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FIRST DIVISION

[G.R. No. 118853, October 16, 1997]

BRAHM INDUSTRIES, INC., PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION, REYNALDO C. GAGARINO, ROBERTO M. DURIAN AND JONE M. COMENDADOR, RESPONDENTS.

D E C I S I O N

BELLOSILLO, J.:

Matters concerning dismissal of workers are, admittedly, within the ambit of management prerogative. However, certain mandatory requirements laid down by law must be complied with to insure that this prerogative is exercised without arbitrariness or abuse of discretion. Our legal system dictates that both the reason for and the manner of dismissing a worker must be appropriate otherwise the termination itself is gravely defective and may be declared unlawful. This is because a worker's job has some of the characteristics of property rights and is therefore within the constitutional mantle of protection that "no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws." As such, a person cannot be deprived of his property right without observance of the proper legal procedure.[1]

Roberto M. Durian, Jone M. Comendador and Reynaldo C. Gagarino filed a case for illegal suspension, illegal dismissal, illegal lay-off, illegal deductions, non-payment of service incentive leave, 13th month pay, and actual, moral and exemplary damages against Brahm Industries, Inc. (BRAHM) before the Labor Arbiter. In their complaints, they alleged that they were employed by BRAHM on various dates with varying salary rates and for different positions.[2] All three (3) claimed that they worked seven (7) days a week from eight o' clock in the morning to five o'clock in the afternoon; that they were required to work overtime three (3) times a week from five o' clock in the afternoon until midnight and at least once a week for the whole night; that they were paid overtime pay based on the minimum wage only; and that without cause and due process, Gagarino's employment was terminated in October 1990, while Durian and Comendador were dismissed in December 1992.[3]

For its part, BRAHM maintained that Gagarino left the company sometime in 1990 to work abroad. When he returned to the Philippines he worked with another company. With respect to Durian and Comendador, Brahm claimed that they abandoned their jobs in 1992 after having been reprimanded by their employer for not finishing some welding work assigned to them. That another reason for Durian's and Comendador's alleged abandonment of their jobs was due to their inability to account for some tools worth P10,000.00 which were under their custody and accountability.

Moreover, BRAHM asserted that complainants were never employed on a regular basis as the latter had their own customers who required them to render home service. That being a small-scale enterprise engaged in contracting and subcontracting projects for the construction of water purifiers and waste control

devices, most of its laborers, including herein complainants, were contractual employees hired on a per project basis. Since its business depended on the availability of contracts or projects, the character of employment of its work force was not permanent but rather coterminous with the project to which they were assigned.

On 8 February 1994 Labor Arbiter Fatima J. Franco ruled that complainants Roberto M. Durian and Jone M. Comendador were illegally dismissed by BRAHM and accordingly ordered the latter to: (a) reinstate complainants to their former positions or equivalent positions without loss of seniority rights, but if reinstatement was no longer possible, to pay them separation pay equivalent to one (1) month for every year of service; (b) pay Roberto M. Durian the amount of Forty-Eight Thousand Thirty-Eight Pesos and Twenty-Five Centavos (P48,038.25) representing his back wages; and, Jone M. Comendador the amount of Sixty Thousand Four Hundred Seventy-Four Pesos and Ninety-Two Centavos (P60,474.92) representing his back wages, 13th month pay and service incentive leave pay; and, (c) pay complainants the amount equivalent to 10% of the total award as attorney's fees.[4]

As regards the case of Reynaldo C. Gagarino, the same was dismissed when the Labor Arbiter found that he filed his complaint only after more than two (2) years from the date of his dismissal. According to the Labor Arbiter, "this lukewarm attitude of complainant (Gagarino) bolstered the conclusion that the filing of his case was merely an afterthought, i.e., when he learned that Durian and Comendador were dismissed, he joined them in filing the instant case."[5] Gagarino did not appeal the dismissal of his case.

Upon appeal by BRAHM, the NLRC affirmed the decision of the Labor Arbiter, subject to the modification that the attorney's fees awarded be reduced to five percent (5%) of the total monetary award.

BRAHM now argues that the NLRC gravely abused its discretion when it held that: (a) private respondents Roberto M. Durian and Jone M. Comendador were regular employees and not merely contractual employees hired on a per project basis; (b) they were illegally dismissed; and, (c) they were entitled to attorney's fees despite the fact that the award lacks factual and legal basis.

We find no merit in the petition. A project employee is one whose 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.[6] Before an employee hired on a per project basis can be dismissed, a report must be made to the nearest employment office of the termination of the services of the workers everytime it completed a project, pursuant to Policy Instruction No. 20.[7]

There was no showing that BRAHM observed the above-mentioned requirement. In fact, it even admitted in the petition its failure to comply with Policy Instruction No. 20. In Ochoco v. National Labor Relations Commission,[8] the failure of the employer to report to the nearest employment office the termination of employment of workers everytime it completed a project was considered by this Court as proof that the dismissed employees were not project employees but regular employees.

Petitioner cannot evade the unfavorable repercussions of its failure to comply with the law by arguing that the requirement under Policy Instruction No. 20 is not mandatory.

Furthermore, Art. 280 of the Labor Code defines who a regular employee is -

> 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.
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> An employment 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 (1) 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 (underscoring supplied).

The primary standard to determine regularity of employment is the reasonable connection between the particular activity performed by the employee in relation to the usual business or trade of the employer. This connection can be determined by considering the nature and work performed and its relation to the scheme of the particular business or trade in its entirety.[9]

The law deems the repeated and continuing need for the service of any employee who has been performing his job for at least one (1) year, even if the performance is not continuous or merely intermittent, as sufficient evidence of the necessity if not the indispensability of that activity to the business.

The work performed by private respondents as "welders" were undoubtedly necessary and desirable to BRAHM’s business or trade of manufacturing water purifiers and waste control devices. Without the performance of such services on a regular basis, BRAHM’s business is expected to grind to a halt. Likewise, BRAHM’s practice of re-hiring private respondents after the completion of every project, which practice continued throughout Comendador’s nine (9) years and Durian’s five (5) years of employment in the company confirms that they were considered by BRAHM as regular employees.

As employer, BRAHM has unlimited access to all pertinent documents and records on the status of employment of its workers. Yet, even as it stubbornly insists that private respondents were project employees only, no contract, payroll or any other convincing evidence which may attest to the nature of their employment was ever