

SECOND DIVISION

[G.R. No. 121605, February 02, 2000]

**PAZ MARTIN JO AND CESAR JO, PETITIONERS, VS. NATIONAL
LABOR RELATIONS COMMISSION AND PETER MEJILA,
RESPONDENTS.**

D E C I S I O N

QUISUMBING, J.:

This petition for certiorari seeks to set aside the Decision^[1] of National Labor Relations Commission (Fifth Division) promulgated on November 21, 1994, and its Resolution dated June 7, 1995, which denied petitioners' motion for reconsideration.

Private respondent Peter Mejila worked as barber on a piece rate basis at Dina's Barber Shop. In 1970, the owner, Dina Tan, sold the barbershop to petitioners Paz Martin Jo and Cesar Jo. All the employees, including private respondent, were absorbed by the new owners. The name of the barbershop was changed to Windfield Barber Shop.

The owners and the barbers shared in the earnings of the barber shop. The barbers got two-thirds (2/3) of the fee paid for every haircut or shaving job done, while one-third (1/3) went to the owners of the shop.

In 1977, petitioners designated private respondent as caretaker of the shop because the former caretaker became physically unfit. Private respondent's duties as caretaker, in addition to his being a barber, were: (1) to report to the owners of the barbershop whenever the airconditioning units malfunctioned and/or whenever water or electric power supply was interrupted; (2) to call the laundry woman to wash dirty linen; (3) to recommend applicants for interview and hiring; (4) to attend to other needs of the shop. For this additional job, he was given an honorarium equivalent to one-third (1/3) of the net income of the shop.

When the building occupied by the shop was demolished in 1986, the barbershop closed. But soon a place nearby was rented by petitioners and the barbershop resumed operations as Cesar's Palace Barbershop and Massage Clinic. In this new location, private respondent continued to be a barber and caretaker, but with a fixed monthly honorarium as caretaker, to wit: from February 1986 to 1990 - P700; from February 1990 to March 1991 - P800; and from July 1992 P1,300.

In November 1992, private respondent had an altercation with his co-barber, Jorge Tinoy. The bickerings, characterized by constant exchange of personal insults during working hours, became serious so that private respondent reported the matter to Atty. Allan Macaraya of the labor department. The labor official immediately summoned private respondent and petitioners to a conference. Upon investigation, it was found out that the dispute was not between private respondent and

petitioners; rather, it was between the former and his fellow barber. Accordingly, Atty. Macaraya directed petitioners' counsel, Atty. Prudencio Abragan, to thresh out the problem.

During the mediation meeting held at Atty. Abragan's office a new twist was added. Despite the assurance that he was not being driven out as caretaker-barber, private respondent demanded payment for several thousand pesos as his separation pay and other monetary benefits. In order to give the parties enough time to cool off, Atty. Abragan set another conference but private respondent did not appear in such meeting anymore.

Meanwhile, private respondent continued reporting for work at the barbershop. But, on January 2, 1993, he turned over the duplicate keys of the shop to the cashier and took away all his belongings therefrom. On January 8, 1993, he began working as a regular barber at the newly opened Goldilocks Barbershop also in Iligan City.

On January 12, 1993, private respondent filed a complaint^[2] for illegal dismissal with prayer for payment of separation pay, other monetary benefits, attorney's fees and damages. Significantly, the complaint did not seek reinstatement as a positive relief.

In a Decision dated June 15, 1993, the Labor Arbiter found that private respondent was an employee of petitioners, and that private respondent was not dismissed but had left his job voluntarily because of his misunderstanding with his co-worker.^[3] The Labor Arbiter dismissed the complaint, but ordered petitioners to pay private respondent his 13th month pay and attorney's fees.

Both parties appealed to the NLRC. In a Decision dated November 21, 1994, it set aside the labor arbiter's judgment. The NLRC sustained the labor arbiter's finding as to the existence of employer-employee relationship between petitioners and private respondent, but it ruled that private respondent was illegally dismissed. Hence, the petitioners were ordered to reinstate private respondent and pay the latter's backwages, 13th month pay, separation pay and attorney's fees, thus:

"For failure of respondents to observe due process before dismissing the complainant, We rule and hold that he was illegally terminated. Consequently, he should be reinstated and paid his backwages starting from January 1, 1993 up to the time of his reinstatement and payment of separation pay, should reinstatement not be feasible on account of a strained employer-employee relationship.

As complainant's income was mixed, (commission and caretaker), he becomes entitled to 13th month pay only in his capacity as caretaker at the last rate of pay given to him.

With respect to separation pay, even workers paid on commission are given separation pay as they are considered employees of the company. Complainant should be adjudged entitled to separation pay reckoned from 1970 up to the time he was dismissed on December 31, 1992 at one-half month pay of his earning as a barber; and as a caretaker the same should be reckoned from 1977 up to December 31, 1992.

As complainant has been assisted by counsel not only in the preparation of the complaint, position paper but in hearings before the Labor Arbiter a quo, attorney's fees equivalent to 10% of the money awards should likewise be paid to complainant.

WHEREFORE, the decision appealed from is Vacated and Set Aside and a new one entered in accordance with the above-findings and awards.

SO ORDERED."^[4]

Its motion for reconsideration having been denied in a Resolution dated June 7, 1995, petitioners filed the instant petition.

The issues for resolution are as follows:

1. Whether or not there exists an employer-employee relationship between petitioners and private respondent.
2. Whether or not private respondent was dismissed from or had abandoned his employment.

Petitioners contend that public respondent gravely erred in declaring that private respondent was their employee. They claim that private respondent was their "partner in trade" whose compensation was based on a sharing arrangement per haircut or shaving job done. They argue that private respondent's task as caretaker could be considered an employment because the chores are very minimal.

At the outset, we reiterate the doctrine that the existence of an employer-employee relationship is ultimately a question of fact and that the findings thereon by the labor arbiter and the NLRC shall be accorded not only respect but even finality when supported by ample evidence.^[5]

In determining the existence of an employer-employee relationship, the following elements are considered: (1) the selection and engagement of the workers; (2) power of dismissal; (3) the payment of wages by whatever means; and (4) the power to control the worker's conduct, with the latter assuming primacy in the overall consideration. The power of control refers to the existence of the power and not necessarily to the actual exercise thereof. It is not essential for the employer to actually supervise the performance of duties of the employee; it is enough that the employer has the right to wield that power.^[6]

Absent a clear showing that petitioners and private respondent had intended to pursue a relationship of industrial partnership, we entertain no doubt that private respondent was employed by petitioners as caretaker-barber. Initially, petitioners, as new owners of the barbershop, hired private respondent as barber by absorbing the latter in their employ. Undoubtedly, the services performed by private respondent as barber is related to, and in the pursuit of the principal business activity of petitioners. Later on, petitioners tapped private respondent to serve concurrently as caretaker of the shop. Certainly, petitioners had the power to dismiss private respondent being the ones who engaged the services of the latter. In fact, private respondent sued petitioners for illegal dismissal, albeit contested by the latter. As a caretaker, private respondent was paid by petitioners wages in the form of