

UNION OF FILIPRO EMPLOYEES (UFE), PETITIONER, VS. BENIGNO VIVAR, JR., NATIONAL LABOR RELATIONS COMMISSION AND NESTLE PHILIPPINES, INC. (FORMERLY FILIPRO, INC.), RESPONDENTS.

G.R. No. 79255. January 20, 1992

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

This labor dispute stems from the exclusion of sales personnel from the holiday pay award and the change of the divisor in the computation of benefits from 251 to 261 days.

On November 8, 1985, respondent Filipro, Inc. (now Nestle Philippines, Inc.) filed with the National Labor Relations Commission (NLRC) a petition for declaratory relief seeking a ruling on its rights and obligations respecting claims of its monthly paid employees for holiday pay in the light of the Court's decision in *Chartered Bank Employees Association v. Ople* (138 SCRA 273 [1985]).

Both Filipro and the Union of Filipino Employees (UFE) agreed to submit the case for voluntary arbitration and appointed respondent Benigno Vivar, Jr. as voluntary arbitrator.

On January 2, 1980, Arbitrator Vivar rendered a decision directing Filipino to:

"pay its monthly paid employees holiday pay pursuant to Article 94 of the Code, subject only to the exclusions and limitations specified in Article 82 and such other legal restrictions as are provided for in the Code," (Rollo, p. 31)

Filipro filed a motion for clarification seeking (1) the limitation of the award to three years, (2) the exclusion of salesmen, sales representatives, truck drivers, merchandisers and medical representatives (hereinafter referred to as sales personnel) from the award of the holiday pay; and (3) deduction from the holiday pay award of overpayment for overtime, night differential, vacation and sick leave benefits due to the use of 251 divisor. (Rollo, pp. 138-145)

Petitioner UFE answered that the award should be made effective from the date of effectivity of the Labor Code, that their sales personnel are not field personnel and are therefore entitled to holiday pay, and that the use of 251 as divisor is an established employee benefit which cannot be diminished.

On January 14, 1986, the respondent arbitrator issued an order declaring that the effectivity of the holiday pay award shall retroact to November 1, 1974, the date of effectivity of the Labor Code. He adjudged, however, that the company's sales personnel are field personnel and, as such, are not entitled to holiday pay. He likewise ruled that with the grant of 10 days' holiday pay, the divisor should be changed from 251 to 261 and ordered the reimbursement of overpayment for overtime, night differential, vacation and sick leave pay due to the use of 251 days as divisor.

Both Nestle and UFE filed their respective motions for partial reconsideration. Respondent Arbitrator treated the two motions as appeals and forwarded the case to the NLRC which issued a resolution dated May 25, 1987 remanding the case to the respondent arbitrator on the ground that it has no jurisdiction to review decisions in voluntary arbitration cases pursuant to Article 263 of the Labor Code as amended by Section 10, Batas Pambansa Blg. 130 and as implemented by Section 5 of the rules implementing B.P. Blg. 130.

However, in a letter dated July 6, 1987, the respondent arbitrator refused to take cognizance of the case reasoning that he had no more jurisdiction to continue as arbitrator because he had resigned from service effective May 1, 1986.

Hence, this petition.

The petitioner union raises the following issues:

- 1) Whether or not Nestle's sales personnel are entitled to holiday pay; and
- 2) Whether or not, concomitant with the award of holiday pay, the divisor should be changed from 251 to 261 days and whether or not the previous use of 251 as divisor resulted in overpayment for overtime, night differential, vacation and sick leave pay.

The petitioner insists that respondent's sales personnel are not field personnel under Article 82 of the Labor Code. The respondent company controverts this assertion.

Under Article 82, field personnel are not entitled to holiday pay. Said article defines field personnel as "non-agricultural employees who regularly perform their duties away from the principal place of business or branch office of the employer and whose actual hours of work in the field cannot be determined with reasonable certainty."

The controversy centers on the interpretation of the clause "whose actual hours of work in the field cannot be determined with reasonable certainty."

It is undisputed that these sales personnel start their field work at 8:00 a.m. after having reported to the office and come back to the office at 4:00 p.m. or 4:30 p.m. if they are Makati-based.

The petitioner maintains that the period between 8:00 a.m. to 4:00 or 4:30 p.m. comprises the sales personnel's working hours which can be determined with reasonable certainty.

The Court does not agree. The law requires that the actual hours of work in the field be reasonably ascertained. The company has no way of determining whether or not these sales personnel, even if they report to the office before 8:00 a.m. prior to field work and come back at 4:30 p.m., really spend the hours in between in actual field work.

We concur with the following disquisition by the respondent arbitrator:

"The requirement for the salesmen and other similarly situated employees to report for work at the office at 8:00 a.m. return at 4:00 or 4:30 p.m. is not within the realm of work in the field as defined in the Code but an exercise of purely management prerogative of providing administrative control over such personnel. This does not in any manner provide a reasonable level of determination on the actual field work of the employees which can be reasonably ascertained. The theoretical analysis that salesmen and other similarly-situated workers regularly report for work at 8:00 a.m. and return to their home station at 4:00 or 4:30 p.m., creating the assumption that their field work is supervised, is surface projection. Actual field work begins after 8:00 a.m. when the sales personnel follow their field itinerary, and ends immediately before 4:00 or 4:30 p.m. when they report back to their office. The period between 8:00 a.m. and 4:00 or 4:30 p.m. comprises their hours of work

in the field, the extent or scope and result of which are subject to their individual capacity and industry and which 'cannot be determined with reasonable certainty.' This is the reason why effective supervision over field work of salesmen and medical representatives, truck drivers and merchandisers is practically a physical impossibility. Consequently, they are excluded from the ten holidays with pay award.' (Rollo, pp. 36-37)

Moreover, the requirement that "actual hours of work in the field cannot be determined with reasonable certainty" must be read in conjunction with Rule IV, Book III of the Implementing Rules which provides:

"Rule IV Holidays with Pay

Section 1. Coverage - This rule shall apply to all employees except:

xxx xxx xxx

(e) Field personnel and other employees whose time and performance is unsupervised by the employer xxx
(Underlining supplied)

While contending that such rule added another element not found in the law (Rollo, p. 13), the petitioner nevertheless attempted to show that its affected members are not covered by the abovementioned rule. The petitioner asserts that the company's sales personnel are strictly supervised as shown by the SOD (Supervisor of the Day) schedule and the company circular dated March 15, 1984 (Annexes 2 and 3, Rollo, pp. 53-55).

Contrary to the contention of the petitioner, the Court finds that the aforementioned rule did not add another element to the Labor Code definition of field personnel. The cause "whose time and performance is unsupervised by the employer" did not amplify but merely interpreted and expounded the clause "whose actual hours of work in the field cannot be determined with reasonable certainty." The former clause is still within the scope and purview of Article 82 which defines field personnel. Hence, in deciding whether or not an employee's actual working hours in the field can be determined with reasonable certainty, query must be made as to whether or not such employee's time and performance is constantly supervised by the employer.

The SOD schedule adverted to by the petitioner does not in the least signify that these sales personnel's time and performance are supervised. The purpose of this schedule is merely to ensure that the sales personnel are out of the office not later than 8:00 a.m. and are back in the office not earlier than 4:00 p.m.

Likewise, the Court fails to see how the company can monitor the number of actual hours spent in field work by an employee through the imposition of sanctions on absenteeism contained in the company circular of March 15, 1984.

The petitioner claims that the fact that these sales personnel are given incentive bonus every quarter based on their performance is proof that their actual hours of work in the field can be determined with reasonable certainty.

The Court thinks otherwise.

The criteria for granting incentive bonus are: (1) attaining or exceeding sales volume based on sales target; (2) good collection performance; (3) proper compliance with good market hygiene; (4) good merchandising work; (5) minimal market returns and (6) proper truck maintenance. (Rollo, p. 190)

The above criteria indicate that these sales personnel are given incentive bonuses precisely because of the difficulty in measuring their actual hours of field work. These employees are evaluated by the result of their work and not by the actual hours of field work which are hardly susceptible to determination.

In *San Miguel Brewery, Inc. v. Democratic Labor Organization* (8 SCRA 613 [1963]), the Court had occasion to discuss the nature of the job of a salesman. Citing the case of *Jewel Tea Co. v. Williams*, C.C.A. Okla., 118 F. 2d

202, the Court stated:

"The reasons for excluding an outside salesman are fairly apparent. Such a salesman, to a greater extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and this employer has no way of knowing the number of hours he works per day."

While in that case the issue was whether or not salesmen were entitled to overtime pay, the same rationale for their exclusion as field personnel from holiday pay benefits also applies.

The petitioner union also assails the respondent arbitrator's ruling that, concomitant with the award of holiday pay, the divisor should be changed from 251 to 261 days to include the additional 10 holidays and the employees should reimburse the amounts overpaid by Filipro due to the use of 251 days' divisor.

Arbitrator Vivar's rationale for his decision is as follows:

"xxx The new doctrinal policy established which ordered payment of ten holidays certainly adds to or accelerates the basis of conversion and computation by ten days. With the inclusion of ten holidays as paid days, the divisor is no longer 251 but 261 or 262 if election day is counted. This is indeed an extremely difficult legal question of interpretation which accounts for what is claimed as falling within the concept of 'solutio indebiti.'

When the claim of the Union for payment of ten holidays was granted, there was a consequent need to abandon that 251 divisor. To maintain it would create an impossible situation where the employees would benefit with additional ten days with pay but would simultaneously enjoy higher benefits by discarding the same ten days for purposes of computing overtime and night time services and considering sick and vacation leave credits. Therefore, reimbursement of such overpayment with the use of 251 as divisor arises concomitant with the award of ten holidays with pay.' (Rollo, p. 34)

The divisor assumes an important role in determining whether or not holiday pay is already included in the monthly paid employee's salary and in the computation of his daily rate. This is the thrust of our pronouncement in *Chartered Bank Employees Association v. Ople* (supra). In that case, We held:

"It is argued that even without the presumption found in the rules and in the policy instruction, the company practice indicates that the monthly salaries of the employees are so computed as to include the holiday pay provided by law. The petitioner contends otherwise.

One strong argument in favor of the petitioner's stand is the fact that the Chartered Bank, in computing overtime compensation for its employees, employs a 'divisor' of 251 days. The 251 working days divisor is the result of subtracting all Saturdays, Sundays and the ten (10) legal holidays from the total number of calendar days in a year. If the employees are already paid for all non-working days, the divisor should be 365 and not 251."

In the petitioner's case, its computation of daily rate, since September 1, 1980, is as follows:

monthly rate x 12 months

251 days

Following the criterion laid down in the *Chartered Bank* case, the use of 251 days' divisor by respondent Filipro indicates that holiday pay is not yet included in the employee's salary, otherwise the divisor should have been 261.

It must be stressed that the daily rate, assuming there are no intervening salary increases, is a constant figure for

the purpose of computing overtime and night differential pay and commutation of sick and vacation leave credits. Necessarily, the daily rate should also be the same basis for computing the 10 unpaid holidays.

The respondent arbitrator's order to change the divisor from 251 to 261 days would result in a lower daily rate which is violative of the prohibition on non-diminution of benefits found in Article 100 of the Labor Code. To maintain the same daily rate if the divisor is adjusted to 261 days, then the dividend, which represents the employee's annual salary, should correspondingly be increased to incorporate the holiday pay. To illustrate, if prior to the grant of holiday pay, the employee's annual salary is P25,100, then dividing such figure by 251 days, his daily rate is P100.00. After the payment of 10 days' holiday pay, his annual salary already includes holiday pay and totals P26,100 (P25,100 + 1,000). Dividing this by 261 days, the daily rate is still P100.00. There is thus no merit in respondent Nestle's claim of overpayment of overtime and night differential pay and sick and vacation leave benefits, the computation of which are all based on the daily rate, since the daily rate is still the same before and after the grant of holiday pay.

Respondent Nestle's invocation of *solutio indebiti*, or payment by mistake, due to its use of 251 days as divisor must fail in light of the Labor Code mandate that "all doubts in the implementation and interpretation of this Code, including its implementing rules and regulations, shall be resolved in favor of labor." (Article 4). Moreover, prior to September 1, 1980, when the company was on a 6-day working schedule, the divisor used by the company was 303, indicating that the 10 holidays were likewise not paid. When Filipro shifted to a 5-day working schedule on September 1, 1980, it had the chance to rectify its error, if ever there was one, but did not do so. It is now too late to allege payment by mistake.

Nestle also questions the voluntary arbitrator's ruling that holiday pay should be computed from November 1, 1974. This ruling was not questioned by the petitioner union as obviously, said decision was favorable to it. Technically, therefore, respondent Nestle should have filed a separate petition raising the issue of effectivity of the holiday pay award. This Court has ruled that an appellee who is not an appellant may assign errors in his brief where his purpose is to maintain the judgment on other grounds, but he cannot seek modification or reversal of the judgment or affirmative relief unless he has also appealed. (*Franco v. Intermediate Appellate Court*, 178 SCRA 331 [1989], citing *La Campana Food Products, Inc. v. Philippine Commercial and Industrial Bank*, 142 SCRA 394 [1986]). Nevertheless, in order to fully settle the issues so that the execution of the Court's decision in this case may not be needlessly delayed by another petition, the Court resolved to take up the matter of effectivity of the holiday pay award raised by Nestle.

Nestle insists that the reckoning period for the application of the holiday pay award is 1985 when the Chartered Bank decision, promulgated on August 28, 1985, became final and executory, and not from the date of effectivity of the Labor Code. Although the Court does not entirely agree with Nestle, we find its claim meritorious.

In *Insular Bank of Asia and America Employees' Union (IBAAEU) v. Inciong*, 132 SCRA 663 [1984], hereinafter referred to as the IBAA case, the Court declared that Section 2, Rule IV, Book III of the implementing rules and Policy Instruction No. 9, issued by the then Secretary of Labor on February 16, 1976 and April 23, 1976, respectively, and which excluded monthly paid employees from holiday pay benefits, are null and void. The Court therein reasoned that, in the guise of clarifying the Labor Code's provisions on holiday pay, the aforementioned implementing rule and policy instruction amended them by enlarging the scope of their exclusion. The Chartered Bank case reiterated the above ruling and added the 'divisor' test.

However, prior to their being declared null and void, the implementing rule and policy instruction enjoyed the presumption of validity and hence, Nestle's non-payment of the holiday benefit up to the promulgation of the IBAA case on October 23, 1984 was in compliance with these presumably valid rule and policy instruction.

In the case of *De Agbayani v. Philippine National Bank*, 38 SCRA 429 [1971], the Court discussed the effect to be given to a legislative or executive act subsequently declared invalid:

x x x x x x x x

"xxx It does not admit of doubt that prior to the declaration of nullity such challenged legislative or executive act must have been in force and had to be complied with. This is so as until after the judiciary, in an appropriate case, declares its invalidity, it is entitled to obedience and respect. Parties may have acted under it and may have changed their positions. What could be more fitting than that in a subsequent litigation regard be had to what has been done while such legislative or executive act was in operation and presumed to be valid in all respects. It is now accepted as a doctrine that prior to its being nullified, its existence as a fact must be reckoned with. This is merely to reflect awareness that precisely because the judiciary is the government organ which has the final say on whether or not a legislative or executive measure is valid, a period of time may have elapsed before it can exercise the power of judicial review that may lead to a declaration of nullity. It would be to deprive the law of its quality of fairness and justice then, if there be no recognition of what had transpired prior to such adjudication.

"In the language of an American Supreme Court decision: 'The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official.' (*Chicot County Drainage Dist. v. Baxter States Bank*, 308 US 371, 374 [1940]). This language has been quoted with approval in a resolution in *Araneta v. Hill* (93 Phil. 1002 [1953]) and the decision in *Manila Motor Co., Inc. v. Flores* (99 Phil., 738 [1956]). An even more recent instance is the opinion of Justice Zaldivar speaking for the Court in *Fernandez v. Cuerva and Co.* (21 SCRA 1095 [1967])." (At pp. 434-435)

The "operative fact" doctrine realizes that in declaring a law or rule null and void, undue harshness and resulting unfairness must be avoided. It is now almost the end of 1991. To require various companies to reach back to 1975 now and nullify acts done in good faith is unduly harsh. 1984 is a fairer reckoning period under the facts of this case.

Applying the aforementioned doctrine to the case at bar, it is not far-fetched that Nestle, relying on the implicit validity of the implementing rule and policy instruction before this Court nullified them, and thinking that it was not obliged to give holiday pay benefits to its monthly paid employees, may have been moved to grant other concessions to its employees, especially in the collective bargaining agreement. This possibility is bolstered by the fact that respondent Nestle's employees are among the highest paid in the industry. With this consideration, it would be unfair to impose additional burdens on Nestle when the non-payment of the holiday benefits up to 1984 was not in any way attributed to Nestle's fault.

The Court thereby resolves that the grant of holiday pay be effective, not from the date of promulgation of the *Chartered Bank* case nor from the date of effectivity of the Labor Code, but from October 23, 1984, the date of promulgation of the *IBAA* case.

WHEREFORE, the order of the voluntary arbitrator is hereby MODIFIED. The divisor to be used in computing holiday pay shall be 251 days. The holiday pay as above directed shall be computed from October 23, 1984. In all other respects, the order of the respondent arbitrator is hereby AFFIRMED.

SO ORDERED.

Narvasa, C.J., Melencio-Herrera, Paras, Feliciano, Padilla, Bidin, Medialdea, Griño-Aquino, Regalado, Davide, Jr., and Romero, JJ., concur.

Cruz and Nocon, JJ., no part.

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