

**ALMA A. VILLAGO AND KAREN MAY C. FALLEGA, PETITIONERS, VS.
AMERICAN SHOE MARKETING/ EDWARD ONG, PRIVATE
RESPONDENT NATIONAL LABOR RELATIONS COMMISSION,
SEVENTH DIVISION, CEBU CI...**

Ponente: INGLES, G. T., J.

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INGLES, G. T., J.:

THE CASE

Before this court is a petition for certiorari filed under Rule 65 of the 1997 Revised Rules on Civil Procedure, as amended seeking to annul and set aside the Decision[1] dated January 31, 2013, of the National Labor Relations Commission, Fourth Division, Cebu City in NLRC Case No. VAC 12-000717-2012 which ruled that petitioners were not illegally dismissed and affirmed the payment of their 13[th] month pay and service incentive leave amounting to P20,984.04. Also assailed is the Resolution[2] dated April 15, 2013 which denied petitioners' Motion for reconsideration.

THE FACTS:

Private respondent American Shoe Marketing (ASM for brevity) is a corporate entity duly organized under Philippine laws with principal office at Gatuslao St. fronting Central Market, Bacolod City. ASM is registered as a sole proprietorship owned and managed by private respondent Edward S. Ong. It is engaged in the sale of shoes, bags, slippers, sandals and other assorted footwear. The corporation has about more or less fifteen personnel composed of salesmen, stockmen and other employees inside the store who attend to walk-in customers.

Sometime in 2002, petitioner Alma Villago was hired by ASM and her employment was covered by a contract with an expiry. There were several contracts pertaining to her employment but on August 11, 2011, she was no longer rehired by ASM.

Petitioner Karen May Fallega, on the other hand, started working for ASM last December, 2010 whose contract of employment also had an expiry. However, on August 11, 2011, she too was no longer rehired by ASM.

Both petitioners were told by ASM that their contracts had already expired and that they were no longer allowed to report for work effective August 11, 2011.

Previously, on July 26, 2011, the Department of Labor and Employment, Bacolod City conducted a routine inspection of the store premises of ASM under Inspection Authority No. RO601-201107-1A-19 wherein the following violations were discovered:

- (1) underpayment of wages per WO # 17 and 18;
- (2) underpayment of the 13[th] month pay;
- (3) underpayment of regular holiday pay;
- (4) underpayment of special holiday pay;

- (5) underpayment of 5 days SIL pay;
- (6) under/non payment of OT; and
- (7) non-coverage of SS/Philhealth/Pag-ibig.

On September 12, 2011, the affected workers including herein petitioners signed a letter complaint filed by their counsel with the Department of Labor and Employment, Bacolod City on September 22, 2011. Several hearings were conducted pertaining to the case and a settlement was subsequently reached between ASM and the said workers including herein petitioners.

Petitioners and Ritchen Abelarde thereafter filed a Complaint[3] for illegal dismissal, regularization, unpaid money claims owing to regularization and attorney's fees with the National Labor Relations Commission, Regional Arbitration Branch VI, Bacolod City. In their position paper filed before the Labor Arbiter, petitioners claimed that they were illegally dismissed by respondents.

In respondents' Position Paper[4], ASM posited that the petitioners were not illegally dismissed but voluntarily abandoned their work sometime in January, 2012. Respondents attached the Affidavits[5] dated August 24, 2012 of Herlyn Grace Pasco and Lerma Piadoche, petitioners' senior co-workers attesting that the former exerted earnest efforts to communicate and locate the latter's whereabouts. In fact, these co-workers declared that they were instructed by respondent to search for petitioners as their services were badly needed. Respondents argue that petitioners' claim of benefits such as incentive leave, 13[th] month pay and other benefits for permanent and regular employees were off-tangent since these were already given to them during their employment. Respondents point out that one of the complainants, Ritchen Abelarde even executed an Affidavit[6] of denial dated March 15, 2012 stating that all their claims for monetary benefits were already paid by respondents and that she was withdrawing her complaint against the company.

The Labor Arbiter's Ruling:

On October 31, 2012, Labor Arbiter Henry Tanoso, Regional Arbitration Branch VI, Baolod City rendered a Decision[7], in favor of petitioners, the pertinent portion of which reads:

xxx

“WHEREFORE, premises considered, judgment is hereby rendered:

- 1) declaring complainants Alma A. Villago and Karen May C. Fallega to be regular employees of respondents and that they were all illegally dismissed;
- 2) ordering respondents to pay complainants backwages from the time they were dismissed on August 11, 2011 until the date of this decision and to pay them separation pay;
- 3) granting complainants' claims for 13[th] month pay and service incentive pay from July 27, 2011 until the date of this Decision;
- 4) ordering respondents to pay complainants attorney's fees in the amount equivalent to ten (10%) percent of the total monetary award herein adjudged and
- 5) dismissing complainants' all other claims.

The computation of the monetary awards to complainants is hereto attached: Respondents American Shoe Marketing/Edward S. Ong are ordered to deposit the total amount of THREE HUNDRED FORTY FOUR THOUSAND FORTY SIX and 52/100(P 344,046.52) PESOS with the cashier of this Arbitration Branch within ten (10) days from receipt of this decision.

SO ORDERED.”

Aggrieved, petitioners filed an appeal with the National Labor Relations Commission, Fourth Division, Cebu

City.

The NLRC Ruling:

On January 31, 2013, the NLRC, Fourth Division, Cebu City rendered a Decision[8], the pertinent portion of which reads as follows:

“Complainants, themselves, by their own acts, terminated their employer-employee relationship with respondents.

The antecedent circumstances and complainants' contemporaneous acts amply provide substantial proof of their voluntary termination of employment. Complainants' continued absence from work after the holidays in January, 2012, their continued failure to report for work coupled with the filing of this case for illegal dismissal only in April 2012 amidst the fact that no positive act of termination was undertaken by respondents amply substantiate that complainants voluntarily terminated their employment, in line with the principle of informal voluntary termination of employment.

We find therefore no dismissal whether legal or illegal, attendant in this case. Such being said, there is no basis for the award of separation pay in lieu of reinstatement and backwages as well as attorney's fees.

However, the grant of complainant's other money claims constituting of 13[th] month pay and service incentive leave pay as computed at the arbitral proceedings must stay.

WHEREFORE, premises considered, respondents' appeal is GRANTED. The Decision appealed from is hereby MODIFIED declaring that complainant was not dismissed legally or illegally. On the other hand, complainants voluntarily and informally terminated their employment with respondents. Consequently, there is no basis for the award of separation pay in lieu of reinstatement as well as backwages and attorney's fees. However, the grant of complainant's 13[th] month pay and service incentive leave amounting to P20,984.04 must stay.

SO ORDERED.”

Commissioner Jose G. Gutierrez, however, affirmed the Decision of the Labor Arbiter in a Dissenting Opinion[9], ratiocinating thus:

“In fact, the hearing of the case entitled In Re: Routine Inspection American Shoe Marketing were on 10 October 2011, 08 November 2011 and 06 January 2012. The case was settled and respective amounts were paid to the salesladies and stockmen, including complainants. The mere fact that complainants filed a complaint against the respondents is more than enough reason on the part of the respondent to find ways to get even with the complainants. There is no other logical thing to happen. Further, it is hard to believe that complainants would informally terminate their employment, with the present economic hardship where the worker is a beggar for a job.

On the basis of the foregoing, I am in favor of AFFIRMING the decision of the Labor Arbiter below.”

Dissatisfied, petitioners filed a Motion for reconsideration which was denied in a Resolution[10] dated April 15, 2013.

Hence, this petition for certiorari.

THE ISSUES:

I.

“WHETHER OR NOT THE PUBLIC RESPONDENT NLRC FAILED TO NOTICE AMPLE MATERIAL FACTS, WHICH, IF PROPERLY CONSIDERED WILL JUSTIFY A DIFFERENT CONCLUSION,

THEREBY ABUSING ITS DISCRETION IN THE APPRECIATION OF FACTS, WHICH IF NOT CORRECTED, WOULD CAUSE GRAVE AND IRREPARABLE DAMAGE OR INJURY TO THE PETITIONERS, CONTRARY TO LAW AND APPLICABLE JURISPRUDENCE; and

II.

WHETHER OR NOT THE FACTUAL FINDINGS OF THE HON. LABOR ARBITER HENRY B. TANOSO AND THE DISSENTING OPINION OF HON. COMMISSIONER JOSE G. GUTTIEREZ ARE SUPPORTED BY THE PROVEN FACTS ATTENDANT TO THIS CASE.”

Petitioners' contentions:

Petitioners insist that they were illegally dismissed due to termination of their contracts.

Petitioner Alma Villago posits that she was hired by respondents sometime in 2002 and that her contract of employment was no longer renewed on August 11, 2011. She corrects her date of dismissal from August 11, 2011 to October 31, 2011 as proven by the payrolls attached to the memorandum of appeal. Petitioner claims that the payroll shows that the period of payment was up to October 31, 2011 which no longer supports respondents' contention that both petitioners were receiving their pay until December, 2011. In actuality, petitioner avers that her name did not even appear in the payroll submitted. Petitioner Alma Villago alleges that she erred in stating in the Position Paper that she was terminated on August 11, 2011 when she was still working for respondents until her termination on November 1, 2011 due to expiry of contract on October 31, 2011. Such claim is supported by the contract of special form dated May 16, 2011 in petitioners' Motion for reconsideration which covered a period of five months from May 16, 2011 to October 31, 2011. Petitioners stress that Villago was dismissed right after the DOLE conducted their routine inspection in their work premises last July 26, 2011.

On the other hand, petitioner Karen May Fallega asseverates that she was no longer allowed to work due to expiration of contract starting August, 2011 since the term of five months had already expired. Fallega points out that this happened also around the time after DOLE's routine inspection. Fallega asserts that her name was not as well included in the payroll for the period August, 2011 to October, 2011.

Also, petitioners maintain that public respondent erred in finding that they abandoned their employment instead of being illegally dismissed. In truth, they assert that respondent Ong did not bother to get the employment records of petitioners so that he could have easily ordered them to report back to work after contacting them. According to petitioners, the testimonies of respondents' witnesses cannot be given credence. During the hearing last January 6, 2012, respondents did not mention at all about finding petitioners and compelling them to return to work. Petitioners insist that respondents knew all along where Villago resided because Ong previously went to his house last November 23, 2012 located at Purok de Amor, Singcang airport, Bacolod City begging her to drop the case in return for monetary consideration. Her refusal was even witnessed by her neighbors Marsan Gonzales and Abner Meneses as declared in their joint affidavit stating that they saw respondent Ong visit Villago's house and the latter narrated to them that her employer wanted her to drop the labor case against the company.

Petitioners also aver that in the last scheduled hearing on January 6, 2012 at the DOLE office, respondent Ong never mentioned that he ordered them back to work. As such, petitioners assert that respondents failed to establish the former's allegation that they exerted efforts to locate them in order to compel them to go back to work. According to them, the better question to be asked is who has the interest in putting an end to petitioners' employment. Petitioners aver that the mere fact that they filed a complaint against respondents is enough reason to get even with them. Besides, they asseverate that it is hard to believe that they would formally terminate their employment given the present economic hardship.

Petitioners further contend that the filing by an employee of a complaint for illegal dismissal is proof enough of

his desire to return to work, negating the employer's charge of abandonment. It is proof of the desire to return to work. Petitioners allege that the filing of a complaint for illegal dismissal is inconsistent with the charge of abandonment for an employee who takes steps to protest his

dismissal cannot by logic be said to have abandoned his work. And, for the defense of abandonment to prosper, petitioners should prove that the failure to report to work was without justifiable reason coupled with respondents' intention to sever the employer-employee relationship

THIS COURT'S RULING:

The sole issue in this case is whether or not petitioners were illegally dismissed.

We rule in the affirmative.

Illegal dismissal, No abandonment

In Illegal dismissal cases, the onus probandi rests on the employer, who has to prove that the dismissal of the employee was for a valid cause.[11] In the instant case, there is no dispute that petitioners are employees of respondents. As regular employees, petitioners' employment cannot be terminated without just or authorized causes and after the observance of due process. In the case at bar, the respondents did not present any evidence to show the existence of any cause, just or authorized, to warrant petitioners' dismissal. No sufficient evidence was adduced to prove that petitioners, if indeed, committed any wrongdoing, were informed of such commission and were subjected to an investigation and after which a subsequent hearing was conducted on the matter. As earlier stated, an employee or worker may be dismissed only on grounds explicitly provided by law, otherwise, there is illegal dismissal. And of course, there should be observance of due process of law.

Since respondents based their defense on abandonment by petitioners, it is likewise incumbent upon them as employers to prove that they clearly, voluntarily and intentionally abandoned their work. We are guided by *Icawat v. NLRC*,[12] viz -

To constitute abandonment, two elements must concur: (1) the failure to report for work or absence without valid or justifiable reason, and (2) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor and being manifested by some overt acts. Mere absence is not sufficient. To prove abandonment, the employer must show that the employee deliberately and unjustifiably refused to resume his employment without any intention of returning. x x x We have consistently ruled that a charge of abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal.

Abandonment is thus a matter of intention and cannot lightly be presumed from certain equivocal acts especially during times of hardship. Absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore.[13] The second element mentioned above is the more determinative factor which must be manifested by some overt acts.[14] An employee should distinctly display an attitude of indifference to his work or disregard any order or plea from the employer to return to work. Clearly, the operative act is still the employee's ultimate act of putting an end to his employment.

Verily, it is incumbent upon the respondents to prove that petitioners abandoned their jobs and never intended to return. This can be done by simply writing to petitioners to require them to explain their absence and, if they fail to do so, disciplinary action may be then commenced against them. Here, there is nary any evidence that respondents wrote to petitioners asking them to explain why they were continually absent from work. For us, it is highly inconceivable that petitioners would abandon their jobs, risk losing the same, which may possibly be their only possession or means of livelihood. Here, respondents heavily rely on the affidavits executed by two of its employees to prove their allegation that petitioners abandoned their jobs. These witnesses attested that respondent

Ong exerted earnest efforts to locate them to bring them back to work but could not reach them. This is hard to believe given the financial hardship of petitioners. And, considering that no notice was issued in the premises directing petitioners to return to work, We are more inclined to agree with the Labor Arbiter's conclusion that there was no abandonment of work by the petitioners.

Moreover, it should be noted that petitioners filed the instant complaint for illegal dismissal immediately after their dismissal. A charge of abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal. The filing thereof is enough proof of one's desire to return to work, thus negating any suggestion of abandonment.[15]

Suffice it to say that it is the employer who has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning. It is therefore incumbent upon petitioners' interest or non-interest in the continuance of their employment.[16] This, respondents failed to do.

Having ruled that there was illegal dismissal in the instant case, Article 279 of the Labor Code mandates that an employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges, to his full backwages, inclusive of allowance and to other applicable benefits or their monetary equivalent computed from the time the compensation was withheld up to the time of actual reinstatement. However, in recognition of the strained relations between petitioners and respondents, the latter are instead liable to give separation pay.

A final note

Whatever doubts, uncertainties or ambiguities remain in this case should ultimately be resolved in favor of the worker in line with the social justice policy of our labor laws and the Constitution. The consistent rule is that the employer must affirmatively show rationally adequate evidence that the dismissal was for a justifiable cause, failing in which makes the termination illegal.[17]

In *Mercardo vs AMA Computer College Paranaque City*, GR No. 183572, April 13, 2010, the Supreme Court ruled that in certiorari proceedings under Rule 65 of the Rules of Court, the appellate court does not assess and weigh the sufficiency of evidence upon which the Labor Arbiter and the NLRC based their conclusion. The query in this proceeding is limited to the determination of whether or not the NLRC acted without or grave abuse of discretion in rendering its decision. Grave abuse of discretion in certiorari proceedings amounts to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law or that public respondent acted in an arbitrary and despotic manner by reason of passion or personal hostility or in such whimsical and capricious exercise of judgment equivalent to lack of jurisdiction.[18] However, as an exception, the appellate court may examine and measure the factual findings of the NLRC if the same are not supported by substantial evidence.

Verily, we find that public respondent's Decision and Resolution were attended with grave abuse of discretion for not being supported by substantial evidence.

WHEREFORE, the petition is GRANTED. The Decision dated January 31, 2013, of the National Labor Relations Commission, Fourth Division, Cebu City, in NLRC Case No. VAC 12-000717-2012 is SET ASIDE. The Decision dated October 31, 2012, of the Labor Arbiter, RAB-VI, Bacolod City in RAB Case No. VI-04-10248-2012 is REINSTATED.

SO ORDERED.

Maxino, P.A.A., and Francisco, R.C., JJ., concur.

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- [1] Rollo, p. 155
- [2] Rollo, p. 29
- [3] Rollo, p 84
- [4] Rollo, p. 112
- [5] Rollo, pp. 116 and 117
- [6] Rollo, p. 118
- [7] Rollo, p. 128
- [8] Rollo, p. 155
- [9] Rollo, p. 166
- [10] Rollo, p. 29
- [11] Josan, JPS, SantiagoCargo Movers vs Aduna, GR No. 190794, February 22, 2012
- [12] Leah Icawat, et. al. vs. National Labor Relations Commission, et. al., G.R. No. 133573, June 20, 2000.
- [13] Hodieng Concrete Products Incs vs Emilia, GR No. 149180, February 14, 2005 citing Samarca vs Arc-Men Industries Inc, GR No. 146118, October 8, 2003
- [14] Dimagan vs Dacwork United, Inc. GR No. 191053, November 28, 2011
- [15] Megaforce Security and Allied Services, Inc vs Lactao GR No. 160940, July 21, 2008
- [16] MZR Industries vs Timbal, GR No. 179901, August 28, 2013
- [17] Hantex Trading Co., Inc. and/or Mariano Chua vs. Court of Appeals, Special Former Tenth Division, et. al., G.R. No. 148241, September 27, 2002.
- [18] FEBTC vs Shemberg Marketing Corp, GR No. 163878, December 12, 2006

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