



# ***DEL ROSARIO PANDIPHIL Inc.***

## **Philippine Shipping Update – Manning Industry**

By: Ruben Del Rosario, President, Del Rosario Pandiphil Inc., May 9, 2013 (Issue 2013/06)

### **The extent of awards in illegal dismissal cases**

In case the Court finds illegal dismissal, how much should be awarded to the seafarer.

Two factors are to be considered in such an award: 1) the unexpired portion of the contract and 2) the computation of the monthly salaries to be awarded.

#### **Unexpired portion of the contract**

The Migrant Workers Act of 1995 (RA 8042) provides for the rule on the entitlement of an overseas Filipino worker (OFW, such as a seafarer) in the event that dismissal from employment is illegal:

“Sec. 10. Money Claims. — . . . In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, the workers shall be entitled to the full reimbursement of his placement fee with interest of twelve percent (12%) per annum, plus his **salaries for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less.**”

Starting with *Marsaman Manning Agency v. NLRC* (1999), the Supreme Court had interpreted the said provision to mean that if an OFW is illegally dismissed from employment, and his **employment contract is for one year or more**, he may be awarded unearned salaries for the remainder of the unexpired portion of the contract or three months salaries whichever is less. However, if the **employment contract is less than one year**, an illegally dismissed OFW shall be entitled to the unearned wages corresponding to his unexpired portion of his contract.

By way of example, if Mr. A was hired for a period of 2 years to work overseas and he was illegally dismissed on his 17<sup>th</sup> month of employment, he will only be entitled to three months salaries although there is an unexpired portion of his contract equivalent to 7 months. On the other hand, if Mr. B was hired for a period of 10 months and he was illegally dismissed on the 2<sup>nd</sup> month of employment, he would be entitled to his 8 months wages for the unexpired portion of his contract.

This scheme persisted until 2009 when the Supreme Court in *Serrano v. Gallant Maritime Services, Inc.* declared the provision “**or for three months for every year of the unexpired term, whichever is less**” of RA 8042 to be unconstitutional as it violates the Constitution’s equal protection clause. In this case, the seafarer was awarded wages for the unexpired portion of his contract equivalent to 9 months and 23 days although the original employment contract was for 1 year.

In 2010, the Congress of the Philippines enacted the Amended Migrant Workers Act (AMWA) fully aware of the ruling of the Supreme Court in *Serrano* which declared a portion of the law to be unconstitutional. Despite knowledge of such decision, the Congress re-enacted the same provision of the Migrant Workers Act in the amended version.

At this point, the constitutionality of the re-enacted provision in the AMWA has not yet been directly dealt with by the Supreme Court in their recent rulings although they have applied the *Serrano* ruling in all cases which had its origin before the AMWA.

It is thus safe to presume that the Court, in case of illegal dismissal, will award salaries for the unexpired portion of the

contract irrespective of the length of the contract.

### **What constitutes salaries**

Salary based on the POEA Contract is construed to be the basic wage of the seafarer. It does not include vacation leave pay, overtime pay and other remunerations. As held in *Serrano*, the word salaries do not include overtime and leave pay.

For seafarers, DOLE Department Order No. 33, series 1996, provides a Standard Employment Contract of Seafarers, in which salary is understood as the basic wage, exclusive of overtime, leave pay and other bonuses; whereas overtime pay is compensation for all work "performed" in excess of the regular eight hours, and holiday pay is compensation for any work "performed" on designated rest days and holidays. By the foregoing definition alone, there is no basis for the automatic inclusion of overtime and holiday pay in the computation of seafarer's monetary award; unless there is evidence that he performed work during those periods.

The rendition of overtime work and the submission of sufficient proof that said work was actually performed are conditions to be satisfied before a seaman could be entitled to overtime pay which should be computed on the basis of 30% of the basic monthly salary. In short, the contract provision guarantees the right to overtime pay but the entitlement to such benefit must first be established.

In the same vein, the claim for the day's leave pay for the unexpired portion of the contract is unwarranted since the same is given during the actual service of the seaman. However, in other rulings of the Supreme Court, aside from the basic wage, other allowances were considered to form part of the word salary.

In the recent case of *Tangga-an v. PTC* (2013, citation below), the Supreme Court awarded all the benefits of the seaman found in the POEA Contract.

The Supreme Court held in that case that the computation of the wages for the unexpired portion of the contract should also include the seafarer's corresponding monthly vacation leave pay and tonnage bonuses which are expressly provided and guaranteed in his employment contract as part of his *monthly* salary and benefit package. These benefits were guaranteed to be paid on a monthly basis, and were not made contingent.

In fact, their monetary equivalent was fixed under the contract and Article 279 of the Labor Code mandates that an employee's full backwages shall be inclusive of allowances and other benefits or their monetary equivalent. It is the obligation of the employer to pay an illegally dismissed employee or worker the whole amount of the salaries or wages, plus all other benefits and bonuses and general increases, to which he would have been normally entitled had he not been dismissed and had not stopped working.

Nevertheless, there was no declaration on the part of the Supreme Court that overtime pay should be computed as part of the seafarer's salary.

***Based on present jurisprudence, it would appear that the Supreme Court has now become more generous in providing awards to seafarers in illegal dismissal cases. In computing the amount of the award to the seafarer in dismissal cases, the formula now appears to be the monthly salary (including all bonuses such as vacation leave with pay) multiplied by the unexpired portion of the contract.***

***Author's Note:*** It should be noted that the monetary exposure of shipowners in case of illegal dismissal has increased with this recent ruling of the High Court in *Tangga-an vs. PTC*; thus, a strict observance of both substantive and procedural due process must be exercised by the Master before resorting to the dismissal of seafarers.

*Lorenzo Tangga-An vs. Philippine Transmarine Carriers, Inc., Universe Tankship Delaware LLC, and Carlos Salinas; G.R. No. 180636; Second Division; March 13, 2013; Associate Justice Mariano Del Castillo, Ponente*

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