332 Phil. 804

THIRD DIVISION

[G.R. No. 92772, November 28, 1996]

SAN MIGUEL JEEPNEY SERVICE AND MAMERTO GALACE, PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION, EDELBERTO PADUA AND 23 OTHERS,[1] RESPONDENTS.

D E C I S I O N

PANGANIBAN, J.:

May workers who are paid on commission basis be considered regular employees, and therefore entitled to separation pay? What constitutes "serious business losses" under Art. 283 of the Labor Code which may justify closure or cessation of operations of business establishments and the laying-off of employees without need of paying separation pay?

The foregoing questions are resolved in this special civil action for certiorari alleging grave abuse of discretion by public respondent National Labor Relations Commission[2] in its Resolution[3] promulgated on February 28, 1990 in NLRC case RB-III-03-12-0201-87, which modified the decision of Labor Arbiter Oswald B. Lorenzo dated August 29, 1988.

The Facts

The 23 complainants were formerly working (as drivers, dispatchers and mechanic) with petitioner San Miguel Jeepney Service (SMJS), with services ranging from two to eight years. Petitioner SMJS had a contract with the U.S. Naval Base Facility located in San Miguel, San Antonio, Zambales, to provide transportation services to personnel and dependents inside said facility. When the said contract expired on 02 May 1988, petitioner Galace, owner and general manager of SMJS, "opted not to renew the existing contract nor bid on the new contract",[4] due to financial difficulties, he having suffered a net loss the prior year. As a consequence, the services of the complainants were terminated. By that time, however, the 23 had already filed a complaint for non-compliance with the minimum wage law from 1980 onwards, plus non-payment of the 13th month pay, legal holiday pay, overtime pay, service incentive leave pay and separation pay. In their position paper, complainants claimed that they were drivers (except for Edna Farin and Brainly Aglibot who worked as dispatchers, and Abner Martinez who was a mechanic-dispatcher) and all of them were receiving their pay based on commission basis, which was below the statutory minimum wage. They further alleged, among others, that their work entitled them to overtime pay, legal holiday pay and severance pay, which were not paid to them.

Petitioners on the other hand rejected any liability for the money claims. In refutation of the complainants' claims, they submitted a position paper stating:

"1. Legal Holiday Pay -- Complainants are not entitled. (a) the casual dispatchers have no fix (sic) day of work, they merely act as substituted (sic); and (b) the drivers-complainants, who are purely on commission basis are not entitled to legal holiday pay (Rule IV, Holiday Pay, Sec. 1 (e), Implementing Rules of the Labor Code).

2. 13th month pay: Not applicable to complainants who are purely on commission basis (Sec. 3 (e), Rules and Regulations Implementing P.D. 851) Complainants casual-dispatchers are not allowed 13th month pay because they are not (paid on) monthly basis.

3. Underpayment of Minimum Wage: Complainants-drivers are not wage earners. They are not paid on the basis of their work-hours rendered but on the percentages of their collections representing fares from their passengers. They control their own collections. There is no basis of minimum wage in relation to their commissions taken by them.

The complainants-casual dispatchers are well over their minimum wage.

4. Overtime pay. -- Complainants cannot claim overtime pay. They control their own time. The amount of their percentages depend on how industrious they are in looking for paying passengers. Hence, complainants control their pay, not the respondents. So, why give overtime pay to one who is really working on such a (sic) time?

5. Separation pay. -- All the complainants stopped working when(ever) they pleased. At least respondent Mamerto Galace has given all the complainants notice on July 17, 1988 (should be 1987) that his contract will terminate on February 3, 1988 and after this date, complainants went on strike. How could they be entitled to separation pay when they wilfully stopped working without the fault of the respondents(?)

6. Service Incentive pay: -- This is not applicable to the complainants who are purely on commission basis (Rule V, Sec. 1 (d), Implementing Rules and Regulations of the Labor Code)."

The arbiter ruled that insofar as the claims for holiday pay, 13th month pay and service incentive pay were concerned, under the Rules Implementing PD 851, the complainants were not entitled to such benefits, being workers on a purely commission basis. With respect to the alleged underpayment of minimum wage, the arbiter held that "since the complainants-drivers control(led) their own collections and time, xxx there could be no basis to determine minimum wage in relation to their commissions xxx. Moreover, a perusal of the Complaint xxx shows a clear admission of payment of the latter on commission basis at the rate of 14.4% of their collections. xxx (T)he failure of the complainants-drivers to state in their Complaint and pleadings the amount of their alleged underpayment only reflects that complainants themselves were unsure if they were underpaid or not. Hence this Arbiter finds no basis to grant the same." (The foregoing findings by the arbiter were subsequently cited with approval by the respondent NLRC.)

It seems that the arbiter also went on to hold implicitly that the drivers were not regular employees of SMJS. He stated:

> "(Insofar) as the cases of Edna Farin and Brainly Aglibot and Abner Martinez are concerned, we rule that they are entitled to the difference of the underpayment of their wages as their jobs are different from that of complainants-drivers, but regular employees of respondents, in accordance with Article(s) 280 and 281 of the Labor Code as amended. These three (3) employees having been found to have been dismissed without due process of law are entitled to separation pay equivalent to one-half (1/2) month for every year of service." (underscoring supplied)

He likewise held that the non-renewal of the contract with the US Naval Base is a closure or cessation of operations NOT due to serious business losses under Art. 283 of the Labor Code, and that being the case, the drivers became entitled to one-half (1/2) month pay for every year of service. All other claims, such as for overtime pay and the like, were dismissed for lack of both legal basis and evidence to support the same. However, the arbiter ordered payment of P1,000.00 to each of the complainants-drivers by way of financial assistance, considering their length of service. The dispositive portion of the arbiter's decision reads:[5]

> "WHEREFORE, premises considered, judgment is hereby rendered ordering respondents to pay complainants Edna Farin, Brainly Aglibot and Abner Martinez the differentials for underpayment of wages, as well as, their severance pay, equivalent to one-half (1/2) month for every year of service.
>
> Respondents are further ordered to extend by way of financial assistance in the amount of P1,000.00 each or a total of P19,000.00."

On appeal, the respondent Commission modified the arbiter's ruling, holding that "all the complainants are regular employees in the contemplation of Article 281 (now Art. 280) of the Labor Code, which provides that employment 'shall be deemed regular when the employee performs activities which are usually necessary and desirable in the usual business or trade "'"; respondent Commission thus ruled that the complainants are entitled to separation pay of one-half month for every year of service, by virtue of the non-renewal of the transportation contract with the naval base. However, finding that the complainants did not ask for financial assistance, the NLRC deleted the award of P1,000.00 for the each of the complainants. The *fallo* of the Commission's Resolution states:[6]

> "WHEREFORE, in the light of the preceding disquisition, the judgment appealed from is hereby modified, in that the award of P1,000.00 each to the complainants for financial assistance is deleted. The respondent is ordered to pay all the complainants their separation pay equivalent to one-half (1/2) month for every year of service."

Dissatisfied, petitioners brought this petition for certiorari under Rule 65 of the Rules of Court on April 19, 1990.

The Issues

The issues raised by petitioners are as follows:[7]

"I

> The respondent NLRC acted in grave abuse of its discretion in awarding separation pay in favor of respondents, such award not being warranted by the facts and the law.
>
> **II**
>
> Assuming arguendo that such award of separation pay is warranted by law, the respondent NLRC nevertheless gravely abused its discretion in making said award in the absence of the requisite factual basis therefor."

Petitioners concede that the NLRC may have been correct after all in holding that complainants/private respondents were regular employees, for they acknowledged albeit grudgingly that "the above ruling seems to be tinged with reason and authority". Nevertheless, they contend that they cannot be held liable for separation pay for "petitioner SMJS had been experiencing financial reverses since 1986".[8] Petitioners cited the figures provided by petitioner Galace showing "sliding incomes":[9]

> "Our gross receipt in 1985 amounted to .. P846,459.25
> Our gross receipt in 1986 amounted to ... 676,748.75
> So, our income decreased in 1986 by P169,710.50
> Our gross income in 1986 was ..... P 676,748.75
> Our gross income in 1987 was 534,204.71
> Our income decreased in 1987 by ..... P142,544.04"

Petitioners also fault the NLRC for acknowledging in its findings of fact (p. 2 of the Resolution) that SMJS had experienced financial reverses while at the same time holding that the closure of SMJS was simply due to non-renewal of its transportation contract, and thereby implying unfairly that SMJS did not cease operations due to financial reverses. Finally, petitioners argue that in order to award separation pay, there must be some numerical and factual basis (e.g. latest salary rate) for the computation thereof, which they claim is absent in this case, as complainants were earning commissions, which of course varied from period to period.

The Court's Ruling

We shall discuss the two issues raised by the petition in reverse order: first, the factual bases for "serious business losses" and then, the applicability and computation of separation pay.

No Serious Business Losses

As petitioners themselves admitted, what they suffered were "sliding incomes", in other words, decreasing **gross revenues.** What the law speaks of is serious business losses or financial reverses. Clearly, sliding incomes are not necessarily losses, much less serious business losses within the meaning of the law. In this connection, we are reminded of our previous ruling that "the requisites of a valid retrenchment are: (a) the losses expected should be substantial and not merely *de minimis* in extent; (b) the substantial losses apprehended must be reasonably imminent; (c) the retrenchment must be reasonably necessary and likely to effectively prevent the expected losses; and (d) the alleged losses, if already