of the industrial court to decide, would amount to a further curtailment of the jurisdiction of said court to an extent which may defeat the purpose of the Magna Carta to the prejudice of labor.' [Luis Recato Dy, et al. vs. CIR, G.R. No. L-17788, May 25, 1962]"

The petitioner-company's arguments on the respondent court's alleged lack of jurisdiction over additional compensation for work done at night by the respondents is without merit.

The other issue raised in the second assignment of error is premised on the petitioner-company's contention that the respondent court's ruling on the additional compensation for nighttime work is not supported by substantial evidence.

This contention is untenable. Pertinent portions of the respondent court's decision read:

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"There is no serious disagreement between the petitioners and respondent management on the facts recited above. The variance in the evidence is only with respect to the money claims. Witnesses for petitioners declared they worked on regular days and on every other Sunday and also during all holidays; that for services rendered on Sundays and holidays they were not paid for the first four (4) hours and what they only received was the overtime compensation corresponding to the number of hours after or in excess of the first four after or in excess of the first four hours; and that such payment is being indicated in the overtime pay for work done in excess of eight hours on regular working days. It is also claimed that their nighttime services could well be seen on their respective daily time records. xx Underlined supplied) (p. 116, rollo)

The respondent court's ruling on additional compensation for work done at night is, therefore, not without evidence. Moreover, the petitioner-company did not deny that the private respondents rendered nighttime work. In fact, no additional evidence was necessary to prove that the private respondents were entitled to additional compensation for whether or not they were entitled to the same is a question of law which the respondent court answered correctly. The "waiver rule" is not applicable in the case at bar. Additional compensation for nighttime work is founded on public policy, hence the same cannot be waived. (Article 6, Civil Code). On this matter, We believe that the respondent court acted according to justice and equity and the substantial merits of the case, without regard to technicalities or legal forms and should be sustained.

The third assignment of error is likewise without merit. The fact that only three of the private respondents testified in court does not adversely affect the interests of the other respondents in the case. The ruling in *Dimayuga v. Court of Industrial Relations* (G.R. No. L-0213, May 27, 1957) has been abandoned in later rulings of this Court. In *Philippine Land-Air-Sea Labor Union (PLASLU) v. Sy Indong Company Rice And Corn Mill* (11 SCRA 277) We had occasion to re-examine the ruling in *Dimayuga*. We stated:

"The latter reversed the decision of the trial Judge as regards the reinstatement with backwages of x x x upon the theory that this is not a class suit; that, 'consequently, it is necessary and imperative that they should personally testify and prove the charges in the complaint'; and that, having failed to do so, the decision of the trial Judge in their favor is untenable under the rule laid down in *Dimayuga vs. Court of Industrial Relations*, G.R. No. L-0213 (May 27, 1957).

"We do not share the view taken in the resolution appealed from. As the trial Judge correctly said, in his dissent from said resolution : ..."

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In the case of *Sanchez v. Court of Industrial Relations*, *supra*, this Court stated:

"To the reproach against the challenged order in the brief of petitioners in view of only two of the seven claimants testifying, a statement by this Court in *Ormoc Sugar Co., Inc. vs. OSCO Workers Fraternity Labor Union* would suffice by way of refutation. Thus: 'This Court fully agrees with the respondent that quality and not quantity of witnesses should be the primordial consideration in the appraisal of evidence.' Barely eight days later, in another decision, the above statement was given concrete expression. Thus: 'The bases of the awards were not only the respective affidavits of the claimants but the testimonies of 24 witnesses (because 6 were not given credence by the court below) who identified the said 239 claimants. The contention of petitioners on this point is therefore unfounded'. Moreover in *Philippine Land-Air-Sea Labor Union (PLASLU) v. Sy Indong Company Rice & Corn Mill*, this Court, through the present Chief Justice, rejected as untenable the theory of the Court of Industrial Relations concerning the imperative needs of all the claimants to testify personally and prove their charges in the complaint. As tersely put: 'We do not share the view taken in the resolution appealed from.'"

The petitioner's contention that its employees fully understood what they signed when they entered into the contracts of employment and that they should be bound by their voluntary commitments is anachronistic in this

time and age.

The Mercury Drug Co., Inc ., maintains a chain of drugstores that are open every day of the week and, for some stores, up to very late at night because of the nature of the pharmaceutical retail business. The respondents knew that they had to work Sundays and holidays and at night, not as exceptions to the rule but as part of the regular course of employment. Presented with contracts setting their compensation on an annual basis with an express waiver of extra compensation for work on Sundays and holidays, the workers did not have much choice. The private respondents were at a disadvantage insofar as the contractual relationship was concerned. Workers in our country do not have the luxury or freedom of declining job openings or filing resignations even when some terms and conditions of employment are not only onerous and inequitable but illegal. It is precisely because of this situation that the framers of the Constitution embodied the provisions on social justice (Section 6, Article II) and protection to labor (Section 9, Article II) in the Declaration of Principles And State Policies.

It is pursuant to these constitutional mandates that the courts are ever vigilant to protect the rights of workers who are placed in contractually disadvantageous positions and who sign waivers or provisions contrary to law and public policy.

WHEREFORE, the petition is hereby dismissed. The decision and resolution appealed from are affirmed with costs against the petitioner.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Melencio-Herrera, Plana, Vasquez, and Relova, JJ., concur.

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