

SANDIGAN SAVINGS AND LOAN BANK, INC., AND SANDIGAN REALTY DEVELOPMENT CORPORATION, PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION AND ANITA M. JAVIER, RESPONDENTS.*G.R. No. 112877. February 26, 1996*

Ponente: HERMOSISIMA, JR., J.

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This Petition for Certiorari, with prayer for the issuance of a temporary restraining order, seeks to review, modify and/or set aside the Resolution[1] dated 24 September 1993 and the Resolution[2] dated 19 November 1993 of public respondent National Labor Relations Commission (NLRC) in NLRC CAS RAB-III-05-1560-90. The former affirmed, with modification, the Decision[3] of the Labor Arbiter of the NLRC Regional Arbitration Branch No. III while the latter denied the motion to reconsider the former.

Private respondent Anita M. Javier (hereinafter referred to as Javier) worked as a realty sales agent of the petitioner Sandigan Realty Development Corporation (hereinafter called the Sandigan Realty) from November 2, 1982 (or November 9, 1982)[4] to November 30, 1986. Their agreement was that Javier would receive a 5% commission for every sale, or if no sale was made, she would receive a monthly allowance of P500.00.

Subsequently, that is, on 1 December 1986, Javier was hired as a marketing collector of petitioner Sandigan Savings and Loan Bank (hereinafter called the Sandigan Bank) by Angel Andan, the President of both the Sandigan Bank and Sandigan Realty. Javier's monthly salary and allowance were initially in the amount of P788.00 and P5 85.00, respectively.

These were adjusted thereafter (the latest adjustment having been made on 1 July 1989), to P1,840.00 per month as salary and to P510.00 as monthly allowance, per "Notice of Salary Adjustment." [5]

Meanwhile, respondent Javier continued to be a realty sales agent of Sandigan Realty on the side, and while she still received the 5% commission on her sales, she no longer enjoyed the P5 00.00 monthly allowance.

On 20 April 1990, Javier was advised by Angel Andan not to report for work anymore. This in effect was a notice of dismissal. The manner by which her dismissal was effected has been correctly described by the Solicitor General, thus:

"On April 20, 1990, around 8:30 in the morning, while performing her duties at the Bank, Javier saw and overheard petitioner Andan summon the Bank's personnel officer, Mrs. Liberata G. Fajardo, and instruct her to prepare her (Javier 's) termination papers. Immediately thereafter, Andan changed his mind and told Mrs. Fajardo to prepare instead a resignation letter for Javier, saying, 'Ayaw ko na siyang makita sa susunod.' Turning to private respondent, he said, 'Huwag na ninyong itanong kung anong dahilan, basta 't gusto ko, ito ang desisyon ko. Naawa lang ako sa iyo noon kaya kita tinanggap. Ka Anita, huwag mong isipin na may kinalaman ang mga pan gyayari kay Ditas, wala, wala, hindi iyon, basta 't si Alice, iniskandalo na naman

ako.'

xxx xxx xxx

In the afternoon, after she received P50,000.00 from one Mr. Ben Santos as full payment for a lot sold in Sta. Rita Village, Guiguinto, Bulacan, Andan ordered Reynaldo Bordado, her co-employee, to withdraw her commission of P10,000.00 from the account of the Realty, saying, 'Ibigay mo sa ka Anita 'yan para hindi na balikan dito. "[6]

The advice of her termination notwithstanding, Javier reported for work at the bank on the next working day or on 23 April 1990. Though she signed the attendance sheet, she left when she could not find her table.

On 18 May 1990, Javier filed a complaint against petitioners and Angel Andan with the NLRC Regional Arbitration Branch No. III at San Fernando, Pampanga, for illegal dismissal, seeking reinstatement and payment of backwages and moral and exemplary damages.

On October 6, 1992, the labor arbiter rendered judgment in private respondent's favor, the dispositive portion of which reads:

"WHEREFORE, considering the foregoing considerations, and for having unjustly dismissed Anita Javier from employment, respondents are hereby directed to reinstate her to her former position as marketing collector of Sandigan Savings and Loan Bank and sales agent of Sandigan Realty Development Coorporation, pay her full backwages from the time of her dismissal, plus 10% attorney's fee and all her monetary award, until her actual reinstatement, and P60,000.00 moral and exemplary damages to compensate for her mental pain and anguish, her social humiliation and besmirched reputation. Should reinstatement be rendered impossible by virtue of the abolition of her position as marketing collector, grant her, in addition to backwages and other benefits, separation pay equivalent to one (1) month for every year of service until after this decision shall have become final and executory." [7]

On appeal, the NLRC affirmed the decision of the Labor Arbiter in its Resolution, dated 24 September 1993, but, deleting the award of damages and attorney's fees, provided the following monetary award of backwages and separation pay:

"Backwages:

Fr:

April 20, 1990-April 20, 1993-36 months

Realty:

P500.00 (allowance) x 36

P18,000.00

Savings Bank:

P2,400.00 x 36

P86,400.00

TOTAL

P104,400.00

Separation Pay:

Realty:

Nov. 2, 1982-April 20, 1993 P500.00 (allowance) x10

-10 years P5,000.00

Savings Bank:

Dec. 1, 1986-April 20, 1993 P2,400.00 x 6

- 6 years P14,400.00

GRAND TOTAL

P123,800.00"

The petitioners' Motion for Reconsideration of the said Resolution, and that of the private respondent, were denied by the NLRC in its Resolution, dated 19 November 1993, the dispositive portion of which reads:

"It appearing that the issues raised by both parties in their Motions for Reconsideration were thoroughly discussed and duly passed upon in the questioned Resolution promulgated on September 24, 1993, the same are hereby denied for lack of merit with finality.

No further motion for reconsideration shall be entertained.

The petitioners, thus, instituted this petition for certiorari, contending that the NLRC gravely and seriously abused its discretion in holding that:

1. Javier is a regular employee of both Sandigan Realty and Sandigan Bank and entitled to backwages and separation pay from both;
2. Javier was receiving P2,400.00 a month from the bank and that she is entitled to separation pay for six years.[8]

The records disclose that petitioner Sandigan Bank no longer disputes the finding that Javier was dismissed by it and that she did not abandon her job thereat. In fact, it would have paid private respondent the monetary award representing backwages and separation pay adjudged against it in the assailed NLRC resolution, if only it found the same to be in the correct amount.[9]

Consequently, the issues in this case are: (1) whether or not the respondent NLRC abused its discretion in finding that private respondent was a regular employee of the petitioner Sandigan Realty, entitled to backwages and separation pay because of her alleged illegal separation therefrom; and (2) whether the computation of the monetary award owing to the private respondent, as contained in the assailed NLRC resolution, was attended with serious errors as to its bases both in fact and in law.

In determining the existence of an employer-employee relationship, the following elements are generally considered: (1) the selection and engagement of the employee; (2) the payment of wages; (3) the power of dismissal; and (4) the employer's power to control the employee with respect to the means and methods by which the work is to be accomplished.[10] This Court has generally relied on the so-called "right of control test" in making such a determination. Where the person for whom the services are performed reserves a right to control not only the end to be achieved but also the means by which such end is reached,[11] the relationship is deemed to

exist. Stated differently, it is the power of control which is the most determinative factor.[12] It is deemed to be such an important factor that the other requisites may even be disregarded.[13] Thus, in the case of *Cosmopolitan Funeral Homes, Inc. v. Maalat*, it was held that "to determine whether a person who performs work for another is the latter's employee or is an independent contractor, the prevailing test is 'the right of control test.'" In the said case, the petitioner therein failed to prove that the contract with private respondent was that of a mere agency, an indication that subject person is free to accomplish his work on his own terms and may engage in other means of livelihood.[14]

Viewed in the light of the foregoing criteria, the features of the relationship between Javier and the Sandigan Realty, as may be gleaned from the facts described herein below by the Office of the Solicitor General, readily negate the existence of an employer-employee relationship between them, the element of control being noticeably absent.

"Javier was hired in 1982 to sell houses or lots owned by the Realty. She was paid 5% commission for every lot or house sold. From 1982 up to 1986 when she was hired as a marketing collector of petitioner bank, she received from the Realty P500.00 monthly allowance if she was unable to make any sale. The P500.00 allowance ceased when she became a regular employee of the petitioner bank.

Javier sold houses or lots according to the manner or means she chose to. The petitioner realty firm, while interested in the result of her work, had no control with respect to the details of how the sale of a house or lot was achieved. She was free to adopt her own selling methods or free to sell at her own time (cf *Insular Life Assurance Co., Ltd. v. NLRC*, 179 SCRA 459 [1989]). Her obligation was merely to turn over the proceeds of each sale to the Realty and, in turn, the Realty paid her by the job, i.e., her commission, not by the hour.

Moreover, selling houses and lots was merely her sideline or extra work for a sister company. "[15]

As it appears that Sandigan Realty had no control over the conduct of Javier as a realty sales agent since its only concern or interest was in the result of her work and not in how it was achieved, there cannot now be any doubt that Javier was not an employee, much less a regular employee of the Sandigan Realty. Hence, she cannot be entitled to the right to security of tenure nor to backwages and separation pay as a consequence of her separation therefrom.

Evidently, the legal relation of Javier to the Sandigan Realty can be that of an independent contractor, where the control of the contracting party is only with respect to the result of the work, as distinguished from an employment relationship where the person rendering service is under the control of the hirer with respect to the details and manner of performance.[16]

In the case of *Sara v. Agarrado*, private respondent who sold palay and rice for the petitioners under an arrangement or agreement that the former would be paid P2.00 commission per sack of milled rice sold as well as a commission of 10% per kilo of palay purchased,[17] and that she would spend her own money for the undertaking, and where she was shown to have worked for petitioners at her own pleasure, that she was not subject to definite hours or conditions of work, that she could even delegate the task of buying and selling to others, if she so desired, or simultaneously engaged in other means of livelihood while selling and purchasing rice or palay, was held to be an independent contractor.[18]

By the same token, the private respondent in another case,[19] who earns on a per head/talent commission basis and who works as she pleases, on her own schedule, terms and conditions was also held to be an independent contractor.

Private respondent Anita Javier is clearly similarly placed as the private respondents in the above-cited cases. Hence, she could not have been a regular employee but an independent contractor in relation to the petitioner

Sandigan Realty.

As we hold that private respondent was not a regular employee of the Sandigan Realty and that she could not, therefore, be entitled to backwages and separation pay, we will necessarily have to limit our treatment of the alleged errors committed by the NLRC in the computation of the monetary award to that adjudged against the petitioner Sandigan Bank. But, first, we have to settle the question as to whether reinstatement or payment of separation pay in its stead is the proper relief to be accorded the private respondent, it appearing that neither the labor arbiter nor the NLRC made a definitive ruling on the matter. This has become especially more significant since private respondent, in her Comment[20] and Memorandum,[21] presses for an order of reinstatement to her former position, claiming that there is no sufficient basis for a grant of separation pay in lieu thereof.

We agree with the private respondent in this respect.

Private respondent Anita Javier, by virtue of her employment status, is, under the law entitled to security of tenure, which means that she has the right to continue in employment until the same is terminated under conditions required by law. Article 279 of the Labor Code, as amended, clearly provides that:

"Security of Tenure. - In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by the Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement."

There being a finding of illegal dismissal of private respondent Anita Javier, her reinstatement should follow as a matter of course, unless it be shown that the same is no longer possible, in which case, payment of separation pay will be ordered, in lieu thereof.[22] In this case, we do not find any such showing or basis to preclude private respondent's reinstatement.

In effect, the petitioner bank is liable to private respondent only for backwages, inclusive of allowances, and other benefits or their monetary equivalent computed from the time her compensation was withheld from her up to the time of her actual reinstatement, at the rate of her latest monthly salary and allowance which was in the total amount of P2,350.00 as shown by Javier's latest "Notice of Salary Adjustment." However, earnings derived elsewhere by Javier from the date of dismissal up to the date of reinstatement, if there be any, should be deducted from said backwages.[23] In this connection, it must be pointed out that the NLRC applied the old rule, otherwise known as the "Mercury Drug Rule," and so, as to the rate of P2,400.00, no evidence was presented as basis. The rule that should apply in this case is that provided in Article 279 of the Labor Code, as amended by Section 34, Republic Act No. 6715, as aforequoted, which took effect on March 21, 1989, considering that the private respondent's dismissal occurred thereafter, or on April 20, 1990.

WHEREFORE, the petition is GRANTED. The assailed resolutions of the National Labor Relations Commission, dated 24 September 1993 and 19 November 1993, are hereby modified to conform both to our finding that private respondent was not a regular employee of Sandigan Realty Development Corporation but of the Sandigan Savings and Loan Bank, Inc. and to our determination respecting the monetary award to which the private respondent is entitled. The petitioner Sandigan Savings and Loan Bank, Inc. is hereby ordered to reinstate private respondent Anita Javier and to pay her backwages from April 20, 1990 up to the date of her actual reinstatement, less earnings derived elsewhere, if any.

SO ORDERED.

Bellosillo, Vitug, and Kapunan, JJ., concur.

Padilla, J. (Chairman), see concurring and dissenting opinion.

[1] Rollo, p. 25.

[2] Rollo, p. 43.

[3] Annex "I", Petition; Rollo, pp. 75-86.

[4] Manifestation and Motion in Lieu of Comment, p. 3; Rollo, p. 161.

[5] Annex "C", Petition; Rollo, p. 45.

[6] See Note 4, Rollo, pp. 161-162.

[7] See Note 3, Rollo, pp. 85-86.

[8] Petition, p. 8; Rollo, p. 15.

[9] *Ibid.*, pp. 7-8; Rollo, pp. 14-15.

[10] *Ruga v. NLRC*, 181 SCRA 266, 273 [1990]; *Aboitiz Shipping Employees Association v. NLRC*, 186 SCRA 825, 829 [1990]; *Cabalan Pastulan Negrito Labor Association v. NLRC*, 241 SCRA 643, 652-653 [1995]; *MAM Realty Development Corporation v. NLRC*, 244 SCRA 797, 800 [1995].

[11] *Ruga v. NLRC*, *supra*, p. 273.

[12] *Cabalan Pastulan Negrito Labor Association v. NLRC*, *supra*, pp. 652-653.

[13] *Sara vs. Agarrado*, 166 SCRA 625; 630 [1988].

[14] 187 SCRA 108, 113 [1990].

[15] See Note 4; Rollo, pp. 166-167.

[16]

[17] See Note 13, p. 628.

[18] *Id.*, p. 631.

[19] *Beech v. de Guzman*, 187 SCRA 773, 775 [1990].

[20] Private Respondent's Comment, Rollo, pp. 175, 184.

[21] Memorandum for Private Respondent, Rollo, pp. 212-219.

[22] *De Ysasi III v. NLRC*, 231 SCRA 173, 197 [1994].

[23] *Gaco v. NLRC*, 230 SCRA 260, 267 [1994] citing *Pines City Education Center, et al. v. NLRC, et al.*, 227 SCRA 655.

concurring and dissenting

PADILLA, J.:

I concur in the ponencia of Mr. Justice Regino Hermosissima, Jr. including its holding that because of the illegal dismissal, the backwages to be awarded to the dismissed employee (Anita Javier) should be reckoned from the date of illegal dismissal to date of actual reinstatement (thereby departing from the "Mercury Drug Rule"). Article 279 of the Labor Code as amended by Rep. Act No. 6715 provides for such a period as the basis in the computation of backwages.

I do not however agree to the deduction from backwages of income or salaries earned by the employee from elsewhere during the period of her illegal dismissal. As I stated in my separate opinion in *Pines City Educational Center v. NLRC*, G.R. No. 96779, 10 November 1993, 227 SCRA 655:

"xxx xxx xxx."

The amendment to Art. 279 of the Labor Code introduced by Rep. Act No 6715 inserted the qualification "full" to the word "backwages." The intent of the law seems to be clear. The plain words of the statute provide that an employee who is unjustly dismissed is entitled to FULL backwages from the time of his dismissal to actual reinstatement. The law provides no qualification nor does it state that income earned by the employee during the period between his unjust dismissal and reinstatement should be deducted from such backwages. When the law does not provide, the Court should not improvise.

It is further my view that the principle of unjust enrichment (if no deduction is allowed from backwages) does not apply in this case, for the following reasons:

1. The applicable provision of law should be construed in favor of labor.
2. The Labor Code is special law which should prevail over the Civil Code provisions on unjust enrichment.
3. The language employed by the statute and, therefore, its intent are clear. Where the unjust dismissal occurs after Rep. Act No. 6715 took effect, backwages must be awarded from the time the employee is unlawfully dismissed until the time he is actually reinstated. There is no provision authorizing deduction of any income earned by the employee during that period. The statutory formula was evidently crafted by the legislature not only for convenience and expediency in executing the monetary judgments in favor of the employees but also to prevent the employer from resorting to delaying tactics when the judgment is executed by pleading income earned by the employee before reinstatement as proper deductions from backwages. It is true that the dismissed employee may also resort to the same delaying tactics but when we consider the by and large inherent inequality of resources between employer and employee, the legislative formula would seem to be equitable. Besides and this we cannot over-stress - given the language of the law, the Court appears to have no alternative but to award such full backwages without deduction or qualification. Any other interpretation opens the Court to the charge of indulging in judicial legislation.

I therefore vote to award private respondents Roland Picart and Lucia Chan full backwages from time of their unjust dismissal to their actual reinstatement, without deduction or qualification in accordance with the mandate of the law (Rep. Act No. 6715)."

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