623 Phil. 857

# FIRST DIVISION

# [ G.R. No. 183233, December 23, 2009 ]

## VIRGILIO G. ANABE, PETITIONER, VS. ASIAN CONSTRUCTION (ASIAKONSTRUKT), ZENAIDA P. ANGELES AND N.O. GARCIA, RESPONDENTS.

## D E C I S I O N

**CARPIO MORALES, J.:**

Virgilio G. Anabe (petitioner) was hired by respondent Asian Construction (Asiakonstrukt) as radio technician/operator on April 15, 1993. By notice dated September 8, 1999, he was advised that his services would be, as he was in fact, terminated effective October 8, 1999 on the ground of retrenchment. Petitioner thus filed on February 10, 2000 a complaint[1] for illegal dismissal and illegal deduction and payment of overtime pay, premium pay, holiday pay, service incentive leave pay, and 13th month pay.

Asiakonstrukt, attributing petitioner's retrenchment to sudden business reversal in the construction industry, averred, however, that petitioner's money claims have been offset against his outstanding accountabilities.

By Decision[2] of June 29, 2001, the Labor Arbiter, finding that Asiakonstrukt failed to submit financial statements to prove losses, ruled that petitioner was not validly dismissed. Thus he disposed:

> WHEREFORE, premises considered, judgment is hereby rendered finding the respondents liable for illegal dismissal and consequently ordered to reinstate complainant to his former position or its equivalent without loss of seniority rights and other privileges, with full backwages and benefits from date of dismissal up to actual date of reinstatement which is in the amount of P136,277.14 as of this month. Respondent[s] are likewise ordered to pay complainant his 13th month pay in the amount of P4,259.64 and illegal deductions in the amount of P164,960.24 and overtime pay in the amount of P6.11 [underpayment of overtime pay as computed by the Computation and Examination Unit of the NLRC]. Respondents are further ordered to pay complainant ten percent (10%) of the total award as attorney's fees.

On appeal, the National Labor Relations Commission (NLRC), taking into consideration the certified true copies of the Audited Financial Statements from 1998 to 2000 submitted by Asiakonstrukt, partly granted the appeal by Resolution[3] of March 10, 2004. It modified the Labor Arbiter's Decision by holding that petitioner was not illegally dismissed. While it affirmed the award of the 13th

month pay, overtime pay and attorney's fees, it ordered the payment to petitioner of P19,170 as separation pay.

Moreover, the NLRC reduced the reimbursable amount of illegal deductions from P164,960.24 to P88,000.00, ratiocinating that petitioner is only entitled to money claims from 1997-1999, the claims prior thereto having already prescribed.

Petitioner's motion for reconsideration was denied by Order[4] dated August 31, 2005, hence, he appealed to the Court of Appeals, assailing the consideration by the NLRC of the Audited Financial Statements which were submitted only on appeal.

By Decision[5] of December 26, 2007, the appellate court held that there was no grave abuse of discretion on the part of the NLRC when it considered the financial statements as they "already form part of the records on appeal."

Citing *Clarion Printing House, Inc. v. NLRC,*[6] the appellate court noted that the NLRC is not precluded from receiving evidence on appeal as technical rules of procedure are not binding in labor cases. And it affirmed the ruling of the NLRC that petitioner is only entitled to the illegal deductions for the period 1997-1999 in the amount of P88,000.00, as the prescriptive period for money claims is only three years from the time the cause of action accrues.

Petitioner's motion for reconsideration having been denied by Resolution[7] of April 2, 2008, he filed the present petition, maintaining that he was illegally dismissed as Asiakonstrukt failed to prove that it was suffering business losses to warrant a valid retrenchment of its employees; and Asiakonstrukt belatedly submitted financial statements were not shown to be newly found evidence and unavailable during the proceedings before the Labor Arbiter to thus cast doubts as to their veracity.

The petition is *partly* meritorious.

Retrenchment is the termination of employment initiated by the employer through no fault of and without prejudice to the employees, it is resorted to during periods of business recession, industrial depression, or seasonal fluctuations or during lulls occasioned by lack of orders, shortage of materials, conversion of the plant for a new production program or the introduction of new methods or more efficient machinery or of automation. It is a management prerogative resorted to, to avoid or minimize business losses,[8] and is recognized by Article 283 of the Labor Code, as amended, *viz*:

> Art. 283. *Closure of establishment and reduction of personnel*.--The employer may also terminate the employment of any employee due to x x x retrenchment **to prevent losses** or the closing or cessation of operations of the establishment x x x by serving a written notice on the worker and the [DOLE] at least one month before the intended date thereof. x x x In case of retrenchment to prevent losses, the separation pay shall be equivalent to one (1) month pay or at least one-half month pay for every year of service whichever is higher. x x x (Emphasis ours.)

To effect a valid retrenchment, the following elements must be present: (1) the retrenchment is reasonably necessary and likely to prevent business losses which, if already incurred, are not merely *de minimis*, but substantial, serious, and real, or only if expected, are reasonably imminent as perceived objectively and in good faith by the employer; (2) the employer serves written notice both to the employee/s concerned and the Department of Labor and Employment at least a month before the intended date of retrenchment; (3) the employer pays the retrenched employee separation pay in an amount prescribed by the Code; (4) the employer exercises its prerogative to retrench in good faith; and (5) the employer uses fair and reasonable criteria in ascertaining who would be retrenched or retained.[9]

The losses must be *supported by sufficient and convincing evidence*,[10] the normal method of discharging which is the submission of financial statements duly audited by independent external auditors.[11]

In the present case, Asiakonstrukt failed to submit its audited financial statements within the two years that the case was pending before the Labor Arbiter. It submitted them only after it received the adverse judgment of the Labor Arbiter.

Indubitably, the NLRC is not precluded from receiving evidence on appeal as technical rules of evidence are not binding in labor cases. There is, however, a caveat to this policy. The delay in the submission of evidence should be clearly explained and should adequately prove the employer's allegation of the cause for termination.[12] In the present case, Asiakonstrukt proffered no explanation behind the belated submission. And the financial statements[13] it submitted covered the period 1998-2000. Further, note that the audited financial statement[14] covering the period 1998-2000 was prepared in April 2001, which begs the question of how the management knew at such date of the company's huge losses to justify petitioner's retrenchment in 1999.

Furthermore, from the certification[15] issued by the Securities and Exchange Commission (SEC), it would appear that Asiakonstrukt failed to submit its financial statements to the SEC, as required under the law, for the period 1998-2000 and 2003-2005, thereby lending credence to petitioner's theory that the financial statements submitted on appeal may have been fabricated. Indeed, Asiakonstrukt could have easily submitted its audited financial statements during the pendency of the proceedings at the labor arbiter's level, especially considering that it was in late 2001 that the case was decided.

For failure then of Asiakonstrukt to clearly and satisfactorily substantiate its financial losses,[16] the dismissal of petitioner on account of retrenchment is unjustified. Petitioner is thus entitled to the twin reliefs of payment of backwages and other benefits from the time of his dismissal up to the finality of this Court's Decision, and reinstatement without loss of seniority rights or, in lieu thereof, payment of separation pay.

On the reduction of petitioner's money claims on account of prescription, under Article 1139 of the Civil Code, actions prescribe by the mere lapse of the time prescribed by law. That law may either be the Civil Code or special laws as