

SECOND DIVISION

[G.R. No. 129449, June 29, 1999]

CISELL A. KIAMCO, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION (4TH DIVISION), PHILIPPINE NATIONAL OIL COMPANY (PNOC) AND PNOC-ENERGY DEVELOPMENT CORPORATION (PNOC-EDC), RESPONDENTS.

D E C I S I O N

BELLOSILLO, J.:

On 1 July 1992 private respondent PHILIPPINE NATIONAL OIL COMPANY (PNOC) through its Energy Research and Development Division, later incorporated as PNOC-ENERGY DEVELOPMENT CORPORATION (PNOC-EDC) (now its co-private respondent herein), hired petitioner Cisell Kiamco as a project employee in its Geothermal Agro-Industrial Plant Project in Valencia, Negros Oriental. The *Contract of Employment*^[1] stipulated among others that Kiamco was being hired by the company as a technician for a period of five (5) months from 1 July 1992 to 30 November 1992, or up to the completion of the project, whichever would come first, at a monthly salary of P3,500.00.

After the termination of the contract, a second one was entered into by the parties containing basically the same terms and conditions except that the work-time was reduced to twenty-two (22) days per month instead of twenty-six (26) days as stipulated in the first contract. The period of employment was from 1 December 1992 to 30 April 1993.^[2] Thereafter Kiamco was again re-hired. This time the contract was for six (6) months spanning 1 May 1993 to 30 November 1993 with an increased salary of P3,850.00 per month.^[3]

However on 20 October 1993 Kiamco received a *Memorandum*^[4] from the administration department demanding an explanation from him on certain infractions he allegedly committed as follows:

1. Misconduct - for having replaced the stereo of a UNDP-ERDC vehicle without permission from the company;
2. Absence without official leave (AWOL) - for petitioner's absence on 13 October 1993 and 15 October 1993;
3. Non-compliance of administrative reporting procedure on accidents - for having failed to submit the Police Accident Report and other necessary requirements of a vehicular accident Kiamco was involved in;
4. Unauthorized use of company vehicles - for having used the UNDP-ERDC company vehicle without permission from his superiors.

In a letter dated 22 October 1993 Kiamco tried to explain his side^[5] but private respondents found his explanation unsatisfactory. On 28 October 1993 Kiamco received a *Memorandum*^[6] placing him under preventive suspension from 1 November 1993 to 30 November 1993 pending further investigation. No investigation however was ever conducted. Private respondents contended that an investigation was not necessary since Kiamco had ceased to be an employee *ipso facto* upon the expiration of his employment contract on 30 November 1993.

On 1 December 1993 Kiamco reported back to work but was prevented by security guards from entering the company premises. On 27 May 1994 private respondent PNOC-EDC reported to the Department of Labor and Employment that petitioner Kiamco was terminated on 1 November 1993 due to the expiration of his employment contract and the abolition of his position.^[7]

Thus on 25 April 1994 Kiamco filed before the NLRC Sub-Regional Arbitration Branch No. VII, Dumaguete City, a Complaint for illegal suspension and dismissal against the PNOC.^[8] He prayed that he be reinstated to his former position and paid back wages. On 30 June 1995 Labor Arbiter Geoffrey P. Villahermosa rendered a Decision dismissing the complaint for lack of merit.^[9] According to the Labor Arbiter, the three (3) employment contracts were freely and voluntarily signed by Kiamco and the PNOC representatives. The contracts plainly stated that Kiamco was being hired for a specific project and for a fixed term. Therefore Kiamco could not question his dismissal since it was in accordance with his employment contract.

Kiamco appealed the decision of the Labor Arbiter to public respondent National Labor Relations Commission (NLRC) which on 27 September 1996 reversed the Labor Arbiter and ruled -

WHEREFORE x x x x the decision appealed from is REVERSED, VACATED and SET ASIDE and a new one entered declaring the complainant as a regular employee of the respondents and to have been illegally dismissed by the latter. Ordering respondents to REINSTATE the complainant to his former position without loss of seniority rights and privileges with back wages from the date of his dismissal up to actual reinstatement less any income he may have earned during the pendency of the case.^[10]

On 12 November 1996 private respondents filed a Motion for Reconsideration of the decision of the NLRC^[11] contending that it erred in holding that Kiamco was a regular employee and that the findings of the Labor Arbiter that Kiamco was a project employee should be affirmed. On 23 January 1997 the NLRC issued a Resolution modifying its 27 September 1996 Decision in NLRC Case No. V-0316-95 the dispositive portion of which reads -

WHEREFORE x x x x the decision in question is MODIFIED in accordance with Our above discussion. Accordingly, the complainant-appellant is declared a project employee at respondent's Geothermal Agro-Industrial Demonstration Plant and to continue with said employment until the full completion of the project but in the absence of proof to that effect, complainant is hereby awarded back wages for a period of six (6) months or in the amount of P23,100.00. The order declaring the complainant-appellant as a regular employee of respondent Philippine National Oil

Corporation [sic], and for said company to reinstate the complainant with full back wages is hereby deleted.^[12]

In his petition for *certiorari* Kiamco assails the 23 January 1997 Resolution of the NLRC. He charges the NLRC with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the questioned Resolution and prays that it be nullified and he reinstated to his former position. He also seeks payment of back wages, damages and attorney's fees. The petition also raises the following issues: (a) whether the petition should be dismissed for failure of petitioner Kiamco to file a motion for reconsideration with the NLRC; (b) whether petitioner is a regular employee or a project employee; (c) whether petitioner is entitled to reinstatement without loss of seniority rights and privileges and to the payment of full back wages; and, (d) whether petitioner is entitled to moral and exemplary damages.

Both the Solicitor General and private respondents insist that the petition should be dismissed because of petitioner's failure to file a motion for reconsideration with the NLRC, pleading that -

It is undisputed that petitioner failed to file a motion for reconsideration of the assailed Resolution before filing this petition. Such being the case, the assailed Resolution became final and executory, petitioner can no longer question the correctness of the assailed Resolution before this Honorable Court. As ruled in *Palomado v. NLRC* (257 SCRA 680, 687-699 ^[1996]): Additionally, the allegations in the petition clearly show that petitioner failed to file a motion for reconsideration of the assailed Resolution before filing the instant petition. x x x such failure constitutes a fatal infirmity even if the petition be treated as a special civil action for *certiorari*. The unquestioned rule in this jurisdiction is that *certiorari* will lie only if there is no appeal or any other plain, speedy and adequate remedy expressly provided by law against the acts of public respondent. In the instant case, the plain and adequate remedy expressly provided by law was a motion for reconsideration of the assailed decision x x x made under oath and filed within ten (10) days from receipt of the questioned decision. And for failure to avail of the correct remedy expressly provided by law, petitioner has permitted the subject Resolution to become final and executory after the lapse of the ten-day period x x x ^[13]

But this is not a rigid rule. In *Macawiwili Gold Mining and Development Co., Inc. v. Court of Appeals*^[14] we held -

Ordinarily, *certiorari* as a special civil action will not lie unless a motion for reconsideration is first filed before the respondent tribunal, to allow it an opportunity to correct its assigned errors (*citation omitted*). This rule, however, is not without exceptions. In *Pajo v. Ago and Ortiz* (108 Phil. 905) we held: Respondent contends that petitioners should have filed a motion for reconsideration of the order in question, or asked for the dissolution of the preliminary injunction issued by the trial court, before coming to us.

This is not always so. It is only when the questions are raised for the first time before this Court in a *certiorari* proceeding that the writ shall not issue unless the lower court had first been given the opportunity to pass

upon the same. In fine, when the questions raised before this Court are the same as those which have been squarely raised in and passed upon by the court below, the filing of a motion for reconsideration in said court before *certiorari* can be instituted in this Court is no longer prerequisite. In *Locsin v. Climaco* (26 SCRA 816) it was stated: When a definite question has been properly raised, argued and submitted to a lower court, and the latter has decided the question, a motion for reconsideration is no longer necessary as a condition precedent to the filing of a petition for *certiorari* in this Court.

The issues now raised by petitioner Kiamco were the very same issues submitted before the NLRC. And, as correctly pointed out by Kiamco, the questioned resolution was in fact already the result of a motion for reconsideration filed by the original private respondent. Thus, a motion for reconsideration filed before the NLRC would only be a rehash of the same arguments it previously considered. We therefore hold that Kiamco's failure to file a motion for reconsideration is not fatal to his present petition.

The more important question to be resolved in this case is whether petitioner Kiamco is a regular employee or a project employee. Article 280 of the Labor Code answers this query thus -

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 service to be performed is seasonal in nature and the employment is for the duration of the season.

An employee shall be deemed to be casual if it is not covered by the preceding paragraph: Provided, that any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists.

In *Violeta v. NLRC*^[15] we held -

The 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. As defined, project employees are those workers hired (1) for a specific project or undertaking, and (2) the completion or termination of such project or undertaking has been determined at the time of engagement of the employee.

Under Policy Instruction No. 20 of the Secretary of Labor, project employees are those employed in connection with a particular project. Non-project or regular employees are those employed without reference to any particular project.^[16]

All the employment contracts which Kiamco signed stipulated that he was being employed by private respondents in their Geothermal Agro-Industrial Demonstration Plant Project in Valencia, Negros Occidental. The contracts similarly provided -

WHEREAS, the COMPANY is undertaking projects related to applied research and development, technical consultancy, training, information and planning services on energy and related technologies, that include the implementation and completion of (the) Geothermal Agroindustrial Demonstration Plant Project with Project Code: 15-04309912-117 hereinafter referred to as the PROJECT.^[17]

Furthermore, not only was Kiamco assigned to a specific project, but the duration and completion of such project had also been determined at the time of his employment. Thus -

NOW THEREFORE, for and in consideration of the foregoing, the COMPANY and the PROJECT EMPLOYEE hereby agree as follows:

1. The COMPANY hires and engages the services of (the) PROJECT EMPLOYEE, and the latter has agreed to render and perform services for the COMPANY, as Technician for a period commencing on 01 May 1993 to 31 October 1993 or up to the completion of the PROJECT, whichever comes first (emphasis supplied).

From the foregoing discussion it is apparent that Kiamco was correctly labeled by the NLRC as a project employee. The basis for this conclusion is indeed well-founded. The three (3) *Contracts of Employment* entered into by Kiamco clearly established that he was a project employee because (a) he was specifically assigned to work for a particular project, which was the Geothermal Agro-Industrial Demonstration Plant Project of private respondents, and (b) the termination and the completion of the project or undertaking was determined and stipulated in the contract at the time of his employment.

The next issue to be addressed is whether petitioner Kiamco, as a project employee, is entitled to reinstatement and payment of back wages. Private respondents postulate that Kiamco could not be reinstated for the following reasons: (a) Kiamco was not a regular employee; (b) the position had already been abolished; (c) petitioner failed to substantiate his claim that the project was still on-going; and, (d) the separation of Kiamco from his employment was not exactly cordial, incurring the ire and anger of both his co-workers and superiors.^[18]

In *Santos v. NLRC*^[19] we said -

The normal consequences of a finding that an employee has been illegally dismissed are, that the employee becomes entitled to reinstatement to his former position without loss of seniority rights and the payment of back wages.

Reinstatement restores the employee who was unjustly dismissed to the