

RICARDO FERNANDEZ, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION AND D.M. CONSUNJI, INC., RESPONDENTS.

G.R. No. 106090. February 28, 1994

Ponente: NOCON, J.

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NOCON, J.:

Forming the crux of the matter in this petition for certiorari is the question of whether or not the National Labor Relations Commission acted with grave abuse of discretion in reversing the Labor Arbiter's decision by dismissing the complaints for illegal dismissal, one of which is petitioner's, on the finding that they were project employees.

Petitioner was hired as a laborer at the D.M. Consunji, Inc., a construction firm, on November 5, 1974. He became a skilled welder and worked for private respondent until March 23, 1986 when his employment was terminated on the ground that the project petitioner had been assigned to was already completed and there was no more work for him to do.

Skeptic of private respondent's reason, petitioner brought his plight before the Labor Arbiter who consolidated the same with three (3) other separate complaints for illegal dismissal and various money claims against private respondent. After filing their respective position papers and other documents pertinent to their causes/defenses, the parties agreed to submit the case for decision based on record.

On May 12, 1988, Labor Arbiter Fernando V. Cinco rendered a decision, finding that complainants worked continuously in various projects ranging from five (5) to twenty (20) years and belonged to a work pool, the dispositive portion of which states as follows:

"WHEREFORE, premises considered, the terminations by respondent of herein complainants are hereby declared illegal. Consequently, respondent is ordered to reinstate the complainants, who have not yet reached the retirement age to their former positions plus backwages of one (1) year.

"Anent complainants who have already reached the retirement age of sixty (60) years as of the date of this decision, respondent is thereby ordered to pay said complainants their retirement/separation benefits equivalent to one half (1/2) month salary for every year of service, a fraction of at least six (6) months being considered as one (1) whole year.

"Moreover, respondent is ordered to pay all complainants their service incentive leave for the past three (3) years; and to pay complainants Ricardo Fernandez, Gaudencio Merhan and Rolando Serona their 13th month pay likewise for the past three (3) years.

The complaints of Amador Borromeo, Jesus Espiritu and Ramon Celestial are hereby dismissed in view of their receipt of Separation pay and their execution of quitclaims in favor of herein respondent.

"The other claims are likewise dismissed for lack of merit.

"SO ORDERED.

"Metro Manila, Philippines. 12 May 1988." [1]

Private respondent questioned on appeal the aforesaid decision of the Labor Arbiter on the ground that the complainants were all project employees who were hired on a project-to-project basis, depending on the availability of projects that the former was able to close with its clients. Respondent pointed to the gaps in complainants' respective employment histories to show that they were indeed hired on an "off-and-on" basis.

In view of the lack of evidence on record to prove the continuous employment of complainants-appellees, and that on the contrary, what was proven was the intermittent nature of their work as shown by the different project contracts, the respondent Commission concluded that complainants-appellees were project employees. The dispositive portion of the decision dated September 29, 1989 of respondent Commission reads:

"WHEREFORE, the decision of the Labor Arbiter is hereby set aside and a new one entered dismissing the complaints filed by complainants-appellees for lack of merit." [2]

From said decision, the complainants-appellees interposed a motion for reconsideration which was denied for lack of merit on July 19, 1991. Respondent Commission affirmed its finding that complainants-appellees were project employees. As such, the nature of their employment did not change by the number of projects in which they have rendered service. Respondent Commission also noted that the motion for reconsideration was filed only on January 29, 1990 which was beyond the ten-day reglementary period from date of receipt of the decision on November 13, 1989.

Without any mention of the denial of said motion for reconsideration, petitioner alone comes before this Court on a petition filed on July 21, 1992 and assails the decision dated September 29, 1989 of respondent Commission contending that it is more in keeping with the intent and spirit of the law to consider him and the thirteen (13) other complainants in the consolidated cases as regular employees.

At the outset, it is obvious that the petition was not filed within a reasonable time from receipt of the questioned decision on November 13, 1989 as the petition was filed only on July 21, 1992. Neither does the filing of the petition appear to be reasonable from the date of receipt of the denial of the motion for reconsideration on August 2, 1991. Reckoned from this later date, petitioner waited for almost one year before he availed of this extraordinary remedy of certiorari. We have consistently stated that "the yardstick to measure the timeliness of a petition for certiorari is the reasonableness of the duration of time that had expired from the commission of the acts complained of up to the institution of the proceedings to annul the same." [3] Without doubt, petitioner's negligence or indifference for such a long period of time has in the meantime rendered the questioned decision final and no longer assailable.

Even if we were to dispense with the requirement that the petition should be filed within a reasonable time, the petition would still have to be dismissed on the merits. Private respondent presented material documents showing that petitioner was hired as a project employee with the specific dates of hiring, the duration of hiring, the dates of his lay-offs, including the lay-off reports and the termination reports submitted to the then Ministry of Labor and Employment. Such data covered the period from November 5, 1974 to March 23, 1986.

Inasmuch as the documentary evidence clearly showed gaps of a month or months between the hiring of petitioner in the numerous projects wherein he was assigned, the ineluctable conclusion is that petitioner has not continuously worked with private respondent but only intermittently as he was hired solely for specific projects. As such, he is governed by Policy Instruction No. 20, the pertinent portions of which read as follows:

"Generally, there are two types of employees in the construction industry, namely 1) Project Employees and 2) Non-project Employees.

"Project employees are those employed in connection with a particular construction project. Non-project employees are those employed by a construction company without reference to a particular project.

"Project employees are not entitled to termination pay if they are terminated as a result of the completion of the project or any phase thereof in which they are employed, regardless of the number of projects in which they have been employed by a particular construction company."

Petitioner cites Article 280 of the Labor Code as legal basis for the decision of the Labor Arbiter in his favor. The text of Article 280 states as follows:

"Article 280. Regular and Casual Employment. The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

"An employment shall be deemed to be casual if it is not covered by the preceding paragraph: Provided, That, any employee who has rendered at least one year of service whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such actually exists."

Petitioner claims that the above-quoted proviso in Article 280 of the Labor Code supports his claim that he should be regarded as a regular employee.

We disagree. The proviso in the second paragraph of Article 280 of the Labor Code has recently been explained in *Mercado v. NLRC*,^[4] where it was held that said proviso deems as regular employees only those "casual" employees who have rendered at least one year of service regardless of the fact that such service may be continuous or broken. It is not applicable to "project" employees, who are specifically excepted therefrom. Thus, the Court therein said:

"The general rule is that the office of a proviso is to qualify or modify only the phrase immediately preceding it or restrain or limit the generality of the clause that it immediately follows. (Statutory Construction by Ruben Agpalo, 1986 ed., p. 173). Thus, it has been held that a proviso is to be construed with reference to the immediately preceding part of the provision to which it is attached, and not to the statute itself or to other sections thereof. (*Chinese Flour Importers Association v. Price Stabilization Board*, 89 Phil. 469 (1951); *Arenas v. City of San Carlos*, G.R. No. 24024, April 5, 1978, 82 SCRA 318 (1978). The only exception to the rule is where the clear legislative intent is to restrain or qualify not only the phrase immediately preceding it (the proviso) but also earlier provisions of the statute or even the statute itself as a whole. (*Commissioner of Internal Revenue v. Filipinas Compania de Seguros*, 107 Phil. 1055 (1960))"

Indeed, a careful reading of the proviso readily discloses that the same relates to employment where the employee is engaged to perform activities that are usually necessary or desirable in the usual business or trade of the employer but hastens to qualify that project employment is specifically exempted therefrom.

Finally, petitioner relies on Policy Instruction No. 20 which was issued by then Secretary Blas F. Ople to stabilize employer-employee relations in the construction industry to support his contention that workers in the construction industry may now be considered regular employees after their long years of service with private respondent. The pertinent provision of Policy Instruction No. 20 reads:

"Members of a work pool from which a construction company draws its project employees, if considered employees of the construction company while in the work pool, are non-project employees or employees for an

indefinite period. If they are employed in a particular project, the completion of the project or of any phase thereof will not mean severance of employer-employee relationship."

Respondent Commission correctly observed in its decision that complainants, one of whom is petitioner, failed to consider the requirement in Policy Instruction No. 20 that to qualify as member of a work pool, the worker must still be considered an employee of the construction company while in the work pool. In other words, there must be proof to the effect that petitioner was under an obligation to be always available on call of private respondent and that he was not free to offer his services to other employers. Unfortunately, petitioner miserably failed to introduce any evidence of such nature during the times when there were no projects.

Noteworthy in this case is the fact that herein private respondent's lay-off reports and the termination reports were duly submitted to the then Ministry of Labor and Employment everytime a project was completed in accordance with Policy Instruction No. 20, which provides:

"Project employees are not entitled to termination pay if they are terminated as a result of the completion of the project or any phase thereof in which they are employed, regardless of the number of projects in which they have been employed by a particular construction company. Moreover, the company is not required to obtain a clearance from the Secretary of Labor in connection with such termination. What is required of the company is a report to the nearest Public Employment Office for statistical purposes."

The presence of this factor makes this case different from the cases decided by the Court where the employees were deemed regular employees. The cases of *Ochoco v. National Labor Relations Commission*,^[5] *Philippine National Construction Corporation v. National Labor Relations Commission*,^[6] *Magante v. National Labor Relations Commission*,^[7] and *Philippine National Construction Corporation v. National Labor Relations Commission, et al.*,^[8] uniformly held that the failure of the employer to report to the nearest employment office the termination of workers everytime a project is completed proves that the employees are not project employees. Contrariwise, the faithful and regular effort of private respondent in reporting every completion of its project and submitting the lay-off list of its employees proves the nature of employment of the workers involved therein as project employees. Given this added circumstance behind petitioner's employment, it is clear that he does not belong to the work pool from which the private respondent would draw workers for assignment to other projects at its discretion.

WHEREFORE, the instant petition for certiorari is hereby DISMISSED in view of the foregoing reasons.

SO ORDERED.

Narvasa, C.J., (Chairman), Padilla, Regalado, and Puno, JJ., concur.

[1] Rollo, pp. 30-31.

[2] Rollo, p. 20.

[3] *Cortez v. CFI of Cadiz*, 52 Phil. 214 (1928); *Centenera v. Yatco*, 106 Phil. 1064 (1960), *Province of Misamis Occidental v. Catolico*, G.R. No. 24397, 23 SCRA 1295 (1968); *Toledo v. Pardo*, G.R. No. 56761, 118 SCRA 566 (1982); *San Juan v. Cuento*, G.R. No. L-45063, 160 SCRA 277 (1988); *Allied Leasing & Finance Corporation v. Court of Appeals*, G.R. No. 91988, 197 SCRA 71 (1991).

[4] G.R. No. 79869, 201 SCRA 332 (1991).

[5] G.R. No. 56363, 120 SCRA 774 (1983);

[6] G.R. No. 85323, 174 SCRA 191 (1989);

[7] G.R. No. 74969, 188 SCRA 21 (1990);

[8] G.R. No. 95816, 215 SCRA 204 (1992).

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