

MARIO DIESTA BAJARO, PETITIONER, VS. METRO STONERICH CORP., AND/OR IBRAHIM M. NUÑO, RESPONDENTS.

G.R. No. 227982. April 23, 2018

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REYES, JR., J:

In view of the distinct nature of the construction industry, the Court recognizes the right of an employer to hire a construction worker for a specific project, provided that the latter is sufficiently apprised of the duration and scope of such undertaking. In this instance, the worker's tenure shall be coterminous with the project. Notably, the employee's performance of work that is necessary and desirable to the construction business, as well as his repeated rehiring, do not bestow upon him regular employment status.

This treats of the Petition for Review on Certiorari[1] under Rule 45 of the Revised Rules of Court seeking the reversal of the Decision[2] dated July 22, 2016, and Resolution[3] dated October 27, 2016, rendered by the Court of Appeals (CA) in CA-G.R. SP No. 143243. The CA affirmed the ruling of the National Labor Relations Commission (NLRC), Second Division, in NLRC LAC No. 07-001980-15(4) and NLRC NCR CN. 06-06903-14,[4] which dismissed the Complaint for illegal dismissal filed by petitioner Mario Diesta Bajaro (Bajaro) against respondent Metro Stonerich Corporation (Metro Stonerich) and/or Ibrahim M. Nuño (Nuño).

The Antecedents

Metro Stonerich is a domestic entity engaged in the construction business, owned and operated by Nuño.[5]

On June 4, 2008, Metro Stonerich hired Bajaro as a concrete pump operator, tasked with operating the pouring of freshly mixed concrete on the former's construction projects. Bajaro was called to work from 7:00 a.m. until 4:00 p.m., from Mondays to Saturdays.[6] He was assigned in various construction projects until May 10, 2014.[7] He received a daily wage of Php 500.00.[8]

Sometime in April 21, 2014, while Bajaro was working at the KCC Mall of Marbel in Koronadal City, South Cotabato, he noticed that one of the pipes was filled with concrete. He lifted the said pipe to empty and clean it. Upon lifting, he suddenly felt an excruciating pain on his thighs and since then, could no longer walk properly.[9] Due to his injury, he requested the Secretary and Manager of Metro Stonerich to take him to the hospital. However, he was ignored and instead, was told to go home and have himself treated.[10]

On April 23, 2014, Bajaro went to the office of Metro Stonerich to seek financial help, but Metro Stonerich refused to pay for his medical expenses.[11]

Bajaro went to the East Avenue Medical Center to have himself treated.[12] He fully recovered after two weeks. Consequently, on May 5, 2014, he was issued a Certificate that he was fit to return to work.[13]

Thus, on May 7, 2014, Bajaro arrived at his work place. However, he was informed to return to work the next day.[14]

Meanwhile, on May 8 and 9, 2014, Bajaro was informed that he should no longer report for work. Instead, he was

offered money in lieu of his employment. He did not accept the money.[15]

This prompted Bajaro to file a complaint before the Labor Arbiter (LA) for illegal dismissal with monetary claims against Metro Stonerich.[16] In his position paper, Bajaro asserted that he was a regular employee of Metro Stonerich,[17] as he was continuously employed for six years and performed activities that were necessary and desirable to the latter's usual business. As a regular employee, he was entitled to security of tenure and could not be dismissed except for just or authorized cause.[18]

Additionally, Bajaro claimed that he was entitled to his monetary benefits consisting of overtime pay differential, as he was merely given Php 50.00 per hour of overtime pay. He also alleged that he was entitled to night shift differential, holiday pay, and proportionate 13th month pay.[19] Finally, Bajaro sought an award of moral damages, exemplary damages and attorney's fees.[20]

On the other hand, Metro Stonerich argued that Bajaro is not a regular employee, but a project employee. Bajaro was hired for five different construction projects, with each project lasting for a period of five months or 12 months. As proof that Bajaro was engaged on a per project basis, Metro Stonerich pointed out that it even submitted reports to the Department of Labor and Employment (DOLE) upon the completion of the projects Bajaro was engaged in.[21]

Furthermore, Metro Stonerich countered that contrary to Bajaro's claim that he was not given the monetary benefits due him, he was actually given overtime pay, service incentive leave (SIL) pay and 13th month pay as shown in its accounting ledgers.[22]

Ruling of the LA

On June 25, 2014, the LA rendered a Decision[23] dismissing Bajaro's complaint for illegal dismissal. The LA held that Bajaro was a project employee, as evidenced by the employment contracts he signed each time he was engaged by Metro Stonerich. Each contract clearly indicated the specific project, as well as the duration of his work. As a project employee, his employment was coterminous with each project.

As for Bajaro's money claims, the LA awarded a total overtime pay differential of Php 14,921.10, finding that Bajaro was entitled to an overtime pay differential of Php 28.10 per hour of overtime pay, multiplied by the 531 (overtime) hours. Also, the LA awarded Php 4,333.30 as proportionate 13th month pay for 2014, and Php 7,500.00, as SIL pay equivalent to 15 days. In addition, the LA awarded attorney's fees equivalent to 10% of the total monetary award, recognizing that Bajaro was forced to litigate to protect his rights.[24]

The LA denied Bajaro's other claims of holiday pay and rest pay premiums, due to the latter's failure to substantiate his claims. The LA also denied Bajaro's claims for moral and exemplary damages, finding that there was no illegal dismissal to speak of.[25]

The dispositive portion of the LA decision reads:

WHEREFORE premises considered, judgment is hereby rendered DISMISSING the complaint for illegal dismissal. However, respondent Metro Stonerich Corporation/Ibrahim M. Nuño are directed to pay [Bajaro] the amount of Php 14,921.10 representing his underpaid overtime pay, Php 4,333.30 unpaid proportionate 13th month pay for 2014 and unpaid [SIL] pay in the amount of Php 7,500.00 plus ten percent by way of attorney's fees in the amount of Php 2,675.44 or a total of Php 29,429.84.

Other claims are DISMISSED for lack of merit.

SO ORDERED.[26]

Aggrieved, Bajaro filed an appeal against the same LA decision.

Ruling of the NLRC

On July 30, 2015, the NLRC rendered a Resolution[27] dismissing Bajaro's appeal for lack of merit. Echoing the ruling of the LA, the NLRC found that Bajaro was a project employee since his employment contracts prove that at the time he was hired/rehired, the duration and scope of his engagement were already specified. The NLRC rejected Bajaro's claim that his continued and repeated rehiring made him a regular employee. The NLRC observed that based on the records presented by Metro Stonerich, it was clear that Bajaro was hired on different dates for various projects. The projects for which he was hired had gaps in between, and did not constitute a continuous employment. Thus, the NLRC concluded that Bajaro was validly dismissed due to the completion of the project in which he was hired. Furthermore, the NLRC affirmed the monetary awards granted by the LA.

The dispositive portion of the NLRC resolution reads:

WHEREFORE, the appeal filed by [Bajaro] is DISMISSED.

The [LA's] decision is AFFIRMED.

SO ORDERED.[28]

Dissatisfied with the ruling, Bajaro filed with the CA a Petition for Certiorari under Rule 65 of the Revised Rules of Court.

Ruling of the CA

On July 22, 2016, the CA rendered the assailed Decision[29] dismissing the Petition for Certiorari, on the ground that the NLRC did not commit any grave abuse of discretion to warrant the nullification of its decision. The CA agreed with the findings of the NLRC that Bajaro was a project employee. The CA opined that every time Bajaro was hired as a concrete pump operator on Metro Stonerich's projects, he was made to sign a Kasunduan Para Sa Katungkulang Serbisyo (Pamproyekto). This indicated that Bajaro was adequately apprised of his employment status, and was sufficiently informed that his employment will last only until the completion of each construction project. Accordingly, the CA held that Bajaro was not illegally dismissed as his employment was terminated due to the completion of the project. The CA affirmed the benefits awarded by the LA and the NLRC.

The dispositive portion of the CA decision states:

WHEREFORE, the instant Petition is DISMISSED and the assailed Resolutions dated July 30, 2015 and September 30, 2015 of the NLRC, Second Division, in NLRC LAC No. 07-001980-15(4) and NLRC NCR CN. 06-06903-14 are hereby AFFIRMED.

SO ORDERED.[30]

Undeterred, Bajaro filed the instant Petition for Review on Certiorari under Rule 45 of the Revised Rules of Court.

Issues

The main issues raised for the Court's resolution are: (i) whether or not Bajaro was a regular employee of Metro Stonerich; and (ii) whether or not he was illegally dismissed by the latter company.

Ruling of the Court

The instant petition is bereft of merit.

It is a well-settled rule that the jurisdiction of the Court in a petition for review on certiorari under Rule 45 of the Revised Rules of Court is limited only to reviewing errors of law, not of fact, unless the factual findings complained of are completely devoid of support from the evidence on record, or the assailed judgment is based on a gross misapprehension of facts.[31] The Court finds that none of the mentioned circumstances are present to warrant a review of the factual findings of the case. At any rate, the CA did not commit any reversible error that would warrant the exercise of the Court's appellate jurisdiction.

Bajaro is a Project Employee of Metro Stonerich

Essentially, the Labor Code classifies four (4) kinds of employees, namely: (i) regular employees or those who have been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer; (ii) project employees or those whose employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time of the employees' engagement; (iii) seasonal employees or those who perform services which are seasonal in nature, and whose employment lasts during the duration of the season; and (iv) casual employees or those who are not regular, project, or seasonal employees. Jurisprudence has added a fifth kind fixed-term employees or those hired only for a definite period of time.[32]

Focusing on the first two kinds of employment, Article 294 of the Labor Code distinguishes a regular from project-based employment as follows:

Art. 294. Regular and casual employment. - The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.

Parenthetically, in a project-based employment, the employee is assigned to a particular project or phase, which begins and ends at a determined or determinable time. Consequently, the services of the project employee may be lawfully terminated upon the completion of such project or phase.[33] For employment to be regarded as project-based, it is incumbent upon the employer to prove that (i) the employee was hired to carry out a specific project or undertaking; and (ii) the employee was notified of the duration and scope of the project.[34] In order to safeguard the rights of workers against the arbitrary use of the word "project" as a means to prevent employees from attaining regular status, employers must prove that the duration and scope of the employment were specified at the time the employees were engaged, and prove the existence of the project.[35]

In the case at bar, Bajaro was hired by Metro Stonerich as a concrete pump operator in five different construction projects, to wit: (i) SM Cubao Expansion and Renovation project located at Araneta Center, Cubao for five months, which began on June 3, 2008; (ii) Robinson's Place Ilocos Nmie for five months, which commenced on January 24, 2009; (iii) Robinson's Tacloban, Marasbaras for five months, which started on December 14, 2010; (iv) KCC Mall Marbel Expansion, Koronadal City for 12 months, which commenced on October 24, 2011; and (v) KCC Mall Zamboanga Project, Zamboanga City for 12 months, which started on January 11, 2013.[36]

It is undisputed that Bajaro was adequately informed of his employment status (as a project employee) at the time of his engagement. This is clearly substantiated by his employment contracts (Kasunduan Para sa Katungkulang Serbisyo (Pamproyekto)), stating that: (i) he was hired as a project employee; and (ii) his employment was for the indicated terming dates therein, and will end on the completion of the project. The said contracts that he signed

sufficiently apprised him that his security of tenure with Metro Stonerich would only last as long as the specific phase for which he was assigned. In fact, the target date of completion was even indicated in each individual contract clearly warning him of the period of his employment.

Furthermore, pursuant to Department Order No. 19, Series of 1993, or the "Guidelines Governing the Employment of Workers in the Construction Industry," Metro Stonerich duly submitted the required Establishment Employment Report on April 23, 2014 to the DOLE for the reduction of its workforce. Bajaro was included among the 10 workers reported for termination as a consequence of the completion of the construction project effective May 23, 2014.[37] As aptly pointed out by the CA, the submission of the said Establishment Employment Report is a clear indication of project employment.

Verily, being a project employee, Metro Stonerich was justified in terminating Bajaro's employment upon the completion of the project for which the latter was hired.

Bajaro's Continuous Rehiring and His Performance of Work that was Necessary and Desirable to Metro Stonerich's Business Did Not Confer Upon Him Regular Employment Status

Remarkably, in *Gadia, et al. v. Sykes Asia, Inc., et al.*,[38] the Court explained that the "projects" wherein the project employee is hired may consist of "(i) a particular job or undertaking that is within the regular or usual business of the employer company, but which is distinct and separate, and identifiable as such, from the other undertakings of the company; or (ii) a particular job or undertaking that is not within the regular business of the corporation." [39]

Accordingly, it is not uncommon for a construction firm to hire project employees to perform work necessary and vital for its business. Suffice it to say, in *William Uy Construction Corp. and/or Uy, et al. v. Trinidad*,[40] the Court acknowledged the unique characteristic of the construction industry and emphasized that the laborer's performance of work that is necessary and vital to the employer's construction business, and the former's repeated rehiring, do not automatically lead to regularization, viz.:

Generally, length of service provides a fair yardstick for determining when an employee initially hired on a temporary basis becomes a permanent one, entitled to the security and benefits of regularization. But this standard will not be fair, if applied to the construction industry, simply because construction firms cannot guarantee work and funding for its payrolls beyond the life of each project. And getting projects is not a matter of course. Construction companies have no control over the decisions and resources of project proponents or owners. There is no construction company that does not wish it has such control but the reality, understood by construction workers, is that work depended on decisions and developments over which construction companies have no say.

For this reason, the Court held in *Caseres v. Universal Robina Sugar Milling Corporation* that the repeated and successive rehiring of project employees do not qualify them as regular employees, as length of service is not the controlling determinant of the employment tenure of a project employee, but whether the employment has been fixed for a specific project or undertaking, its completion has been determined at the time of the engagement of the employee.[41] (Citations omitted and emphasis and underscoring Ours)

Additionally, in *Malicdem, et al. v. Marulas Industrial Corporation, et al.*,[42] the Court took judicial notice of the fact that in the construction industry, an employee's work depends on the availability of projects. The employee's tenure "is not permanent but coterminous with the work to which he is assigned." [43] Consequently, it would be extremely burdensome for the employer, who depends on the availability of projects, to carry the employee on a permanent status and pay him wages even if there are no projects for him to work on. An employer cannot be forced to maintain the employees in the payroll, even after the completion of the project.[44] "To do so would

make the employee a privileged retainer who collects payment from his employer for work not done. This is extremely unfair to the employers and amounts to labor coddling at the expense of management." [45]

Accordingly, it is all too apparent that the employee's length of service and repeated re-hiring constitute an unfair yardstick for determining regular employment in the construction industry. Thus, Bajaro's rendition of six years of service, and his repeated re-hiring are not badges of regularization.

Bajaro is Entitled to Overtime Pay Differentials, Proportionate 13th Month Pay, SIL Pay and Attorney's Fees

Although Bajaro was hired as a project employee, he is still entitled to certain benefits under the law. Particularly, Bajaro is bound to receive overtime pay differentials, SIL pay, and proportionate 13th month pay, with attorney's fees equivalent to 10% of the total monetary award.

Specifically, as for Bajaro's overtime pay, the records show that Bajaro rendered 531 hours of overtime work. Pursuant to Article 87 of the Labor Code, Bajaro is entitled to receive an additional compensation equivalent to 25% of his daily wage of Php 500.00 for every hour of overtime work he rendered. Unfortunately however, Bajaro merely received a meager overtime pay of Php 50.00. Thus, the Court agrees with the LA's conclusion that Bajaro is entitled to an overtime pay differential. [46]

Additionally, Metro Stonerich failed to prove that it paid Bajaro his SIL pay. Notably, Article 95 of the Labor Code states that "every employee who has rendered at least one year of service shall be entitled to a yearly SIL of five days with pay." Metro Stonerich failed to prove that it gave Bajaro his SIL pay. [47] It must be noted that in claims for payment of salary differential, SIL, holiday pay and 13th month pay, the burden rests on the employer to prove payment. This standard follows the basic rule that in all illegal dismissal cases the burden rests on the defendant to prove payment rather than on the plaintiff to prove non-payment. This likewise stems from the fact that all pertinent personnel files, payrolls, records, remittances and other similar documents - which will show that the differentials, SIL and other claims of workers have been paid - are not in the possession of the worker but are in the custody and control of the employer. [48]

Likewise, Bajaro is entitled to receive his proportionate 13th month pay corresponding to January 2014 to April 22, 2014. [49]

In addition, Bajaro should be awarded attorney's fees equivalent to 10% of the total monetary award, as the instant case includes a claim for unlawfully withheld wages. [50] Added to this, all amounts due shall earn a legal interest of six percent (6%) per annum.

On the other hand, Bajaro's claims for premium pay for holiday and rest day are denied for lack of factual basis, due to Bajaro's failure to specify the dates that he worked during special days, or rest days. [51] It bears stressing that premium pays for holidays and rest days, are not usually incurred in the normal course of business. [52] As such, the burden is shifted on the employee to prove that he actually rendered service on holidays and rest days. [53]

In fine, the Court affirms the right of an employer to hire project employees, for as long as the latter are sufficiently apprised of the nature and term of their employment. Metro Stonerich was not remiss in informing Bajaro of his limited tenure as a project employee. Accordingly, being a project employee, Bajaro was validly terminated from employment due to the completion of the project in which he was engaged.

WHEREFORE, premises considered, the instant appeal is hereby DISMISSED for lack of merit. Accordingly, the Decision dated July 22, 2016 of the Court of Appeals in CA-G.R. SP No. 143243 is AFFIRMED with modification in that all monetary awards shall earn legal interest of six percent (6%) per annum from the finality

of this Decision until the full satisfaction of the obligation. The Labor Arbiter is ordered to prepare a comprehensive accounting of all monetary awards pursuant to this Court's ruling.

SO ORDERED.

Carpio,[*] Acting C. J., (Chairperson), Bersamin,**] Perlas-Bernabe, and Caguioa, JJ., concur.

[*] Designated as Acting Chief Justice per Special Order No. 2539 dated February 28, 2018.

**] Designated as additional Member per Raffle dated August 30, 2017.

[1] Rollo, pp. 11-25.

[2] Penned by Associate Justice Jane Aurora C. Lantion, with Associate Justices Fernanda Lampas Peralta and Nina G. Antonio-Valenzuela, concurring; id. at 239-248.

[3] Id. at 271-272.

[4] Id. at 179-187.

[5] Id. at 145.

[6] Id. at 46.

[7] Id. at 145.

[8] Id. at 43.

[9] Id. at 47.

[10] Id.

[11] Id.

[12] Id.

[13] Id. at 48.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 49.

[18] Id. at 49.

[19] Id. at 52.

[20] Id.

[21] Id. at 147.

[22] Id.

[23] Id. at 145-151.

[24] Id. at 151.

[25] Id. at 150-151.

[26] Id. at 151.

[27] Id. at 179-187.

[28] Id. at 187.

[29] Id. at 239-248.

[30] Id. at 248.

[31] Tenazas, et al. v. R. Villegas Taxi Transport, et al., 731 Phil. 217, 228 (2014), citing "J" Marketing Corp. v. Taran, 607 Phil. 414, 424-425 (2009).

[32] GMA Network, Inc. v. Pabriga, et al., 722 Phil. 161 , 170 (2013), citing Brent School, Inc. v. Zamora, 260 Phil. 747 (1990).

[33] Dacles v. Millenium Erectors Corp., et al., 763 Phil. 550, 558 (2015), citing Omni Hauling Services, Inc., et al. v. Bon, et al., 742 Phil. 335, 343-344 (2014).

[34] Dacles v. Millenium Erectors Corporation, id. at 557.

[35] Id. at 558.

[36] Rollo, p. 147.

[37] Id. at 247.

[38] 752 Phil. 413 (2015).

[39] Id. at 421, citing Omni Hauling Services, Inc., et al. v. Bon, et al., supra note 33, at 344.

[40] 629 Phil. 185 (2010).

[41] Id. at 190.

[42] 728 Phil. 264 (2014).

[43] Id. at 274.

[44] Id. at 275.

[45] Id.

[46] Rollo, p. 150.

[47] Id. at 150-151.

[48] Loon, et al. v. Power Master, Inc., et al., 723 Phil. 515, 531-532 (2013).

[49] Rollo, p. 150.

[50] LABOR CODE OF THE PHILIPPINES, Article 111.

[51] Rollo, p. 150.

[52] Loon, et al. v. Power Master, Inc., et al., supra note 48, at 532, citing Lagatic v. NLRC, 349 Phil. 172,

185-186 (1998).

[53] Loon, et al. v. Power Master, Inc., et al., id.

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