

CUL TRANSPORT SERVICES/ CAROLINA UY LAM, PETITIONERS, VS. NATIONAL LABOR RELATIONS COMMISSION AND PAULINO O. HERMOSO, RESPONDENTS.

Ponente: SALAZAR-FERNANDO, J.

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SALAZAR-FERNANDO, J.:

Before this Court is a Petition for Certiorari under Rule 65 of the 1997 Revised Rules of Civil Procedure, seeking to reverse and set aside the Decision[1] dated September 20, 2013 and Resolution[2] November 14, 2013 of the National Labor Relation Commission (NLRC) (Second Division) in NLRC-LAC Case No. 06-001865-13; NLRC-NCR Case No. 10-15196-12 entitled: "Paulino O. Hermoso, Complainant-Appellant/s, versus CUL Transport Services/Carolina Uy Lam, Respondents-Appellee/s.", the dispositive portions of which read:

a) Decision dated September 20, 2013

"WHEREFORE, premises considered, the appeal is granted and a new one is herein entered finding the dismissal of complainant Paulino O. Hermoso illegal. Accordingly, respondent CUL Transport Services is ordered to pay complainant Paulino O. Hermoso the total amount of Two Hundred Thirty Six Thousand Nine Hundred Ninety Two Pesos and 30/100 (Php236,992.30) representing his separation pay and backwages as well as his cash bond.

The attached computation shall form part of this Decision.

SO ORDERED."

b) Resolution dated November 14, 2013

"Acting on the Motion for Reconsideration filed by respondents on October 7, 2013 relative to the Decision of the Commission dated September 20, 2013, We resolve to DENY the same as the motion raised no new matters of substance which would warrant reconsideration of the Decision of this Commission.

SO ORDERED."

The facts are:

Petitioner CUL Transport Services (CUL Transport for brevity) is a single proprietorship owned and operated by petitioner Carolina Uy Lam, engaged in transport business and owns a number of buses that ply the Metro Manila – Bicol Province – Leyte, Visayas and vice-versa routes. Sometime in October 2008, it engaged the services of private respondent Paulino O. Hermoso (Hermoso for brevity) as bus driver for the Manila to Maasin, Leyte via Tacloban, Leyte route. He was paid on "commission" basis and was required to put up a bond which he paid through salary deduction. His last trip was on August 5, 2012, after which he was no longer given any work assignment. On October 8, 2012, he filed with the Regional Arbitration Branch of the NLRC, National Capital Region, a Complaint[3] for "Illegal Dismissal-Constructive, Non-payment of 13[th] Month Pay, Non-payment of Separation Pay, Non-payment-Others, Regularization, and Attorney's Fees."

During the mandatory conciliation and mediation conference before the Labor Arbiter, the parties failed to reach a

settlement, thus they were required to, as they did, file their respective position papers.[4] After the submission by the parties of their subsequent pleadings,[5] the Labor Arbiter rendered a Decision[6] dated May 8, 2013 with the following disposition:

"WHEREFORE, premises considered, complaint for constructive dismissal and claims for 13[th] Month Pay and separation pay is hereby DISMISSED. Respondent CUL transport however is duty bound to release to complainant his P25,000.00 pesos cash bond.

Other claims are hereby DISMISSED for lack of merit.

SO ORDERED."

Aggrieved, private respondent Hermoso appealed from the decision of the Labor Arbiter to public respondent NLRC which subsequently rendered the assailed decision. Petitioners' Motion for Reconsideration[7] and Supplement to the Motion for Reconsideration[8] of the assailed decision were denied in the assailed resolution.

Hence, this petition based on the following grounds:

A.WITH ALL DUE RESPECT, THE HONORABLE NATIONAL LABOR RELATIONS COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT REVERSED THE LABOR ARBITER'S FINDINGS AND CONSIDERED PRIVATE RESPONDENT' HERMOSO TO HAVE BEEN ILLEGALLY DISMISSED.

B.WITH ALL DUE RESPECT, THE HONORABLE NATIONAL LABOR RELATIONS COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT FOUND PRIVATE RESPONDENT HERMOSO TO BE ENTITLED TO SEPARATION PAY, CASH BOND AND BACKWAGES CONSISTING OF BASIC SALARY, 13TH MONTH PAY, SERVICE INCENTIVE LEAVE AND EMERGENCY COST OF LIVING ALLOWANCE.

The petition has not merit.

Petitioner CUL Transport argues that: private respondent Hermoso was not a regular employee, but was engaged only as a reliever driver whose work was intermittent and on a per trip basis; from the time he was hired up to August 12, 2012, he rendered services for only forty-nine (49) times and he would sign a contract for each and every undertaking or trip that he was engaged for; if he did not have work after August 5, 2012, it was because there was a cessation of relationship with the petitioners and no other; private respondent Hermoso was engaged as an occasional or "project" basis which is expressly sanctioned by Article 280 of the Labor Code, as amended; he could not have been considered a regular employee entitled to security of tenure since his employment was only made occasionally on a per trip basis, as when a reliever driver was needed; granting arguendo that he was a regular employee, the filing of the complaint is premature since he had not yet failed to perform his undertaking as a reliever driver for more than six (6) months; from the time he was not given any work assignment, only two (2) months and three (3) days had passed, thus his "floating status" could not be considered as a termination of employment; private respondent Hermoso was not dismissed from employment, thus the determination of its legality is immaterial; while the employer has the burden of proving that the termination was for a valid or just cause, the employee must first establish by competent evidence the fact of his dismissal from employment; in this case, there is no evidence to prove private respondent Hermoso's claim of actual dismissal; there is constructive dismissal if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it would foreclose any choice except to forego continued employment;[9] in this case, the petitioners did not commit any act of clear discrimination, insensibility or disdain against private respondent Hermoso which became unbearable on his part that made him forego employment; aside from being a mere reliever driver, for which the petitioners had no obligation to continuously hire him, their other drivers did not

want to work with him, thus they should not be punished for it; there were "just causes" for terminating private respondent Hermoso's employment, namely: gross and habitual neglect of duties and the accident that happened in Irosin, Sorsogon during the performance of his duties; the Service Contract Agreement that he signed with the petitioners provides that the "company shall terminate his service contract agreement anytime if found that you have acted maliciously or negligently in the performance of your service that would cause damage to the bus or buses you are driving, or any malicious or grossly negligent performance as a conductor."; assuming that he was a regular employee of petitioner CUL Transport, he failed to report for work without any valid or justifiable reason up to the filing of the complaint on October 12, 2012 and even up to now; if he really intended to work, he should have personally reported back for work; since there is no illegal dismissal in this case, private respondent Hermoso is not entitled to reinstatement and other privileges, such payment of backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement; aside from the fact that private respondent Hermoso failed to discuss in his position paper and reply his claim for reinstatement, separation pay, basic salary and ECOLA, including the actual amount he was receiving as basis for his monetary claim, there was actually an express abandonment or waiver of separation pay; being a field personnel who was paid on a purely commission basis, he is not entitled to 13th month pay under Article 82, Title I, Book III of the Labor Code, as amended; petitioner CUL Transport has no obligation to return the P25,000.00 cash bond put up by private respondent Hermoso because under the Service Contract Agreement, said amount would answer for damages caused on the bus he would be driving, by intent or neglect, and would be returned only upon resignation or termination from employment, provided no damage was incurred on the bus he has driven; and, in this case, private respondent Hermoso figured in a vehicular accident in Irosin, Sorsogon, for which petitioner CUL Transport paid P18,000.00 for the two motorcycle passengers who were injured and the damage to the truck involved in the accident.

In his Comment,[10] private respondent Hermoso counters that: he is a regular employee of petitioner CUL Transport, notwithstanding the written agreement he signed; under the law, the written provisions and oral agreement between the parties are not the determining factors as to the status of one's employment; the employment status of a person is defined and prescribed by law and not by what the parties should say it should be; under Article 280 of the Labor Code, an employee who has rendered at least one (1) year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity which he is employed and his employment shall continue while such activity exists; in this case, private respondent Hermoso was a bus driver of petitioner CUL Transport which is into transportation business and he performed a service that was indispensable to said business; thus, it is clear that the position, nature and the work he performed is reasonably connected to the usual business or trade of the petitioners; as a regular employee, private respondent Hermoso could not be dismissed without just or authorized cause; on the alleged temporary suspension of operations, the petitioners should have proven that such suspension was bonafide, valid and was done in good faith and that the same complies with the procedural requirement of notice under Article 283 of the Labor Code; in this case, there is no showing that the suspension was in good faith and that the notice requirement was complied with; having been constructively dismissed, private respondent Hermoso is entitled to all the benefits due him under Article 279 of the Labor Code, namely: reinstatement without loss of seniority rights, full backwages, inclusive of allowances, and other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement; and, this petition should be dismissed for failure of the petitioners to show that public respondent NLRC committed grave abuse of discretion when it rendered the assailed decision and issued the assailed resolution.

The issues involved in this case are: a) whether or not private respondent Hermoso was a regular employee of petitioner CUL Transport; b) whether or not he was illegally dismissed; and, c) in the affirmative, whether or not

he is entitled to separation pay, the return of cash bond, backwages and other monetary benefits.

Article 280 of the Labor Code, in its truest sense, distinguishes between regular and casual employees to protect the interests of labor. Its language evidently manifests the intent to safeguard the tenurial interest of the worker who may be denied the rights and benefits due a regular employee by virtue of lopsided agreements with the economically powerful employer who can maneuver to keep an employee on a casual status for as long as convenient.[11]

Article 280 of the Labor Code, states:

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 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 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.

The provision enumerates two (2) kinds of employees, the regular employees and the casual employees. The regular employees consist of the following:

1)

those engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer; and

2)

those who have rendered at least one year of service whether such service is continuous or broken.

In *Integrated Contractor and Plumbing Works, Inc. v. National Labor Relations Commission*,^[12] the Supreme Court held that the test to determine whether an employment is regular or not is the reasonable connection between the particular activity performed by the employee in relation to the usual business or trade of the employer. And, if the employee has been performing the job for at least one year, even if the performance is not continuous or merely intermittent, the law deems the repeated and continuing need for its performance as sufficient evidence of the necessity, if not indispensability of that activity to the business.^[13]

Petitioners' claim that private respondent Hermoso is not a regular employee because his work was intermittent and a per trip basis is untenable. As held in *Integrated Contractor and Plumbing Works, Inc. v. National Labor Relations Commission*,^[14] even if the employee's work is not continuous or merely intermittent, the law considers the continuing need for its performance as sufficient evidence of the necessity, if not indispensability of that activity to the business. The record shows that private respondent Hermoso had worked for the petitioners for a period of more than one (1) year and, as a reliever driver/conductor, he performed activities which are usually necessary or desirable in the usual business or trade of the employer. Thus, he is deemed a regular employee as defined under Article 280 of the Labor Code, as amended.

Neither can the payment of private respondent Hermoso's wages on commission basis rule out the existence of employer-employee relationship. Article 97(f) of the Labor Code clearly provides that an employee's wages can

be in the form of commissions.

Petitioners' contention that private respondent Hermoso is a "field personnel" is untenable. In *Auto Bus Transport Systems, Inc. v. Bautista*,^[15] the Supreme Court emphasized that the definition of a "field personnel" is not merely concerned with the location where the employee regularly performs his duties but also with the fact that the employee's performance is unsupervised by the employer. It was held that field personnel are those who regularly perform their duties away from the principal place of business of the employer and whose actual hours of work in the field cannot be determined with reasonable certainty. Thus, in order to determine whether an employee is a field employee, it is also necessary to ascertain if actual hours of work in the field can be determined with reasonable certainty by the employer. In so doing, an inquiry must be made as to whether or not the employee's time and performance are constantly supervised by the employer.

As correctly pointed out by private respondent Hermoso,^[16] while discharging his duties as driver/conductor, he was still under the constant supervision of the petitioners, through their inspectors who would board the bus from strategic locations and dispatchers who saw to it that the bus and its crew left the premises at specific time and arrive at the proper time.

Petitioners' reliance on the case of *Rada vs. National Labor Relations Commission*^[17] is misplaced. Aside from the fact that said case has a different factual backdrop, the petitioner therein, Hilario Rada was deemed a "project employee," because he was hired for a fixed period or a specific project or undertaking, the completion or termination of which has been determined at the time of his engagement. He also appears to have signed several contracts of employment with definite terms after the termination or expiration of the period of the earlier contracts of employment. While the petitioners in this case claim that private respondent Hermoso signed an agreement for a per trip employment, all they could produce to prove said allegation is a copy^[18] of an undated contract which is vague as it contains no stipulation regarding its period or duration. Said contract is a nullity as its objective was merely to frustrate the security of tenure of private respondent Hermoso who, under Article 280 of the Labor Code, is a regular employee of the petitioners.

On the issue of illegal dismissal, public respondent NLRC correctly ruled that private respondent Hermoso was constructively dismissed. There is constructive dismissal when "there is cessation of work, because 'continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank or a diminution in pay' and other benefits. Aptly called a dismissal in disguise or an act amounting to dismissal but made to appear as if it were not, constructive dismissal may, likewise, exist if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it could foreclose any choice by him except to forego his continued employment."^[19]

In this case, private respondent Hermoso was not given work assignment for more than two (2) months before he filed a complaint with the Regional Arbitration Office of the NLRC. According to the petitioners, one of the reasons why he was not allowed to work was because no one among their other drivers wanted to work with him even after he was given an opportunity to look for a driver who would want to work with him. Indeed, the other drivers of petitioner CUL Transport appear to have executed a Certification^[20] stating that they "are not willing to and/or refused to drive CUL buses if our partner driver is Paulino Hermoso, x x x." Notably, the drivers who signed said certification did not offer any explanation why they refused to work with private respondent Hermoso. It is not farfetched that the petitioners themselves caused the execution of said certification. This is a clear case of discrimination not only by CUL Transport's other drivers, but by petitioners, as well, who wittingly or unwittingly perpetuated the same by not exercising their management prerogative. Thus, as aptly held by public respondent NLRC:

" X x x. The reason given by the respondents why complainant was no longer given any driving assignment is

that "they could not find any co-worker of Complainant who is willing to serve as his PARTNER or CO-WORKER." This justification offered by the respondents is not valid considering that respondent CUL transport Services can always, in the exercise of its management prerogative, assign anyone among its many drivers to drive with the complainant in one of its buses. The prerogative to prescribe work assignments, it must be emphasized, does not belong to the employee, but rather to the employer. In so stating, an employee cannot willfully disobey a lawful order of his employer or representative in connection with his work. It cannot be a valid defense then to state that nobody wants to partner or to co-drive with the complainant for respondent CUL Transport Service can always exercise its prerogative to assign a driver to partner or co-drive with the complainant. Hence, when he was not given any driving assignment, complainant believed that he could no longer work for respondent CUL Transport Services which compelled him to give up his work because his continued employment was rendered impossible, unreasonable or unlikely."^[21]

Anent the issue of whether or not private respondent is entitled to separation pay, the return of cash bond, backwages and other monetary benefits, this Court finds that public respondent NLRC did not err in granting the same. Having been illegally dismissed, private respondent Hermoso is entitled, under Article 279^[22] of the Labor Code, as amended, to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement. Public respondent NLRC is correct when it awarded private respondent Hermoso separation pay since reinstatement is no longer feasible due to strained relationship between the parties.

All told, public respondent NLRC did not err, much less, gravely abuse its discretion amounting to lack or excess of jurisdiction when it rendered the assailed decision and issued the assailed resolution.

WHEREFORE, the Petition is DENIED for lack of merit and ordered DISMISSED.

SO ORDERED.

[*]Bueser, and [**]Inting, JJ., concur.

[*] Acting Senior Member per Office Order No. 484-14-RSF dated November 24, 2014.

[**] Acting Junior Member per Office Order No. 484-14-RSF dated November 24, 2014.

[1] Rollo, pp. 35-41

[2] Rollo, pp. 43-44

[3] Rollo, pp. 111-112

[4] Complainant's Position Paper, Rollo, pp. 54-62; Position Paper for the Respondents, Rollo, 64-68

[5] Complainant's Reply (To Respondent's Position Paper), Rollo, pp. 73-75; Rejoinder, Rollo, pp. 76-79

[6] Rollo, pp. 82-90

[7] Rollo, pp. 113-120

[8] Rollo, pp. 121-124

[9] Citing the case of *Salvalosa vs. National Labor Relations Commission*, G.R. No. 182086, 24 November 2010.

[10] Rollo, pp. 142-152

[11] Bustamante v. National Labor Relations Commission, 325 Phil. 415, 422 (1996), citing Baguio Country Club Corporation v. National Labor Relations Commission, G.R. No. 71662, 28 February 1992, 206 SCRA 643, 649.

[12] G.R. No. 152427, 09 August 2005, 466 SCRA 265, 273.

[13] Id.

[14] Id.

[15] G.R. No. 156367, May 16, 2005, 458 SCRA 578.

[16] Citing the case of AutoBus Transport Systems, Inc. v. Antonio Bautista, G.R. No. 156367, May 16, 2005

[17] 205 SCRA 69

[18] Rollo, p. 51

[19] Verdadero v. Barneys Autolines Group of Companies Transport, Inc., G.R. No. 195428, August 29, 2012, 679 SCRA 545, 555, citing Morales v. Harbour Centre Port Terminal, Inc., G.R. No. 174208, January 25, 2012, 664 SCRA 110, 117-118.

[20] Rollo, pp. 125-126

[21] Page 7 of the the assailed Decision dated, September 30, 2013, Rollo, p. 39

[22] Art. 279. Security of tenure. In cases of regular employment, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

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