

JOSE MEL BERNARTE, PETITIONER, VS. PHILIPPINE BASKETBALL ASSOCIATION (PBA), JOSE EMMANUEL M. EALA, AND PERRY MARTINEZ, RESPONDENTS.

G.R. No. 192084. September 14, 2011

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

This is a petition for review[1] of the 17 December 2009 Decision[2] and 5 April 2010 Resolution[3] of the Court of Appeals in CA-G.R. SP No. 105406. The Court of Appeals set aside the decision of the National Labor Relations Commission (NLRC), which affirmed the decision of the Labor Arbiter, and held that petitioner Jose Mel Bernarte is an independent contractor, and not an employee of respondents Philippine Basketball Association (PBA), Jose Emmanuel M. Eala, and Perry Martinez. The Court of Appeals denied the motion for reconsideration.

The Facts

The facts, as summarized by the NLRC and quoted by the Court of Appeals, are as follows:

Complainants (Jose Mel Bernarte and Renato Guevarra) aver that they were invited to join the PBA as referees. During the leadership of Commissioner Emilio Bernardino, they were made to sign contracts on a year-to-year basis. During the term of Commissioner Eala, however, changes were made on the terms of their employment.

Complainant Bernarte, for instance, was not made to sign a contract during the first conference of the All-Filipino Cup which was from February 23, 2003 to June 2003. It was only during the second conference when he was made to sign a one and a half month contract for the period July 1 to August 5, 2003.

On January 15, 2004, Bernarte received a letter from the Office of the Commissioner advising him that his contract would not be renewed citing his unsatisfactory performance on and off the court. It was a total shock for Bernarte who was awarded Referee of the year in 2003. He felt that the dismissal was caused by his refusal to fix a game upon order of Ernie De Leon.

On the other hand, complainant Guevarra alleges that he was invited to join the PBA pool of referees in February 2001. On March 1, 2001, he signed a contract as trainee. Beginning 2002, he signed a yearly contract as Regular Class C referee. On May 6, 2003, respondent Martinez issued a memorandum to Guevarra expressing dissatisfaction over his questioning on the assignment of referees officiating out-of-town games. Beginning February 2004, he was no longer made to sign a contract.

Respondents aver, on the other hand, that complainants entered into two contracts of retainer with the PBA in the year 2003. The first contract was for the period January 1, 2003 to July 15, 2003; and the second was for September 1 to December 2003. After the lapse of the latter period, PBA decided not to renew their contracts.

Complainants were not illegally dismissed because they were not employees of the PBA. Their respective

contracts of retainer were simply not renewed. PBA had the prerogative of whether or not to renew their contracts, which they knew were fixed.[4]

In her 31 March 2005 Decision,[5] the Labor Arbiter[6] declared petitioner an employee whose dismissal by respondents was illegal. Accordingly, the Labor Arbiter ordered the reinstatement of petitioner and the payment of backwages, moral and exemplary damages and attorney's fees, to wit:

WHEREFORE, premises considered all respondents who are here found to have illegally dismissed complainants are hereby ordered to (a) reinstate complainants within thirty (30) days from the date of receipt of this decision and to solidarily pay complainants:

1. backwages from January 1, 2004 up to the finality of this Decision, which to date is

2. moral damages

3. exemplary damages JOSE MEL BERNARTE

P536,250.00 100,000.00 50,000.00 RENATO GUEVARRA

P211,250.00

100,000.00

50,000.00

4. 10% attorney's fees

TOTAL

or a total of P1,152,250.00 68,625.00

P754,875.00 36,125.00

P397,375.00

The rest of the claims are hereby dismissed for lack of merit or basis.

SO ORDERED.[7]

In its 28 January 2008 Decision,[8] the NLRC affirmed the Labor Arbiter's judgment. The dispositive portion of the NLRC's decision reads:

WHEREFORE, the appeal is hereby DISMISSED. The Decision of Labor Arbiter Teresita D. Castillon-Lora dated March 31, 2005 is AFFIRMED.

SO ORDERED.[9]

Respondents filed a petition for certiorari with the Court of Appeals, which overturned the decisions of the NLRC and Labor Arbiter. The dispositive portion of the Court of Appeals' decision reads:

WHEREFORE, the petition is hereby GRANTED. The assailed Decision dated January 28, 2008 and Resolution dated August 26, 2008 of the National Labor Relations Commission are ANNULLED and SET ASIDE. Private respondents' complaint before the Labor Arbiter is DISMISSED.

SO ORDERED.[10]

The Court of Appeals' Ruling

The Court of Appeals found petitioner an independent contractor since respondents did not exercise any form of

control over the means and methods by which petitioner performed his work as a basketball referee. The Court of Appeals held:

While the NLRC agreed that the PBA has no control over the referees' acts of blowing the whistle and making calls during basketball games, it, nevertheless, theorized that the said acts refer to the means and methods employed by the referees in officiating basketball games for the illogical reason that said acts refer only to the referees' skills. How could a skilled referee perform his job without blowing a whistle and making calls? Worse, how can the PBA control the performance of work of a referee without controlling his acts of blowing the whistle and making calls?

Moreover, this Court disagrees with the Labor Arbiter's finding (as affirmed by the NLRC) that the Contracts of Retainer show that petitioners have control over private respondents.

x x x x

Neither do We agree with the NLRC's affirmance of the Labor Arbiter's conclusion that private respondents' repeated hiring made them regular employees by operation of law.[11]

The Issues

The main issue in this case is whether petitioner is an employee of respondents, which in turn determines whether petitioner was illegally dismissed.

Petitioner raises the procedural issue of whether the Labor Arbiter's decision has become final and executory for failure of respondents to appeal with the NLRC within the reglementary period.

The Ruling of the Court

The petition is bereft of merit.

The Court shall first resolve the procedural issue posed by petitioner.

Petitioner contends that the Labor Arbiter's Decision of 31 March 2005 became final and executory for failure of respondents to appeal with the NLRC within the prescribed period. Petitioner claims that the Labor Arbiter's decision was constructively served on respondents as early as August 2005 while respondents appealed the Arbiter's decision only on 31 March 2006, way beyond the reglementary period to appeal. Petitioner points out that service of an unclaimed registered mail is deemed complete five days from the date of first notice of the post master. In this case three notices were issued by the post office, the last being on 1 August 2005. The unclaimed registered mail was consequently returned to sender. Petitioner presents the Postmaster's Certification to prove constructive service of the Labor Arbiter's decision on respondents. The Postmaster certified:

x x x

That upon receipt of said registered mail matter, our registry in charge, Vicente Asis, Jr., immediately issued the first registry notice to claim on July 12, 2005 by the addressee. The second and third notices were issued on July 21 and August 1, 2005, respectively.

That the subject registered letter was returned to the sender (RTS) because the addressee failed to claim it after our one month retention period elapsed. Said registered letter was dispatched from this office to Manila CPO (RTS) under bill #6, line 7, page1, column 1, on September 8, 2005.[12]

Section 10, Rule 13 of the Rules of Court provides:

SEC. 10. Completeness of service. - Personal service is complete upon actual delivery. Service by ordinary mail is complete upon the expiration of ten (10) days after mailing, unless the court otherwise provides.

Service by registered mail is complete upon actual receipt by the addressee, or after five (5) days from the date he received the first notice of the postmaster, whichever date is earlier.

The rule on service by registered mail contemplates two situations: (1) actual service the completeness of which is determined upon receipt by the addressee of the registered mail; and (2) constructive service the completeness of which is determined upon expiration of five days from the date the addressee received the first notice of the postmaster.[13]

Insofar as constructive service is concerned, there must be conclusive proof that a first notice was duly sent by the postmaster to the addressee.[14] Not only is it required that notice of the registered mail be issued but that it should also be delivered to and received by the addressee.[15] Notably, the presumption that official duty has been regularly performed is not applicable in this situation. It is incumbent upon a party who relies on constructive service to prove that the notice was sent to, and received by, the addressee.[16]

The best evidence to prove that notice was sent would be a certification from the postmaster, who should certify not only that the notice was issued or sent but also as to how, when and to whom the delivery and receipt was made. The mailman may also testify that the notice was actually delivered.[17]

In this case, petitioner failed to present any concrete proof as to how, when and to whom the delivery and receipt of the three notices issued by the post office was made. There is no conclusive evidence showing that the post office notices were actually received by respondents, negating petitioner's claim of constructive service of the Labor Arbiter's decision on respondents. The Postmaster's Certification does not sufficiently prove that the three notices were delivered to and received by respondents; it only indicates that the post office issued the three notices. Simply put, the issuance of the notices by the post office is not equivalent to delivery to and receipt by the addressee of the registered mail. Thus, there is no proof of completed constructive service of the Labor Arbiter's decision on respondents.

At any rate, the NLRC declared the issue on the finality of the Labor Arbiter's decision moot as respondents' appeal was considered in the interest of substantial justice. We agree with the NLRC. The ends of justice will be better served if we resolve the instant case on the merits rather than allowing the substantial issue of whether petitioner is an independent contractor or an employee linger and remain unsettled due to procedural technicalities.

The existence of an employer-employee relationship is ultimately a question of fact. As a general rule, factual issues are beyond the province of this Court. However, this rule admits of exceptions, one of which is where there are conflicting findings of fact between the Court of Appeals, on one hand, and the NLRC and Labor Arbiter, on the other, such as in the present case.[18]

To determine the existence of an employer-employee relationship, case law has consistently applied the four-fold test, to wit: (a) the selection and engagement of the employee; (b) the payment of wages; (c) the power of dismissal; and (d) the employer's power to control the employee on the means and methods by which the work is accomplished. The so-called "control test" is the most important indicator of the presence or absence of an employer-employee relationship.[19]

In this case, PBA admits repeatedly engaging petitioner's services, as shown in the retainer contracts. PBA pays petitioner a retainer fee, exclusive of per diem or allowances, as stipulated in the retainer contract. PBA can terminate the retainer contract for petitioner's violation of its terms and conditions.

However, respondents argue that the all-important element of control is lacking in this case, making petitioner an independent contractor and not an employee of respondents.

Petitioner contends otherwise. Petitioner asserts that he is an employee of respondents since the latter exercise control over the performance of his work. Petitioner cites the following stipulations in the retainer contract which evidence control: (1) respondents classify or rate a referee; (2) respondents require referees to attend all basketball games organized or authorized by the PBA, at least one hour before the start of the first game of each day; (3) respondents assign petitioner to officiate ballgames, or to act as alternate referee or substitute; (4) referee agrees to observe and comply with all the requirements of the PBA governing the conduct of the referees whether on or off the court; (5) referee agrees (a) to keep himself in good physical, mental, and emotional condition during the life of the contract; (b) to give always his best effort and service, and loyalty to the PBA, and not to officiate as referee in any basketball game outside of the PBA, without written prior consent of the Commissioner; (c) always to conduct himself on and off the court according to the highest standards of honesty or morality; and (6) imposition of various sanctions for violation of the terms and conditions of the contract.

The foregoing stipulations hardly demonstrate control over the means and methods by which petitioner performs his work as a referee officiating a PBA basketball game. The contractual stipulations do not pertain to, much less dictate, how and when petitioner will blow the whistle and make calls. On the contrary, they merely serve as rules of conduct or guidelines in order to maintain the integrity of the professional basketball league. As correctly observed by the Court of Appeals, "how could a skilled referee perform his job without blowing a whistle and making calls? x x x [H]ow can the PBA control the performance of work of a referee without controlling his acts of blowing the whistle and making calls?"[20]

In *Sonza v. ABS-CBN Broadcasting Corporation*,[21] which determined the relationship between a television and radio station and one of its talents, the Court held that not all rules imposed by the hiring party on the hired party indicate that the latter is an employee of the former. The Court held:

We find that these general rules are merely guidelines towards the achievement of the mutually desired result, which are top-rating television and radio programs that comply with standards of the industry. We have ruled that:

Further, not every form of control that a party reserves to himself over the conduct of the other party in relation to the services being rendered may be accorded the effect of establishing an employer-employee relationship. The facts of this case fall squarely with the case of *Insular Life Assurance Co., Ltd. v. NLRC*. In said case, we held that:

Logically, the line should be drawn between rules that merely serve as guidelines towards the achievement of the mutually desired result without dictating the means or methods to be employed in attaining it, and those that control or fix the methodology and bind or restrict the party hired to the use of such means. The first, which aim only to promote the result, create no employer-employee relationship unlike the second, which address both the result and the means used to achieve it.[22]

We agree with respondents that once in the playing court, the referees exercise their own independent judgment, based on the rules of the game, as to when and how a call or decision is to be made. The referees decide whether an infraction was committed, and the PBA cannot overrule them once the decision is made on the playing court. The referees are the only, absolute, and final authority on the playing court. Respondents or any of the PBA officers cannot and do not determine which calls to make or not to make and cannot control the referee when he blows the whistle because such authority exclusively belongs to the referees. The very nature of petitioner's job of officiating a professional basketball game undoubtedly calls for freedom of control by respondents.

Moreover, the following circumstances indicate that petitioner is an independent contractor: (1) the referees are required to report for work only when PBA games are scheduled, which is three times a week spread over an average of only 105 playing days a year, and they officiate games at an average of two hours per game; and (2)

the only deductions from the fees received by the referees are withholding taxes.

In other words, unlike regular employees who ordinarily report for work eight hours per day for five days a week, petitioner is required to report for work only when PBA games are scheduled or three times a week at two hours per game. In addition, there are no deductions for contributions to the Social Security System, Philhealth or Pag-Ibig, which are the usual deductions from employees' salaries. These undisputed circumstances buttress the fact that petitioner is an independent contractor, and not an employee of respondents.

Furthermore, the applicable foreign case law declares that a referee is an independent contractor, whose special skills and independent judgment are required specifically for such position and cannot possibly be controlled by the hiring party.

In *Yonan v. United States Soccer Federation, Inc.*,^[23] the United States District Court of Illinois held that plaintiff, a soccer referee, is an independent contractor, and not an employee of defendant which is the statutory body that governs soccer in the United States. As such, plaintiff was not entitled to protection by the Age Discrimination in Employment Act. The U.S. District Court ruled:

Generally, "if an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to details by which the result is achieved, an employer/employee relationship is likely to exist." The Court must be careful to distinguish between "control[ing] the conduct of another party contracting party by setting out in detail his obligations" consistent with the freedom of contract, on the one hand, and "the discretionary control an employer daily exercises over its employee's conduct" on the other.

Yonan asserts that the Federation "closely supervised" his performance at each soccer game he officiated by giving him an assessor, discussing his performance, and controlling what clothes he wore while on the field and traveling. Putting aside that the Federation did not, for the most part, control what clothes he wore, the Federation did not supervise Yonan, but rather evaluated his performance after matches. That the Federation evaluated Yonan as a referee does not mean that he was an employee. There is no question that parties retaining independent contractors may judge the performance of those contractors to determine if the contractual relationship should continue. x x x

It is undisputed that the Federation did not control the way Yonan refereed his games. He had full discretion and authority, under the Laws of the Game, to call the game as he saw fit. x x x In a similar vein, subjecting Yonan to qualification standards and procedures like the Federation's registration and training requirements does not create an employer/employee relationship. x x x

A position that requires special skills and independent judgment weights in favor of independent contractor status. x x x Unskilled work, on the other hand, suggests an employment relationship. x x x Here, it is undisputed that soccer refereeing, especially at the professional and international level, requires "a great deal of skill and natural ability." Yonan asserts that it was the Federation's training that made him a top referee, and that suggests he was an employee. Though substantial training supports an employment inference, that inference is dulled significantly or negated when the putative employer's activity is the result of a statutory requirement, not the employer's choice. x x x

In *McInturff v. Battle Ground Academy of Franklin*,^[24] it was held that the umpire was not an agent of the Tennessee Secondary School Athletic Association (TSSAA), so the player's vicarious liability claim against the association should be dismissed. In finding that the umpire is an independent contractor, the Court of Appeals of Tennessee ruled:

The TSSAA deals with umpires to achieve a result-uniform rules for all baseball games played between TSSAA member schools. The TSSAA does not supervise regular season games. It does not tell an official how to conduct the game beyond the framework established by the rules. The TSSAA does not, in the vernacular of

the case law, control the means and method by which the umpires work.

In addition, the fact that PBA repeatedly hired petitioner does not by itself prove that petitioner is an employee of the former. For a hired party to be considered an employee, the hiring party must have control over the means and methods by which the hired party is to perform his work, which is absent in this case. The continuous rehiring by PBA of petitioner simply signifies the renewal of the contract between PBA and petitioner, and highlights the satisfactory services rendered by petitioner warranting such contract renewal. Conversely, if PBA decides to discontinue petitioner's services at the end of the term fixed in the contract, whether for unsatisfactory services, or violation of the terms and conditions of the contract, or for whatever other reason, the same merely results in the non-renewal of the contract, as in the present case. The non-renewal of the contract between the parties does not constitute illegal dismissal of petitioner by respondents.

WHEREFORE, we DENY the petition and AFFIRM the assailed decision of the Court of Appeals.

SO ORDERED.

Brion, Del Castillo,[*] Perez, and Sereno, JJ., concur.

[*] Designated Acting Member per Special Order No. 1077 dated 12 September 2011.

[1] Under Rule 45 of the Rules of Court.

[2] Rollo, pp. 73-83. Penned by Associate Justice Magdangal M. De Leon with Associate Justices Jose C. Reyes, Jr. and Ricardo R. Rosario, concurring.

[3] Id. at 85-86. In the same resolution, the Court of Appeals granted the Motion to Withdraw motion for reconsideration filed by Renato Guevarra, another referee and petitioner's co-respondent in the Court of Appeals, rendering the decision of the Court of Appeals final as to him.

[4] Id. at 74-75.

[5] Id. at 111-147.

[6] Teresita D. Castillon-Lora.

[7] Rollo, p. 147.

[8] Id. at 87-94. Penned by Presiding Commissioner Gerardo C. Nograles with Commissioners Perlita B. Velasco and Romeo L. Go, concurring.

[9] Id. at 93.

[10] Id. at 83.

[11] Id. at 78-79, 81.

[12] Id. at 150.

[13] Philemploy Services and Resources, Inc. v. Rodriguez, G.R. No. 152616, 31 March 2006, 486 SCRA 302, 321.

[14] Id.; Spouses Aguilar v. Court of Appeals, 369 Phil. 655, 661 (1999).

[15] Spouses Aguilar v. Court of Appeals, supra at 662, citing De la Cruz v. De la Cruz, 160 SCRA 361 (1988).

[16] *Spouses Aguilar v. Court of Appeals*, supra at 662, citing *Barrameda v. Castillo*, 168 Phil. 170, (1977).

[17] *Barrameda v. Castillo*, 168 Phil. 170, 173 (1977).

[18] *Sycip Gorres Velayo & Company v. De Raedt*, G.R. No. 161366, 16 June 2009, 589 SCRA 160, 167.

[19] *Id.*; *Sonza v. ABS-CBN Broadcasting Corporation*, G.R. No. 138051, 10 June 2004, 431 SCRA 583, 594-595.

[20] *Rollo*, p. 78.

[21] *Supra* note 19.

[22] *Id.* at 603-604.

[23] Case No. 09 C 4280, 22 June 2011 (citations omitted).

[24] Not Reported in S.W.3d, 2009 WL 4878614 *Tenn.Ct.App.*, 2009. No. M2009-00504-COA-R3-CV, 16 December 2009.

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