



RECEIVED
JAN 21 2020
BY: YIA
TIME: 3:14 PM

Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

**PACIFIC METALS CO.,
LTD.,**

Petitioner,

G.R. No. 226920

Members:

- versus -

PERALTA, C.J., Chairperson,
CAGUIOA,
REYES, J., JR.,
LAZARO-JAVIER, and
INTING,* JJ.

**EDGAR ALLAN TAMAYO,
ERAMEN MINERALS,
INC., and ENRIQUE
FERNANDEZ,**

Respondents.

Promulgated:

DEC 05 2019

X-----X

DECISION

LAZARO-JAVIER, J.:

This Petition for Review¹ assails the following issuances of the Court of Appeals-Eleventh Division² in CA-G.R. SP No. 135353 entitled “*Edgar Allan A. Tamayo v. National Labor Relations Commission, Pacific Metals Co., Eramen Minerals, Inc., Chitaru Okamura, and Enrique Fernandez*.”

* Designated as additional member per S.O. No. 2726 dated October 25, 2019.

¹ Under Rule 45 of the Revised Rules of Court.

² Penned by Associate Justice Pedro B. Corales with the concurrence of Associate Justice Sesinando E. Villon and Associate Justice Rodil V. Zalameda (now a member of this Court), all members of the Eleventh Division, *Rollo*, pp. 423-437.

1. Decision³ dated February 29, 2016, finding respondent Tamayo to be a regular employee of petitioner, thus, reversing the initial ruling of the labor arbiter, and affirmed by the NLRC, that he was a mere project employee;
2. Resolution⁴ dated September 7, 2016, denying petitioner's motion for reconsideration.⁵

Antecedents

Petitioner Pacific Metals Co., Ltd., (PAMCO) is a foreign company engaged in the importation of nickel ore mined in the Philippines. Saprolite Ore refers to nickel ore suitable for smelting into ferronickel, the main raw material for production of stainless steel which is now widely used in manufacturing kitchen equipment, bathtubs, table and cookware, and medical and laboratory equipment, among others.⁶

PAMCO is registered in Japan and opened a Philippine Representative Office in April 2008. Chitaru Okamura is PAMCO's general manager and liaison officer for its Philippine office.⁷

In line with its desire to purchase high quality nickel ore from its target area, PAMCO negotiated to enter into an exploration agreement with Eramen Minerals, Inc. (ERAMEN) for the development of a target area covered by the latter's Mineral Production and Sharing Agreement (MPSA). ERAMEN is the exclusive contractor operating under MPSA No. 209-2005-III, registered with the Mines and Geosciences Bureau, Department of Environment and Natural Resources (DENR). PAMCO's target area is within the area covered by ERAMEN's MPSA which covered a four thousand six hundred nineteen (4,619) hectare land in Sta. Cruz and Candelaria, Zambales.⁸ ERAMEN was represented by its president Enrique Fernandez.

In preparation for its joint venture business with ERAMEN, PAMCO engaged the services of respondent Edgar Allan Tamayo, a licensed and registered geologist. Tamayo signed up for a two-month employment contract, commencing on September 2010. In turn, PAMCO agreed to pay Tamayo ₱90,000.00 per month for his services. According to PAMCO, Tamayo's two-month engagement was extended for another two (2) months, or until January 31, 2011.⁹

On January 17, 2011, PAMCO and ERAMEN entered into an Exploration Agreement¹⁰ wherein PAMCO shall provide financial and

³ *Id.*

⁴ *Id.* at 479-481.

⁵ *Id.* at 433-447.

⁶ *Id.* at 19.

⁷ Position Paper, *id.* at 80-81

⁸ *Rollo*, p. 20.

⁹ *Id.* at 80-82.

¹⁰ *Id.* at 145-153.

technical assistance to ERAMEN in the exploration project while PAMCO shall have the exclusive option to participate in the subsequent mining project for the purpose of purchasing saprolite ore which had been identified and exploited in the target area.

Tamayo was designated manager for the ERAMEN/PAMCO Exploration Project. As such, he was in charge of preparing the project reports and updates, and budget requests for approval of Fernandez, ERAMEN's president.¹¹ There is no showing, however, that Tamayo's engagement with the ERAMEN/PAMCO Exploration Project was covered by an employment contract.

Subsequently, by letter¹² dated November 29, 2011, Tamayo was informed that his services as exploration manager was terminated effective December 31, 2011 in view of the completion of the exploration aspect of the project.¹³ For clearance purposes, Tamayo was requested to submit his Final Exploration Report and to turn-over the complete database of the Exploration Project, as well as all other documents, supplies, and equipment which were still in his custody to Emilio T. Figueroa III, General Manager for the Sta. Cruz Nickel project, or to Chief Accountant Emily Calanog.¹⁴

In response, Tamayo sent an email¹⁵ to ERAMEN/Fernandez on December 13, 2011 to clarify the requirements for his clearance and to inform the company that he was waiving his last salary to cover office items which may have been lost.¹⁶ Tamayo sent two (2) more e-mails thereafter, one on May 30, 2012 and another on January 12, 2013. In his first e-mail, Tamayo expressed his suspicion that there had been a connivance among some of the technical people involved in the exploration project and that his career with ERAMEN ended because of a "group from the [University of the Philippines] allegedly ganged up on him."¹⁷ In his second e-mail, Tamayo informed PAMCO's Okamura and ERAMEN's Fernandez that he intended to file a complaint before the NLRC unless his demands were granted by the company, such as payment of backwages, termination of some administrative personnel, moral and "professional" damages of ₱10 Million, and other "terms and conditions to protect his future professional and moral interest."¹⁸

On December 12, 2012, Tamayo filed a complaint for illegal dismissal against PAMCO and ERAMEN. He prayed for backwages, separation pay, 13th month pay, moral and exemplary damages, and attorney's fees.

¹¹ *Id.* at 101.

¹² *Id.* at 123 (erroneously dated November 29, 2010).

¹³ *Id.* at 101-102.


¹⁴ *Id.* at 123.

¹⁵ *Id.* at 124.

¹⁶ *Id.* at 102.

¹⁷ *Id.* at 103.

¹⁸ *Id.* at 133.



Proceedings Before The Labor Arbiter

Tamayo averred in his position paper¹⁹ that PAMCO hired him as its Mineral Exploration and Drilling Manager in September 2010. His responsibilities included designing a drilling program, assessing technical data, managing exploration drilling activities, and preparing project budgetary requirements.²⁰ Aside from his main duties as geologist, PAMCO also tasked him to hire and teach locals in setting up their organization, coordinate with local government units (LGUs), and manage operations and construction. He even personally bought supplies from Divisoria for this purpose.²¹

Tamayo further alleged that on January 31, 2011, PAMCO entered into an Exploration Agreement with ERAMEN for exploration of minerals in a 4,619-hectare property located in Sta. Cruz and Candelaria, Zambales. This area was covered by the MPSA issued to ERAMEN. He was appointed Project Manager of the ERAMEN/PAMCO Exploration Project.²²

After Okamura informed him that the exploration project was proceeding to the mining phase, and believing that he was instrumental in the project's success, Tamayo sent an e-mail²³ to Fernandez inquiring about his career path in the company. Fernandez did not reply.

Tamayo claimed that after his e-mail to Fernandez, he noticed a change in the attitude of other employees toward him. They were hostile, made up lies about him, and committed acts demonstrating a collective effort to drive him to resign from his post.²⁴

Sometime in November 2011, Tamayo received a letter signed by Fernandez informing him that his work for the exploration project had already been concluded and his employment was only until December 31, 2011.²⁵

Tamayo argued that he was a regular employee of PAMCO and/or of the ERAMEN/PAMCO Exploration Project, having rendered work directly related, nay, necessary and desirable, to the main business of the company and the exploration project. He should not be considered a project employee because the duration of his employment was not determined at the time of his engagement and his termination had not been reported to the Department of Labor and Employment (DOLE) in accordance with law.²⁶

Being a regular employee, Tamayo claimed security of tenure. Termination of his employment, without valid or authorized cause, violated his security of tenure. Both PAMCO and ERAMEN should be held liable for

¹⁹ *Id.* at 53-73.

²⁰ *Id.* at 55.

²¹ *Id.*

²² *Id.* at 56.

²³ Dated November 4, 2011, *rollo*, p. 122.

²⁴ *Rollo*, p. 57.

²⁵ *Id.* at 58-59.

²⁶ *Id.* at 60-61.

his backwages, separation pay, 13th month pay, moral and exemplary damages, and attorney's fees.

PAMCO's Arguments

In its position paper,²⁷ PAMCO asserted that it hired Tamayo as exploration manager under a two-month employment contract, starting September 21, 2010. The contract was extended for another two (2) months and it ended on January 31, 2011. Thereafter, Tamayo was hired by ERAMEN and it (PAMCO) was not a party thereto.²⁸ Tamayo cannot claim to be its regular employee because it was clear in the service contract that he was hired as a consultant. Tamayo, thus, cannot demand payment for services he no longer rendered, more so, if he sought to collect the same under the guise of being illegally dismissed.²⁹

ERAMEN's Arguments

ERAMEN, on the other hand, basically countered³⁰ that PAMCO initially hired Tamayo and later recommended him to the joint venture as exploration manager.³¹ Tamayo was not illegally dismissed because he was a project employee whose services were deemed co-terminous with the project for which he was hired.³² Thus, Tamayo may be terminated as soon as the exploration project was completed. Further, due process was observed in Tamayo's termination. Under Section 2, Rule 1 of the Implementing Rules of Book VI of the Labor Code, as amended by Department Order No. 10, effective June 22, 1997, if termination was due to contract or phase completion of a project, the employer must furnish the employee a written notice therefor within reasonable time from effectivity date of termination.³³ Here, Tamayo was sent the written notice a month before the intended termination. Notably, Tamayo was guilty of bad faith in refusing to submit his final report and using the same to get back at his former co-employees.³⁴

Further, Tamayo was not entitled to reinstatement and backwages because he was not illegally dismissed. Neither was the award of moral and exemplary damages warranted absent a showing of bad faith on the part of his employers.³⁵ Attorney's fees cannot be awarded either because the complaint for illegal dismissal was based entirely on Tamayo's wrong assumption that he was illegally dismissed. Finally, Fernandez cannot be held solidarily liable with the company, sans any evidence that he acted maliciously in effecting

²⁷ Dated May 31, 2013, *id.* at 79-86.

²⁸ *Rollo*, p. 82.

²⁹ *Id.* at 84.

³⁰ Position Paper dated May 31, 2013, *id.* at 98-113.

³¹ *Rollo*, p. 100.

³² *Id.* at 106.

³³ *Id.* at 107-108.

³⁴ *Id.* at 108.

³⁵ *Id.* at 110.

Tamayo's termination.³⁶

Labor Arbiter's Ruling

By Decision³⁷ dated August 30, 2013, Labor Arbiter Marie Josephine C. Suarez ruled that Tamayo was not a regular employee but a project employee of the ERAMEN/PAMCO Exploration Project. Tamayo himself was aware of such fact. This was clear when Tamayo inquired with Fernandez about the management's plan for his "career path" in the company. Hence, Tamayo was not illegally dismissed and his termination was due solely to contract completion. This notwithstanding, the labor arbiter still ordered ERAMEN to pay Tamayo's salary for December 2011 and 13th month pay for 2011, or the total amount of ₱180,000.00.

NLRC'S Ruling

On appeal, the NLRC affirmed under Decision³⁸ dated January 24, 2014. It sustained the labor arbiter's finding that Tamayo was not illegally dismissed, but was terminated due to project completion. The NLRC, however, modified the computation of Tamayo's 13th month pay to its pro-rated value of ₱82,500.00.

Tamayo's motion for reconsideration was denied under Resolution dated March 26, 2014.

Court of Appeals' Ruling

Tamayo elevated the case to the Court of Appeals (CA) *via* a petition for certiorari.³⁹

By Decision⁴⁰ dated February 29, 2016, the CA reversed. It ruled that Tamayo was PAMCO's regular employee who had been illegally dismissed. The CA ordered Tamayo's reinstatement with backwages, *viz*:

WHEREFORE, the instant petition for *certiorari* is **GRANTED**. The January 24, 2014 Decision and March 26, 2014 Resolution of the National Labor Relations Commission, Fourth Division in NLRC LAC No. 10-002743-13 are hereby **REVERSED** and **SET ASIDE**. Private respondent Pacific Metals Co. is **ORDERED** to reinstate petitioner Edgar Allan A. Tamayo to his former position, or to an equivalent position if the same is no longer existing, without loss of seniority rights and privileges and pay his backwages computed from December 2011 up to the time of actual reinstatement plus attorney's fees equivalent to 10% of his monetary

³⁶ *Id.* at 111.

³⁷ *Id.* at 192-197.

³⁸ *Id.* at 294-302.

³⁹ *Id.* at 337-351.

⁴⁰ *Id.* at 423-437.

award.

SO ORDERED.

The CA held that the extension of Tamayo's employment with PAMCO did not have a specific duration. He was just required to render service until he got assigned to the ERAMEN/PAMCO Exploration Project. When Tamayo was re-hired after the expiration of his service contract, he ceased to be a project employee. This is clear from *Pasos v. Philippine National Construction Corporation*⁴¹ where it was ruled that when an employee's services are extended without any specification as to the duration, he is deemed to have become a regular employee of the company. In the same vein, when Tamayo was re-hired by PAMCO for an unspecified period and continuously worked for the project for more than a year, he is deemed to have become a regular employee of PAMCO.⁴²

PAMCO's motion for reconsideration was denied under Resolution dated September 7, 2016.

The Present Petition

PAMCO now faults the CA for brushing aside the factual findings and legal conclusion of the NLRC, the quasi-judicial agency with the expertise on matters relating to labor, which sustained the LA's ruling that Tamayo was a mere project employee whose employment got validly terminated due to contract completion. PAMCO also asserts that ERAMEN must be solely liable to pay for Tamayo's money claims, if warranted, being the latter's real employer.

In his Comment⁴³ dated July 18, 2017, Tamayo argued that PAMCO failed to overturn the Court of Appeals' disposition that he was a regular employee of PAMCO.

By Comment dated July 28, 2017,⁴⁴ ERAMEN claimed that Tamayo was PAMCO's employee who got assigned to the joint exploration project. PAMCO cannot insist otherwise based on the Memorandum dated November 23, 2011 signed by its representative Emilio T. Figueroa, under which Tamayo was given authority to approve limited expenses for the project. For one, PAMCO invoked the document at such a late stage in the proceedings, i.e., only in its motion for reconsideration with the Court of Appeals. It is a basic postulate that points of law, theories, and arguments not brought to the court's attention will not ordinarily be considered by a reviewing court. For another, even if the memorandum be given consideration, the same was issued by

⁴¹ 713 Phil. 416, 433 (2013).

⁴² *Rollo*, pp. 432-433.

⁴³ *Id.* at 538-542.

⁴⁴ *Id.* at 515-532.

Figueroa who was then acting for the ERAMEN/PAMCO Exploration Project. This only showed that PAMCO effectively controlled the finances of the exploration agreement.

Issues

1. Is Tamayo a regular or project employee?
2. If Tamayo be deemed a regular employee, which between PAMCO and ERAMEN shall be liable to pay his backwages, 13th month pay, damages, and attorney's fees?

Ruling

Nature of Tamayo's employment

The question of whether respondent is a regular or a project employee is factual in nature and as a general rule, the factual findings of the CA on this score are binding on the Supreme Court. The rule, however, admits of exceptions. Where the factual findings of the CA are contrary to those of the NLRC or LA, the Court is constrained to resolve it due to the incongruent findings of the NLRC and the CA.⁴⁵ We are, therefore, constrained to revisit the factual milieu of the case in order to determine whether Tamayo is a regular employee of PAMCO and/or ERAMEN.

The principal test to determine if one is a project employee is whether such employee had been assigned to carry out a "specific project or undertaking," the duration and scope of which is specified at the time such employee was engaged for that project.⁴⁶ This is clear from Article 280 of the Labor Code which distinguishes a "project employee" from a "regular employee," viz:

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 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.

⁴⁵ *Filsystems, Inc. v. Puente*, 493 Phil. 923, 930 (2005).

⁴⁶ *Hanjin Heavy Industries and Construction Co. Ltd., et al. v. Ibañez, et al.*, 578 Phil. 497, 510 (2008).

(Emphasis supplied.)

PAMCO asserts that Tamayo was a project employee because his employment contract with the company was pre-determined and had a specific duration, i.e., two (2) months.

We do not agree.

True, Tamayo's first engagement was in fact covered by a duly executed Service Contract,⁴⁷ specifying the project for which he was hired and its two-month duration. But this is not the contested engagement in this case. The controversy hinges on Tamayo's subsequent employment or his re-hiring and assignment as exploration manager for the ERAMEN/PAMCO Exploration Project. This engagement was not covered by any employment contract.

Be that as it may, the lack of an employment contract would not hinder the determination of the status of Tamayo's employment. For while the appropriate evidence showing that a person is a project employee pertains to the employment contract specifying the project and its duration; the existence of such contract is not always conclusive of the nature of one's employment.⁴⁸

In connection with Tamayo's subsequent engagement for the ERAMEN/PAMCO Exploration Project, he rendered services therefor from January 2011 until December 2011 when he got terminated due to alleged project completion.

That the exploration project was allegedly already completed does not suffice to convince that indeed the project had reached its conclusion. For no proof was adduced to substantiate this allegation. It is quite unconvincing that the exploration project was alleged to have already been completed or was even nearing completion, only one year after its commencement, considering that the project was actually good for five years. Surely, a project good for five years could not have been accomplished for such short period of one year.

More, it cannot go unnoticed that the supposed "project completion" happened when Tamayo was about to complete his first year of employment with PAMCO. It bears stress that it is common practice for employers to set the duration of an employment contract to a period shorter than one year to prevent an employee from attaining regular employment status, conformably with Article 295⁴⁹ of the Labor Code. The termination of Tamayo's

⁴⁷ *Id.* at 185-186.

⁴⁸ See *Liganza v. RBL Shipyard Corporation*, 535 Phil. 662, 669 (2006).

⁴⁹ Renumbered, formerly Art. 280.

ART. 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 service to be performed is seasonal in nature and the

employment, therefore, just a few weeks short of his one-year anniversary as an employee is highly suspect. It is not remotely possible that the termination was done to prevent Tamayo from gaining the status of a regular employee.

Based on Article 295 of the Labor Code, one is deemed a regular employee if one: a) had been engaged to perform tasks which are usually necessary or desirable in the usual business or trade of the employer, unless the employment is one for a specific project or undertaking or where the work is seasonal and for the duration of a season; or b) has rendered at least one (1) year of service, whether such service is continuous or broken, with respect to the activity for which he is employed and his employment continues as long as such activity exists.

Tamayo is a licensed and registered geologist. The typical duties of a geologist are:

- Ensure that minerals are extracted from mines, pits and quarries in such a way that maximum profit is obtained with as little damage to the environment as possible
- To work closely with the drill and blast engineers to determine the best way to blast all of the rock out of the pit floor
- Study and examine the minerals as they are extracted to assess their quality
- Analyze and interpret geological data using computer software
- Locate and estimate mineral ore deposits and prepare geological maps, charts and reports concerning mineral extraction
- Identify risks for natural disasters such as mud slides and earthquakes
- Investigate the composition of the earth's surface
- Collect samples of natural resources through drilling and other methods
- Communicate findings in the form of reports, meetings etc.
- Produce geological maps.⁵⁰


Employer-Employee Relationship between Pamco and Tamayo

As stated, PAMCO is engaged in the business of nickel ore importation. It does not simply involve sourcing out suppliers of raw materials; for sure, mineral importation takes more effort. Nickel ore is not readily available. Areas where to find it must first be determined and studied. Too, extensive work to finally generate it would involve manpower and substantial financing. And since the mineral comes from natural resources, there are environmental safety requirements that must be complied with.

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.

⁵⁰ <http://www.infomine.com/careers/job-descriptions/mine-geologist/> May 29, 2019.



To accomplish this step by step process, PAMCO must rely on the expertise of a geologist with knowledge of Philippine soil and its rich sources of minerals. The tasks ordinarily performed by a geologist, therefore, are necessary to the business which PAMCO was engaged in. It is, thus, undeniable that Tamayo is a regular employee of PAMCO, for he performs work that is usually necessary and desirable to PAMCO's business.

Verily, the mere fact that respondents worked on projects that were time-bound did not automatically characterize them as project employees. The nature of their work was determinative, as the Court considers its ruling in *DM Consunji, Inc., et al. v. Jamin* that “[o]nce a project or work pool employee has been: (1) continuously, as opposed to intermittently, rehired by the same employer for the same tasks or nature of tasks; and (2) these tasks are vital, necessary and indispensable to the usual business or trade of the employer, then the employee must be deemed a regular employee.”⁵¹

Here, although PAMCO persistently claims that Tamayo was only rehired for two (2) more months following the expiration of his first two-month contract with the company, records bear that Tamayo rendered service much longer than two (2) months. He was made to stay on for a year for the work he rendered was in fact necessary and indispensable to PAMCO's usual trade or business.

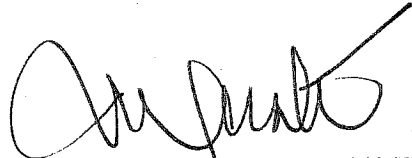
ACCORDINGLY, the petition is **DENIED** and the Decision dated February 29, 2016 and Resolution dated September 7, 2016 of the Court of Appeals in CA-G.R. SP No. 135353, **AFFIRMED**.

SO ORDERED.

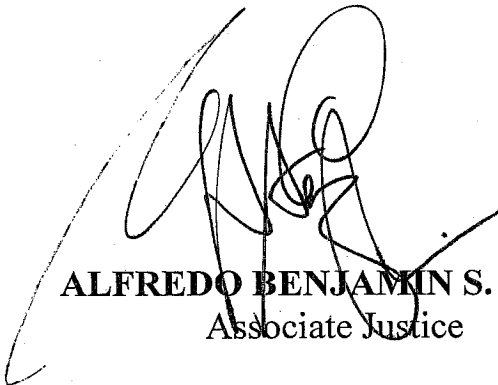

AMY C. LAZARO-JAVIER
Associate Justice

⁵¹ *Romeo Alba v. Conrado G. Espinosa, et al.*, G.R. No. 227734, August 9, 2017, 837 SCRA 52, 68, citing *DM Consunji, Inc., et al v. Jamin*, 686 Phil. 220 (2012).

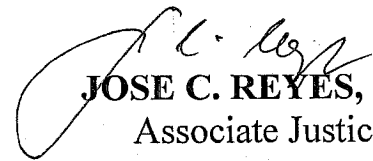
WE CONCUR:




DIOSDADO M. PERALTA
Chief Justice



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice



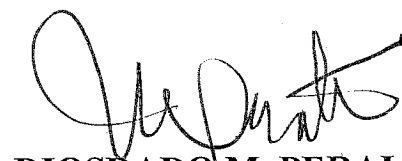
JOSE C. REYES, JR.
Associate Justice



HENRI JEAN PAUL B. INTING
Associate Justice

CERTIFICATION

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



DIOSDADO M. PERALTA
Chief Justice

