

**JESSIE H. ESPOLONG, LEVI R. PASCUAL AND LEO R. PASCUAL,
PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION
(FIFTH DIVISION), TOP RATE CONSTRUCTION AND GENERAL
SERVICES, INC. A...**

Ponente: VILLON, J.

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VILLON, J.:

This is a petition for certiorari under Rule 65 of the 1997 Rules of Civil Procedure, as amended, assailing, on grounds of grave abuse of discretion amounting to lack or excess of jurisdiction, the decision[1] dated June 8, 2012 and the resolution[2] dated July 30, 2012 of public respondent National Labor Relations Commission (NLRC), Fifth Division, in NLRC LAC No. 01-000275-12. The said issuances overturned the decision[3] dated October 28, 2011 of Labor Arbiter (LA) Joel S. Lustria in NLRC-NCR Case No. 05-06882-11 which, in turn, found merit in the complaint for illegal dismissal and non-payment of separation pay filed by petitioners Jessie H. Espolong (or “Jessie”), Levi R. Pascual (or “Levi”) and Leo R. Pascual (or “Leo”).

The factual and procedural antecedents of the case are hardly in dispute.

Leo, Jessie and Levi were hired by private respondent Top Rate Construction and General Services, Inc. (or “Top Rate”) as janitors/members of the maintenance crew sometime in October 1995,[4] January 1997,[5] and December 1998,[6] respectively. They were all assigned to perform their tasks and duties at BF Homes Subdivision, Las Piñas City (or “BF Homes”). On January 13, 2011, however, BF Homes informed Top Rate that due to its cost-cutting program, it was turning over to the latter the janitorial and maintenance personnel assigned thereat, including petitioners, at the end of the month.[7] On January 31, 2011, petitioners were informed by private respondent Raul Nelson S. Sanares (or “Sanares”), Vice President of Top Rate, that they had been terminated from their employment effective on that same day.

Thereafter, petitioners instituted the instant case before the arbitration branch of the NLRC.[8] Petitioners argued that they were regular employees because, in addition to the length of their tenure with the company, their positions were usually necessary or desirable to the business of Top Rate. Hence, they were illegally dismissed from employment.

Private respondents disagreed with petitioners' assertion. They averred that petitioners were contractual employees whose terms merely expired when BF Homes terminated the janitorial and maintenance phase of work of its service agreement with Top Rate. They also claimed that Top Rate is a legitimate job contractor pursuant to Department Order (DO) No. 18-02, series of 2002[9] of the Department of Labor and Employment (DOLE). Hence, petitioners were not even entitled to separation pay.

The LA found merit in petitioners' cause of action. The pertinent portions of his decision dated October 28, 2011 are quoted hereinbelow, to wit:

“xxx Complainants' dismissal is anchored on the fact that respondents' service agreement to (sic) its client, BF

Homes was terminated because of the cost-cutting program that the latter has adopted. Thus, respondents consequently deemed complainants' contractual employment as having expired also, which to us, deserved scant consideration. It must be stressed that herein complainants is (sic) not privy to the service agreement or whatever contracts that respondents and its (sic) client BF Homes may have. Complainants have nothing to do with the termination of the service agreement between herein respondents and its (sic) client, BF Homes. In short, complainants were unceremoniously dismissed.

xxx xxx xxx

WHEREFORE, premises considered, judgment is hereby rendered, declaring respondents guilty of illegal dismissal. Accordingly, respondents are hereby ordered jointly and severally liable:

1)

To pay complainants the amounts of which, opposite their respective names, representing their backwages, computed only up to the promulgation of this decision:

Names

Separation Pay

Jessie H. Espolong

P102,774.22

Levi R. Pascual

P102,774.22

Leo R. Pascual

P102,774.22

2)

To pay complainants the amounts of which, opposite their respective names, representing their separation pay:

Names

Separation Pay

Jessie H. Espolong

P147,056.00

Levi R. Pascual

P136,552.00

Leo R. Pascual

P168,064.00

SO ORDERED.”[10]

On December 23, 2011, private respondents interposed an appeal[11] before the NLRC which, in its February 28, 2012 resolution, dismissed the same on technical grounds. Thus:

“Respondents seasonably filed their Appeal on December 23, 2012 (sic) with a P759,994.66 surety bond issued by Plaridel Surety and Insurance Company, per PSIC Bond No. 00170 JCL (15). However, the surety

was not accompanied by a copy of their Indemnity Agreement with the bonding company and a copy of the security deposit or collateral securing the bond, as required in the aforesaid Rule. Being so, it is as if no bond was filed.

The posting of the bond is indispensable to the perfection of an appeal in cases involving monetary awards from the decision of the Labor Arbiter. The posting of the bond is not only mandatory but a jurisdictional requirement as well, and non-compliance therewith rendered the decision of the Labor Arbiter final and executory.

Thus, Respondents are deemed to have lost their appeal due to non-perfection.

WHEREFORE, premises considered, the respondents' Memorandum of Appeal is DISMISSED for non-perfection.

SO ORDERED.”[12]

Private respondents sought a reconsideration[13] of the above resolution, attaching therewith a copy of the requisite Indemnity Agreement[14] and an Official Receipt[15] of covering their P759,994.66 cash collateral, both dated December 21, 2011. The aforesaid resolution was set aside and private respondents' appeal was reinstated. On June 8, 2012, the NLRC rendered the assailed decision reversing the ruling of the LA, ratiocinating as follows:

"Indeed, the provisions of Department Order 18-02 [Series of 2002] which implement Articles 106 to 109 of the Labor Code on sub-contracting, are applicable in this case.

"That respondent corporation is a legitimate job contractor is borne out by the evidence on record evincing its registration with the Securities (and) Exchange Commission and the Department of Labor and Employment, and by the service contracts it has entered into with various entities.

"As provided in paragraph [a], Section 4, of Department Order 18-02 [Series of 2002], 'contracting' or 'subcontracting' refers to an arrangement whereby a principal agrees to put out or farm out with a contractor or subcontractor the performance or completion of a specific job, work or service within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal as hereinafter qualified.

"In this case, respondent company's client, BF Homes had a service contract with the former, which was renewed on a regular basis. It was under these service contracts that the complainants were deployed to perform janitorial services to the client, and undisputedly, their assignment was covered by separate contracts, duly signed by the complainants, and providing for a specific duration, salary rate and containing the express provision, to wit:

'xxx

- Ang kontratang ito ay nasasakupan ng mga batas at alituntunin ng tanggapan at mawawalang bisa pagkatapos ng kontrata ng Top Rate Construction & General Services, Inc. at BF HOMES, INCORPORATED sa petsang isinasaad ng kontrata or sa anumang araw na tapusin ng BF HOMES, INCORPORATED ang kontrata ng Top Rate Construction & General Services, Inc.'

"Evidently, the complainants' continued employment was dependent on the existence of a valid service contract with the client to whom they were assigned to render janitorial services.

"It has been held that the decisive determinant in term employment should not be the activities that the employee is called upon to perform, but the day certain agreed upon by the parties for the commencement and termination of their employment relationship.

"All told, the subsequent expiration of the complainants' assignment at BF Homes Inc., and the subsequent non-renewal of their services did not make respondent liable for unjustified termination, as what transpired in the complainants' case is the expiration and non-renewal of a valid employment contract.

xxx xxx xxx

WHEREFORE, premises considered, the Decision of Labor Arbiter Joel S. Lustria dated October 28, 2011 is VACATED and SET ASIDE and a new one entered DISMISSING the complaint for lack of merit.

SO ORDERED."[16]

Petitioners' motion for reconsideration[17] was denied in the assailed July 30, 2012 resolution for being filed out of time, thus:

"As evidenced in the registry return card, complainants through counsel received a copy of the Commission's Decision on June 16, 2012 giving complainants until June 27, 2012 since June 26, 2012 falls on a Sunday to seasonably move for reconsideration.

"However, records disclose that complainants' Motion for Reconsideration was personally filed on June 28, 2012 and was received by the NLRC 5th Division on June 29, 2012. Complainants have in effect waived their right to move for reconsideration for failure to comply with the jurisdictional requirement of filing a Motion within the ten [10]-day reglementary period.

"WHEREFORE, premises considered, the Motion for Reconsideration of complainants is DENIED for being filed out of time.

SO ORDERED."

[18]

Hence the present recourse, petitioners raising the following issues, to wit:

I.THE HONORABLE PUBLIC RESPONDENT GRAVELY ABUSED ITS DISCRETION WHICH AMOUNTS TO LACK OR IN EXCESS OF JURISDICTION WHEN IT WHEN (SIC) DISMISSED PETITIONERS' MOTION FOR RECONSIDERATION MERELY ON TECHNICAL GROUND;

II.THE HONORABLE PUBLIC RESPONDENT GRAVELY ABUSED ITS DISCRETION WHICH AMOUNTS TO LACK OR IN EXCESS OF JURISDICTION WHEN IT FAILED TO APPRECIATE MATERIAL FACTS SHOWING THAT PETITIONERS ARE REGULAR EMPLOYEES;

III.THE HONORABLE PUBLIC RESPONDENT GRAVELY ABUSED ITS DISCRETION WHICH AMOUNTS TO LACK OR IN EXCESS OF JURISDICTION WHEN IT MISTAKENLY APPLIED DOLE DEPARTMENT ORDER NO. 18-02, SERIES OF 2002 AND CITED INAPPLICABLE JURISPRUDENCE.[19]

It is well settled that rules of procedure in labor cases may be relaxed.[20] The said rules should not be applied in a very rigid and technical sense.[21] Thus, We find that the minor lapses on the part of the petitioners, specifically delay of only one (1) day in the filing of motion for reconsideration of the assailed NLRC decision is excusable in light of the aforesaid jurisprudential doctrine.

Now, on the substantive aspect of the case. Petitioners contend that as janitors/members of the maintenance crew who have been with the company for thirteen (13) to sixteen (16) years, their services are usually necessary or desirable to Top Rate since it is engaged in the business of providing general services to its clients. Thus, they submit that the contracts of employment[22] which redefine the nature of their relationship with Top Rate are contrary to law and public policy.

It should be emphasized that the parties in this case executed contracts denominated as “Pagkahirang bilang Kontraktual na Kawani,” stipulating that it shall be effective for one (1) year or until the cancellation of Top Rate's service agreement with BF Homes. The contract engaging the services of Jessie is quoted herein below, to wit:

“Ikinalulugod na ipaalam sa iyo ng pamunuan ng TOP RATE CONSTRUCTION & GENERAL SERVICES, INC. na ikaw ay nahirang bilang Subd. Maintenance itinalaga sa BF HOMES, INCORPORATED simula May 19, 2010 hanggang May 18, 2011, sa ilalim ng mga sumusunod na tagubilin at patakaran:

- Tatanggap ka ng kabuuang suweldo na nagkakahalaga ng P382.00 kada araw at ito ay babayaran dalawang beses isang buwan hanggang sa matapos ang kontratang ito.
- Ipinaalam na kung ang iyong serbisyo ay hindi sapat sa inaasahan ng mga nakatataas o di kaya ikaw ay sumuway sa batas at alituntunin ng tanggapan at ng tanggapang pinagtalagahan, ang kontratang ito ay ipawawalang bisa.
- Ang kontratang ito ay nasasakupan ng mga batas at alituntunin ng tanggapan at mawawalang bisa pagkatapos ng kontrata ng Top Rate Construction & General Services, Inc. at BF HOMES, INCORPORATED sa petsang isinasaad ng kontrata o sa anumang araw na tapusin ng BF HOMES, INCORPORATED ang kontrata ng Top Rate Construction & General Services, Inc.

xxx xxx xxx”[23]

Except for the covered periods and amount of salary, the contracts with petitioners Levi and Leo are of the same terms and conditions.

Applying relevant laws and jurisprudence, petitioners can be considered as project employees under the terms and conditions provided in Section 9 of DO No. 18-02, to wit:

- “(a) The specific description of the job, work or service to be performed by the contractual employee;
- (b) The place of work and terms and conditions of employment, including a statement of the wage rate applicable to the individual contractual employee; and
- (c) The term or duration of employment, which shall be coextensive with the contract of the principal and subcontractor, or with the specific phase for which the contractual employee is engaged, as the case may be.”

The principal test for determining whether an employee is a project employee, as distinguished from a regular employee, is whether or not he is assigned to carry out a specific project or undertaking, the duration and scope of which are specified at the time he is engaged for the project.[24] In a number of cases, the Supreme Court has held that the length of service or the re-hiring of construction workers on a project-to-project basis does not confer upon them regular employment status, since their re-hiring is only a natural consequence of the fact that experienced construction workers are preferred. Employees who are hired for carrying out a separate job, distinct from the other undertakings of the company, the scope and duration of which has been determined and made known to the employees at the time of the employment, are properly treated as project employees and their services may be lawfully terminated upon the completion of a project.[25]

Evidently, the contracts signed by petitioners clearly define the works or services to be performed, and the place of work, in relation to the service agreement between BF Homes and Top Rate. The termination of the janitorial and maintenance phase of work as defined in the said service agreement resulted to the valid termination of petitioners' employment. Consequently, they are not entitled to the reliefs herein prayed for.

Furthermore, the Court cannot subscribe to petitioners' claim that Top Rate is involved in labor-only contracting. Book III, Rule VIII, Sections 8 and 9 of the Omnibus Rules Implementing the Labor Code define job contracting and labor-only contracting as follows:

“Section 8. Job Contracting. — There is job contracting permissible under the Code if the following conditions are met:

(a)

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

(b)

investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of his business.

Section 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 Rule, the Secretary of Labor and Employment 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.”

Permissible job contracting or subcontracting refers to an arrangement whereby a principal agrees to put out or farm out to a contractor or subcontractor the performance or completion of a specific job, work or service within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal. In contrast, labor-only contracting, a prohibited act, is an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal.[26] In distinguishing between permissible job contracting and prohibited labor-only contracting, the Supreme Court declared in *Alexander Vinoya v. NLRC*[27] that “it is not enough to

show substantial capitalization or investment in the form of tools, equipment, machineries and work premises, among others, to be considered as an independent contractor. In fact, jurisprudential holdings are to the effect that in determining the existence of an independent contractor relationship, several factors might be considered such as, but not necessarily confined to, whether the contractor is carrying on an independent business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of specified pieces of work; the control and supervision of the workers; the power of the employer with respect to the hiring, firing and payment of the workers of the contractor; the control of the premises; the duty to supply premises, tools, appliances, materials and labor; and the mode, manner and terms of payment.”

In the instant case We find substantial evidence to support the finding that Top Rate is a legitimate job contractor. It must be noted that Top Rate was registered under DOLE Certificate of Registration No. NCR-5-0705-537 stating, *inter alia*:

“CERTIFICATE OF REGISTRATION

Numbered NCR-5-0705-537

TIN: 000-413-836-000

issued to

TOP RATE CONSTRUCTION &
GENERAL SERVICES, Inc.

2/F TLC Centre,

15 Aguirre Avenue, BF Homes,

Parañaque City

for having complied with the requirements as provided under the Labor Code, as amended, and its Implementing Rules and having paid registration fee in the amount of ONE HUNDRED PESOS (P100.00) per Official Receipt Number 2552891-D, dated 28 July 2005.

In witness whereof, and by authority vested in me by the Labor Code, as amended, and its Implementing Rules specifically Department Order No. 18-02, Series of 2002 entitled Rules Implementing Articles 106 to 109 of the Labor Code, as amended, I have hereunto set my hand and affixed the Official Seal of National Capital Region, Department of Labor and Employment, Malate, Manila on this 28th day of July, 2005.

xxx xxx xxx”[28]

The DOLE certificate having been issued by a public officer, it carries with it the presumption that it was issued in the regular performance of official duty.[29] In the absence of proof, petitioners' bare assertion cannot prevail over this presumption. Moreover, the DOLE being the agency primarily responsible for regulating the business of independent job contractors, We can presume in the absence of evidence to the contrary that it thoroughly evaluated the requirements submitted by Top Rate as a precondition to the issuance of the Certificate of Registration.[30]

The conclusion that Top Rate is a legitimate job contractor is further bolstered by its General Information Sheet (GIS) which reveals a total paid-up capital stock of P38,000,000.00, along with service agreements with various clients such as Banco Filipino Savings & Mortgage Bank,[31] Pilar Development Corporation,[32] BF Citi Land Corporation,[33] Good Shepherd Realty Corporation,[34] Top Management Programs, Corporation,[35] BF Citi Realty Corporation,[36] Citibuilders, Inc.,[37] and Intra Construction and Trading Corporation.[38] Top Rate thus cannot be considered a labor-only contractor.

A writ of certiorari is an extraordinary prerogative writ that is never demandable as a matter of right. To warrant the issuance thereof, the abuse of discretion must have been so gross or grave, as when there was such capricious

and whimsical exercise of judgment equivalent to lack of jurisdiction; or the exercise of power was done in an arbitrary or despotic manner by reason of passion, prejudice, or personal hostility. The abuse must have been committed in a manner so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[39] Nothing of that sort is obtaining in this case.

WHEREFORE, in light of all the foregoing, the petition is hereby DENIED for lack of merit. The assailed issuances of the National Labor Relations Commission are hereby AFFIRMED and UPHELD.

SO ORDERED.

Sadang, M.Q.C.,[*] and Corales, P.B., JJ., concur.

[*] Acting Senior Member vice Justice Florito S. Macalino per Office Order No. 469-14-ABR dated November 14, 2014

[1] Rollo, pp. 30-38.

[2] Rollo, pp. 26-28.

[3] Rollo, pp. 40-47.

[4] Rollo, pp. 105-106.

[5] Rollo, pp. 101-104.

[6] Rollo, pp. 107-108.

[7] Rollo, p. 353.

[8] Rollo, pp. 85-88.

[9] Rules Implementing Articles 106 to 109 of the Labor Code, as amended.

[10] Rollo, pp. 45, 47.

[11] Rollo, pp. 150-167.

[12] Rollo, p. 76.

[13] Rollo, pp. 197-200.

[14] Rollo, pp. 207-208.

[15] Rollo, p. 210.

[16] Rollo, pp. 34-36, 38.

[17] Rollo, pp. 188-196.

[18] Rollo, p. 27.

[19] Rollo, p. 10.

[20] Roy D. Pasos v. Philippine National Construction Corporation, G.R. No. 192394, July 3, 2013.

[21] Millennium Erectors Corporation v. Virgilio Magallanes, G.R. No. 184362, November 15, 2010.

[22] Rollo, pp. 305-352.

[23] Rollo, p. 305.

[24] D.M. Consunji Corporation v. Rogelio P. Bello, G.R. No. 159371, July 29, 2013.

[25] Wilfredo Aro v. NLRC, G.R. No. 174792, March 7, 2012 citing Abesco Construction and Development Corporation v. Alberto Ramirez, G.R. No. 141168, April 10, 2006; Filipinas Pre-Fabricated Building System (Filsystem), Inc. v. Roger D. Puente, G.R. No. 153832, March 18, 2005; Isaac Cioco, Jr. v. C.E. Construction Corporation, G.R. Nos. 156748 and 156896, September 8, 2004; and D.M. Consunji, Inc. v. NLRC, G.R. No. 116572, December 18, 2000.

[26] Rolando Sasan, Sr. v. NLRC, G.R. No. 176240, October 17, 2008.

[27] G.R. No. 126586. February 2, 2000.

[28] Rollo, p. 245.

[29] Ramy Gallego v. Bayer Philippines, Inc., G.R. No. 179807, July 31, 2009.

[30] Sasan v. NLRC, *supra*.

[31] Rollo, pp. 246-251.

[32] Rollo, pp. 252-255.

[33] Rollo, pp. 256-260.

[34] Rollo, pp. 261-265.

[35] Rollo, pp. 266-270.

[36] Rollo, pp. 271-275.

[37] Rollo, pp. 276-279.

[38] Rollo, pp. 280-291.

[39] Ebrencio F. Indoyon, Jr. v. Court of Appeals, G.R. No. 193706, March 12, 2013.

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