323 Phil. 135

SECOND DIVISION

[G.R. No. 113166, February 01, 1996]

ISMAEL SAMSON, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION AND ATLANTIC GULF AND PACIFIC CO., MANILA, INC., RESPONDENTS.

D E C I S I O N

REGALADO, J.:

In the present petition for review on certiorari, which should properly have been initiated as and is hereby considered a special civil action for certiorari under Rule 65, herein petitioner Ismael Samson assails the decision of public respondent National Labor Relations Commission (NLRC) dated November 29, 1993[1] which declared that he was a project employee, in effect reversing the earlier finding of labor arbiter Felipe T. Garduque II that he is actually a regular employee.

Petitioner has been employed with private respondent Atlantic Gulf and Pacific Co., Manila, Inc. (AG & P) in the latter's various construction projects since April, 1965, in the course of which employment he worked essentially as a rigger, from laborer to rigger foreman. From 1977 up to 1985, he was assigned to overseas projects of AG & P, particularly in Kuwait and Saudi Arabia.

On November 5, 1989, petitioner filed a complaint for the conversion of his employment status from project employee to regular employee, which complaint was later amended to include claims for underpayment, non-payment of premium pay for holiday and rest day, refund of reserve fund, and 10% thereof as attorney's fees. Petitioner alleged therein that on the basis of his considerable and continuous length of service with AG & P. he should already be considered a regular employee and, therefore, entitled to the benefits and privileges appurtenant thereto.

The labor arbiter, in a decision dated June 30, 1993,[2] declared that petitioner should be considered a regular employee on the ground that it has not been shown that AG & P had made the corresponding report to the nearest Public Employment Office every time a project wherein petitioner was assigned had been completed and his employment contract terminated, as required under DOLE Policy Instruction No. 20. Furthermore, pursuant to the same policy instruction, the labor arbiter found that since petitioner was not free to leave anytime and to offer his services to other employers, he should be considered an employee for an indefinite period because he is a member of a work pool from which AG & P draws its project employees and is considered an employee thereof during his membership therein, hence the completion of the project does not mean termination of the employer-employee relationship.

In refutation of the allusion of AG & P to the maxims of "no work, no pay" and "a fair day's wage for a fair day's labor," the labor arbiter held that there is no evidence

that at one point in time the respondent has not secured any contract and, further, that complainant has been continuously rendering service in the corporation since 1965 up to the date of his aforesaid decision. Consequently, the labor arbiter ordered that petitioner's employment status be changed from project to regular employee effective November 5, 1989 and that he be given other benefits accorded regular employees plus 10% thereof as attorney's fees. The claim against petitioner's reserve fund was denied on the ground of prescription.

On appeal, public respondent NLRC reversed the decision of the labor arbiter and dismissed the complaint for lack of merit. It ruled that the evidence shows that petitioner was engaged for a fixed and determinable period, which thereby made him a project employee; that there was no evidence presented nor any allegation made by petitioner to support the labor arbiter's finding that the former was not free to leave and offer his services to other employers; that Policy Instruction No. 20 has been superseded by Department Order No. 19, Series of 1993, which provides that non-compliance with the required report to the nearest Public Employment Office no longer affixes a prescription of regular employment; and that the repeated or constant re-hiring of project workers for subsequent projects is permitted without such workers being considered regular employees.

Finally, it ratiocinated that "[l]ength of service, while such may be used as a yardstick for other types of employees in other endeavor(s), does not apply to workers in the construction industry, particularly to project employees. In the case at bar, the characteristics peculiar to the construction business make it imperative for construction companies to hire workers for a particular project as the need arises and it would be financially disadvantageous to owners of construction companies to retain in its payrolls employees and/or workers whose services are no longer required in the particular project to which they have been assigned."[3]

Hence this petition, which presents for resolution the sole issue of whether petitioner is a project or regular employee.

Petitioner principally argues that respondent commission gravely erred in declaring that he is merely a project employee, invoking in support thereof the ruling enunciated in the case of *Caramol vs. National Labor Relations Commission, et al.*[4] His being a regular employee is allegedly supported by evidence, such as his project employment contracts with private respondent, which show that petitioner performed the same kind of work as rigger throughout his period of employment and that, as such, his task was necessary and desirable to private respondent's usual trade or business.

The Solicitor General[5] fully agrees with petitioner, with the observation that the evidence indubitably shows that after a particular project has been accomplished, petitioner would be re-hired immediately the following day save for a gap of one (1) day to one (1) week from the last project to the succeeding one; and that between 1965 to 1977, there were at least fifty (50) occasions wherein petitioner was hired by private respondent for a continuous period of time. He hastens to add that Department Order No. 19, which purportedly superseded Policy Instruction No. 20, cannot be given retroactive effect because at the time petitioner's complaint was filed, the latter issuance was still in force.

On the other hand, private respondent preliminarily avers that the present petition for review under Rule 45 filed by petitioner is not the proper remedy from a decision of the NLRC. Even assuming that the same may be treated as a special civil action under Rule 65, the petition must still fail for failure of petitioner to exhaust administrative remedies in not filing a motion for reconsideration from the questioned decision of respondent commission as required under Section 14, Rule VII Of the Implementing Rules. Besides, the judgment under review supposedly became final and executory on January 13, 1994 pursuant to the Entry of Judgment dated February 9, 1994.

Respondent AG & P then insists that petitioner is merely a project employee for several reasons. First, the factual findings of respondent commission, which is supported by substantial evidence, is already conclusive and binding and, therefore, entitled to respect by this Court. Second, Department Order No. 19 amended Policy Instruction No. 20 by doing away with the required notice of termination upon completion of the project. Hence, non-compliance with the required report, which is only one of the "indicators" for project employment, no longer affixes a prescription of regular employment, by reason of which the doctrine laid down in the *Caramol* case no longer applies to the case at bar. In addition, Department Order No. 19 allows the re-hiring of employees without making them regular employees, aside from the fact that the word "rehiring" connotes new employment. Third, on the basis of petitioner's project employment contracts, his services were engaged for a fixed and determinable period which thus makes each employment for every project separate and distinct from one another. Consequently, the labor arbiter supposedly erred in taking into account petitioner's various employments in the past in determining his length of service, considering that upon completion of a project, the services of the project employee are deemed terminated, his employment being coterminous with each project or phase of the project to which he is assigned.

Finally, so it is claimed, petitioner should be considered a project employee since he falls under the exception provided for in Article 280 of the Labor Code to the effect that "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 x x x."

The bulk of the problem appears to hinge on the determination of whether or not Department Order No. 19 should be given retroactive effect in order that the notice of termination requirement may be dispensed with in this case for a correlative ruling on the presumption of regularity of employment which normally arises in case of non-compliance therewith. Both the petitioner and the Solicitor General submit that said order can only have prospective application. Private respondent believes otherwise. We find for petitioner.

When the present action for regularization was filed on November 5, 1989[6] and during the entire period of petitioner's employment with private respondent prior to said date, the rule in force then was Policy Instruction No. 20 which, in the fourth paragraph thereof, required the employer company to report to the nearest Public Employment Office the fact of termination of a project employee as a result of the