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FIRST DIVISION

[G.R. No. 160952, August 20, 2004]

MARCIAL GU-MIRO, PETITIONER, VS. ROLANDO C. ADORABLE AND BERGESEN D.Y. MANILA, RESPONDENTS.

DECISION

YNARES-SATIAGO, J.:

Before us is a petition for review on certiorari of the decision of the Court of Appeals in CA-G.R. SP No. 66131 dated May 29, 2003,[1] which modified the decision of the National Labor Relations Commission (NLRC) by increasing the incentive bonus awarded to petitioner from US$594.56 to US$1189.12.

Petitioner Marcial Gu-Miro was formerly employed as a Radio Officer of respondent Bergesen D.Y. Philippines, which acted for and in behalf of its principal Bergesen D.Y. ASA, on board its different vessels. A Certification dated April 14, 1998 was issued by Bergesen D.Y. Philippines, Inc.'s President and General Manager Rolando C. Adorable showing that petitioner served in the company on board its vessels starting 1988.[2] The case before us involves an employment contract signed by petitioner to commence service on board the M/V HEROS, which stipulated a monthly salary of US$929.00 for a period of eight (8) months. It also provided for overtime pay of US$495.00 per month and vacation leave with pay in the amount of US$201.00 per month equivalent to six and a half days.[3] The contract of employment was signed on March 18, 1996 and petitioner commenced work on April 15, 1996.

Record shows that respondent company traditionally gives an incentive bonus termed as Re-employment Bonus to employees who decide to rejoin the company after the expiration of their employment contracts. After the expiration of petitioner's contract in December 1996, the same was renewed by respondent company until September 9, 1997, as stated in the Certification issued by Bergesen D.Y. Philippines, Inc. In September 1997, petitioner's services were terminated due to the installation of labor saving devices which made his services redundant. Upon his forced separation from the company, petitioner requested that he be given the incentive bonus plus the additional allowances he was entitled to. Respondent company, however, refused to accede to his request.

Thus, in June 1999 petitioner filed a complaint with the NLRC, Regional Arbitration Branch of Cebu, for payment of the incentive bonus from April 15, 1996 to September 15, 1997, 10% of the basic wage, unclaimed payment for incentive bonus from September 1993 to June 1994, non-remittance of provident fund from July 1992 to June 1994, moral and exemplary damages as well as attorney's fees. On December 29,

1999, the complaint was provisionally dismissed by the NLRC due to the failure of petitioner to file the required position paper. Petitioner re-filed the complaint on March 2, 2000 accordingly.

In a Decision dated June 6, 2000, the Labor Arbiter dismissed the case for lack of merit,[4] based on the following findings:

> x x x. "Incentive bonus" or reemployment bonus are benefits not found in the POEA approved contract. These are benefits which are specifically granted pursuant to an internal memorandum entitled "Employment Conditions for Filipino Seafarers serving on board vessels of Bergesen D.Y. ASA". As stated in the said internal memorandum, entitlement to the benefits therein (is) not automatic but (is) subject to some conditions. As clearly stated in the said memorandum, the reemployment bonus is an "incentive bonus system for reemployment upon signing for a subsequent period." x x x. In order that a seafarer, like the complainant, be entitled to reemployment/incentive bonus, he must satisfy all of the following requirements, to wit:
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> > 1) He must be employed in a vessel under a principal who is a member of the reemployment bonus scheme;
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> > 2) He must have been an officer of the principal member's vessel subject to the additional conditions stated in page 2 of the aforementioned internal memorandum; and
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> > 3) After serving in a principal-member's vessel, he must be reemployed in another or the same principal-member's vessel.
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> To avail of the benefits under this scheme, seafarers like the complainant has to prove that he met all the foregoing conditions. It is, thus, his burden to prove that he is entitled to the said benefit. Complainant, however, miserably failed to adduce evidence that he met all the foregoing conditions for entitlement to the benefit. He relied on his unsubstantiated allegation that a certain Captain D. Ramirez received an incentive bonus even if he did not sign up with the Company. x x x.
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> xxx xxx xxx
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> For obvious reasons, complainant's claims for moral and exemplary damages as well as attorney's fees are denied. x x x.[5]

Petitioner appealed to the NLRC, which set aside the Labor Arbiter's decision and ordered respondents to pay petitioner the amount of US$594.56 in a Decision dated March 5, 2001. The pertinent portion of the NLRC's decision states:

> The Contract of Employment entered into between the complainant and the respondents specifically set a term of eight (8) months which was supposed to be from April 15, 1996 up to December 14, 1996. The complainant's length of service from December 15, 1996 to September 9, 1997, or a

period of nine (9) months, more or less, was an extended term of employment. A closer look at the facts shows that the extended term was even longer than the original term of the contract.

xxx xxx xxx

[W]e construe that the extended term of the contract of employment from December 15, 1996 up to September 9, 1997 was considered as re-employment of the complainant. And when there was re-employment, it is presumed that all the conditions set forth by the respondents in their established company written policy entitled "Employment Conditions for Filipino Seafarers Serving Onboard Vessels of Bergesen D.Y. ASA" are deemed complied with. The pertinent portion of the said company policy states:

2. Re-employment bonus

The company has established an incentive bonus system for re-employment upon signing for a subsequent period.

The conditions are as follows:

xxx xxx xxx

Radio Officers/Electricians – Serving onboard bulk carriers- 8% of basic wage per month of actual service.

To do otherwise, we would allow the respondent to circumvent its own established policy to merely extending the original contract of employment. [6]

Petitioner and respondents filed separate Motions for Reconsideration which were both denied by the NLRC in its Resolution dated April 24, 2001.

Not satisfied with the monetary award, petitioner filed a petition for review with the Court of Appeals claiming that there was an error in computing the amount of the incentive bonus he is entitled to. Petitioner argued that he should be considered as a regular employee of respondent company and thus, entitled to backwages or, at the very least, separation pay.

The Court of Appeals, on May 29, 2003, rendered the assailed Decision where it ruled:

WHEREFORE, the petition is GRANTED. The assailed Decision dated March 5, 2001 is hereby MODIFIED increasing the award of incentive bonus from US$594.56 to US$1189.12.

SO ORDERED.[7]

In arriving at its decision, the appellate court made the following findings:

> It is uncontroverted that the company grants incentive bonus for re-employment upon signing for a subsequent period. For radio officers onboard bulk carriers, it shall be 8% of the basic wage per month of actual service. In this case, we find nothing in the record to show that the classification of the vessel to which the petitioner was deployed is a Gas/LPG Tanker, which would make him entitled to 10% instead of 8% of the basic wage as incentive bonus. Thus, the public respondent correctly applied the rate of 8% of the basic wage per month of actual service, the basic wage in this case being the amount stipulated in the contract of employment, *i.e.*, US$929.00, and does not include the stipulated rate for overtime pay.
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> The question now is the application of the provision of the memorandum with respect to the length of actual service. Record shows that after the expiration of the original eight-month employment contract on December 15, 1996, the petitioner was in fact re-employed when his service was extended for another nine (9) months or up to September 1997. This unquestionably entitled him to the incentive bonus for the 8-month period covered by the contract and which was correctly awarded to him by the public respondent NLRC. However, as to the succeeding period, although it was not covered by a written contract, it is unrebutted that the petitioner was actually made to suffer work during that period. Hence, there was a monthly re-employment of the petitioner for the succeeding 9 months. Conformably, since the incentive bonus is given for re-employment upon signing for a subsequent period, for purposes of computing the same, the petitioner is deemed to have been re-employed not only for the 8 months covered by the contract but also for the succeeding 8 months preceding the last month when he was terminated. x x x.
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> xxx xxx xxx
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> As for the claim for backwages or separation pay, we note that these claims were neither raised in the petitioner's position paper nor in the motion for reconsideration filed before the NLRC; hence, they can no longer be raised for the first time in this petition. x x x.[8]

Hence, the instant petition for certiorari based on the following grounds:

I. THE HONORABLE COURT OF APPEALS ERRED WHEN IT PLACED THE BURDEN UPON PETITIONER TO PROVE THAT M/V HEROS IS AN LPG/GAS TANKER.

II. CONSIDERING THAT PETITIONER HAD WORKED FOR BERGESEN D.Y. PHILIPPINES FOR AND IN BEHALF OF ITS PRINCIPAL BERGESEN D.Y. ASA FOR TEN (10) LONG YEARS ABOARD ITS DIFFERENT VESSELS, PETITIONER SHOULD HAVE BEEN CONSIDERED AS A REGULAR EMPLOYEE BY THE COURT OF APPEALS.

III. THE HONORABLE COURT OF APPEALS LIKEWISE ERRED WHEN IT SAID IN ITS DECISION THAT PETITIONER FAILED TO RAISE THE ISSUE OF BACKWAGES AND SEPARATION PAY IN THE MOTION FOR RECONSIDERATION FILED WITH THE NLRC.[9]

In this petition, we are called upon to resolve two basic issues: The first concerns what percentage to use in computing the incentive bonus which petitioner is entitled to. In the memorandum entitled *Employment Conditions for Filipino Seafarers Serving Onboard Vessels of Bergesen D.Y. ASA* (Employment Conditions Memorandum), Radio Officers are entitled to re-employment bonus equivalent to a certain percentage of their basic wage per month of actual service. If the employee served onboard a bulk carrier, he is entitled to 8% of his basic wage per month of actual service. Alternatively, if service was done onboard a gas carrier tanker, the employee is entitled to 10% of his basic wage per month of actual service.

The NLRC and the Court of Appeals both agree that petitioner failed to adduce concrete proof to show that M/V HEROS is a Gas/LPG Tanker and not a bulk carrier. Hence, the Court of Appeals upheld the use of 8% by the NLRC as multiplier to compute the incentive bonus. Respondent company argues that petitioner failed to allege the nature of M/V HEROS at the earliest opportunity, belatedly alleging this information in the Motion for Reconsideration with the NLRC. Petitioner insists that M/V HEROS is a Gas/LPG Tanker which entitles him to 10% of his basic wage as incentive bonus; and that the Court of Appeals erred in ruling that it was petitioner's burden to prove the classification of M/V HEROS.

We rule in petitioner's favor. The registration papers, which contain the vessel classification of M/V HEROS, are the conclusive evidence that petitioner needs to prove his allegation. However, these are in the custody of respondent company or its mother company, Bergesen D.Y. ASA. Interestingly, respondent company never presented the registration papers in evidence.

We find that respondent company's failure to controvert the allegation, when it had the opportunity and resources to do so, works in favor of petitioner. Time and again we have held that should doubts exist between the evidence presented by the employer and the employee, the scales of justice must be tilted in favor of the latter.[10] Moreover, the law creates the presumption that evidence willfully suppressed would be adverse if produced.[11]

Consequently, the amount of incentive bonus termed as re-employment bonus which petitioner is entitled to should be computed as follows:

Salary per month = US$929.00

No. of months of actual service = 16 months

Rate = **10% of basic wage**

US$929.00/month x 16 months x 10% = **US$1,486.40**

The second and third grounds raised in this petition are related, based on petitioner's allegation that he should be considered a regular employee of respondent company, having been employed onboard the latter's different vessels for the span of 10 years. Hence, petitioner claims that he is entitled to backwages or at the very least separation

pay, invoking our decision in *Millares, et al. v. NLRC*[12] where it was held that the repeated re-hiring of a Chief Engineer of a shipping company for 20 years is sufficient evidence of the necessity and indispensability of the employee's service to the employer's business or trade. Hence, applying the express provision of Article 280 of the Labor Code,[13] such an employee should be considered as a regular employee.

Petitioner's argument is not well-taken. The decision of *Millares, et al. v. NLRC* was reconsidered and set aside in a Resolution[14] where it was held:

> [I]t is clear that seafarers are considered contractual employees. They can not be considered as regular employees under Article 280 of Labor Code. Their employment is governed by the contracts they sign every time they are rehired and their employment is terminated when the contract expires. Their employment is contractually fixed for a certain period of time. They fall under the exception of Article 280 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 nature of the work or services to be performed is seasonal in nature and employment is for the duration of the season.
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> xxx xxx xxx
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> Moreover, it is an accepted maritime industry practice that employment of seafarers (is) for a fixed period only. Constrained by the nature of their employment which is quite peculiar and unique in itself, it is for the mutual interest of both the seafarer and the employer why employment status must be contractual only or for a certain period of time. Seafarers spend most of their time at sea and understandably, they cannot stay for a long and an indefinite period of time at sea. Limited access to shore society during the employment will have an adverse impact on the seafarer. The national, cultural and lingual diversity among the crew during the [Contract of Enlistment] is a reality that necessitates the limitation of its period.[15]

Clearly, petitioner cannot be considered as a regular employee notwithstanding that the work he performs is necessary and desirable in the business of respondent company. As expounded in the above-mentioned *Millares* Resolution, an exception is made in the situation of seafarers. The exigencies of their work necessitates that they be employed on a contractual basis.

Thus, even with the continued re-hiring by respondent company of petitioner to serve as Radio Officer onboard Bergesen's different vessels, this should be interpreted not as a basis for regularization but rather a series of contract renewals sanctioned under the doctrine set down by the second *Millares* case. If at all, petitioner was preferred because of practical considerations—namely, his experience and qualifications. However, this does not alter the status of his employment from being contractual.

With respect to the claim for backwages and separation pay, it is now well-settled that the award of backwages and separation pay in lieu of reinstatement are reliefs that are

awarded to an employee who is unjustly dismissed.[16] In the instant case, petitioner was separated from his employment due to the termination of an impliedly renewed contract with respondent company. Hence, there is no illegal or unjust dismissal.

WHEREFORE, premises considered, the petition is **GRANTED IN PART.** The Decision of the Court of Appeals in CA-G.R. SP No. 66131 dated May 29, 2003 is **MODIFIED** in that the award of incentive bonus is increased from US$1189.12 to US$1,486.40. Petitioner's claim that he be declared a regular employee and awarded backwages and separation pay is **DENIED** for lack of merit.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Quisumbing, Carpio, and *Azcuna, JJ.*, concur.

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[1] Rollo, pp. 25-33; penned by Associate Justice Delilah Vidallon-Magtolis and concurred in by Associate Justices Remedios A. Salazar-Fernando and Edgardo F. Sundiam.

[2] Annex D, Court of Appeals Rollo, p. 74.

[3] Annex 1, Court of Appeals Rollo, p. 46.

[4] Court of Appeals Rollo, p. 59.

[5] *Id.*, pp. 56-58.

[6] *Id.*, pp. 23-24.

[7]Rollo, p. 33.

[8] *Id.*, pp. 31-32.

[9] *Id.*, pp. 16-18.

[10] Asuncion v. NLRC, G.R. No. 129329, 31 July 2001, 362 SCRA 56, citing Dizon v. NLRC, G.R. No. 79554, 14 December 1989, 180 SCRA 52; These policies are embodied in Articles 3 and 4 of the Labor Code, which read:

ART. 3. *Declaration of basic policy*. — The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers. x x x

ART 4. *Construction in favor of labor*. — All doubts in the implementation and interpretation of the provisions of this Code, including its implementing rules and regulations, shall be resolved in favor of labor.

[11] Rules of Court, Rule 131, Sec. 3 (e).

[12] G.R. No. 110524, 14 March 2000, 328 SCRA 79.

[13] Article 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.

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 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.

[14] Millares, et al. v. NLRC, G.R. No. 110524, 29 July 2002, 385 SCRA 306.

[15] *Id.*, pp. 318-319.

[16] Bustamante v. NLRC, G.R. No. 111651, 28 November 1996, 265 SCRA 61; Times Transit Credit Coop., Inc. v. NLRC, G.R. No. 117105, 2 March 1999, 304 SCRA 11; De Paul/King Philip Customs Tailor v. NLRC, G.R. No. 129824, 10 March 1999, 304 SCRA 448; Philippine Industrial Security Agency Corporation v. Dapiton and NLRC, G.R. No. 127421, 8 December 1999, 320 SCRA 124; Vinoya v. NLRC, G.R. No. 126586, 25 August 2000, 339 SCRA 65; Prudential Bank and Trust Company v. Reyes, G.R. No. 141093, 20 February 2001, 352 SCRA 316.
