

COSMOPOLITAN FUNERAL HOMES, INC., PETITIONER, VS. NOLI MAALAT AND NATIONAL LABOR RELATIONS COMMISSION, RESPONDENTS.

G.R. No. 86693. July 02, 1990

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

The nature of the work of a "funeraria" supervisor, whether employee or commission agent, is the issue raised in this petition.

Sometime in 1962, petitioner Cosmopolitan Funeral Homes, Inc. engaged the services of private respondent Noli Maalat as a "supervisor" to handle the solicitation of mortuary arrangements, sales, and collections. The funeral services which he sold refer to the taking of the corpse, embalming, casketing, viewing and delivery. The private respondent was paid on a commission basis of 3.5% of the amounts actually collected and remitted.

On January 15, 1987, respondent Maalat was dismissed by the petitioner for commission of the following violations despite previous warnings:

- “(a) Understatement of the reported contract price against the actual contract price charged to and paid by the customers;
- (b) Misappropriation of funds or collections by non-remittance of collections and non-issuance of Official Receipt;
- (c) Charging customers additional amount and pocketing the same for the cost of medicines, linen, and security services without issuing Official Receipt;
- (d) Non-reporting of some embalming and re-embalming charges and pocketing the same and non-issuance of Official Receipt;
- (e) Engaging in tomb making and inclusion of the price of the tomb in the package price without prior knowledge of the customers and the company.” (At p. 16, Records)

Maalat filed a complaint for illegal dismissal and non-payment of commissions.

On the basis of the parties' position papers, Labor Arbiter Newton R. Sancho rendered a decision declaring Maalat's dismissal illegal and ordering the petitioner to pay separation pay, commission, interests and attorney's fee in the total amount of P205,571.52.

In an appeal from the decision, the National Labor Relations Commission (NLRC), on May 31, 1988, reversed the Arbiter's action and rendered a new decision, the dispositive portion of which reads:

"WHEREFORE, premises considered, the decision dated November 27, 1987, is hereby SET ASIDE and VACATED, and a New One ENTERED, ordering as follows:

1. Judgment is hereby rendered declaring the dismissal of complainant Noli Maalat respondent-appellant as justified and with lawful cause. By way of equitable relief and in the interest of social and compassionate justice, We hereby order and direct respondent Cosmopolitan Funeral Homes, Inc. to pay complainant Maalat his separation pay equivalent to one-half (1/2%) month average income for every year of service to appellant, computed on his last year of service immediately preceding his separation from respondent, subject to allowable set-offs and deductions of the counter-claims of respondent company, after due notice and hearing.

2. The claims for accrued commissions by complainant may be admitted, subject to proofs thereof, and allowable set-offs and deductions credited to the account of respondent-appellant by way of counter-claims, after due notice and hearing.

3. All the evidence adduced by the parties are hereby admitted, subject to rebuttal and/or controversion by either party during the hearing and the hearings hereafter.

4. The Attorney's fee in favor of complainant's counsel is hereby fixed at two (2%) percent, assessable over whatever final money award complainant may be entitled on the aggregate sums thereof, after proper hearing on the same.

All other claims and counter-claims are hereby dismissed for lack of merit, except those specified above.

Finally, this case is remanded to the Regional Arbitration Branch of origin for further proceedings in accordance with the above judgment. No findings as to costs." (At pp. 66-67, Rollo)

The petitioner's motion for reconsideration was denied, hence, this petition for review before this Court.

The issues raised in this petition are:

- I. Whether or not the NLRC erred in ruling that an employment relationship existed between the parties; and
- II. Whether or not there was equitable basis for the award of 1/2 month separation pay for every year of service.

I

In determining whether a person who performs work for another is the latter's employee or an independent contractor, the prevailing test is the "right of control" test. Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the manner and means to be used in reaching that end.

The petitioner argues that Maalat was never its employee for he was only a commission agent whose work was not subject to its control. Citing *Investment Planning Corporation of the Philippines v. Social Security System* (21 SCRA 924 [1967]), the petitioner states that the work of its agents approximates that of an independent contractor since the agent is not under control by the latter with respect to the means and methods employed in the performance of the work, but only as to the results.

The NLRC, after its perusal of the facts and evidence on record, stated that there exists an employment relationship between the parties. The petitioner has failed to overcome this factual finding.

The fact that the petitioner imposed and applied its rule prohibiting superiors from engaging in other funeral business which it considered inimical to company interests proves that it had the right of control and actually exercised its control over the private respondent. In other words, Maalat worked exclusively for the petitioner.

Moreover, the private respondent was prohibited from engaging in part-time embalming business outside of the company and a violation thereof was cause for dismissal. Incurring absences without leave was likewise subject to disciplinary action: a reprimand for the first offense, one week suspension for the second offense, and dismissal

for the third offense.

The petitioner admits that these prohibitive rules bound the private respondent but states that these rules have no bearing on the means and methods ordinarily required of a supervisor. The overall picture is one of employment. The petitioner failed to prove that the contract with private respondent was but a mere agency, which indicates that a "supervisor" is free to accomplish his work on his own terms and may engage in other means of livelihood.

In *Investment Planning Corporation*, supra, cited by the petitioner, the majority of the "commission agents" are regularly employed elsewhere. Such a circumstance is absent in Maalat's case. Moreover, the private respondent's job description states that "xxx he attends to the needs of the clientele and arranges the kind of casket and funeral services the customers would like to avail themselves of", and indicates that he must always be on the job or at least most of the time.

Likewise, the private respondent was not allowed to issue his own receipts, nor was he allowed to directly deduct his commission as truly independent salesmen practice.

Worthy of note too are two other company rules which provide that "negotiation and making of contract with customers shall be done inside the office" and "signing of contract should be made immediately before the cadaver or deceased is place in the casket." (Annex 10-B, Petitioner's, Position Paper, Records) Said rules belie the petitioner's stand that it does not have control over the means and methods by which the work is accomplished. The control test has been satisfied. (*Social Security System v. Court of Appeals*, 156 SCRA 383 [1987])

The finding by the public respondent that the petitioner has reported private respondent to the Social Security System as a covered employee adds strength to the conclusion that Maalat is an employee.

There is no reversible error in the findings of facts by the NLRC which are supported by substantial evidence and which we, therefore, do not disturb on appeal.

The payment of compensation by way of commission does not militate against the conclusion that private respondent was an employee. Under Article 97 of the Labor Code, "wage" shall mean "the remuneration of earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, price or commission basis x x x".

The non-observance of regular office hours does not sufficiently show that Maalat is a "supervisor on commission basis" nor does the same indicate that he is an independent salesman. As a supervisor, although compensated on commission basis, he is exempt from the observance of normal hours of work for his compensation is measured by the number of sales he makes. He may not have had the usual fixed time for starting and ending his work as in other types of employment but he had to spend most of his working hours at his job. People die at all times of the day or night.

All considered, we rule that private respondent is an employee of petitioner corporation.

II

The petitioner impugns the award of separation pay equivalent to one-half (1/2) month average income for every year of service to private respondent. The NLRC ruled that:

"However, mindful of the fact the complainant Noli Maalat has served respondent company for the last twenty four (24) years, more or less, it is but proper to afford him some equitable relief, consistent with the recent rulings of the Supreme Court, due to his past services with no known previous record, and the ends of social

and compassionate justice will thus be served if he is paid a portion of his separation pay, equivalent to one-half (1/2) month every year of his service to said company. (See *Soco v. Merchantile Corporation* G.R. No. 53364-65, March 16, 1987; and *Firestone, et al. v. Lariosa, et al.*, G.R. No. 70479, February 27, 1987). We are not inclined to grant complainant his full month termination pay for every year of his service because, unlike in the former *Soco* case, the misconduct of the employee merely involves infraction of company rules while in the latter *Firestone* case it involves misconduct of a rank-and-file employee, although similarly involving acts of dishonesty." (At pp. 65-66, Rollo)

This Court will not disturb the finding by the NLRC that private respondent Maalat was dishonest in the discharge of his functions. The finding is sufficiently supported by the evidence on record.

Additionally, the private respondent did not appeal from the NLRC decision, thereby impliedly accepting the validity of his dismissal.

We take exception, therefore, to the grant of separation pay to private respondent.

In *Philippine Long Distance Telephone Company (PLDT) v. NLRC*, (164 SCRA 671 [1988]), this Court re--examined the doctrine in the aforecited *Firestone* and *Soco* cases and other previous cases that employees dismissed for cause are nevertheless entitled to separation pay on the ground of social and compassionate justice. In abandoning this doctrine, the Court held, and we quote:

"xxx We hold that henceforth separation pay shall be allowed as a measure of social justice only in those instances where the employee is validly dismissed for causes other than serious misconduct or those reflecting on his moral character. Where the reason for the valid dismissal is, for example, habitual intoxication or an offense involving moral turpitude, like theft or illicit sexual relations with a fellow worker, the employer may not be required to give the dismissed employee separation pay, or financial assistance, or whatever other name it is called, on the ground of social justice.

"A contrary rule would, as the petitioner correctly argues, have the effect of rewarding rather than punishing the erring employee for his offense x x x.

"The policy of social justice is not intended to countenance wrongdoing simply because it is committed by the underprivileged. At best it may mitigate the penalty but it certainly will not condone the offense. Compassion for the poor is an imperative of every humane society but only when the recipient is not a rascal claiming an undeserved privilege x x x."

Subsequent decisions have abided by this pronouncement. (See *Philippine National Construction Corporation v. National Labor Relations Commission*, 170 SCRA 207 [1989]; *Eastern Paper Mills, Inc. v. National Labor Relations Commission*, 170 SCRA 597 [1989]; *Osias Academy v. National Labor Relations Commission*, G.R. No. 83234, April 18, 1989; and *Nasipit Lumber Co., Inc. v. National Labor Relations Commission*, G.R. No. 54424, August 31, 1989.)

Conformably with the above cited PLDT ruling, this Court pronounces that the grant of separation pay to private respondent Maalat, who was validly terminated for dishonesty, is not justified.

Parenthetically, it may be mentioned that the Labor Arbiter, apparently unaware of the petition for review pending before this Court, conducted further proceedings to compute private respondent's separation pay, unclaimed commission and 2% attorney's fee, in compliance with the NLRC decision of May 31, 1988. After hearing, the Labor Arbiter rendered a decision on May 10, 1989, the pertinent portion of which reads:

"In sum, the sustainable claims of complainant are as follows:

(1) Separation Pay : P 76,064.40

(2) Unpaid Commissions : 39,344.80

Sub-total : P115,409.20

(3) 2% Attorney's Fees : ____2, 308.18

P117,717.38

"WHEREFORE, judgment is hereby rendered ordering respondent Cosmopolitan Funeral Homes, Inc., to pay complainant Noli Maalat his claims above set forth in the total amount of P117, 717.38 only."

Neither party appealed from said decision.

For being in conflict with our holding that the private respondent is not entitled to separation pay, this Court sets aside the Labor Arbiter's computation of separation pay. However, we uphold his computation of unclaimed commissions amounting to P39,344.80. The amount of attorney's fee should consequently be recomputed at 2% of P39,344.80 or P786.89.

WHEREFORE, the judgment of the National Labor Relations Commission is AFFIRMED except for the grant of separation pay which is hereby disallowed. Private respondent Maalat is entitled to unclaimed commissions of P39,344.80 and 2% attorney's fees of P786.89, said amounts being considered final.

SO ORDERED.

Feliciano, Bidin, and Cortes, JJ., concur.

Fernan, C.J., (Chairman), on leave.

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