ABESCO CONSTRUCTION AND DEVELOPMENT CORPORATION AND MR. OSCAR BANZON, GENERAL MANAGER, VS. ALBERTO RAMIREZ, BERNARDO DIWA, MANUEL LOYOLA, REYNALDO P. ACODESIN, ALEXANDER BAUTIST...

G.R. NO. 141168. April 10, 2006

Ponente: CORONA, J.

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CORONA, J.:

Petitioner company was engaged in a construction business where respondents were hired on different dates from 1976 to 1992 either as laborers, road roller operators, painters or drivers.

In 1997, respondents filed two separate complaints[1] for illegal dismissal against the company and its General Manager, Oscar Banzon, before the Labor Arbiter (LA). Petitioners allegedly dismissed them without a valid reason and without due process of law. The complaints also included claims for non-payment of the 13th month pay, five days' service incentive leave pay, premium pay for holidays and rest days, and moral and exemplary damages. The LA later on ordered the consolidation of the two complaints.[2]

Petitioners denied liability to respondents and countered that respondents were "project employees" since their services were necessary only when the company had projects to be completed. Petitioners argued that, being project employees, respondents' employment was coterminous with the project to which they were assigned. They were not regular employees who enjoyed security of tenure and entitlement to separation pay upon termination from work.

After trial, the LA declared respondents as regular employees because they belonged to a "work pool" from which the company drew workers for assignment to different projects, at its discretion. He ruled that respondents were hired and re-hired over a period of 18 years, hence, they were deemed to be regular employees. He likewise found that their employment was terminated without just cause. In a decision dated January 7, 1998, he stated:

> WHEREFORE, judgment is hereby rendered declaring respondents guilty of illegal dismissal and ordering the latter to reinstate complainants to their former positions with backwages and other benefits from the time their compensation was withheld from them up to the time their actual reinstatement which as of the date of this decision amounted to:
>
> NAME
>
> 1. Alberto Ramirez
> P49,764.00
>
> 2. Manuel B. Loyola
> 46,695.22
>
> 3. Hernando Diwa

49,764.00

4. Reynaldo Acodesin
46,695.22

5. Alexander Bautista
45,285.24

6. Edgar Tajonera

62,985.00

7. Gary Dison
53,911.00

TOTAL P 355,099.68

However, if reinstatement is no longer feasible, a one-month salary shall be awarded as a form of separation pay, in addition to the aforementioned award.

Respondents are likewise ordered to pay complainants the following:

NAME
UNPAID SALARY SALARY DIFFEREN
TIAL 13[TH] MONTH PAY 5 DAYS SERVICE INCENTIVE LEAVE SEPARATION PAY

1.Hernando iwa

P765.00
P1,274.00
P4,147.00

2.Alexander Bautista

P23,088.00 11,141.00 P2,005.00 45,617.00

3.Alberto Ramirez

11,141.00 2,005.00 74,646.00

4.Manuel B. Loyola

11,141.00 2,020.00 41,170.00

5.Reynaldo Acodesin

11,141.00 2,020.00 20,735.00

6.Edgardo Tajonera

19,500.00 3,750.00 130,000.00

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7.Gary Dison

11,141.00 2,020.00 29,029.00

P765.00 P23,088.00 P76,479.00 P13,820.00 P345,344.00

xxx

All other claims are hereby dismissed for lack of merit.[3]

Petitioners appealed to the National Labor Relations Commission (NLRC) which affirmed the LA's decision.[4]

Subsequently, petitioners filed a petition for review in the Court of Appeals (CA) arguing that they were not liable for illegal dismissal since respondents' services were merely put on hold until the resumption of their business operations. They also averred that they had paid respondents their full wages and benefits as provided by law, hence, the latter had no more right to further benefits.

The CA was not convinced and dismissed petitioners' appeal. It held:

> We note that the petitioners are taking a new tack in arguing, for the first time, that the [respondents] were not dismissed but their employment was merely suspended. Previous to this, their defense was that the [respondents] were project employees who were not entitled to security of tenure. The petitioners are barred from raising a new defense at this stage of the case.
>
> xxx xxx xxx
>
> WHEREFORE, the petition for certiorari is hereby dismissed, for lack of merit.[5]

Petitioners filed a motion for reconsideration but it was dismissed by the CA.[6]

In this petition for review under Rule 45 of the Rules of Court, petitioners raise the following issues for resolution: (1) whether respondents were project employees or regular employees and (2) whether respondents were illegally dismissed.

On the first issue, we rule that respondents were regular employees. However, we take exception to the reasons cited by the LA (which both the NLRC and the CA affirmed) in considering respondents as regular employees and not as project employees.

Contrary to the disquisitions of the LA, employees (like respondents) who work under different project employment contracts for several years do not automatically become regular employees; they can remain as project employees regardless of the number of years they work.[7] Length of service is not a controlling factor in determining the nature of one's employment.[8]

Moreover, employees who are members of a "work pool" from which a company (like petitioner corporation) draws workers for deployment to its different projects do not become regular employees by reason of that fact alone. The Court has enunciated in some cases[9] that members of a "work pool" can either be project employees or regular employees.

The principal test for determining whether employees are "project employees" or "regular employees" is whether they are assigned to carry out a specific project or undertaking, the duration and scope of which are specified at the time they are engaged for that project.[10] Such duration, as well as the particular work/service to be performed, is defined in an employment agreement and is made clear to the employees at the time of hiring.[11]

In this case, petitioners did not have that kind of agreement with respondents. Neither did they inform respondents of the nature of the latter's work at the time of hiring. Hence, for failure of petitioners to substantiate their claim that respondents were project employees, we are constrained to declare them as regular employees.

Furthermore, petitioners cannot belatedly argue that respondents continue to be their employees (so as to escape liability for illegal dismissal). Before the LA, petitioners staunchly postured that respondents were only "project employees" whose employment tenure was coterminous with the projects they were assigned to. However, before the CA, they took a different stance by insisting that respondents continued to be their employees. Petitioners' inconsistent and conflicting positions on their true relation with respondents make it all the more evident that the latter were indeed their regular employees.

On the issue of illegal dismissal, we hold that petitioners failed to adhere to the "two-notice rule" which requires that workers to be dismissed must be furnished with: (1) a notice informing them of the particular acts for which they are being dismissed and (2) a notice advising them of the decision to terminate the employment.[12] Respondents were never given such notices.

WHEREFORE, the petition is hereby DENIED.

Costs against petitioners.
SO ORDERED.
Puno, (Chairperson), Sandoval-Gutierrez, Azcuna, and Garcia, JJ., concur.

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[*] The present petition impleaded the Court of Appeals, the National Labor Relations Commission (Second Division), and Labor Arbiter Emiliano T. De Asis as respondents. However, under Rule 45, Section 4 of the 1997 Rules of Civil Procedure, the petition may be filed without impleading the lower courts or judges thereof as petitioners or respondents. Hence, the Court deleted them from the title.

[1] NLRC Case No. RAB-III-04-7505-97 and NLRC Case No. RAB-III-02-7530-97.

[2] Case No. RAB-III-02-7530-97.

[3] Decided by Labor Arbiter Emiliano T. De Asis; rollo, pp. 35-43.

[4] Decided by Commissioner Angelita A. Gacutan as concurred in by Commissioners Raul T. Aquino and Victoriano R. Calaycay; rollo, pp. 89-96.

[5] Penned by Justice Hector L. Hofileña, as concurred in by Associate Justices Omar U. Amin and Teodoro P. Regino of the 16th Division of the Court of Appeals; rollo, pp. 29-34.

[6] Id., pp. 26-27.

[7] Palomares, et al. v. NLRC, 343 Phil. 213 (1997).

[8] Id.

[9] Raycor Aircontrol Systems, Inc. v. NLRC, 330 Phil. 306 (1996); ALU-TUCP v. NLRC, G.R. No. 109902, 2 August 1994, 234 SCRA 678.

[10] Article 280, Labor Code; see also Raycor Aircontrol Systems, Inc. v., NLRC, supra.

[11] Section 2.2, Department Order No. 19, Series of 1993, Guidelines Governing the Employment of Workers in the Construction Industry.

[12] Section 2[1], Rule XXIII, Book V, Rules to Implement the Labor Code, as Amended by Article 1, Department Order No. 09, Series of 1997 and Section 2, Rule 1, Book VI, Rules to Implement the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997; see Austria v. NLRC, 371 Phil. 340 (1999).

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