

**SAN MIGUEL JEEPNEY SERVICE AND MAMERTO GALACE,  
PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION,  
EDELBERTO PADUA AND 23 OTHERS, RESPONDENTS.**

*G.R. No. 92772. November 28, 1996*

Ponente: PANGANIBAN, J.

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**PANGANIBAN, J.:**

May workers who are paid on commission basis be considered regular employees, and therefore entitled to separation pay? What constitutes "serious business losses" under Art. 283 of the Labor Code which may justify closure or cessation of operations of business establishments and the laying-off of employees without need of paying separation pay?

The foregoing questions are resolved in this special civil action for certiorari alleging grave abuse of discretion by public respondent National Labor Relations Commission[2] in its Resolution[3] promulgated on February 28, 1990 in NLRC case RB-III-03-12-0201-87, which modified the decision of Labor Arbiter Oswald B. Lorenzo dated August 29, 1988.

**The Facts**

The 23 complainants were formerly working (as drivers, dispatchers and mechanic) with petitioner San Miguel Jeepney Service (SMJS), with services ranging from two to eight years. Petitioner SMJS had a contract with the U.S. Naval Base Facility located in San Miguel, San Antonio, Zambales, to provide transportation services to personnel and dependents inside said facility. When the said contract expired on 02 May 1988, petitioner Galace, owner and general manager of SMJS, "opted not to renew the existing contract nor bid on the new contract", [4] due to financial difficulties, he having suffered a net loss the prior year. As a consequence, the services of the complainants were terminated. By that time, however, the 23 had already filed a complaint for non-compliance with the minimum wage law from 1980 onwards, plus non-payment of the 13th month pay, legal holiday pay, overtime pay, service incentive leave pay and separation pay. In their position paper, complainants claimed that they were drivers (except for Edna Farin and Brainly Aglibot who worked as dispatchers, and Abner Martinez who was a mechanic-dispatcher) and all of them were receiving their pay based on commission basis, which was below the statutory minimum wage. They further alleged, among others, that their work entitled them to overtime pay, legal holiday pay and severance pay, which were not paid to them.

Petitioners on the other hand rejected any liability for the money claims. In refutation of the complainants' claims, they submitted a position paper stating:

"1. Legal Holiday Pay -- Complainants are not entitled. (a) the casual dispatchers have no fix (sic) day of work, they merely act as substituted (sic); and (b) the drivers-complainants, who are purely on commission basis are not entitled to legal holiday pay (Rule IV, Holiday Pay, Sec. 1 (e), Implementing Rules of the Labor Code).

2. 13th month pay: Not applicable to complainants who are purely on commission basis (Sec. 3 (e), Rules and Regulations Implementing P.D. 851) Complainants casual-dispatchers are not allowed 13th month pay because

they are not (paid on) monthly basis.

3. Underpayment of Minimum Wage: Complainants-drivers are not wage earners. They are not paid on the basis of their work-hours rendered but on the percentages of their collections representing fares from their passengers. They control their own collections. There is no basis of minimum wage in relation to their commissions taken by them.

The complainants-casual dispatchers are well over their minimum wage.

4. Overtime pay. -- Complainants cannot claim overtime pay. They control their own time. The amount of their percentages depend on how industrious they are in looking for paying passengers. Hence, complainants control their pay, not the respondents. So, why give overtime pay to one who is really working on such a (sic) time?

5. Separation pay. -- All the complainants stopped working when(ever) they pleased. At least respondent Mamerto Galace has given all the complainants notice on July 17, 1988 (should be 1987) that his contract will terminate on February 3, 1988 and after this date, complainants went on strike. How could they be entitled to separation pay when they wilfully stopped working without the fault of the respondents(?)

6. Service Incentive pay: -- This is not applicable to the complainants who are purely on commission basis (Rule V, Sec. 1 (d), Implementing Rules and Regulations of the Labor Code)."

The arbiter ruled that insofar as the claims for holiday pay, 13th month pay and service incentive pay were concerned, under the Rules Implementing PD 851, the complainants were not entitled to such benefits, being workers on a purely commission basis. With respect to the alleged underpayment of minimum wage, the arbiter held that "since the complainants-drivers control(led) their own collections and time, xxx there could be no basis to determine minimum wage in relation to their commissions xxx. Moreover, a perusal of the Complaint xxx (T)he failure of the complainants-drivers to state in their Complaint and pleadings the amount of their alleged underpayment only reflects that complainants themselves were unsure if they were underpaid or not. Hence this Arbiter finds no basis to grant the same." (The foregoing findings by the arbiter were subsequently cited with approval by the respondent NLRC.)

It seems that the arbiter also went on to hold implicitly that the drivers were not regular employees of SMJS. He stated:

"(Insofar) as the cases of Edna Farin and Brainly Aglibot and Abner Martinez are concerned, we rule that they are entitled to the difference of the underpayment of their wages as their jobs are different from that of complainants-drivers, but regular employees of respondents, in accordance with Article(s) 280 and 281 of the Labor Code as amended. These three (3) employees having been found to have been dismissed without due process of law are entitled to separation pay equivalent to one-half (1/2) month for every year of service." (underscoring supplied)

He likewise held that the non-renewal of the contract with the US Naval Base is a closure or cessation of operations NOT due to serious business losses under Art. 283 of the Labor Code, and that being the case, the drivers became entitled to one-half (1/2) month pay for every year of service. All other claims, such as for overtime pay and the like, were dismissed for lack of both legal basis and evidence to support the same. However, the arbiter ordered payment of P1,000.00 to each of the complainants-drivers by way of financial assistance, considering their length of service. The dispositive portion of the arbiter's decision reads:[5]

"WHEREFORE, premises considered, judgment is hereby rendered ordering respondents to pay complainants Edna Farin, Brainly Aglibot and Abner Martinez the differentials for underpayment of wages, as well as, their severance pay, equivalent to one-half (1/2) month for every year of service.

Respondents are further ordered to extend by way of financial assistance in the amount of P1,000.00 each or a total of P19,000.00."

On appeal, the respondent Commission modified the arbiter's ruling, holding that "all the complainants are regular employees in the contemplation of Article 281 (now Art. 280) of the Labor Code, which provides that employment 'shall be deemed regular when the employee performs activities which are usually necessary and desirable in the usual business or trade ""'; respondent Commission thus ruled that the complainants are entitled to separation pay of one-half month for every year of service, by virtue of the non-renewal of the transportation contract with the naval base. However, finding that the complainants did not ask for financial assistance, the NLRC deleted the award of P1,000.00 for the each of the complainants. The fallo of the Commission's Resolution states:[6]

"WHEREFORE, in the light of the preceding disquisition, the judgment appealed from is hereby modified, in that the award of P1,000.00 each to the complainants for financial assistance is deleted. The respondent is ordered to pay all the complainants their separation pay equivalent to one-half (1/2) month for every year of service."

Dissatisfied, petitioners brought this petition for certiorari under Rule 65 of the Rules of Court on April 19, 1990.

#### The Issues

The issues raised by petitioners are as follows:[7]

"I

The respondent NLRC acted in grave abuse of its discretion in awarding separation pay in favor of respondents, such award not being warranted by the facts and the law.

II

Assuming arguendo that such award of separation pay is warranted by law, the respondent NLRC nevertheless gravely abused its discretion in making said award in the absence of the requisite factual basis therefor."

Petitioners concede that the NLRC may have been correct after all in holding that complainants/private respondents were regular employees, for they acknowledged albeit grudgingly that "the above ruling seems to be tinged with reason and authority". Nevertheless, they contend that they cannot be held liable for separation pay for "petitioner SMJS had been experiencing financial reverses since 1986".[8] Petitioners cited the figures provided by petitioner Galace showing "sliding incomes":[9]

"Our gross receipt in 1985 amounted to .. P846,459.25  
Our gross receipt in 1986 amounted to ... 676,748.75  
So, our income decreased in 1986 by ..... P169,710.50  
Our gross income in 1986 was ..... P 676,748.75  
Our gross income in 1987 was ..... 534,204.71  
Our income decreased in 1987 by ..... P142,544.04"

Petitioners also fault the NLRC for acknowledging in its findings of fact (p. 2 of the Resolution) that SMJS had experienced financial reverses while at the same time holding that the closure of SMJS was simply due to non-renewal of its transportation contract, and thereby implying unfairly that SMJS did not cease operations due to financial reverses. Finally, petitioners argue that in order to award separation pay, there must be some numerical and factual basis (e.g. latest salary rate) for the computation thereof, which they claim is absent in this case, as complainants were earning commissions, which of course varied from period to period.

#### The Court's Ruling

We shall discuss the two issues raised by the petition in reverse order: first, the factual bases for "serious business

losses" and then, the applicability and computation of separation pay.

#### No Serious Business Losses

As petitioners themselves admitted, what they suffered were "sliding incomes", in other words, decreasing gross revenues. What the law speaks of is serious business losses or financial reverses. Clearly, sliding incomes are not necessarily losses, much less serious business losses within the meaning of the law. In this connection, we are reminded of our previous ruling that "the requisites of a valid retrenchment are: (a) the losses expected should be substantial and not merely de minimis in extent; (b) the substantial losses apprehended must be reasonably imminent; (c) the retrenchment must be reasonably necessary and likely to effectively prevent the expected losses; and (d) the alleged losses, if already incurred, and the expected imminent losses sought to be forestalled, must be proved by sufficient and convincing evidence."<sup>[10]</sup> We have also held that adverse business conditions justify the exercise of management prerogative to retrench in order to avoid the not-so-remote possibility of closure of the entire business.<sup>[11]</sup> At the other end of the spectrum, it seems equally clear that not every asserted possibility of loss is sufficient legal warrant for reduction of personnel. In the nature of things, the possibility of incurring losses is constantly present, in greater or lesser degree, in the carrying on of business operations, since some, indeed many, of the factors which impact upon the profitability or viability of such operations may be substantially outside the control of the employer.<sup>[12]</sup>

All the foregoing considerations simply require that the employer bears the burden of proving his allegation of economic or business reverses with clear and satisfactory evidence, it being in the nature of an affirmative defense.<sup>[13]</sup> Apparently, the petitioners' evidence failed to persuade the public respondent, and it is not difficult to understand why. The petition made reference to a position paper dated March 10, 1988,<sup>[14]</sup> in which petitioner Galace admitted that "I did not ask to renew our contract with the Navy Exchange because our income had been consistently going down (petitioner then shows the decreases in gross incomes for 1985, 1986 and 1987). It became clear to me as early as of (sic) July last year that I shall not be able to continue operating because of the sliding incomes. So, in August, I announced that I would not renew my contract." Apparently, petitioner did not renew his contract because of "sliding incomes", and not because of serious business losses.

In the same position paper, he also stated that "(i)n 1987, I incurred a loss of P40,471.69 from operation. x x x From 1980 to 1986, or in the six years of previous operations, I had managed to make a profit in spite of all the expenses." Such loss per se, absent any other evidence, and viewed in the light of the amounts of gross receipts the business generated historically, may not be deemed the serious business loss contemplated by law, and thus cannot justify the non-payment of separation pay. Neither did petitioners present any evidence whatsoever regarding the impact of the said net loss on the business (extent of impairment of equity, loss of liquidity, and so forth) nor on expected losses that would have been incurred had operations been continued (under, say, a new contract with the base).

Moreover, we note that in the same position paper, petitioner Galace admitted that he had been persistently refusing to recognize the union organized among his employees, which undoubtedly had to do with the work stoppage that he later complained of. In brief, we are of the belief that the cessation of operations and closure of SMJS were, in the ultimate analysis, triggered by factors other than a P40,000.00 loss. We therefore find no grave abuse of discretion on the part of respondent Commission in ordering the payment of separation pay equivalent to one-half month's wage for every year of service.

#### Propriety of Granting Separation Pay

Public respondent had found the private respondents -- drivers, dispatchers and mechanic -- to be regular employees,<sup>[15]</sup> and, as mentioned earlier, petitioners yielded to said ruling, terming it "tinged with reason and authority". But even if they had not conceded thus, it is obvious that public respondent is correct. The rationale for

this ruling is simply that the complainants/private respondents were unarguably performing work necessary and desirable in the business of SMJS. Without the services rendered by private respondents, petitioners could not have conducted their business of providing transportation services within the naval base. This plus the fact that private respondents had each rendered from two to eight years of service cause them to come squarely within the ambit of Art. 280 of the Labor Code; beyond dispute, they were not only employees, but regular employees, as correctly held by public respondent.

The mere fact that they were paid on commission basis does not affect or change their status as regular employees. The test for determining whether an employee is regular or casual has nothing to do with the manner of computing or paying a employee's wages or compensation. Rather,

"The primary standard, *x x x*, of determining a regular (as against casual) employment is the reasonable connection between the particular activity performed by the employee in relation to the usual business or trade of the employer. The test is whether the former is usually necessary or desirable in the usual business or trade of the employer. The connection can be determined by considering the nature of the work performed and its relation to the scheme of the particular business or trade in its entirety. Also, if the employee has been performing the job for at least one year, even if the performance is not continuous or merely intermittent, the law deems the repeated and continuing need for its performance as sufficient evidence of the necessity if not indispensability of that activity to the business. Hence, the employment is also considered regular, but only with respect to such activity and while such activity exists." [16] (underscoring supplied)

On the other hand, we should hasten to add that while in this particular case, these "commission-basis" employees involved were regular employees (by operation of law, plus of course, the fact that their status as employees had never been challenged at any stage of the present case), it does not follow that every employee paid (whether wholly or partly) on commission basis can be considered a regular employee, or an employee at all, for that matter. While this caveat may seem rather elementary, it is still needful to stress that there are many lines of business legally and legitimately engaging the services of workers, who are paid on commission basis to perform activities desirable and necessary for such businesses, without creating any kind of employer-employee relationship at any time. A case in point is *Singer Sewing Machine Company vs. Drilon*, [17] where certain individuals were hired to work as collectors or "collecting agents" of the company but per written agreement were to be considered at all times as independent contractors and not employees of the company. The key issue in *Singer* was whether these so-called independent contractors were in reality employees. After applying the control test, this Court held: [18]

"The nature of the relationship between a company and its collecting agents depends on the circumstances of each particular relationship. Not all collecting agents are employees and neither are all collecting agents independent contractors. The collectors could fall under either category depending on the facts of each case.

The (Collection Agency) Agreement confirms the status of the collecting agent in this case as an independent contractor not only because he is explicitly described as such but also because the provisions permit him to perform collection services for the company without being subject to the control of the latter except only as to the result of his work. xxx

xxx xxx xxx

xxx xxx xxx

The Court finds the contention of the respondents that the union members are employees under Article 280 of the Labor Code to have no basis. The definition that regular employees are those who perform activities which are desirable and necessary for the business of the employer is not determinative in this case. Any agreement may provide that one party shall render services for and in behalf of another for a consideration (no matter how

necessary for the latter's business) even without being hired as an employee. This is precisely true in the case of an independent contractorship as well as in an agency agreement. The Court agrees with the petitioner's argument that Article 280 is not the yardstick for determining the existence of an employment relationship because it merely distinguishes between two kinds of employees, i.e., regular employees and casual employees, for purposes of determining the right of an employee to certain benefits, to join or form a union, or to security of tenure. Article 280 does not apply where the existence of an employment relationship is in dispute." (underscoring ours)

Having said that, we return to the instant case and, at the risk of being repetitive, reiterate that in this case there was no question about the existence of employer-employee relationship between petitioners and private respondents. Art. 280 therefore can be properly applied to the present case, to confirm the regular-employee status of the private respondents.

Prescinding from the foregoing, as such regular employees, private respondents are entitled to security of tenure and their services may be terminated only for causes provided by law. Likewise, they are also to be accorded the benefits provided under the Labor Code, including inter alia separation pay for loss of employment resulting from retrenchment to prevent losses or closure/cessation of operation not due to serious business losses. The Solicitor General in his Comment suggested that, being regular employees, they are likewise entitled to the protection of minimum wage status.<sup>[19]</sup> Hence, the separation pay due them may be computed on the basis of the minimum wage prevailing at the time their services were terminated by petitioners. We agree. Executive Order No. 178 fixed the minimum wage for non-agricultural workers working outside Metro Manila at P53.00 a day effective October 1, 1987. Thus, we utilize this figure as the basis for computing private respondents' separation pay.

WHEREFORE, in view of the foregoing, the assailed Resolution of public respondent NLRC is hereby AFFIRMED. The separation pay of the private respondents equivalent to one-half month pay for every year of service shall be computed at the then prevailing minimum daily wage of P53.00.

### **SO ORDERED.**

Narvasa, C.J. (Chairman), Davide, Jr., Melo, and Francisco, JJ., concur.

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[1] Should be 22 only, Edelberto Padua being one of the 23 complainants, now private respondents. The 22 others are: Edna Farin, Brainly Aglibot, Abner Martinez, Federico Ablog, Pelagio Aglibot, Marino Alumpo, Angel Amiller, Joseph Aquino, Pablo Beza, Carlito Evangelista, Virgilio Diaz, Victorio Laconsay, Virgilio Lucero, Cesario Martinez, Mariano Minola, Herminio Navilla, Eduardo Pulido, Paulo Radoc, Jr., Jesus de la Resma, Ferdinand Farin, Deolito Reolizo and Santos Taben. See Labor Arbiter's Decision, p. 2; rollo, p. 35.

[2] Third Division, composed of Comm. Rogelio I. Rayala, ponente, and Pres. Comm. Lourdes C. Javier and Comm. Ireneo B. Bernardo, concurring.

[3] Rollo, p. 17.

[4] Per the Memorandum dated 02 May 1988 of Lt. J.R. Jutte, Officer in Charge, Navy Resale Activity Detachment, U.S. Naval Communication Station, Philippines.

[5] NLRC Resolution, p. 1.

[6] NLRC Resolution, p. 5.

[7] Rollo, p. 10.

[8] Rollo, pp. 11-12.

[9] Ibid., p.103.

[10] Catatista vs. National Labor Relations Commission, 247 SCRA 46, August 3, 1995, citing the case of Lopez Sugar Corporation vs. Federation of Free Workers, 189 SCRA 179, August 30, 1990.

[11] Revidad vs. National Labor Relations Commission, 245 SCRA 356, June 27, 1995.

[12] Lopez Sugar Corporation vs. Federation of Free Workers, *supra*, at page 186.

[13] Precision Electronics Corporation vs. NLRC, 178 SCRA 667, 670, October 23, 1989.

[14] Rollo, pp. 43-44.

[15] NLRC Resolution, pp. 3-4.

[16] De Leon vs. National Labor Relations Commission, 176 SCRA 615. 621, August 21, 1989, cited in Baguio Country Club Corporation vs. NLRC, 206 SCRA 643, February 28, 1992. See also Ferrochrome Phils., Inc. vs. NLRC, 236 SCRA 315, September 5, 1994.

[17] 193 SCRA 270, January 24, 1991.

[18] Ibid., at p. 279.

[19] Under Art. 98 of Title II, Book III of the Labor Code, persons excluded from the application of minimum wage statutes are those in "farm tenancy or leasehold, domestic service and persons working in their respective homes in needle work or in any cottage industry duly registered in accordance with law." Since the drivers, dispatchers and mechanic in this case are not excluded by law, and moreover are considered as non-agricultural workers within the scope of Art. 99 of the same Code, they are entitled to payment of minimum wage.

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