SUPREME COURT
SECOND DIVISION

ISMAEL SAMSON,
***Petitioner*,**

-versus-

G.R. No. 113166
February 1, 1996

NATIONAL LABOR RELATIONS COMMISSION and ATLANTIC GULF AND PACIFIC CO., MANILA, INC.,
***Respondents*.**
x----------x

D E C I S I O N

REGALADO, *J.*:

In the present Petition for Review on Certiorari, which should properly have been initiated as and is hereby considered a special civil action for certiorari under Rule 65, herein petitioner Ismael Samson assails the decision of public respondent National Labor Relations Commission (NLRC) dated November 29, 1993[1] which declared that he was a project employee, in effect reversing the earlier finding of labor arbiter Felipe T. Garduque II that he is actually a regular employee.

Petitioner has been employed with private respondent Atlantic Gulf and Pacific Co., Manila, Inc. (AG & P) in the latter' s various

construction projects since April, 1965, in the course of which employment he worked essentially as a rigger, from laborer to rigger foreman. From 1977 up to 1985, he was assigned to overseas projects of AG & P, particularly in Kuwait and Saudi Arabia.

On November 5, 1989, petitioner filed a complaint for the conversion of his employment status from project employee to regular employee, which complaint was later amended to include claims for underpayment, non-payment of premium pay for holiday and rest day, refund of reserve fund, and 10% thereof as attorney' s fees . Petitioner alleged therein that on the basis of his considerable and continuous length of service with AG & P, he should already be considered a regular employee and, therefore, entitled to the benefits and privileges appurtenant thereto.

The labor arbiter, in a decision dated June 30, 1993,[2] declared that petitioner should be considered a regular employee on the ground that it has not been shown that AG & P had made the corresponding report to the nearest Public Employment Office every time a project wherein petitioner was assigned had been completed and his employment contract terminated, as required under DOLE Policy Instruction No. 20. Furthermore, pursuant to the same policy instruction, the labor arbiter found that since petitioner was not free to leave anytime and to offer his services to other employers, he should be considered an employee for an indefinite period because he is a member of a work pool from which AG & P draws its project employees and is considered an employee thereof during his membership therein, hence the completion of the project does not mean termination of the employer-employee relationship.

In refutation of the allusion of AG & P to the maxims of "no work, no pay" and "a fair day's wage for a fair day's labor," the labor arbiter held that there is no evidence that at one point in time the respondent has not secured any contract and, further, that complainant has been continuously rendering service in the corporation since 1965 up to the date of his aforesaid decision. Consequently, the labor arbiter ordered that petitioner's employment status be changed from project to regular employee effective November 5, 1989 and that he be given other benefits accorded regular employees plus 10% thereof as

attorney' s fees. The claim against petitioner's reserve fund was denied on the ground of prescription.

On appeal, public respondent NLRC reversed the decision of the labor arbiter and dismissed the complaint for lack of merit. ruled that the evidence shows that petitioner was engaged for d fixed and determinable period, which thereby made him a project employee; that there was no evidence presented nor any allegation made by petitioner to support the labor arbiter's finding that the former was not free to leave and offer his services to other employers; that Policy Instruction No. 20 has been superseded by Department Order No. 19, Series of 1993, which provides that non-compliance with the required report to the nearest Public Employment Office no longer affixes a prescription of regular employment; and that the repeated or constant re-hiring of project workers for subsequent projects is permitted without such workers being considered regular employees.

Finally, it ratiocinated that "[l]ength of service, while such may be used as a yardstick for other types of employees in other endeavor(s), does not apply to workers in the construction industry, particularly to project employees. In the case at bar, the characteristics peculiar to the construction business make it imperative for construction companies to hire workers for a particular project as the need arises and it would be financially disadvantageous to owners of construction companies to retain in its payrolls employees and/or workers whose services are no longer required in the particular project to which they have been assigned."[3]

Hence this petition, which presents for resolution the sole issue of whether petitioner is a project or regular employee.

Petitioner principally argues that respondent commission gravely erred in declaring that he is merely a project employee, invoking in support thereof the ruling enunciated in the case of Caramol vs. National Labor Relations Commission, et al.[4] His being a regular employee is allegedly supported by evidence, such as his project employment contracts with private respondent, which show that petitioner performed the same kind of work as rigger throughout his period of employment and that, as such, his task was necessary and desirable to private respondent's usual trade or business.

The Solicitor General[5] fully agrees with petitioner, with the observation that the evidence indubitably shows that after a particular project has been accomplished, petitioner would be re-hired immediately the following day save for a gap of one (1) day to one (1) week from the last project to the succeeding one; and that between 1965 to 1977, there were at least fifty (50) occasions wherein petitioner was hired by private respondent for a continuous period of time. He hastens to add that Department Order No. 19, which purportedly superseded Policy Instruction No. 20, cannot be given retroactive effect because at the time petitioner's complaint was filed, the latter issuance was still in force.

On the other hand, private respondent preliminarily avers that the present petition for review under Rule 45 filed by petitioner is not the proper remedy from a decision of the NLRC. Even assuming that the same may be treated as a special civil action under Rule 65, the petition must still fail for failure of petitioner to exhaust administrative remedies in not filing a motion for reconsideration from the questioned decision of respondent commission as required under Section 14, Rule VII Of the Implementing Rules. Besides, the judgment under review supposedly became final and executory on January 13, 1994 pursuant to the Entry of Judgment dated February 9, 1994.

Respondent AG & P then insists that petitioner is merely a project employee for several reasons. First, the factual findings of respondent commission, which is supported by substantial evidence, is already conclusive and binding and, therefore, entitled to respect by this Court. Second, Department Order No. 19 amended Policy Instruction No. 20 by doing away with the required notice of termination upon completion of the project. Hence, non-compliance with the required report, which is only one of the "indicators" for project employment, no longer affixes a prescription of regular employment, by reason of which the doctrine laid down in the Caramol case no longer applies to the case at bar. In addition, Department Order No. 19 allows the re-hiring of employees without making them regular employees, aside from the fact that the word "rehiring" connotes new employment. Third, on the basis of petitioner's project employment contracts, his services were engaged for a fixed and determinable period which thus

makes each employment for every project separate and distinct from one another. Consequently, the labor arbiter supposedly erred in taking into account petitioner's various employments in the past in determining his length of service, considering that upon completion of a project, the services of the project employee are deemed terminated, his employment being coterminous with each project or phase of the project to which he is assigned.

Finally, so it is claimed, petitioner should be considered a project employee since he falls under the exception provided for In Article 280 of the Labor Code to the effect that "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."

The bulk of the problem appears to hinge on the determination of whether or not Department Order No. 19 should be given retroactive effect in order that the notice of termination requirement may be dispensed with in this case for a correlative ruling on the presumption of regularity of employment which normally arises in case of non-compliance therewith. Both the petitioner and the Solicitor General submit that said order can only have prospective application. Private respondent believes otherwise. We find for petitioner .

When the present action for regularization was filed on November 5, 1989[6] and during the entire period of petitioner' s employment with private respondent prior to said date, the rule in force then was Policy Instruction No. 20 which, in the fourth paragraph thereof, required the employer company to report to the nearest Public Employment Office the fact of termination of a project employee as a result of the completion of the project or any phase thereof in which he is employed. Furthermore, contrary to private respondent's asseveration, Department Order No. 19, which was issued on April 1, 1993, did not totally dispense with the notice requirement but,

instead, made provisions therefor and considered it as one of the "indicators" that a worker is a project employee.

This is evident in Section 2.2 thereof which provides that:

> "2.2 Indicators of project employment. — Either one or more of the following circumstances, among others, may be considered as indicators that an employee is a project employee.
>
> (a) The duration of the specific/identified undertaking for which the worker- is engaged is reasonably determinable.
>
> (b) Such duration, as well as the specific work/service to be performed, is defined in an employment agreement and is made clear to the employee at the time of hiring.
>
> (c) The work/service performed by the employee is in connection with the particular project/undertaking for which he is engaged.
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> (d) The employee, while not employed and awaiting engagement, is free to offer his services to any other employer.
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> (e) The termination of his employment in the particular project/undertaking is reported to the Department of Labor and Employment (DOLE) Regional Office having jurisdiction over the workplace within 30 days following the date of his separation from work, using the prescribed form on employees terminations/dismissals/suspensions.
>
> (f) An undertaking in the employment contract by the employer to pay completion bonus to the project employee as practiced by most construction companies." (Emphasis supplied)

More importantly, it must be emphasized that the notice of termination requirement has been retained by express provision of Department Order No. 19 under Section 6.1 thereof, to wit:

> "6.1. Requirements of labor and social legislations. (a) The construction company and the general contractor and/or subcontractor referred to in Sec. 2. 5 shall be responsible for the workers in its employ on matters of compliance with the requirements of existing laws and regulations on hours of work, wages, wage-related benefits, health, safety and social welfare benefits, including submission to the DOLE-Regional Office of Work Accident/Illness Report, Monthly Report on Employees' Terminations/Dismissals/Suspensions and other reports. (Emphasis ours.)

Perforce, we agree with the labor arbiter that private respondent's failure to report the termination of petitioner's services to the nearest Public Employment Office, after completion of every project or a phase thereof to which he is assigned, is a clear indication that petitioner was not and is not a project employee.

On the bases of the foregoing, the retroactivity or prospectivity of Department Order No. 19 would normally be of no moment. At any rate, even if the new issuance has expressly superseded Policy Instruction No. 20, the same cannot be given retroactive effect as such an application would be prejudicial to the employees and would run counter to the constitutional mandate on social justice and protection to labor. Furthermore, this view that we take is more in accord with the avowed purpose of Department Order No. 19 "to ensure the protection and welfare of workers employed" in the construction industry, and which interpretation may likewise be inferred from a reading of Section 7 thereof, applied corollarily to this case, which provides that "nothing herein shall be construed to authorize the diminution or reduction of benefits being enjoyed by employees at the time of issuance hereof."

It is a basic and irrefragable rule that in carrying out and interpreting the provisions of the Labor Code and its implementing regulations, the workingman ' s welfare should be the primordial and paramount consideration. The interpretation herein handed down gives meaning

and substance to the liberal and compassionate spirit of the law enunciated in Article 4 of the Labor Code that "all doubts n the implementation and interpretation of the provisions of the Labor Code including its implementing rules and regulations shall be resolved in favor of labor."[7]

The mandate in Article 281 of the Labor Code, which pertinently prescribes that "the provisions of written agreement to the contrary notwithstanding and regardless of the oral 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 and that "any employee who has rendered at least one year of service, whether such service is continuous or broken shall be regular employee with respect to the activity in which and his employment shall continue while such act should apply in the case of herein petitioner.

It is not disputed that petitioner had been working for private respondent for approximately twenty-eight (28) years as of the adjudication of his plaint by respondent NLRC, and that his "project-to-project" employment was renewed several times. With the successive contracts of employment wherein petitioner continued to perform virtually the same kind of work, i.e., as rigger, throughout his period of employment, it is manifest that petitioner' s assigned tasks were usually necessary or desirable in the usual business or trade of private respondent.[8] The repeated re-hiring and continuing need for his services are sufficient evidence of the necessity and indispensability of such services to private respondent's business or trade.[9]

Where from the circumstances it is apparent that periods have been imposed to preclude the acquisition of tenurial security by the employee, they should be struck down as contrary to public policy, morals, good customs or public order.[10] As observed by the Solicitor General, the record of this case discloses, as part of petitioner ' s position paper, a certification[11] duly issued by private respondent clearly showing that the former' s services were engaged by private respondent on a continuing basis since 1965. The certification indubitably indicates that after a particular project has been accomplished, petitioner would be re-hired immediately the following

day save for a gap of one (1) day to one (1) week from the last project to the succeeding one.[12] There can, therefore, be no escape from the conclusion that petitioner is a regular employee of private respondent.

Anent the issue on non-exhaustion of administrative remedies, we hold that the failure of the petitioner to file a motion for reconsideration of the NLRC decision before coming to this Court was not a fatal omission. The exhaustion of administrative remedies doctrine is not a hard and fast rule and does not apply where the issue is purely a legal one.[13] A motion for reconsideration as a prerequisite for the filing of an action under Rule 65 may be dispensed with where the issue is purely of law, as in the present case.[14] At all events and in the interest of substantial justice, especially in cases involving the rights of workers, procedural lapses, if any, may be disregarded to enable the Court to examine and resolve the conflicting rights and responsibilities of the parties. This liberality is warranted in the case at bar, especially since it has been shown that the intervention of the Court is necessary for the protection of herein petitioner.[15]

WHEREFORE, the questioned decision of respondent National Labor Relations Commission, dated November 29, 1993, is hereby **REVERSED AND SET ASIDE**, and the decision of Labor Arbiter Felipe T. Garduque II in NCR Case No. 00-116255-92, dated June 30, 1993, is hereby ordered **REINSTATED**.

SO ORDERED.

Romero, Puno and Mendoza, *JJ.*, concur.

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[1] Annex A, Petition; Rollo, 13.
[2] Annex B, id.; ibid., 20.
[3] Rollo, 17.
[4] G.R. No. 102973, August 24, 1993, 225 SCRA 582.
[5] Manifestation and Motion in Lieu of Comment; Rollo, 82-94.
[6] Rollo, 13.
[7] International Travel Service vs. Minister of Labor, et al., L-49526, August 13, 1990, 188 SCRA 456.
[8] Caramol vs. NLRC, et al., supra, fn. 4.

[9] Baguio Country Club Corporation vs. NLRC, et al., G.R. No. 71664 February 28, 1992, 206 SCRA 643.
[10] Caramol vs. NLRC, et al., ante, fn. 4.
[11] Manifestation and Motion in Lieu of Comment, 7; Rollo, 88
[12] Original Record, 26-27.
[13] Commissioner of Immigration vs. Vamenta, Jr., etc., et al., L-34030, May 31, 1972, 45 SCRA 342; Del Mar vs. Philippine veterans Administration, L-27299, June 27, 1973, 51 SCRA 340; Bagatsing, etc., et al. vs. Ramirez, etc., et al., L-41631, December 17, 1976, 74 SCRA 306.
[14] Philippine Airlines Employees Association vs. Philippine Air Lines, Inc., et al., L-31396, January 30, 1982, 111 SCRA 215.
[15] Ranara vs. NLRC, et al., G.R. No. 100969, August 14, 1992, 212 SCRA 631.