

**GRANDSPAN DEVELOPMENT CORPORATION, PETITIONER, VS.
RICARDO BERNARDO, ANTONINO CEÑIDOZA AND EDGARDO DEL
PRADO, SURVIVING PARENT OF EDGAR DEL PRADO, RESPONDENTS.**

G.R. NO. 141464. September 21, 2005

Ponente: SANDOVAL-GUTIERREZ, J.

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SANDOVAL-GUTIERREZ, J.

Before us is a petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, assailing the Decision[1] dated September 17, 1999 and Resolution[2] dated January 6, 2000 rendered by the Court of Appeals in CA-G.R. SP No. 50610, entitled "Ricardo Bernardo, Antonino Ceñidoza and Edgardo Del Prado, as surviving parent of Edgar Del Prado vs. National Labor Relations Commission, Grandspan Development Corporation and Joaquin Narag doing business under the name & style of J. Narag Construction."

The instant controversy stemmed from a complaint for illegal dismissal and non-payment of benefits filed with the Labor Arbiter by Ricardo Bernardo, Antonino Ceñidoza and Edgar Del Prado, respondents, against Grandspan Development Corporation, petitioner, and/or its warehouse manager, Manuel G. Lee, docketed as NLRC Case No. RAB-IV-11-4605-92-RI.

Respondents, in their complaint, alleged that sometime in 1990, they were employed as truck scale monitors by petitioner with a daily salary of P104.00 each. Eventually, they were assigned at its Truck Scale Section of the Warehouse/Materials Department. They were issued identification cards signed by Bonifacio Selmo, petitioner's personnel manager. On October 28, 1992, petitioner sent them a notice terminating their services effective October 29, 1992 for using profane or offensive language, in violation of Article VI (2) (a) of the company's Rules and Regulations.

Petitioner denied the allegations of respondents in their complaint, claiming that they are employees of J. Narag Construction. Sometime in the third quarter of 1992, Canad Japan Co., Ltd. engaged petitioner's services for fabrication works of several round and rectangular steel tanks needed for the HCMG or Sogo project due for completion in September, 1992. As a consequence, petitioner subcontracted the services of J. Narag Construction which, in turn, assigned its 3 helpers (herein respondents) to work for petitioner's project. Sometime in October, 1992, Manuel G. Lee, manager of petitioner's Warehouse Department received a report from supervisor Robert Ong that respondents vandalized the company's log book and chairs. This prompted petitioner to send J. Narag Construction a memorandum terminating the services of respondents for violation of the company's Rules and Regulations.

After the submission of the parties' pleadings and position papers, the Labor Arbiter rendered a Decision dated June 30, 1994 dismissing respondents' complaint. In concluding that respondents were validly dismissed from employment, the Labor Arbiter held that they were project employees whose services were terminated upon completion of the project for which they were hired.

Upon appeal, the National Labor Relations Commission (NLRC) issued a Resolution dated March 7, 1995 remanding the case to the Labor Arbiter for appropriate proceedings to determine whether there is an employer-employee relationship between the parties.

Both parties filed their respective motions for reconsideration but were denied by the NLRC in separate Resolutions dated April 28, 1995 and May 31, 1995.

Respondents then filed with this Court a petition for certiorari. Pursuant to our ruling in *St. Martin's Funeral Home vs. NLRC*,^[3] we referred the petition to the Court of Appeals for its appropriate action and disposition.

Meantime, respondent Del Prado died and was substituted by his surviving parent, Edgardo Del Prado.

On September 17, 1999, the Appellate Court rendered a Decision setting aside the NLRC's Resolutions and ordering petitioner (1) to reinstate respondents Bernardo and Ceñidoza to their former positions and pay, jointly and severally with J. Narag Construction, their backwages and other benefits, and (2) to pay respondent Del Prado his separation pay.

The Court of Appeals found that respondents are employees of petitioner; that they were non-project workers; and that they were denied due process, thus:

"In the instant case, petitioners were assigned to the Truck Scaling Materials Department of Grandspan. They worked in Grandspan's premises using the materials, supplies and equipment of Grandspan. They were under the supervision of Grandspan as to the manner and results of their work, and performed services directly connected to the usual business of respondent Grandspan for the fabrication of heavy structural components. The memorandum dated 28 October 1992 (p. 75 Rollo) dismissing the petitioners in fact emanated from Grandspan Materials Manager Manuel G. Lee and is addressed to the Personnel Department of Grandspan, albeit containing the self-serving claim that the employees-petitioners were 'J. Narag Construction personnel'. Under the circumstances, We rule that J. Narag was a labor-only contractor. While petitioners were in J. Narag Construction's payroll, such fact does not per se establish J. Narag Construction as an independent contractor, i.e., the employer of the petitioners. x x x.

x x x x x

The Office of the Solicitor General opines that petitioners were non-project employees as they were assigned at Grandspan's Materials Department. We agree. Moreover, if petitioners were truly project employees, private respondents should have presented proof that they submitted to the nearest public employment office a report of termination of service of their project employees upon completion of the construction project, as required by Policy Instruction No. 20. x x x.

Going now to the issue of whether or not petitioners were illegally dismissed, We rule in the affirmative. In the letter/memo dated 28 October 1992 (Rollo, p. 75), by which Grandspan ostensibly requested J. Narag to terminate petitioners' contract immediately, the reason cited for the dismissal was violation of Article VI 2.a. of company Rules and Regulations (the use of profane or offensive languages addressed to company officers) committed, according to the petitioners, through the vandalism of logbooks and office furniture at the Truck Scale Section of the Warehouse/Materials Department with obscene drawings. x x x.

However, this is not supported by substantial evidence which is necessary in order that petitioners may be dismissed for just cause. Considering that private respondent failed to discharge the burden of proof reposed on it to show that the dismissal was justified, the inevitable result is a finding that the dismissal was unjustified (*Uy vs. NLRC*, 261 SCRA 505; *Caurdanetaan Piece Workers Union vs. Laguesma*, 296 SCRA 401).

Moreover, petitioners were not given ample opportunity to prepare adequately for their defense, including legal representation (*Abiera vs. NLRC*, supra; *Pangasinan III Electric Cooperative, Inc. vs. NLRC*, 215 SCRA 669),

nor were they served notice of investigation, nor given an opportunity to be heard. This violates the requirement of notice and hearing in case of employee dismissal, thus petitioners' dismissal was void (*Abiera vs. NLRC*, 202 SCRA 7; *Falguera vs. Lansangan*, 251 SCRA 364).

As illegally dismissed employees, petitioners are protected by Article 279 of the Labor Code, x x x.

In the case of petitioner Edgar del Prado, now deceased and represented in this petition by his surviving parent Edgardo del Prado, reinstatement is no longer possible, thus he should be paid separation pay equivalent to one month salary for every year of service in addition to backwages (*International Phamaceuticals, Inc. vs. NLRC*, 287 SCRA 228).

WHEREFORE, finding merit in the petition, the same is GRANTED. The assailed NLRC resolutions dated 7 March 1995 and 28 April 1995 are ANNULLED and SET ASIDE.

Private respondent Grandspan is ordered to reinstate petitioners Ricardo Bernardo and Antonino Ceñidoza to their former positions without loss of seniority rights. Grandspan and J. Narag Construction are declared jointly and severally liable to pay said petitioners full backwages and other benefits and privileges enjoyed by respondent Grandspan employees.

Private respondents Grandspan and J. Narag Construction are likewise ordered to pay petitioner Edgardo del Prado, surviving parent of Edgar del Prado, the latter's separation pay at the rate of one (1) month salary for every year of service rendered by the deceased.

SO ORDERED."

On October 8, 1999, petitioner filed a motion for reconsideration. Respondents also filed a motion for reconsideration and/or clarification praying that the Appellate Court's Decision be modified by awarding respondent Del Prado his backwages.

On January 6, 2000, the Court of Appeals promulgated its Resolution denying petitioner's motion for reconsideration but modifying its Decision in the sense that petitioner and J. Narag Construction are ordered to pay respondent Del Prado his separation pay and backwages.

Hence, this petition for review on certiorari.

The issue for our resolution is whether the Court of Appeals erred in holding that respondents are employees of petitioner.

Petitioner argues that it has no employer-employee relationship with respondents since they are employees of J. Narag Construction, an independent contractor.

In *Miguel vs. JCT Group, Inc.*,^[4] we held:

"The test for determining an employer-employee relationship hinges on resolving who has the power to select employees, who pays for their wages, who has the power to dismiss them, and who exercises control in the methods and the results by which the work is accomplished."

The Court of Appeals found that J. Narag Construction assigned respondents to perform activities directly related to the main business of petitioner. They worked in petitioner's premises, using its equipment, materials and supplies. J. Narag Construction's payroll worksheets covering the period from December 21, 1990 to July 31, 1991 show that the payment of their salaries was approved by petitioner. The manager and supervisor of petitioner's Warehouse Department supervised the manner and results of their work. It was petitioner who terminated their services after finding them guilty of using profane or offensive language in violation of Article VI (2) (a) of the company's Rules and Regulations. The Appellate Court then concluded that these circumstances

confirm the existence of an employer-employee relationship between petitioner and respondents.

We agree.

Unswayed, petitioner insists that J. Narag Construction, being a legitimate independent contractor, is the employer of respondents. On this point, the Court of Appeals held that J. Narag Construction is a labor-only contractor.

Article 106 of the Labor Code, as amended, provides in part:

"ART. 106. Contractor or subcontracting. – x x x.

x x x x x

There is 'labor-only' contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer. x x x."

On the basis of the records, we have no reason to deviate from the Appellate Court's finding that J. Narag Construction is indeed a labor-only contractor. These are the reasons: (1) it is not registered as a building contractor with the SEC; (2) it has no contract with petitioner; and (3) there is no proof of its financial capability and has no list of equipment, tools, machineries and implements used in the business.

Clearly, J. Narag Construction could not be respondents' employer.

But petitioner maintains that respondents are project employees and as such, their services ended in September, 1992 upon completion of its HCMG or Sogo project.

In *Kiamco vs. NLRC*,^[5] we held:

"The principal test for determining whether particular employees are properly characterized as 'project employees,' as distinguished from 'regular employees,' is whether or not the 'project employees' were assigned to carry out a 'specific project or undertaking,' the duration and scope of which were specified at the time the employees were engaged for that project. As defined, project employees are those workers hired (1) for a specific project or undertaking, and (2) the completion or termination of such project or undertaking has been determined at the time of engagement of the employee."

Here, petitioner could not present employment contracts signed by respondents showing that their employment was for the duration of the HCMG or Sogo project.

Likewise, as correctly observed by the Court of Appeals, petitioner failed to present any report terminating the services of respondents when its projects were actually finished.

Section 2.2 (e) of the Labor Department Order No. 19 expressly provides that the report of termination is one of the indications of project employment.^[6]

Time and again, we held that failure of the employer to file termination reports after every project completion with the nearest public employment office is an indication that respondents were not project employees.^[7]

We, therefore, uphold the finding of the Court of Appeals that respondents are petitioner's regular employees. As such, they are entitled to security of tenure and can only be dismissed for a just or authorized cause, as provided by Article 279 of the Labor Code, as amended, thus:

"ARTICLE 279. 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 this 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."

In *Bolinao Security and Investigation Service, Inc. vs. Toston*[8], we emphasized that "it is incumbent upon the employer to prove by the quantum of evidence required by law that the dismissal of an employee is not illegal, otherwise, the dismissal would be unjustified."

Here, petitioner failed to discharge its burden. In terminating respondents' services, it merely relied on the alleged completion of the HCMG or Sogo project and on the report that respondents uttered profane or offensive language in violation of the company's Rules and Regulations. As earlier mentioned, they are not project employees. And as found by the Court of Appeals, there is no evidence to substantiate the charge of uttering profane or offensive language.

It also appears that petitioner violated respondents' right to due process.

In *Loadstar Shipping Co., Inc. vs. Mesano*,[9] we held:

"The law requires that an employee sought to be dismissed must be served two written notices before termination of his employment. The first notice is to apprise the employee of the particular acts or omissions by reason of which his dismissal has been decided upon; and the second notice is to inform the employee of the employer's decision to dismiss him. Failure to comply with the requirement of two notices makes the dismissal illegal. The procedure is mandatory. Non-observance thereof renders the dismissal of an employee illegal and void."

Records show that respondents were not served by petitioner with notices, verbal or written, informing them of the particular acts for which their dismissal is sought. Neither were they required to give their side regarding the alleged serious misconduct imputed against them.

We thus sustain the Court of Appeals ruling that respondents were deprived of both their substantive and procedural rights to due process and, therefore, the termination of their employment is illegal.

Since respondents were illegally dismissed from work, they are entitled to reinstatement without loss of seniority rights, full backwages, inclusive of allowances, and other benefits or their monetary equivalent computed from the time their compensation was withheld from them up to the time of their actual reinstatement.[10]

However, the circumstances obtaining in this case do not warrant the reinstatement of respondents. Antagonism caused a severe strain in the parties' employer-employee relationship. Thus, a more equitable disposition would be an award of separation pay equivalent to at least one month pay, or one month pay for every year of service, whichever is higher, (with a fraction of at least six (6) months being considered as one (1) whole year),[11] in addition to their full backwages, allowances and other benefits.[12]

Records show that respondents were employed by petitioner from 1990 to October 29, 1992, or for two (2) years, with a daily salary of P104.00 each, hence, entitled to a separation pay of P4,992.00.[13]

WHEREFORE, the assailed Decision dated September 17, 1999 and Resolution dated January 6, 2000 of the Court of Appeals in CA-G.R. SP No. 50610 are hereby **AFFIRMED** with **MODIFICATION** in the sense that petitioner is ordered to pay each respondent separation pay equivalent to P4,992.00, plus their respective full backwages, and other privileges and benefits, or their monetary equivalent, during the period of their dismissal up to their supposed actual reinstatement.

Costs against petitioner.

SO ORDERED.

Panganiban, (Chairman), Corona, Carpio-Morales, and Garcia, JJ., concur.

[1] Penned by Justice Portia Aliño-Hormachuelos, and concurred in by Justice Buenaventura J. Guerrero (retired) and Justice Remedios A. Salazar-Fernando, Annex "A" of the Petition, Rollo at 29-42.

[2] Annex "B", id. at 43-45.

[3] G.R. No. 130866, September 16, 1998, 295 SCRA 494, holding that the appeal from the NLRC should be initially filed with the Court of Appeals, no longer with this Court, pursuant to the doctrine of hierarchy of courts.

[4] G.R. No. 157752, March 16, 2005, 453 SCRA 529, 543, citing *Sonza vs. ABS-CBN Broadcasting Corporation*, 431 SCRA 583 (2004); *Abante vs. Lamadrid Bearing & Parts Corp.*, 430 SCRA 368 (2004); *Trader's Royal Bank vs. NLRC*, 321 SCRA 467 (1999); and *Ruga vs. NLRC*, 181 SCRA 266 (1990).

[5] G.R. No. 129449, June 29, 1999, 309 SCRA 424, 432, citing *Violeta vs. NLRC*, 280 SCRA 520 (1997).

[6] Superseded Policy Instruction No. 20, cited in *Tomas Lao Construction vs. NLRC*, 278 SCRA 716.

[7] *Audion Electric Co. vs. NLRC*, G.R. No. 106648, June 17, 1999, 308 SCRA 340, 350, citing *Ochoco vs. NLRC*, 120 SCRA 774; *Capitol Industrial Construction Corp. vs. NLRC*, 221 SCRA 469; *Phil. National Construction Corp. vs. NLRC*, 174 SCRA 191; *Philippine National Construction Corporation vs. NLRC*, 215 SCRA 204; *Aurora Land Projects Corp. vs. NLRC*, 266 SCRA 48; and *Tomas Lao Construction vs. NLRC*, *ibid.*

[8] G.R. No. 139135, January 26, 2004, 421 SCRA 406, 407, cited in *ACD Investigation Security Agency, Inc. vs. Daquera*, G.R. No. 147473, March 30, 2004, 426 SCRA 494, 499.

[9] G.R. No. 138956, August 6, 2003, 408 SCRA 478, 483, citing *Cruz vs. NLRC*, 324 SCRA 770 (2000).

[10] *Hodieng Concrete Products vs. Emilia*, G.R. No. 149180, February 14, 2005 at 7, see Article 27 of the Labor Code, as amended by Section 34, R.A. 6715 and citing *Philtread Tire & Rubber Corporation*, G.R. No. 142759, November 10, 2004 at 8-9, *Bolinao Security and Investigation Service, Inc. vs. Toston*, *ibid.*, *Cebu Marine Beach Resort vs. NLRC*, 414 SCRA 173 (2003) and *Damasco vs. NLRC*, 346 SCRA 714 (2000).

[11] *Ibid.*, citing *Philtread Tire & Rubber Corporation*, *ibid.*, *Bolinao Security and Investigation Service, Inc. vs. Toston*, *ibid.*, *Jardine Davies, Inc. vs. NLRC*, 311 SCRA 289 (1999) and *Lopez vs. NLRC*, 297 SCRA 508 (1998).

[12] *Ibid.*, citing *Cebu Marine Beach Resort vs. NLRC*, *supra.*, *Samarca vs. Arc-Men Industries, Inc.*, *supra* and *Philippine Tobacco Flue-Curing and Redrying Corp. vs. NLRC*, et al., 300 SCRA 37 (1998)

[13] 1990 – October 29, 1992 = 2 yrs.

Daily Rate - P104.00

P104.00 x 6 days = P624.00 x 4 weeks

P2,496.00 per month x 2 yrs. = P4,992.00

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