Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

LEGEND HOTEL (MANILA), owned by TITANIUM CORPORATION, and/or, NELSON NAPUD, in his capacity as the President of Petitioner Corporation, Petitioner,	**G.R. No. 153511**
	Present:
	BERSAMIN, *Acting Chairperson,* DEL CASTILLO, ABAD,* VILLARAMA, JR., and PERLAS-BERNABE, *JJ.*
-versus-	
HERNANI S. REALUYO, also known as JOEY ROA, Respondent.	Promulgated: 18 JUL 2012

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D E C I S I O N

BERSAMIN, *J.*:

This labor case for illegal dismissal involves a pianist employed to perform in the restaurant of a hotel.

On August 9, 1999, respondent, whose stage name was Joey R. Roa, filed a complaint for alleged unfair labor practice, constructive illegal dismissal, and the underpayment/nonpayment of his premium pay for holidays, separation pay, service incentive leave pay, and 13th month pay. He prayed for attorney's fees, moral damages of ₱100,000.00 and exemplary damages for ₱100,000.00.[1]

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* Vice Justice Teresita J. Leonardo-De Castro, who is on wellness leave, per Special Order No. 1252 issued on July 12, 2012.

[1] *Rollo*, p. 45.

Respondent averred that he had worked as a pianist at the Legend Hotel's Tanglaw Restaurant from September 1992 with an initial rate of ₱400.00/night that was given to him after each night's performance; that his rate had increased to ₱750.00/night; and that during his employment, he could not choose the time of performance, which had been fixed from 7:00 pm to 10:00 pm for three to six times/week. He added that the Legend Hotel's restaurant manager had required him to conform with the venue's motif; that he had been subjected to the rules on employees' representation checks and chits, a privilege granted to other employees; that on July 9, 1999, the management had notified him that as a cost-cutting measure his services as a pianist would no longer be required effective July 30, 1999; that he disputed the excuse, insisting that Legend Hotel had been lucratively operating as of the filing of his complaint; and that the loss of his employment made him bring his complaint.[2]

In its defense, petitioner denied the existence of an employer-employee relationship with respondent, insisting that he had been only a talent engaged to provide live music at Legend Hotel's Madison Coffee Shop for three hours/day on two days each week; and stated that the economic crisis that had hit the country constrained management to dispense with his services.

On December 29, 1999, the Labor Arbiter (LA) dismissed the complaint for lack of merit upon finding that the parties had no employer-employee relationship.[3] The LA explained thusly:

> x x x
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> On the pivotal issue of whether or not there existed an employer-employee relationship between the parties, our finding is in the negative. The finding finds support in the service contract dated September 1, 1992 xxx.
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> x x x

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2 Id. at 53-54.
3 Id. at 53-58.

> Even if we grant the initial non-existence of the service contract, as complainant suggests in his reply (third paragraph, page 4), the picture would not change because of the admission by complainant in his letter dated October 8, 1996 (Annex "C") that what he was receiving was talent fee and not salary.
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> This is reinforced by the undisputed fact that complainant received his talent fee nightly, unlike the regular employees of the hotel who are paid by monthly xxx.
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> x x x
>
> And thus, absent the power to control with respect to the means and methods by which his work was to be accomplished, there is no employer-employee relationship between the parties xxx.
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> x x x
>
> WHEREFORE, this case must be, as it is hereby, DISMISSED for lack of merit.
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> SO ORDERED.[4]

Respondent appealed, but the National Labor Relations Commission (NLRC) affirmed the LA on May 31, 2001.[5]

Respondent assailed the decision of the NLRC in the Court of Appeals (CA) on *certiorari*.

On February 11, 2002, the CA set aside the decision of the NLRC,[6] holding:

> x x x
>
> Applying the above-enumerated elements of the employee-employer relationship in this case, the question to be asked is, are those elements present in this case?
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> The answer to this question is in the affirmative.
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> x x x
>
> Well settled is the rule that of the four (4) elements of employer-employee relationship, it is the power of control that is more decisive.
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> In this regard, public respondent failed to take into consideration that in petitioner's line of work, he was supervised and controlled by respondent's restaurant manager who at certain times would require him to perform only tagalog songs or music, or wear barong tagalog to conform with Filipiniana motif of the place and the time of his performance is fixed

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4 Id. at 55-58.
5 Id. at 60-64.
6 Id. at 67-77; penned by Associate Justice Mercedes Gozo-Dadole (retired), with Associate Justice Salvador J. Valdez, Jr. (retired/deceased) and Associate Justice Juan Q. Enriquez, Jr. (retired) concurring.

by the respondents from 7:00 pm to 10:00 pm, three to six times a week. Petitioner could not choose the time of his performance. xxx.

As to the status of petitioner, he is considered a regular employee of private respondents since the job of the petitioner was in furtherance of the restaurant business of respondent hotel. Granting that petitioner was initially a contractual employee, by the sheer length of service he had rendered for private respondents, he had been converted into a regular employee xxx.

x x x

xxx In other words, the dismissal was due to retrenchment in order to avoid or minimize business losses, which is recognized by law under Article 283 of the Labor Code, xxx.

x x x

WHEREFORE, foregoing premises considered, this petition is GRANTED. xxx.[7]

Issues

In this appeal, petitioner contends that the CA erred:

I. XXX WHEN IT RULED THAT THERE IS THE EXISTENCE OF EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN THE PETITIONER HOTEL AND RESPONDENT ROA.

II. XXX IN FINDING THAT ROA IS A REGULAR EMPLOYEE AND THAT THE TERMINATION OF HIS SERVICES WAS ILLEGAL. THE CA LIKEWISE ERRED WHEN IT DECLARED THE REINSTATEMENT OF ROA TO HIS FORMER POSITION OR BE GIVEN A SEPARATION PAY EQUIVALENT TO ONE MONTH FOR EVERY YEAR OF SERVICE FROM SEPTEMBER 1999 UNTIL JULY 30, 1999 CONSIDERING THE ABSENCE OF AN EMPLOYMENT RELATIONSHIP BETWEEN THE PARTIES.

III. XXX WHEN IT DECLARED THAT ROA IS ENTITLED TO BACKWAGES, SERVICE INCENTIVE LEAVE AND OTHER BENEFITS CONSIDERING THAT THERE IS NO EMPLOYER EMPLOYEE RELATIONSHIP BETWEEN THE PARTIES.

IV. XXX WHEN IT NULLIFIED THE DECISION DATED MAY 31, 2001 IN NLRC NCR CA NO. 023404-2000 OF THE NLRC AS WELL AS ITS RESOLUTION DATED JUNE 29, 2001 IN FAVOR OF HEREIN PETITIONER HOTEL WHEN HEREIN RESPONDENT ROA FAILED TO SHOW PROOF THAT THE NLRC AND THE LABOR ARBITER HAVE COMMITTED GRAVE ABUSE OF DISCRETION OR LACK OF JURISDICTION IN THEIR RESPECTIVE DECISIONS.

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[7] Id. at 71-76.

V. XXX WHEN IT OVERLOOKED THE FACT THAT THE PETITION WHICH ROA FILED IS IMPROPER SINCE IT RAISED QUESTIONS OF FACT.

VI. XXX WHEN IT GAVE DUE COURSE TO THE PETITION FILED BY ROA WHEN IT IS CLEARLY IMPROPER AND SHOULD HAVE BEEN DISMISSED OUTRIGHT CONSIDERING THAT A PETITION FOR CERTIORARI UNDER RULE 65 IS LIMITED ONLY TO QUESTIONS OR ISSUES OF GRAVE ABUSE OF DISCRETION OR LACK OF JURISDICTION COMMITTED BY THE NLRC OR THE LABOR ARBITER, WHICH ISSUES ARE NOT PRESENT IN THE CASE AT BAR.

The assigned errors are divided into the procedural issue of whether or not the petition for *certiorari* filed in the CA was the proper recourse; and into two substantive issues, namely: (*a*) whether or not respondent was an employee of petitioner; and (*b*) if respondent was petitioner's employee, whether he was validly terminated.

Ruling

The appeal fails.

Procedural Issue:
Certiorari was a proper recourse

Petitioner contends that respondent's petition for *certiorari* was improper as a remedy against the NLRC due to its raising mainly questions of fact and because it did not demonstrate that the NLRC was guilty of grave abuse of discretion.

The contention is unwarranted. There is no longer any doubt that a petition for *certiorari* brought to assail the decision of the NLRC may raise factual issues, and the CA may then review the decision of the NLRC and pass upon such factual issues in the process.[8] The power of the CA to review factual issues in the exercise of its original jurisdiction to issue writs of *certiorari* is based on Section 9 of *Batas Pambansa Blg.* 129, which

[8] *Leonardo v. Court of Appeals*, G.R. No. 152459, June 15, 2006, 490 SCRA 691, 697; *St. Martin Funeral Homes v. NLRC*, G.R. No. 130866, September 16, 1998, 295 SCRA 494, 502.

pertinently provides that the CA "*shall have the power to try cases and conduct hearings, receive evidence and perform any and all acts necessary to resolve factual issues raised in cases falling within its original and appellate jurisdiction, including the power to grant and conduct new trials or further proceedings*."

Substantive Issue No. 1:
Employer-employee relationship existed between the parties

We next ascertain if the CA correctly found that an employer-employee relationship existed between the parties.

The issue of whether or not an employer-employee relationship existed between petitioner and respondent is essentially a question of fact.[9] The factors that determine the issue include who has the power to select the employee, who pays the employee's wages, who has the power to dismiss the employee, and who exercises control of the methods and results by which the work of the employee is accomplished.[10] Although no particular form of evidence is required to prove the existence of the relationship, and any competent and relevant evidence to prove the relationship may be admitted,[11] a finding that the relationship exists must nonetheless rest on substantial evidence, which is that amount of relevant evidence that a reasonable mind might accept as adequate to justify a conclusion.[12]

Generally, the Court does not review factual questions, primarily because the Court is not a trier of facts. However, where, like here, there is a conflict between the factual findings of the Labor Arbiter and the NLRC, on the one hand, and those of the CA, on the other hand, it becomes proper for

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9 *Lopez v. Bodega City*, G.R. No. 155731, September 3, 2007, 532 SCRA 56, 64; *Manila Water Company, Inc. v. Peña*, G.R. No. 158255, July 8, 2004, 434 SCRA 53, 58.

10 *Leonardo v. Court of Appeals*, *supra*, note 8, p. 700.

11 *Opulencia Ice Plant and Storage v. NLRC*, G.R. No. 98368, December 15, 1993, 228 SCRA 473, 478.

12 Section 5, Rule 133, *Rules of Court*; *People's Broadcasting (Bombo Radyo Phils., Inc.) v. Secretary of the Department of Labor and Employment*, G.R. No. 179652, May 8, 2009, 587 SCRA 724, 753.

the Court, in the exercise of its equity jurisdiction, to review and re-evaluate the factual issues and to look into the records of the case and re-examine the questioned findings.[13]

A review of the circumstances reveals that respondent was, indeed, petitioner's employee. He was undeniably employed as a pianist in petitioner's Madison Coffee Shop/Tanglaw Restaurant from September 1992 until his services were terminated on July 9, 1999.

First of all, petitioner actually wielded the power of selection at the time it entered into the service contract dated September 1, 1992 with respondent. This is true, notwithstanding petitioner's insistence that respondent had only offered his services to provide live music at petitioner's Tanglaw Restaurant, and despite petitioner's position that what had really transpired was a negotiation of his rate and time of availability. The power of selection was firmly evidenced by, among others, the express written recommendation dated January 12, 1998 by Christine Velazco, petitioner's restaurant manager, for the increase of his remuneration.[14]

Petitioner could not seek refuge behind the service contract entered into with respondent. It is the law that defines and governs an employment relationship, whose terms are not restricted to those fixed in the written contract, for other factors, like the nature of the work the employee has been called upon to perform, are also considered. The law affords protection to an employee, and does not countenance any attempt to subvert its spirit and intent. Any stipulation in writing can be ignored when the employer utilizes the stipulation to deprive the employee of his security of tenure. The inequality that characterizes employer-employee relations generally tips the

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[13] *Lopez v. Bodega City*, *supra*, p. 64; *Manila Water Company, Inc. v. Pena*, *supra*, pp. 58-59; *Tiu v. Pasaol, Sr.*, G.R. No. 139876, April 30, 2003, 402 SCRA 312, 319.

[14] *Rollo*, p. 47.

scales in favor of the employer, such that the employee is often scarcely provided real and better options.[15]

Secondly, petitioner argues that whatever remuneration was given to respondent were only his *talent fees* that were not included in the definition of *wage* under the *Labor Code*; and that such *talent fees* were but the consideration for the service contract entered into between them.

The argument is baseless.

Respondent was paid ₱400.00 per three hours of performance from 7:00 pm to 10:00 pm, three to six nights a week. Such rate of remuneration was later increased to ₱750.00 upon restaurant manager Velazco's recommendation. There is no denying that the remuneration denominated as talent fees was fixed on the basis of his talent and skill and the quality of the music he played during the hours of performance each night, taking into account the prevailing rate for similar talents in the entertainment industry.[16]

Respondent's remuneration, albeit denominated as talent fees, was still considered as included in the term *wage* in the sense and context of the *Labor Code*, regardless of how petitioner chose to designate the remuneration. Anent this, Article 97(*f*) of the *Labor Code* clearly states:

> xxx *wage* paid to any employee shall mean the remuneration or earnings, **however designated**, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the same, **which is payable by an employer to an employee under a written or unwritten contract of employment for work done or to be done, or for services rendered or to be rendered,** and includes the fair and reasonable value, as determined by the Secretary of Labor, of board, lodging, or other facilities customarily furnished by the employer to the employee.

Clearly, respondent received compensation for the services he rendered as a pianist in petitioner's hotel. Petitioner cannot use the service

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15 *Paguio v. National Labor Relations Commission*, G.R. No. 147816, May 9, 2003, 403 SCRA 190, 198.
16 *Rollo*, p. 14.

contract to rid itself of the consequences of its employment of respondent. There is no denying that whatever amounts he received for his performance, howsoever designated by petitioner, were his wages.

It is notable that under the *Rules Implementing the Labor Code* and as held in *Tan v. Lagrama*,[17] every employer is required to pay his employees by means of a payroll, which should show in each case, among others, the employee's rate of pay, deductions made from such pay, and the amounts actually paid to the employee. Yet, petitioner did not present the payroll of its employees to bolster its insistence of respondent not being its employee.

That respondent worked for less than eight hours/day was of no consequence and did not detract from the CA's finding on the existence of the employer-employee relationship. In providing that the " normal hours of work of any employee shall not exceed eight (8) hours a day," Article 83 of the *Labor Code* only set a maximum of number of hours as "normal hours of work" but did not prohibit work of less than eight hours.

Thirdly, the power of the employer to control the work of the employee is considered the most significant determinant of the existence of an employer-employee relationship.[18] This is the so-called control test, and is premised on whether the person for whom the services are performed reserves the right to control both the end achieved and the manner and means used to achieve that end.[19]

Petitioner submits that it did not exercise the power of control over respondent and cites the following to buttress its submission, namely: (*a*) respondent could beg off from his nightly performances in the restaurant for other engagements; (*b*) he had the sole prerogative to play and perform any musical arrangements that he wished; (*c*) although petitioner, through its manager, required him to play at certain times a particular music or song, the

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17 G.R. No. 151228, August 15, 2002, 387 SCRA 393.
18 *Coca Cola Bottlers Phils., Inc. v. NLRC*, G.R. No. 120466, May 17, 1999, 307 SCRA 131, 139.
19 *Leonardo v. Court of Appeals*, *supra*, note 8, p. 700.

music, songs, or arrangements, including the beat or tempo, were under his discretion, control and direction; (*d*) the requirement for him to wear *barong* Tagalog to conform with the Filipiniana motif of the venue whenever he performed was by no means evidence of control; (*e*) petitioner could not require him to do any other work in the restaurant or to play the piano in any other places, areas, or establishments, whether or not owned or operated by petitioner, during the three hour period from 7:00 pm to 10:00 pm, three to six times a week; and (*f*) respondent could not be required to sing, dance or play another musical instrument.

A review of the records shows, however, that respondent performed his work as a pianist under petitioner's supervision and control. Specifically, petitioner's control of both the end achieved and the manner and means used to achieve that end was demonstrated by the following, to wit:

> *a.* He could not choose the time of his performance, which petitioners had fixed from 7:00 pm to 10:00 pm, three to six times a week;
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> *b.* He could not choose the place of his performance;
>
> *c.* The restaurant's manager required him at certain times to perform only Tagalog songs or music, or to wear *barong* Tagalog to conform to the Filipiniana motif; and
>
> *d.* He was subjected to the rules on employees' representation check and chits, a privilege granted to other employees.

Relevantly, it is worth remembering that the employer need not actually supervise the performance of duties by the employee, for it sufficed that the employer has the right to wield that power.

Lastly, petitioner claims that it had no power to dismiss respondent due to his not being even subject to its Code of Discipline, and that the power to terminate the working relationship was mutually vested in the parties, in that either party might terminate at will, with or without cause.

The claim is contrary to the records. Indeed, the memorandum informing respondent of the discontinuance of his service because of the present business or financial condition of petitioner[20] showed that the latter had the power to dismiss him from employment.[21]

Substantive Issue No. 2:
Validity of the Termination

Having established that respondent was an employee whom petitioner terminated to prevent losses, the conclusion that his termination was by reason of retrenchment due to an authorized cause under the *Labor Code* is inevitable.

Retrenchment is one of the authorized causes for the dismissal of employees recognized by the *Labor Code*. It is a management prerogative resorted to by employers to avoid or to minimize business losses. On this matter, Article 283 of the *Labor Code* states:

> Article 283. *Closure of establishment and reduction of personnel*. – **The employer may also terminate the employment of any employee** due to the installation of labor-saving devices, redundancy, **retrenchment to prevent losses** or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. xxx. **In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.**

The Court has laid down the following standards that an employer should meet to justify retrenchment and to foil abuse, namely:

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[20] *Rollo*, p. 46.
[21] *Television and Production Exponents, Inc. v. Servaña*, G.R. No. 167648, January 28, 2008, 542 SCRA 578, 587.

> (*a*) The expected losses should be substantial and not merely *de minimis* in extent;
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> (*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 incurred, and the expected imminent losses sought to be forestalled must be proved by sufficient and convincing evidence.[22]

Anent the last standard of sufficient and convincing evidence, it ought to be pointed out that a less exacting standard of proof would render too easy the abuse of retrenchment as a ground for termination of services of employees.[23]

Was the retrenchment of respondent valid?

In termination cases, the burden of proving that the dismissal was for a valid or authorized cause rests upon the employer. Here, petitioner did not submit evidence of the losses to its business operations and the economic havoc it would thereby imminently sustain. It only claimed that respondent's termination was due to its "present business/financial condition." This bare statement fell short of the norm to show a valid retrenchment. Hence, we hold that there was no valid cause for the retrenchment of respondent.

Indeed, not every loss incurred or expected to be incurred by an employer can justify retrenchment. The employer must prove, among others, that the losses are substantial and that the retrenchment is reasonably necessary to avert such losses. Thus, by its failure to present sufficient and convincing evidence to prove that retrenchment was necessary, respondent's termination due to retrenchment is not allowed.

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[22] *Oriental Petroleum and Minerals Corporation v. Fuentes*, G.R. No. 151818, October 14, 2005, 473 SCRA 106, 115; *Anino v. National Labor Relations Commission*, G.R. No. 123226, May 21, 1998, 290 SCRA 489, 502.

[23] *Oriental Petroleum and Minerals Corporation v. Fuentes*, *supra*, pp. 115-116.

The Court realizes that the lapse of time since the retrenchment might have rendered respondent's reinstatement to his former job no longer feasible. If that should be true, then petitioner should instead pay to him separation pay at the rate of one month pay for every year of service computed from September 1992 (when he commenced to work for the petitioners) until the finality of this decision, and full backwages from the time his compensation was withheld until the finality of this decision.

WHEREFORE, we **DENY** the petition for review on *certiorari*, and **AFFIRM** the decision of the Court of Appeals promulgated on February 11, 2002, subject to the modification that should reinstatement be no longer feasible, petitioner shall pay to respondent separation pay of one month for every year of service computed from September 1992 until the finality of this decision, and full backwages from the time his compensation was withheld until the finality of this decision.

Costs of suit to be paid by the petitioners.

SO ORDERED.

LUCAS P. BERSAMIN
Associate Justice
Acting Chairperson, First Division

WE CONCUR:

MARIANO C. DEL CASTILLO
Associate Justice

ROBERTO A. ABAD
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LUCAS P. BERSAMIN
Associate Justice
Acting Chairperson, First Division

CERTIFICATION

Pursuant to Section 13, Article VII of the Constitution and the Division Acting Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO
Senior Associate Justice
(Per Section 12, R.A. 296,
The Judiciary Act of 1948, as amended)