

ELVIRA ABASOLO, ANTONIO ABAY, PURIFICACION ABAY, CATALINA ABELLERA, DANIEL ABELLERA, ELSIE ABELLERA, LOURDES ADUSE, PACITA ALAMAN, REYNALDO ALBAY, ROGELIO ALBAY, EMERITA ALCOY, ...*G.R. No. 118475. November 29, 2000*

Ponente: DE LEON, JR., J.

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Before us is a petition for certiorari seeking to annul two Resolutions of the National Labor Relations Commission (NLRC), Third Division, dated July 6, 1994[1] and September 23, 1994[2], in its affirmance of the Decision[3] of Labor Arbiter Ricardo N. Olarez dated December 29, 1993 dismissing petitioners' consolidated complaint for separation pay for lack of merit.

The facts are as follows:

Private respondent La Union Tobacco Redrying Corporation (LUTORCO), which is owned by private respondent See Lin Chan, is engaged in the business of buying, selling, redrying and processing of tobacco leaves and its by-products. Tobacco season starts sometime in October of every year when tobacco farmers germinate their seeds in plots until they are ready for replanting in November. The harvest season starts in mid-February. Then, the farmers sell the harvested tobacco leaves to redrying plants or do the redrying themselves. The redrying plant of LUTORCO receives tobacco for redrying at the end of February and starts redrying in March until August or September.

Petitioners have been under the employ of LUTORCO for several years until their employment with LUTORCO was abruptly interrupted sometime in March 1993 when Compania General de Tabaccos de Filipinas (also known as TABACALERA) took over LUTORCO's tobacco operations. New signboards were posted indicating a change of ownership and petitioners were then asked by LUTORCO to file their respective applications for employment with TABACALERA. Petitioners were caught unaware of the sudden change of ownership and its effect on the status of their employment, though it was alleged that TABACALERA would assume and respect the seniority rights of the petitioners.

On March 17, 1993, the disgruntled employees instituted before the NLRC Regional Arbitration Branch No. 1, San Fernando, La Union a complaint[4] for separation pay against private respondent LUTORCO on the ground that there was a termination of their employment due to the closure of LUTORCO as a result of the sale and turnover to TABACALERA. Other equally affected employees filed two additional complaints[5], also for separation pay, which were consolidated with the first complaint.

Private respondent corporation raised as its defense that it is exempt from paying separation pay and denied that it terminated the services of the petitioners; and that it stopped its operations due to the absence of capital and operating funds caused by losses incurred from 1990 to 1992 and absence of operating funds for 1993, coupled

with adverse financial conditions and downfall of prices.[6] It alleged further that LUTORCO entered into an agreement with TABACALERA to take over LUTORCO's tobacco operations for the year 1993 in the hope of recovering from its serious business losses in the succeeding tobacco seasons and to create a continuing source of income for the petitioners.[7] Lastly, it manifested that LUTORCO, in good faith and with sincerity, is willing to grant reasonable and adjusted amounts to the petitioners, as financial assistance, if and when LUTORCO could recover from its financial crisis.[8]

On December 29, 1993, Labor Arbiter Ricardo N. Olarez rendered his decision dismissing the complaint for lack of merit. In upholding private respondent LUTORCO's position, the Labor Arbiter declared that the petitioners are not entitled to the benefits under Article 283[9] of the Labor Code since LUTORCO ceased to operate due to serious business losses and, furthermore, TABACALERA, the new employer of the petitioner has assumed the seniority rights of the petitioners and other employment liabilities of the LUTORCO.[10]

Petitioners appealed[11] then the decision of the Labor Arbiter to the public respondent NLRC where it was assigned to the Third Division.

In its Opposition to Appeal[12] dated February 5, 1994 private respondent LUTORCO presented new allegations and a different stand for denying separation pay. It alleged that LUTORCO never ceased to operate but continues to operate even after TABACALERA took over the operations of its redrying plant in Aringay, La Union. Petitioners were not terminated from employment but petitioners instead refused to work with TABACALERA, despite the notice to petitioners to return to work in view of LUTORCO's need for workers at its Agoo plant which had approximately 300,000 kilos of Virginia tobacco for processing and redrying. Furthermore, petitioners are not entitled to separation pay because petitioners are seasonal workers.

Adopting these arguments of private respondent, the NLRC, in a Resolution[13] dated July 6, 1994, affirmed the dismissal of the consolidated complaints for separation pay. Public respondent held that petitioners are not entitled to the protection of Article 283 of the Labor Code providing for separation pay since there was no closure of establishment or termination of services to speak of. It declared that there was no dismissal but a "non-hiring due mainly to [petitioners] own volition." [14] Moreover, the benefits of Article 283 of the Labor Code apply only to regular employees, not seasonal workers like petitioners.[15] Inasmuch as public respondent in its Resolution[16] dated September 23, 1994 denied petitioners' motion for reconsideration, petitioners now assail the correctness of the NLRC's resolution via the instant petition.

Petitioners anchor their petition on the following grounds, to wit:

I. PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OR LACK OF JURISDICTION IN RULING THAT THERE WAS NO DISMISSAL OR TERMINATION OF SERVICES.

II. PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OR LACK OF JURISDICTION IN RULING THAT PETITIONERS WERE NOT REGULAR EMPLOYEES.

III. PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OR LACK OF JURISDICTION IN NOT AWARDING SEPARATION PAY TO THE PETITIONERS.

Petitioners vigorously maintain that they are regular workers of respondent LUTORCO since they worked continuously for many years with LUTORCO, some of them even for over 20 years, and that they performed functions necessary and desirable in the usual business of LUTORCO.[17] According to them, the fact that some of them work only during the tobacco season does not affect their status as regular workers since they have been

repeatedly called back to work for every season, year after year.[18] Thus, petitioners take exception to the factual findings and conclusions of the NLRC, stressing that the conclusions of the NLRC were based solely on the new theory advanced by private respondent LUTORCO only on appeal, that is, that it was only LUTORCO's tobacco re-drying operation that was sold, and hence, diametrically opposed to its theory before the Labor Arbiter, i.e., that it is the entire company (LUTORCO) itself that was sold.

Private respondent LUTORCO, on the other hand, insists that petitioners' employment was not terminated; that it never ceased to operate, and that it was petitioners themselves who severed their employer-employee relationship when they chose employment with TABACALERA because petitioners found more stability working with TABACALERA than with LUTORCO.[19] It likewise insists that petitioners are seasonal workers since almost all of petitioners never continuously worked in LUTORCO for any given year[20] and they were required to reapply every year to determine who among them shall be given work for the season. To support its argument that petitioners are seasonal workers, private respondent LUTORCO cites the case of *Mercado, Sr. v. NLRC*[21] wherein this Court held that "the employment of [seasonal workers] legally ends upon the completion of the xxx season."

Clearly, the crux of the dispute boils down to two issues, namely, (a) whether petitioners' employment with LUTORCO was terminated, and (b) whether petitioners are regular or seasonal workers, as defined by law. Both issues are clearly factual in nature as they involved appreciation of evidence presented before the NLRC whose finding of facts and conclusions thereon are entitled to respect and finality in the absence of proof that they were arrived at arbitrarily or capriciously.[22] In the instant case, however, cogent reasons exist to apply the exception, to wit:

First, upon a thorough review, the records speak of a sale to TABACALERA in 1993 under conditions evidently so concealed that petitioners were not formally notified of the impending sale of LUTORCO's tobacco re-drying operations to TABACALERA and its attendant consequences with respect to their continued employment status under TABACALERA. They came to know of the fact of that sale only when TABACALERA took over the said tobacco re-drying operations. Thus, under those circumstances, the employment of petitioners with respondent LUTORCO was technically terminated when TABACALERA took over LUTORCO's tobacco re-drying operations in 1993.[23]

Moreover, private respondent LUTORCO's allegation that TABACALERA assured the seniority rights of petitioners deserves scant consideration inasmuch as the same is not supported by documentary evidence nor was it confirmed by TABACALERA. Besides, there is no law requiring that the purchaser of an entire company should absorb the employees of the selling company. The most that the purchasing company can do, for reasons of public policy and social justice, is to give preference to the qualified separated employees of the selling company, who in its judgment are necessary in the continued operation of the business establishment. In the instant case, the petitioner employees were clearly required to file new applications for employment. In reality then, they were hired as new employees of TABACALERA.

Second, private respondent LUTORCO's contention that petitioners themselves severed the employer-employee relationship by choosing to work with TABACALERA is bereft of merit considering that its offer to return to work was made more as an afterthought when private respondent LUTORCO later realized it still had tobacco leaves for processing and redrying. The fact that petitioners ultimately chose to work with TABACALERA is not adverse to petitioners' cause. To equate the more stable work with TABACALERA and the temporary work with LUTORCO is illogical. Petitioners' untimely separation in LUTORCO was not of their own making and therefore, not construable as resignation therefrom inasmuch as resignation must be voluntary and made with the intention of relinquishing the office, accompanied with an act of relinquishment.[24]

Third, the test of whether or not an employee is a regular employee has been laid down in *De Leon v. NLRC*,^[25] in which this Court held:

The primary standard, therefore, of determining regular employment is the reasonable connection between the particular activity performed by the employee in relation to the usual trade or business of the employer. The test is whether the former is usually necessary or desirable in the usual business or trade of the employer. The connection can be determined by considering the nature of the work performed and its relation to the scheme of the particular business or trade in its entirety. Also if the employee has been performing the job for at least a year, even if the performance is not continuous and merely intermittent, the law deems repeated and continuing need for its performance as sufficient evidence of the necessity if not indispensability of that activity to the business. Hence, the employment is considered regular, but only with respect to such activity, and while such activity exists.

Thus, the nature of one's employment does not depend solely on the will or word of the employer. Nor on the procedure for hiring and the manner of designating the employee, but on the nature of the activities to be performed by the employee, considering the employer's nature of business and the duration and scope of work to be done.^[26]

In the case at bar, while it may appear that the work of petitioners is seasonal, inasmuch as petitioners have served the company for many years, some for over 20 years, performing services necessary and indispensable to LUTORCO's business, serve as badges of regular employment.^[27] Moreover, the fact that petitioners do not work continuously for one whole year but only for the duration of the tobacco season does not detract from considering them in regular employment since in a litany of cases^[28] this Court has already settled that seasonal workers who are called to work from time to time and are temporarily laid off during off-season are not separated from service in said period, but are merely considered on leave until re-employed.

Private respondent's reliance on the case of *Mercado v. NLRC* is misplaced considering that since in said case of *Mercado*, although the respondent company therein consistently availed of the services of the petitioners therein from year to year, it was clear that petitioners therein were not in respondent company's regular employ. Petitioners therein performed different phases of agricultural work in a given year. However, during that period, they were free to contract their services to work for other farm owners, as in fact they did. Thus, the Court ruled in that case that their employment would naturally end upon the completion of each project or phase of farm work for which they have been contracted.

All the foregoing considered, the public respondent NLRC in the case at bar erred in its total affirmance of the dismissal of the consolidated complaint, for separation pay, against private respondents LUTORCO and See Lin Chan considering that petitioners are regular seasonal employees entitled to the benefits of Article 283 of the Labor Code which applies to closures or cessation of an establishment or undertaking, whether it be a complete or partial cessation or closure of business operation.^[29]

In the case of *Philippine Tobacco Flue-Curing & Redrying Corporation v. NLRC*^[30] this Court, when faced with the question of whether the separation pay of a seasonal worker, who works for only a fraction of a year, should be equated with the separation pay of a regular worker, resolved that question in this wise:

The amount of separation pay is based on two factors: the amount of monthly salary and the number of years of service. Although the Labor Code provides different definitions as to what constitutes "one year of service," Book Six^[31] does not specifically define "one year of service" for purposes of computing separation pay. However, Articles 283 and 284 both state in connection with separation pay that a fraction of at least six months shall be considered one whole year. Applying this case at bar, we hold that the amount of separation pay which respondent members xxx should receive is one-half (1/2) their respective average monthly pay

during the last season they worked multiplied by the number of years they actually rendered service, provided that they worked for at least six months during a given year.

Thus, in the said case, the employees were awarded separation pay equivalent to one (1) month, or to one-half (1/2) month pay for every year they rendered service, whichever is higher, provided they rendered service for at least six (6) months in a given year. As explained in the text of the decision in the said case, "month pay" shall be understood as "average monthly pay during the last season they worked." [32] An award of ten percent (10%) of the total amount due petitioners as attorney's fees is legally and morally justifiable under Art. 111 of the Labor Code, [33] Sec. 8, Rule VIII, Book III of its Implementing Rules, [34] and par. 7, Art. 2208 [35] of the Civil Code. [36]

WHEREFORE, the petition is hereby GRANTED, and the assailed Resolutions dated July 6, 1994 and September 23, 1994 of public respondent NLRC are REVERSED and SET ASIDE. Private respondent La Union Tobacco Redrying Corporation is ORDERED: (a) to pay petitioners separation pay equivalent to one (1) month, or one-half (1/2) month pay for each year that they rendered service, whichever is higher, provided that they rendered service for at least six (6) months in a given year, and; (b) to pay ten percent (10%) of the total amount due to petitioners, as and for attorney's fees. Consequently, public respondent NLRC is ORDERED to COMPUTE the total amount of separation pay which each petitioner who has rendered service to private respondent LUTORCO for at least six (6) months in a given year is entitled to receive in accordance with this decision, and to submit its compliance thereon within forty-five (45) days from notice of this decision.

SO ORDERED.

Bellosillo, (Chairman), Mendoza, Quisumbing, and Buena, JJ., concur.

[1] Penned by Commissioner Ireneo B. Bernardo and concurred in by Presiding Commissioner Lourdes C. Javier and Commissioner Joaquin A. Tanodra in NLRC CN. RAB-I-03-1055-93, RAB-I-03-1056-93 and RAB-I-03-1100-93 CA No. L-001300, Rollo, pp. 37-55.

[2] Rollo, pp. 27-36.

[3] Rollo, pp. 56-64.

[4] Docketed as NLRC Case No. RAB-I-03-1055-93, Rollo, pp. 69-75.

[5] Filed on March 25, 1993 and June 15, 1993, docketed as NLRC Case Nos. RAB-I-03-1056-93 and RAB-I-03-1100-93, respectively, Rollo, pp. 65-68.

[6] Rollo, pp. 85-86.

[7] Ibid.

[8] Rollo, p. 87.

[9] Article 283. Closure of establishment and reduction of personnel.

x x x in cases of closure and cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered as one (1) whole year.

[10] Rollo, pp. 61-64.

[11] Rollo, pp. 90-102.

[12] Rollo, pp. 103-109.

[13] See Note No. 1, *supra*.

[14] Rollo, p. 50.

[15] Rollo, pp. 51-52.

[16] See Note No. 2, *supra*.

[17] Rollo, p. 304.

[18] Rollo, p. 305.

[19] Rollo, pp. 239-240.

[20] Rollo, p. 236.

[21] 201 SCRA 332, 343 [1991].

[22] PASVIL/Pascual Liner, Inc., Workers Union-NAFLU v. NLRC, 311 SCRA 444, 457 [1999].

[23] See San Felipe Neri School of Mandaluyong, Inc. v. NLRC, 201 SCRA 478 [1991] citing Central Azucarera del Danao v. Court of Appeals, 137 SCRA 295 [1985].

[24] Pascua v. NLRC (Third Division), 287 SCRA 554, 567 [1998]; see Tacloban Sagkahan Rice and Corn Mills Co. v. NLRC, 183 SCRA 425 [1990].

[25] De Leon v. NLRC, 176 SCRA 615, 621 [1989].

[26] Bernardo v. NLRC, 310 SCRA 186, 201 [1999].

[27] Maraguinot, Jr. v. NLRC (Second Division), 284 SCRA 539, 556 [1998].

[28] Bacolod-Murcia Milling Co., Inc. v. NLRC, 204 SCRA 155, 158 [1991]; Visayan Stevedore Transportation Company v. CIR, 19 SCRA 426 [1967]; Industrial-Commercial Agricultural Workers' Organization (ICAWO) v. CIR, 16 SCRA 562, 565-566 [1966]; Manila Hotel Company v. Court of Industrial Relations, 9 SCRA 184, 186 [1963].

[29] Coca-Cola Bottlers (Phils.), Inc. v. NLRC 194 SCRA 592, 599 [1991].

[30] 300 SCRA 37, 63 -65 [1998].

[31] Book Six of the Labor Code contains the provisions pertaining to termination of employment and computation of separation pay.

[32] See Note No. 30.

[33] (a) In cases of unlawful withholding of wages the culpable party may be assessed attorney's fees equivalent to ten percent of the amount of wages recovered.

(b) It shall be unlawful for any person to demand or accept, in any judicial or administrative proceedings for the recovery of the wages, attorney's fees, which exceed ten percent of the amount of wages recovered.

[34] Attorney's fees in any judicial or administrative proceedings for the recovery of wages shall not exceed 10%

of the amount awarded. The fees may be deducted from the total amount due the winning party.

[35] In absence of stipulation, attorney's fees and expenses of litigation, other than judicial consist, cannot be recovered, except:

xxx (7) In actions for the recovery of wages of household helpers, laborers and skilled workers xxx.

[36] Marsaman Manning Agency, Inc. v. NLRC, 313 SCRA 88, 99-100 [1999] citing Philippine National Construction Corporation v. NLRC, 277 SCRA 91, 105 [1997]; Sebuguero v. NLRC, 248 SCRA 532, 548 [1995].

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