

SIXTH DIVISION[*]

[CA-G.R. SP NO. 128130, February 09, 2015]

**PENTA-SHIMIZU-TOA JOINT VENTURE, ISAO MICHISHITA,
PROJECT MANAGER, PETITIONERS, VS. NATIONAL LABOR
RELATIONS COMMISSION AND JOMAR LEE, RESPONDENTS.**

D E C I S I O N

PERALTA, JR., E. B., J.:

Via Rule 65 of the Rules of Court, petitioners challenged^[1] the NLRC's verdict^[2] in regard to private respondent Jomar Lee's status as a regular employee and his entitlement to separation pay for termination of his employment on account of redundancy and its subsequent Resolution dated September 28, 2012 in NLRC LAC No. 03-000904-12 (NLRC RAB III Case No. 01-17246-11).^[3]

The labor dispute between petitioners and Mr. Lee commenced when Mr. Lee initiated a Complaint for illegal dismissal against petitioners. It was premised on the idea that petitioners were engaged in a joint venture with Penta-Ocean Construction Co. Ltd. and TOA Corporation for the construction and completion of the Subic Bay Port Development Project inside the Subic Bay Freeport Zone.

The joint project was divided into three stages and in the course of the venture, petitioners hired employees which included private respondent Lee.

On February 10, 2006, Lee was hired as a laboratory technician by petitioners and was asked to sign a "Project Employment Contract" as a project employee. According to Mr. Lee, he was continuously employed by petitioners during the completion of the project at Subic Bay Freeport Zone as reflected on the "Extension Contracts"^[4] he signed and certificates of employment.^[5]

On September 2, 2008, petitioners required Mr. Lee to work as an alternate radiological safety officer and on January 31, 2010, Mr. Lee was allegedly informed by petitioners that he will no longer be a laboratory technician but would be working as service driver and radiological safety officer at the same time. Thereafter, in April, 2010, Mr. Lee's employment was terminated as he was not required to work by petitioners. At that time, Mr. Lee was receiving P11,000.00 monthly salary.

Consequently, Mr. Lee instituted a Complaint for illegal dismissal and insisted that he was a regular employee and he performed tasks which were usually necessary and desirable in the usual business or trade of petitioners. Mr. Lee further averred that his continuous rehiring by petitioners and the length of periods he was employed by petitioners accorded him the status of a regular employee.

By contrast, petitioners claimed that during implementation of the construction work of Subic Port Development Project, it employed Mr. Lee as laboratory technician and

later on as radiological health safety officer. At the outset, petitioners informed Mr. Lee that he was a project employee and his employment was contingent upon the completion of the Subic Port Development Project. However, the project was not completed on its target date due to some variables, and the employment of Mr. Lee was extended through "Extension Contracts". Per the "Extension Contracts," Mr. Lee's services will only be retained for the duration of the specific contract for which he was employed. Petitioners, thus, asserted that Mr. Lee can hardly be classified as a regular employee.

On January 27, 2012, Labor Arbiter Reynaldo V. Abdon dismissed Mr. Lee's Complaint against petitioners and opined that Mr. Lee was a project employee and was not entitled to separation pay.

Aggrieved by the judgment of the labor arbiter, Mr. Lee elevated his case before the NLRC.

Sans the project employment contract, the NLRC modified the findings of the labor arbiter and concluded that Mr. Lee was a regular employee who was entitled to P46,420.00 as separation pay.

Thereafter, petitioners ventilated grievances in the form of the current remedial measure under Rule 65 before Us to resolve the dichotomy of rulings on the status of Mr. Lee as a regular or project employee.

Article 280 of the Labor Code distinguishes a "project employee" from a "regular employee":

*"Art. 280. Regular and Casual Employment. 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** or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.*

xxx (Emphasis Supplied)"

In *Wilfredo Aro, et al., v. NLRC*,^[6] citing *Hanjin Heavy Industries and Construction Co. Ltd. v. Ibanez*,^[7] the concepts referred to in Article 280 of the Labor Code were extensively discussed in this wise:

"x x x [T]he principal test for determining whether particular employees are properly characterized as "project employees" as distinguished from "regular employees" is whether or not the project employees were assigned to carry out a "specific project or undertaking," the duration and scope of which were specified at the time the employees were engaged for that project.

In a number of cases, the Court has held that the length of service or the

re-hiring of construction workers on a project-to-project basis does not confer upon them regular employment status, since their re-hiring is only a natural consequence of the fact that experienced construction workers are preferred. Employees who are hired for carrying out a separate job, distinct from the other undertakings of the company, the scope and duration of which has been determined and made known to the employees at the time of the employment, are properly treated as project employees and their services may be lawfully terminated upon the completion of a project. Should the terms of their employment fail to comply with this standard, they cannot be considered project employees."

To echo what was relayed in *Aro*, a project employee is therefore one who is hired for a specific project or undertaking, and the completion or termination of such project or undertaking has been determined at the time of engagement of the employee.^[8]

Based on synthesis of the factual backdrop, it appeared that Mr. Lee was hired as a laboratory technician in the construction of the Subic Port project of petitioners at the Subic Bay Freeport Zone. While there was no indication of the project employment contract^[9] itself before the NLRC and the copy of the contract was attached in the current Petition, the absence of the covenant at the level of the NLRC did not automatically confer a regular status of employment upon Mr. Lee.^[10] Verily, there were other pertinent documents adduced before the NLRC which indicated that Mr. Lee was a project employee, such as the extension contracts and certificates of his employment.

Also, the extension contracts with the conformity of Mr. Lee specifically provided that his employment was for a fixed period, and every time his employment will be extended pending completion of the project, he was duly informed at the initial stage on how long his services will be needed by petitioners.

Moreover, Mr. Lee's continuous re-hiring in the identical undertaking will not bestow upon him the status of a regular employee. In the first place, his re-hiring was but a natural consequence of his coterminous employment with the project, and the tasks he performed as laboratory technician and radiological health safety officer were not vital, necessary and indispensable to the construction business of petitioners.^[11] Neither was there any indication, too, that the period fixed on the extension contracts was imposed to preclude Mr. Lee's acquisition of security of tenure.

Withal, the length of service of the project employee is not the controlling test of employment of tenure but the fact that his engagement as project employee was fixed for a specific task and determinable as to its duration, and these facts were communicated to him at the time he was hired.^[12]

With respect to the termination of his employment, it was legally ended by petitioners since the Port Project was completed and consequently, there was no more reason to retain the services of Mr. Lee considering that the duration of Mr. Lee's employment was conditioned on the completion of the project or phase of the project, in conjunction with Section 1 (c), Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code: