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SECOND DIVISION

[G.R. NO. 162833, June 15, 2007]

LAKAS SA INDUSTRIYA NG KAPATIRANG HALIGI NG ALYANSA-PINAGBUKLOD NG MANGGAGAWANG PROMO NG BURLINGAME, PETITIONER, VS. BURLINGAME CORPORATION, RESPONDENT.

DECISION

QUISUMBING, J.:

This is an appeal to reverse and set aside both the Decision[1] dated August 29, 2003 of the Court of Appeals and its Resolution[2] dated March 15, 2004 in CA-G.R. SP No. 69639. The appellate court had reversed the decision[3] dated December 29, 2000 of the Secretary of Labor and Employment which ordered the holding of a certification election among the rank-and-file promo employees of respondent Burlingame Corporation.

The facts are undisputed.

On January 17, 2000, the petitioner *Lakas sa Industriya ng Kapatirang Haligi ng Alyansa-Pinagbuklod ng Manggagawang Promo ng Burlingame* (LIKHA-PMPB) filed a petition for certification election before the Department of Labor and Employment (DOLE). LIKHA-PMPB sought to represent all rank-and-file promo employees of respondent numbering about 70 in all. The petitioner claimed that there was no existing union in the aforementioned establishment representing the regular rank-and-file promo employees. It prayed that it be voluntarily recognized by the respondent to be the collective bargaining agent, or, in the alternative, that a certification/consent election be held among said regular rank-and-file promo employees.

The respondent filed a motion to dismiss the petition. It argued that there exists no employer-employee relationship between it and the petitioner's members. It further alleged that the petitioner's members are actually employees of F. Garil Manpower Services (F. Garil), a duly licensed local employment agency. To prove such contention, respondent presented a copy of its contract for manpower services with F. Garil.

On June 29, 2000, Med-Arbiter Renato D. Parungo dismissed[4] the petition for lack of employer-employee relationship, prompting the petitioner to file an appeal[5] before the Secretary of Labor and Employment.

On December 29, 2000, the Secretary of Labor and Employment ordered the immediate conduct of a certification election.[6]

A motion for reconsideration of the said decision was filed by the respondent on

January 19, 2001, but the same was denied in the Resolution[7] of February 19, 2002 of the Secretary of Labor and Employment.

Respondent then filed a complaint with the Court of Appeals, which then reversed[8] the decision of the Secretary. The petitioner then filed a motion for reconsideration, [9] which the Court of Appeals denied[10] on March 15, 2004.

Hence the instant petition for review on certiorari.

The issue raised in the petition is:

> WHETHER THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN DECLARING THAT THERE IS NO EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN PETITIONER'S MEMBERS AND BURLINGAME BECAUSE F. GARIL MANPOWER SERVICES IS AN INDEPENDENT CONTRACTOR.[11]

Respondent contends that there is no employer-employee relationship between the parties.[12] Petitioner, on the other hand, insists that there is.[13]

The resolution of this issue boils down to a determination of the true status of F. Garil, i.e., whether it is an independent contractor or a labor-only contractor.

The case of *De Los Santos v. NLRC*[14] succinctly enunciates the statutory criteria:

> Job contracting is permissible only if the following conditions are met: 1) the contractor carries on an independent business and undertakes the contract work on his own account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof; and 2) the contractor has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of the business.[15]

According to Section 5 of DOLE Department Order No. 18-02, Series of 2002:[16]

> **Section 5. *Prohibition against labor-only contracting*.** – Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and any of the following elements are [is] present:
>
> > i) The contractor or sub-contractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or
> >
> > ii) The contractor does not exercise the right to control over the performance of the work of the contractual employee.

> The foregoing provisions shall be without prejudice to the application of Article 248(C) of the Labor Code, as amended.
>
> "Substantial capital or investment" refers to capital stocks and subscribed capitalization in the case of corporations, tools, equipment, implements, machineries and work premises, actually and directly used by the contractor or subcontractor in the performance or completion of the job, work or service contracted out.
>
> The "right to control" shall refer to the right reserved to the person for whom the services of the contractual workers are performed, to determine not only the end to be achieved, but also the manner and means to be used in reaching that end.

Given the above criteria, we agree with the Secretary that F. Garil is not an independent contractor.

First, F. Garil does not have substantial capitalization or investment in the form of tools, equipment, machineries, work premises, and other materials, to qualify as an independent contractor. No proof was adduced to show F. Garil's capitalization.

Second, the work of the promo-girls was directly related to the principal business or operation of Burlingame. Marketing and selling of products is an essential activity to the main business of the principal.

Lastly, F. Garil did not carry on an independent business or undertake the performance of its service contract according to its own manner and method, free from the control and supervision of its principal, Burlingame.

The "four-fold test" will show that respondent is the employer of petitioner's members. The elements to determine the existence of an employment relationship are: (a) the selection and engagement of the employee; (b) the payment of wages; (c) the power of dismissal; and (d) the employer's power to control the employee's conduct. The most important element is the employer's control of the employee's conduct, not only as to the result of the work to be done, but also as to the means and methods to accomplish it.[17]

A perusal of the contractual stipulations between Burlingame and F. Garil shows the following:

> 1. The AGENCY shall provide Burlingame Corporation or the CLIENT, with sufficient number of screened, tested and pre-selected personnel (professionals, highly-skilled, skilled, semi-skilled and unskilled) who will be deployed in establishment selling products manufactured by the CLIENT.
>
> 2. The AGENCY shall be responsible in paying its workers under this contract in accordance with the new minimum wage including the daily living allowances and shall pay them overtime or remuneration that which is authorized by law.
> 3. It is expressly understood and agreed that the worker(s) supplied shall be considered or treated as employee(s) of the AGENCY.