Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

DIGITAL TELECOMMUNICATIONS PHILIPPINES, INC.,
Petitioner,

-*versus*-

DIGITEL EMPLOYEES UNION (DEU), ARCEO RAFAEL A. ESPLANA, ALAN D. LICANDO, FELICITO C. ROMERO, JR., ARNOLD D. GONZALES, REYNEL FRANCISCO B. GARCIA, ZOSIMO B. PERALTA, REGINO T. UNIDAD and JIM L. JAVIER,
Respondents.

G.R. Nos. 184903-04

Present:

CARPIO, *J.*,
Chairperson,
BRION,
DEL CASTILLO,
PEREZ, and
PERLAS-BERNABE, *JJ.*

Promulgated:

OCT 10 2012

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DECISION

PEREZ, *J.*:

This treats of the petition for review filed by Digital Telecommunications Philippines, Inc. (Digitel) assailing the 18 June 2008

Decision[1] and 9 October 2008 Resolution of the Court of Appeals 10th Division in CA-G.R. SP No. 91719, which affirms the Order of the Secretary of Labor and Employment directing Digitel to commence Collective Bargaining Agreement (CBA) negotiations and in CA-G.R. SP No. 94825, which declares the dismissal of affected Digitel employees as illegal.

The facts, as borne by the records, follow.

By virtue of a certification election, Digitel Employees Union (Union) became the exclusive bargaining agent of all rank and file employees of Digitel in 1994. The Union and Digitel then commenced collective bargaining negotiations which resulted in a bargaining deadlock. The Union threatened to go on strike, but then Acting Labor Secretary Bienvenido E. Laguesma assumed jurisdiction over the dispute and eventually directed the parties to execute a CBA.[2]

However, no CBA was forged between Digitel and the Union. Some Union members abandoned their employment with Digitel. The Union later became dormant.

Ten (10) years thereafter or on 28 September 2004, Digitel received from Arceo Rafael A. Esplana (Esplana), who identified himself as President of the Union, a letter containing the list of officers, CBA proposals and ground rules.[3] The officers were respondents Esplana, Alan D. Licando (Vice-President), Felicito C. Romero, Jr. (Secretary), Arnold D. Gonzales

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1 Penned by Associate Justice Normandie B. Pizarro with Associate Justices Josefina Guevara-Salonga and Magdangal M. De Leon, concurring. *Rollo*, pp. 1042-1061.

2 Id. at 255-263.

3 Id. at 62-63.

(Treasurer), Reynel Francisco B. Garcia (Auditor), Zosimo B. Peralta (PRO), Regino T. Unidad (Sgt. at Arms), and Jim L. Javier (Sgt. at Arms).

Digitel was reluctant to negotiate with the Union and demanded that the latter show compliance with the provisions of the Union's Constitution and By-laws on union membership and election of officers.

On 4 November 2004, Esplana and his group filed a case for Preventive Mediation before the National Conciliation and Mediation Board based on Digitel's violation of the duty to bargain. On 25 November 2004, Esplana filed a notice of strike.

On 10 March 2005, then Labor Secretary Patricia A. Sto. Tomas issued an Order[4] assuming jurisdiction over the labor dispute.

During the pendency of the controversy, Digitel Service, Inc. (Digiserv), a non-profit enterprise engaged in call center servicing, filed with the Department of Labor and Employment (DOLE) an Establishment Termination Report stating that it will cease its business operation. The closure affected at least 100 employees, 42 of whom are members of the herein respondent Union.

Alleging that the affected employees are its members and in reaction to Digiserv's action, Esplana and his group filed another Notice of Strike for union busting, illegal lock-out, and violation of the assumption order.

On 23 May 2005, the Secretary of Labor ordered the second notice of strike subsumed by the previous Assumption Order.[5]

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4 Id. at 289-291.
5 Id. at 123-124.

Meanwhile, on 14 March 2005, Digitel filed a petition with the Bureau of Labor Relations (BLR) seeking cancellation of the Union's registration on the following grounds: 1) failure to file the required reports from 1994-2004; 2) misrepresentation of its alleged officers; 3) membership of the Union is composed of rank and file, supervisory and managerial employees; and 4) substantial number of union members are not Digitel employees.[6]

In a Decision dated 11 May 2005, the Regional Director of the DOLE dismissed the petition for cancellation of union registration for lack of merit. The Regional Director ruled that it does not have jurisdiction over the issue of non-compliance with the reportorial requirements. He also held that Digitel failed to adduce substantial evidence to prove misrepresentation and the mixing of non-Digitel employees with the Union. Finally, he declared that the inclusion of supervisory and managerial employees with the rank and file employees is no longer a ground for cancellation of the Union's certificate of registration.[7]

The appeal filed by Digitel with the BLR was eventually dismissed for lack of merit in a Resolution dated 9 March 2007, thereby affirming the 11 May 2005 Decision of the Regional Director.

CA-G.R. SP No. 91719

In an Order dated 13 July 2005, the Secretary of Labor directed Digitel to commence the CBA negotiation with the Union. Thus:

> WHEREFORE, all the foregoing premises considered, this Office hereby orders:

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6 Id. at 271-285.
7 Id. at 125-127.

> 1. DIGITEL to commence collective bargaining negotiation with DEU without further delay; and,
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> 2. The issue of unfair labor practice, consisting of union-busting, illegal termination/lockout and violation of the assumption of jurisdiction, specifically the return-to-work aspect of the 10 March 2005 and 03 June 2005 orders, be CERTIFIED for compulsory arbitration to the NLRC.[8]

Digitel moved for reconsideration on the contention that the pendency of the petition for cancellation of the Union's certificate of registration is a prejudicial question that should first be settled before the DOLE could order the parties to bargain collectively. On 19 August 2005, then Acting Secretary Manuel G. Imson of DOLE denied the motion for reconsideration, affirmed the 13 July 2005 Order and reiterated the order directing parties to commence collective bargaining negotiations.[9]

On 14 October 2005, Digitel filed a petition, docketed as CA-G.R. SP No. 91719, before the Court of Appeals assailing the 13 July and 19 August 2005 Orders of the DOLE Secretary and attributing grave abuse of discretion on the part of the DOLE Secretary for ordering Digitel to commence bargaining negotiations with the Union despite the pendency of the issue of union legitimacy.

CA-G.R. SP No. 94825

In accordance with the 13 July 2005 Order of the Secretary of Labor, the unfair labor practice issue was certified for compulsory arbitration before the NLRC, which, on 31 January 2006, rendered a Decision dismissing the unfair labor practice charge against Digitel but declaring the dismissal of the 13 employees of Digiserv as illegal and ordering their reinstatement. The

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8 Id. at 154.
9 Id. at 183-184.

Union manifested that out of 42 employees, only 13 remained, as most had already accepted separation pay. The dispositive portion of the Decision reads:

> WHEREFORE, premises considered, the charge of unfair labor practice is hereby DISMISSED for lack of merit. However, the dismissal of the remaining thirteen (13) affected employees is hereby declared illegal and DIGITEL is hereby ORDERED to reinstate them to their former position with full backwages up to the time they are reinstated, computed as follows:
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> x x x x.[10]

Upon motion for reconsideration filed by Digitel, four (4) affected employees, namely Ma. Loreta Eser, Marites Jereza, Leonore Tuliao and Aline G. Quillopras, were removed from entitlement to the awards pursuant to the deed of quitclaim and release which they all signed.[11]

In view of this unfavorable decision, Digitel filed another petition on 9 June 2006 in CA-G.R. SP No. 94825 before the Court of Appeals, challenging the above NLRC Decision and Resolution and arguing mainly that Digiserv employees are not employees of Digitel.

Ruling of the Court of Appeals

On 18 June 2008, the Tenth Division of the Court of Appeals consolidated the two petitions in CA-G.R. SP No. 91719 and CA-G.R. SP No. 94825, and disposed as follows:

> **WHEREFORE**, the petition in CA-G.R. SP No. 91719 is **DISMISSED**. The July 13, 2005 **Order** and the August 19, 2005 **Resolution** of the DOLE Secretary are **AFFIRMED** in *toto*. With costs.

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10 Id. at 590-594.
11 Id. at 624-632.

> The petition in CA-G.R. SP No. 94825 is partially **GRANTED,** with the effect that the assailed dispositions must be **MODIFIED**, as follows:
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> 1) In addition to the order directing reinstatement and payment of full backwages to the nine (9) affected employees, Digital Telecommunications Philippines, Inc. is furthered **ORDERED**, should reinstatement is no longer feasible, to pay separation pay equivalent to one (1) month pay, or one-half (1/2) month pay for every year of service, whichever is higher.
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> 2) The one hundred thousand (PhP100,000.00) peso-fine imposed on Digital Telecommunications Philippines, Inc. is **DELETED**. No costs.[12]

The Court of Appeals upheld the Secretary of Labor's Order for Digitel to commence CBA negotiations with the Union and emphasized that the pendency of a petition for the cancellation of a union's registration does not bar the holding of negotiations for a CBA. The Court of Appeals sustained the finding that Digiserv is engaged in labor-only contracting and that its employees are actually employees of Digitel.

Digitel filed a motion for reconsideration but was denied in a Resolution dated 9 October 2008.

Hence, this petition for review on *certiorari*.

Digitel argues that the Court of Appeals seriously erred when it condoned the act of the Secretary of Labor in issuing an assumption order despite the pendency of an appeal on the issue of union registration. Digitel maintains that it cannot be compelled to negotiate with a union for purposes of collective bargaining when the very status of the same as the exclusive bargaining agent is in question.

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[12] Id. at 1059-1060.

Digitel insists that had the Court of Appeals considered the nature of the activities performed by Digiserv, it would reach the conclusion that Digiserv is a legitimate contractor. To bolster its claim, Digitel asserts that the affected employees are registered with the Social Security System, *Pag-ibig*, Bureau of Internal Revenue and Philhealth with Digiserv as their employer. Digitel further contends that assuming that the affected Digiserv employees are employees of Digitel, they were nevertheless validly dismissed on the ground of closure of a department or a part of Digitel's business operation.

The three issues raised in this petition are: 1) whether the Secretary of Labor erred in issuing the assumption order despite the pendency of the petition for cancellation of union registration; 2) whether Digiserv is a legitimate contractor; and 3) whether there was a valid dismissal.

The pendency of a petition for cancellation of union registration does not preclude collective bargaining.

The first issue raised by Digitel is not novel. It is well-settled that the pendency of a petition for cancellation of union registration does not preclude collective bargaining.

The 2005 case of *Capitol Medical Center, Inc. v. Hon. Trajano*[13] is *apropos*. The respondent union therein sent a letter to petitioner requesting a negotiation of their CBA. Petitioner refused to bargain and instead filed a petition for cancellation of the union's certificate of registration. Petitioner's refusal to bargain forced the union to file a notice of strike. They eventually staged a strike. The Secretary of Labor assumed jurisdiction over the labor

[13] 501 Phil. 144 (2005).

dispute and ordered all striking workers to return to work. Petitioner challenged said order by contending that its petition for cancellation of union's certificate of registration involves a prejudicial question that should first be settled before the Secretary of Labor could order the parties to bargain collectively. When the case eventually reached this Court, we agreed with the Secretary of Labor that the pendency of a petition for cancellation of union registration does not preclude collective bargaining, thus:

> That there is a pending cancellation proceeding against the respondent Union is not a bar to set in motion the mechanics of collective bargaining. If a certification election may still be ordered despite the pendency of a petition to cancel the union's registration certificate (*National Union of Bank Employees vs. Minister of Labor*, *110 SCRA 274*), more so should the collective bargaining process continue despite its pendency. We must emphasize that the majority status of the respondent Union is not affected by the pendency of the Petition for Cancellation pending against it. Unless its certificate of registration and its status as the certified bargaining agent are revoked, the Hospital is, by express provision of the law, duty bound to collectively bargain with the Union.[14]

Trajano was reiterated in *Legend International Resorts Limited v. Kilusang Manggagawa ng Legenda (KML-Independent)*.[15] Legend International Resorts reiterated the rationale for allowing the continuation of either a CBA process or a certification election even during the pendency of proceedings for the cancellation of the union's certificate of registration. Citing the cases of *Association of Court of Appeals Employees v. Ferrer-Calleja*[16] and *Samahan ng Manggagawa sa Pacific Plastic v. Hon. Laguesma,*[17] it was pointed out at the time of the filing of the petition for certification election – or a CBA process as in the instant case – the union

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14 Id. at 150.
15 G.R. No. 169754, 23 February 2011, 644 SCRA 94, 106.
16 G.R. No. 94716, 15 November 1991, 203 SCRA 596.
17 334 Phil. 955 (1997).

still had the personality to file a petition for certification − or to ask for a CBA negotiation – as in the present case.

Digiserv is a labor-only contractor.

Labor-only contracting is expressly prohibited by our labor laws. Article 106 of the Labor Code defines labor-only contracting as "supplying workers to an employer [who] does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer."

Section 5, Rule VIII-A, Book III of the Omnibus Rules Implementing the Labor Code (Implementing Rules), as amended by Department Order No. 18-02, expounds on the prohibition against labor-only contracting, thus:

> **Section 5**. *Prohibition against labor-only contracting*. − Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where the contractor or subcontractor merely recruits, supplies or places workers to perform a job, work or service for a principal, and any of the following elements are present:
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> i) The contractor or subcontractor does not have substantial capital or investment which relates to the job, work or service to be performed and the employees recruited, supplied or placed by such contractor or subcontractor are performing activities which are directly related to the main business of the principal; or
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> ii) The contractor does not exercise the right to control over the performance of the work of the contractual employee.
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> The foregoing provisions shall be without prejudice to the application of Article 248 (c) of the Labor Code, as amended.
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> x x x x

> The "right to control" shall refer to the right reserved to the person for whom, the services of the contractual workers are performed, to determine not only the end to be achieved, but also the manner and means to be used in reaching that end.

The law and its implementing rules allow contracting arrangements for the performance of specific jobs, works or services. Indeed, it is management prerogative to farm out any of its activities, regardless of whether such activity is peripheral or core in nature. However, in order for such outsourcing to be valid, it must be made to an independent contractor because the current labor rules expressly prohibit labor-only contracting.[18]

After an exhaustive review of the records, there is no showing that first, Digiserv has substantial investment in the form of capital, equipment or tools. Under the Implementing Rules, substantial capital or investment refers to "capital stocks and subscribed capitalization in the case of corporations, tools, equipment, implements, machineries and work premises, actually and directly used by the contractor or subcontractor in the performance or completion of the job, work or service contracted out." The NLRC, as echoed by the Court of Appeals, did not find substantial Digiserv's authorized capital stock of One Million Pesos (₱1,000,000.00). It pointed out that only Two Hundred Fifty Thousand Pesos (₱250,000.00) of the authorized capital stock had been subscribed and only Sixty-Two Thousand Five Hundred Pesos (₱62,500.00) had been paid up. There was no increase in capitalization for the last ten (10) years.[19]

Moreover, in the Amended Articles of Incorporation, as well as in the General Information Sheets for the years 1994, 2001 and 2005, the primary purpose of Digiserv is to provide manpower services. In *PCI Automation*

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18 *Aliviado v. Procter & Gamble Phils., Inc.*, G.R. No. 160506, 6 June 2011, 650 SCRA 400, 412-414.

19 *Rollo*, p. 582.

Center, Inc. v. National Labor Relations Commission,[20] the Court made the following distinction: "the legitimate job contractor provides services while the labor-only contractor provides only manpower. The legitimate job contractor undertakes to perform a specific job for the principal employer while the labor-only contractor merely provides the personnel to work for the principal employer." The services provided by employees of Digiserv are directly related to the business of Digitel, as rationalized by the NLRC in this wise:

> It is undisputed that as early as March 1994, the affected employees, except for two, were already performing their job as Traffic Operator which was later renamed as Customer Service Representative (CSR). It is equally undisputed that all throughout their employment, their function as CSR remains the same until they were terminated effective May 30, 2005. Their long period of employment as such is an indication that their job is directly related to the main business of DIGITEL which is telecommunication[s]. Because, if it was not, DIGITEL would not have allowed them to render services as Customer Service Representative for such a long period of time.[21]

Furthermore, Digiserv does not exercise control over the affected employees. The NLRC highlighted the fact that Digiserv shared the same Human Resources, Accounting, Audit and Legal Departments with Digitel which manifested that it was Digitel who exercised control over the performance of the affected employees. The NLRC also relied on the letters of commendation, plaques of appreciation and certification issued by Digitel to the Customer Service Representatives as evidence of control.

Considering that Digiserv has been found to be engaged in labor-only contracting, the dismissed employees are deemed employees of Digitel.

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20 322 Phil. 536, 550 (1996).

21 *Rollo*, p. 583.

Section 7 of the Implementing Rules holds that labor-only contracting would give rise to: (1) the creation of an employer-employee relationship between the principal and the employees of the contractor or sub-contractor; and (2) the solidary liability of the principal and the contractor to the employees in the event of any violation of the Labor Code.

Accordingly, Digitel is considered the principal employer of respondent employees.

The affected employees were illegally dismissed.

In addition to finding that Digiserv is a labor-only contractor, records teem with proof that its dismissed employees are in fact employees of Digitel. The NLRC enumerated these evidences, thus:

> That the remaining thirteen (13) affected employees are indeed employees of DIGITEL is sufficiently established by the facts and evidence on record.
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> It is undisputed that the remaining affected employees, except for two (2), were already hired by DIGITEL even before the existence of DIGISERV. (The other two (2) were hired after the existence of DIGISERV). The UNION submitted a sample copy of their appointment paper (Annex "A" of UNION's Position Paper, Records, Vol. 1, p. 100) showing that they were appointed on March 1, 1994, almost three (3) months before DIGISERV came into existence on May 30, 1994 (Annex "B", Ibid, Records, Vol. 1, p. 101). On the other hand, not a single appointment paper was submitted by DIGITEL showing that these remaining affected employees were hired by DIGISERV.
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> It is equally undisputed that the remaining, affected employees continuously held the position of Customer Service Representative, which was earlier known as Traffic Operator, from the time they were appointed on March 1, 1994 until they were terminated on May 30, 2005. The UNION alleges that these Customer Service Representatives were under the Customer Service Division of DIGITEL. The UNION's allegation is correct. Sample of letter of commendations issued to Customer Service

> Representatives (Annexes "C" and "C-1" of UNION's Position Paper, Records, p. 100 and 111) indeed show that DIGITEL has a Customer Service Division which handles its Call Center operations.
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> Further, the Certificates issued to Customer Service Representative likewise show that they are employees of DIGITEL (Annexes "C-5", "C-6" - "C-7" of UNION's Position Paper, Records, Vol. 1, pp. 115 to 117), Take for example the "Service Award" issued to Ma. Loretta C. Esen, one of the remaining affected employees (Annex "C-5", Supra). The "Service Award" was signed by the officers of DIGITEL – the VP-Customer Services Division, the VP-Human Resources Division and the Group Head-Human Resources Division. It was issued by DIGITEL to Esen thru the above named officers **"In recognition of her seven (7) years continuous and valuable contributions to the achievement of Digitel's organization objectives".** It cannot be gainsaid that it is only the employer that issues service award to its employees.[22] (Emphasis not supplied)

As a matter of fact, even before the incorporation of Digiserv, the affected employees were already employed by Digitel as Traffic Operators, later renamed as Customer Service Representatives.

As an alternative argument, Digitel maintains that the affected employees were validly dismissed on the grounds of closure of Digiserv, a department within Digitel.

In the recent case of *Waterfront Cebu City Hotel v. Jimenez,*[23] we referred to the closure of a department or division of a company as retrenchment. The dismissed employees were undoubtedly retrenched with the closure of Digiserv.

For a valid retrenchment, the following elements must be present:

> (1) That retrenchment is reasonably necessary and likely to prevent business losses which, if already incurred, are not merely *de minimis,* but substantial, serious, actual and real, or if only expected, are reasonably imminent as perceived objectively and in good faith by the

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22 Id. at 587-588.

23 G.R. No. 174214, 13 June 2012.

> employer;
> (2) That the employer served written notice both to the employees and to the Department of Labor and Employment at least one month prior to the intended date of retrenchment;
> (3) That the employer pays the retrenched employees separation pay equivalent to one (1) month pay or at least ½ month pay for every year of service, whichever is higher;
> (4) That the employer exercises its prerogative to retrench employees in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure; and
> (5) That the employer used fair and reasonable criteria in ascertaining who would be dismissed and who would be retained among the employees, such as status, efficiency, seniority, physical fitness, age, and financial hardship for certain workers.[24]

Only the first 3 elements of a valid retrenchment had been here satisfied. Indeed, it is management prerogative to close a department of the company. Digitel's decision to outsource the call center operation of the company is a valid reason to close down the operations of a department under which the affected employees were employed. Digitel cited the decline in the volume of transaction of operator-assisted call services as supported by Financial Statements for the years 2003 and 2004, during which Digiserv incurred a deficit of ₱163,624.00 and ₱164,055.00, respectively.[25] All affected employees working under Digiserv were served with individual notices of termination. DOLE was likewise served with the corresponding notice. All affected employees were offered separation pay. Only 9 out of the 45 employees refused to accept the separation pay and chose to contest their dismissal before this Court.

The fifth element regarding the criteria to be observed by Digitel clearly does not apply because all employees under Digiserv were dismissed. The instant case is all about the fourth element, that is, whether or not the affected employees were dismissed in good faith. We find that there was no good faith in the retrenchment.

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24 Id.
25 *Rollo*, p. 707.

Prior to the cessation of Digiserv's operations, the Secretary of Labor had issued the first assumption order to enjoin an impending strike. When Digiserv effected the dismissal of the affected employees, the Union filed another notice of strike. Significantly, the Secretary of Labor ordered that the second notice of strike be subsumed by the previous assumption order. Article 263(g) of the Labor Code provides:

> When, in his opinion, there exists a labor dispute causing or likely to cause a strike or lockout in an industry indispensable to the national interest, the Secretary of Labor and Employment may assume jurisdiction over the dispute and decide it or certify the same to the Commission for compulsory arbitration. Such assumption or certification shall have the effect of automatically enjoining the intended or impending strike or lockout as specified in the assumption or certification order. If one has already taken place at the time of assumption or certification, all striking or locked out employees shall immediately return to work and the employer shall immediately resume operations and readmit all workers under the same terms and conditions prevailing before the strike or lockout. The Secretary of Labor and Employment or the Commission may seek the assistance of law enforcement agencies to ensure the compliance with this provision as well as with such orders as he may issue to enforce the same.

The effects of the assumption order issued by the Secretary of Labor are two-fold. It enjoins an impending strike on the part of the employees and orders the employer to maintain the *status quo*.

There is no doubt that Digitel defied the assumption order by abruptly closing down Digiserv. The closure of a department is not illegal *per se.* What makes it unlawful is when the closure is undertaken in bad faith. In *St. John Colleges, Inc. v. St. John Academy Faculty and Employees Union,*[26] bad faith was evidenced by the timing of and reasons for the closure and the timing of and reasons for the subsequent opening. There, the collective bargaining negotiations between *St. John* and the Union resulted in a bargaining deadlock that led to the filing of a notice of strike. The labor

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[26] 536 Phil. 631 (2006).

dispute was referred to the Secretary of Labor who assumed jurisdiction. Pending resolution of the dispute, *St. John* closed the school prompting the Union to file a complaint for illegal dismissal and unfair labor practice. The Union members alleged that the closure of the high school was done in bad faith in order to get rid of the Union and render useless any decision of the SOLE on the CBA deadlocked issues. We held that closure was done to defeat the affected employees' security of tenure, thus:

> The determination of whether SJCI acted in bad faith depends on the particular facts as established by the evidence on record. Bad faith is, after all, an inference which must be drawn from the peculiar circumstances of a case. The two decisive factors in determining whether SJCI acted in bad faith are (1) the timing of, and reasons for the closure of the high school, and (2) the timing of, and the reasons for the subsequent opening of a college and elementary department, and, ultimately, the reopening of the high school department by SJCI after only one year from its closure.
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> Prior to the closure of the high school by SJCI, the parties agreed to refer the 1997 CBA deadlock to the SOLE for assumption of jurisdiction under Article 263 of the Labor Code. As a result, the strike ended and classes resumed. After the SOLE assumed jurisdiction, it required the parties to submit their respective position papers. However, instead of filing its position paper, SJCI closed its high school, allegedly because of the "irreconcilable differences between the school management and the Academy's Union particularly the safety of our students and the financial aspect of the ongoing CBA negotiations." Thereafter, SJCI moved to dismiss the pending labor dispute with the SOLE contending that it had become moot because of the closure. Nevertheless, a year after said closure, SJCI reopened its high school and did not rehire the previously terminated employees.
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> Under these circumstances, it is not difficult to discern that the closure was done to defeat the parties' agreement to refer the labor dispute to the SOLE; to unilaterally end the bargaining deadlock; to render nugatory any decision of the SOLE; and to circumvent the Union's right to collective bargaining and its members' right to security of tenure. By admitting that the closure was due to irreconcilable differences between the Union and school management, specifically, the financial aspect of the ongoing CBA negotiations, SJCI in effect admitted that it wanted to end the bargaining deadlock and eliminate the problem of dealing with the demands of the Union. **This is precisely what the Labor Code abhors and punishes as unfair labor practice since the net effect is to defeat the Union's right to collective bargaining**.[27] (Emphasis not supplied)

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[27] Id. at 645-646.

As in *St. John*, bad faith was manifested by the timing of the closure of Digiserv and the rehiring of some employees to Interactive Technology Solutions, Inc. (I-tech), a corporate arm of Digitel. The assumption order directs employees to return to work, and the employer to reinstate the employees. The existence of the assumption order should have prompted Digitel to observe the *status quo*. Instead, Digitel proceeded to close down Digiserv. The Secretary of Labor had to subsume the second notice of strike in the assumption order. This order notwithstanding, Digitel proceeded to dismiss the employees.

The timing of the creation of I-tech is dubious. It was incorporated on 18 January 2005 while the labor dispute within Digitel was pending. I-tech's primary purpose was to provide call center/customer contact service, the same service provided by Digiserv. It conducts its business inside the Digitel office at *110 E. Rodriguez Jr. Avenue, Bagumbayan, Quezon City*. The former head of Digiserv, Ms. Teresa Taniega, is also an officer of I-tech. Thus, when Digiserv was closed down, some of the employees presumably non-union members were rehired by I-tech.

Thus, the closure of Digiserv pending the existence of an assumption order coupled with the creation of a new corporation performing similar functions as Digiserv leaves no iota of doubt that the target of the closure are the union member-employees. These factual circumstances prove that Digitel terminated the services of the affected employees to defeat their security of tenure. The termination of service was not a valid retrenchment; it was an illegal dismissal of employees.

It needs to be mentioned too that the dismissal constitutes an unfair labor practice under Article 248(c) of the Labor Code which refers to contracting out services or functions being performed by union members

when such will interfere with, restrain or coerce employees in the exercise of their rights to self-organization. At the height of the labor dispute, occasioned by Digitel's reluctance to negotiate with the Union, I-tech was formed to provide, as it did provide, the same services performed by Digiserv, the Union members' nominal employer.

Under Article 279 of the Labor Code, an illegally dismissed employee is entitled to backwages and reinstatement. Where reinstatement is no longer viable as an option, as in this case where Digiserv no longer exists, separation pay equivalent to one (1) month salary, or one-half (1/2) month pay for every year of service, whichever is higher, should be awarded as an alternative.[28] The payment of separation pay is in addition to payment of backwages.[29]

Indeed, while we have found that the closure of Digiserv was undertaken in bad faith, badges thereof evident in the timing of Digiserv's closure, hand in hand, with I-tech's creation, the closure remains a foregone conclusion. There is no finding, and the Union makes no such assertion, that Digiserv and I-tech are one and the same corporation. The timing of Digiserv's closure and I-tech's ensuing creation is doubted, not the legitimacy of I-tech as a business process outsourcing corporation providing both inbound and outbound services to an expanded local and international *clientele.*[30]

The finding of unfair labor practice hinges on Digitel's contracting-out certain services performed by union member-employees to interfere

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28 See Book VI, Rule 1, Section 4(b) of the Omnibus Rules Implementing the Labor Code; *Purefoods Corporation v. Nagkakaisang Samahang Manggagawa ng Purefoods Rank-and-File*, G.R. No. 150896, 28 August 2008, 563 SCRA 471, 480-481.

29 *Golden Ace Builders v. Talde*, G.R. No. 187200, 5 May 2010, 620 SCRA 283, 288-289 citing *Macasero v. Southern Industrial Gases Philippines*, G.R. No. 178524, 30 January 2009, 577 SCRA 500, 506-507.

30 See http://www.bestjobsph.com/bt-empd-itechsolutions.htm. (visited 2 October 2012).

with, restrain or coerce them in the exercise of their right to self-organization.

We have no basis to direct reinstatement of the affected employees to an ostensibly different corporation. The surrounding circumstance of the creation of I-tech point to bad faith on the part of Digitel, as well as constitutive of unfair labor practice in targeting the dismissal of the union member-employees. However, this bad faith does not contradict, much less negate, the impossibility of the employees' reinstatement because Digiserv has been closed and no longer exists.

Even if it is a possibility that I-tech, as though Digitel, can absorb the dismissed union member-employees as I-tech was incorporated during the time of the controversy with the same primary purpose as Digiserv, we would be hard pressed to mandate the dismissed employees' reinstatement given the lapse of more than seven (7) years.

This length of time from the date the incident occurred to its resolution[31] coupled with the demonstrated litigiousness of the disputants: (1) with all sorts of allegations thrown by either party against the other; (2) the two separate filings of a notice of strike by the Union; (3) the Assumption Orders of the DOLE; (4) our own finding of unfair labor practice by Digitel in targeting the union member-employees, abundantly show that the relationship between Digitel and the union member-employees is *strained*. Indeed, such discordance between the parties can very well be a necessary consequence of the protracted and branched out litigation. We adhere to the oft-quoted doctrine that separation pay may avail in lieu of

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[31] *Panday v. National Labor Relations Commission,* G.R. No. 67664, 20 May 1992, 209 SCRA 122, 126-127.

reinstatement if reinstatement is no longer practical or in the best interest of the parties.[32]

Under the *doctrine of strained relations*, the payment of separation pay is considered an acceptable alternative to reinstatement when the latter option is no longer desirable or viable. On one hand, such payment liberates the employee from what could be a highly oppressive work environment. On the other hand, it releases the employer from the grossly unpalatable obligation of maintaining in its employ a worker it could no longer trust.[33]

Finally, an illegally dismissed employee should be awarded moral and exemplary damages as their dismissal was tainted with unfair labor practice.[34] Depending on the factual milieu, jurisprudence has awarded varying amounts as moral and exemplary damages to illegally dismissed employees when the dismissal is attended by bad faith or fraud; or constitutes an act oppressive to labor; or is done in a manner contrary to good morals, good customs or public policy; or if the dismissal is effected in a wanton, oppressive or malevolent manner.[35]

In *Nueva Ecija I Electric Cooperative, Inc. (NEECO I) Employees Association v. National Labor Relations Commission*, we intoned:

> Unfair labor practices violate the constitutional rights of workers and employees to self-organization, are inimical to the legitimate interests of both labor and management, including their right to bargain collectively and otherwise deal with each other in an atmosphere of freedom and mutual respect; and disrupt industrial peace and hinder the promotion of healthy and stable labor-management relations. As the conscience of the

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32 *Velasco v. National Labor Relations Commission*, 525 Phil. 749, 761 (2006).

33 *Golden Ace Builders v. Talde,* supra note 29 at 289-290.

34 *Purefoods Corporation v. Nagkakaisang Samahang Manggagawa ng Puerfoods Rank-and-File,* supra note 28 at 480; *Quadra v. Court of Appeals*, 529 Phil. 218, 224-225 (2006) citing *Nueva Ecija I Electric Cooperative, Inc. (NEECO I) Employees Association v. National Labor Relations Commission,* 380 Phil. 44, 57-58 (2000).

35 *Woodridge School v. Pe Benito*, G.R. No. 160240, 29 October 2008, 570 SCRA 164, 186.

> government, it is the Court's sworn duty to ensure that none trifles with labor rights.[36]

We awarded moral damages in the amount of ₱10,000.00 and likewise awarded ₱5,000.00 as exemplary damages for each dismissed employee.

In the recent case of *Purefoods Corporation v. Nagkakaisang Samahang Manggagawa ng Purefoods Rank-and-File*,[37] we awarded the aggregate amount of ₱500,000.00 as moral and exemplary damages to the illegally dismissed union member-employees which exact number was undetermined.

In the case at hand, with the Union's manifestation that only 13 employees remain as respondents, as most had already accepted separation pay, and consistent with our finding that Digitel committed an unfair labor practice in violation of the employees' constitutional right to self-organization, we deem it proper to award each of the illegally dismissed union member-employees the amount of ₱10,000.00 and ₱5,000.00 as moral and exemplary damages, respectively.

WHEREFORE, the Petition is **DENIED**. The Decision of the Court of Appeals in CA-G.R. SP No. 91719 is **AFFIRMED**, while the Decision in CA-G.R. SP No. 94825 declaring the dismissal of affected union member-employees as illegal is **MODIFIED** to include the payment of moral and exemplary damages in amount of ₱10,000.00 and ₱5,000.00, respectively, to each of the thirteen (13) illegally dismissed union-member employees.

Petitioner Digital Telecommunications Philippines, Inc. is **ORDERED** to pay the affected employees backwages and separation pay

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36 Supra note 34 at 57-58.
37 Supra note 28 at 481.

equivalent to one (1) month salary, or one-half (1/2) month pay for every year of service, whichever is higher.

Let this case be **REMANDED** to the Labor Arbiter for the computation of monetary claims due to the affected employees.

SO ORDERED.

JOSE PORTUGAL PEREZ
Associate Justice

WE CONCUR:

ANTONIO T. CARPIO
Associate Justice
Chairperson

ARTURO D. BRION
Associate Justice

MARIANO C. DEL CASTILLO
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.

ANTONIO T. CARPIO
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division 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.

MARIA LOURDES P. A. SERENO
Chief Justice