

SILVERIO'S SEAFOODS & RESTAURANT REPRESENTED BY TERESA C. NEIHUM, PETITIONER, VS. JUPITER T. BALINES AND NATIONAL LABOR RELATIONS COMMISSION RESPONDENTS.

Ponente: CORALES, J.

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CORALES, J.:

This is a Petition for Certiorari[2] under Rule 65 of the Rules of Court assailing the April 30, 2012 Decision[3] and the June 26, 2012 Resolution[4] of the National Labor Relations Commission (NLRC) in NLRC LAC No. 10-002757-11. The assailed Decision affirmed with modification the August 31, 2011 Decision[5] of the Labor Arbiter ordering Silverio's Seafoods & Restaurant (Silverio's Seafoods) and Teresa C. Neihum (Neihum) to pay private respondent Jupiter T. Balines' (Balines) his backwages, separation pay, salary differential, and service incentive leave pay (SILP). The questioned Resolution denied the subsequent motion for reconsideration of Silverio's Seafoods and Neihum.

The Antecedents

Silverio's Seafoods is a restaurant owned and managed by Neihum. It hired Balines on March 1997 as a waiter with a daily rate of P190.00 for a two (2)-shift work schedule.

Balines failed to report for his shifts on February 22 and 23, 2011. When he returned to work on February 26, 2011, Neihum blurted in anger "I could not afford to see him now".

Allegedly, Balines sought clarification from the management regarding his employment status but the same went unheeded. Feeling aggrieved, he filed on May 18, 2011 a complaint for illegal dismissal, underpayment of salary, and nonpayment of separation pay and SILP against both Silverio's Seafoods and Neihum.[6]

According to Balines, he drove for Alvin Coquia, one of the owners of Silverio's Seafoods, on February 21, 2011. He was so tired that he was not able to report for his second shift on February 22, 2011 and his first shift on February 23, 2011. Since February 24 and 25, 2011 were his official day-off, he only reported to work on February 26, 2011 but Neihum told him that she would have to think it over before accepting him back. He went to Neihum's house after several days to inquire the status of his employment but she refused to talk to him. On March 1, 2011, Balines served as an extra-waiter upon the request of Neihum's son, Marvin Carvajal, but Neihum questioned his presence in the event. The management of Silverio's Seafoods also ignored his query regarding his employment status.[7]

In their position paper,[8] Silverio's Seafood and Neihum clarified that there was no intention to dismiss Balines when he was told that "I could not afford to see him now". At that time, Neihum was still studying Balines' infractions and the corresponding disciplinary measures to adopt because he had incurred frequent absences without permission, committed an act of dishonesty sometime in July 2010 when he failed to give the money intended for BPI-MS payment, indulged in gambling, always drunk, and displayed bad temper and mood that ended up in mauling his wife who also works in Silverio's Seafoods. Several memoranda were given to Balines to

address these series of violations.[9] In fact, on February 28, 2011, a memorandum was issued to Balines suspending him for one (1) month due to his absence on February 22 and 23, 2011.[10] Balines was not dismissed from employment but was merely suspended, and assuming that they really intended to terminate his employment, there were valid cause for his dismissal considering his habitual unauthorized absences amounting to habitual neglect and his repeated infractions which constitute gross misconduct.

The Rulings of the Labor Arbiter and the NLRC

In the August 31, 2011 Decision,[11] the Labor Arbiter doubted the validity of the memorandum of suspension allegedly given to Balines and held that he was constructively dismissed from employment. There was no evidence showing that Balines received the memorandum of suspension or that he was notified to resume his work after the alleged one (1)-month suspension expired on March 26, 2011. The Labor Arbiter also opined that the imposition of the one (1)-month suspension without requiring Balines to explain his side violated his right to due process. The dispositive portion of the Labor Arbiter's Decision reads:

WHEREFORE, all the foregoing premises being considered, judgment is hereby rendered ordering the respondents to pay complainant, as follows: a) P41,912.00 as backwages; P87,360.00 as separation pay; P44,408.00 as salary differential; and P3,600.00 as service incentive leave pay.

The claim for night differential pay is dismissed for want of merit.

SO ORDERED.

On appeal,[12] the NLRC, through its April 30, 2012 Decision,[13] affirmed the Labor Arbiter's findings that Balines was illegally dismissed from employment because he was prevented from reporting to work following his absences on February 21, 22, and 23, 2011. It held that the memorandum of suspension was self-serving and a mere afterthought as there was no indication that Balines was served with a copy of the said memorandum or at least informed of his supposed suspension despite the fact that his wife is also an employee of Silverio's Seafoods. The NLRC did not find any just cause warranting Balines' dismissal from service. There is no habitual absenteeism or gross neglect of duty because he only incurred 11 absences in a span of three (3) years. It further ruled that dismissal from service was too harsh a penalty for Balines' consecutive unjustifiable absences from February 21 to 23, 2011. However, the NLRC concluded that under the prevailing circumstances, Silverio's Seafoods acted in good faith when it dismissed Balines. Accordingly, it deleted the award of backwages in favor of Balines and disposed the case as follows:

WHEREFORE, premises considered, the appealed Decision is AFFIRMED with a MODIFICATION that the award of backwages is set-aside.

SO ORDERED. (Emphasis appears in the original text of the Decision)

Silverio's Seafoods and Neihum sought reconsideration but the NLRC denied the same in its June 26, 2012 Resolution.[14]

Undeterred, petitioner Silverio's Seafoods filed the instant petition for certiorari imputing grave abuse of discretion on the part of the NLRC for disregarding the memorandum of suspension and ruling that Balines was illegally dismissed from employment. It insists on the regularity of the memorandum of suspension which was received by the Department of Labor and Employment (DOLE), Dagupan District Office on February 28, 2011 and claims that the discontinuance of Balines' employment was due to his failure to make himself available for work even after the expiration of his suspension. Lastly, it harps on the management prerogative to discipline and impose penalty to erring employees like Balines who committed habitual absenteeism and was shown to be incorrigible despite several stern warnings.[15]

Required to comment, Balines echoes the findings of the NLRC but questions the deletion of the award of backwages. He argues that backwages is a normal consequence of illegal dismissal and in the interest of justice, this Court should restore his entitlement to said award.[16]

This Court's Ruling

The petition lacks merit.

Grave abuse of discretion has been defined as the capricious and whimsical exercise of judgment amounting to or equivalent to lack of jurisdiction. There is grave abuse of discretion when the power is exercised in an arbitrary or despotic manner by reason of "passion or personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[17] Thus, the instant petition would prosper only if there is a clear showing of grave abuse of discretion on the part of the public respondent. It is therefore imperative for petitioner to prove that the NLRC capriciously, whimsically, or arbitrarily disregarded evidence which is material to or decisive of the controversy.[18]

After a judicious scrutiny of the evidence on records and consideration of the parties respective arguments, We cannot attribute grave abuse of discretion on the part of the NLRC. Its findings are supported by substantial evidence, thus, entitled to great respect and considered final. It also reviewed the rationale of the Labor Arbiter's decision and applied the proper case law,[19] except as to the payment of backwages.

Silverio's Seafoods Failed to Prove the Fact of Balines' Suspension

Petitioner's bare allegation that Balines was not dismissed from employment but was merely suspended for one (1) month cannot be given due credence by this Court. As aptly held by the NLRC, the regularity of the supposed one (1)-month suspension could easily be questioned in the absence of evidence showing that Balines received a copy of the memorandum of suspension. It is quite strange that Silverio's Seafoods was able to furnish the DOLE Dagupan District with a copy of the memorandum of suspension on February 28, 2011 but did not exert effort to serve the same to Balines. We note that after being absent for two (2) days, Balines reported to Neihum on February 26, 2011 yet he was never informed of any on-going investigation for his unauthorized absences. Further, Silverio's Seafoods did not bother to explain their failure to notify Balines of the purported suspension despite the fact that his wife was also its employee. Thus, We cannot also help but entertain doubt on the naked assertion of Silverio's Seafoods that it merely suspended Balines from work and it was the latter who refused to make himself available after the expiration of his suspension. Needless to state, the employer has the burden of proof to show the employee's deliberate and unjustified refusal to resume his employment without any intention of returning. Mere failure to report is not sufficient.[20] To reiterate, the records are bereft of any indication of Balines' unequivocal intent to discontinue his employment in Silverio's Seafoods.

No Just Cause and Due Process for Balines' Dismissal

Undisputedly, Balines was prevented from working on February 26, 2011. Neihum even told Balines that she could not afford to see him. This is a clear overt act showing Balines' termination from employment.

We cannot sustain the argument of Silverio's Seafoods that Balines' absenteeism constitutes gross neglect of duty which is a just cause for his dismissal from service. Under Article 282 of the Labor Code, neglect of duty must be gross and habitual to be a valid ground for dismissal.[21] Gross negligence implies want of care in the performance of one's duties while habitual neglect imparts repeated failure to perform the assigned duties for a period of time, depending on the circumstances.[22] Willful neglect of duties connotes bad faith on the part of the employee in failing to perform his job to the detriment of the employer and the latter's business.[23]

Under these standards and the circumstances obtaining in the case, the NLRC aptly ruled that Balines is not guilty of gross and habitual neglect of duties. He was absent for only seven (7) days in 2009 and two (2) days each in 2010 and 2011 or a total of 11 days for the past three (3) years. Such number of absences neither reflected an indifferent attitude to and lack of motivation in work nor proved to be inimical to the general productivity and business of Silverio's Seafoods. It did not also escape Our attention that Balines' absences on February 22 and 23, 2011 were due to the undisputed fact that he drove to Sabangan, Bonuan on February 21, 2011 upon the orders of one (1) of the owners of Silverio's Seafoods. He did the task although it was not covered by his job description as waiter. Equally telling is the fact that Balines also served as an extra waiter in an event of Neihum's son. These instances are reflective of diligence which overcome the imputation of want of care.

Balines' past infractions, such as his several absences before February 22 and 23, 2011, for which he had been duly penalized cannot also be taken collectively as justification for his eventual dismissal from service.[24] In *Cavite Apparel, Inc. v. Marquez*,[25] the Supreme Court cautioned employers that while previous infractions may be used to support an employee's dismissal from work in connection with a subsequent similar offense, the implementation of their policies must be fair and reasonable; at the very least, penalties must be commensurate to the offense involved and to the degree of the infraction. Here, a penalty less punitive than dismissal would suffice for Balines' violation of company rules on absences. Whatever missteps may be committed by labor ought not to be visited with a consequence so severe for what is at stake is not merely the employee's position, but his very likelihood and perhaps the life and subsistence of his family.[26]

It bears stressing that Balines is not required to prove his innocence on the charges leveled against him. The burden rests upon Silverio's Seafoods to establish the valid cause of Balines' termination. Where there is absence of clear, valid, and legal cause of termination, such as in this case, the law considers it a case of illegal dismissal.[27]

Balines Entitled to Backwages

With Our foregoing disquisition, the award of backwages in favor of Balines should be reinstated. The case of *Itoyon-Suyoc Mines, Inc. v. NLRC*[28] cited by the NLRC in its assailed decision no longer finds application in view of the clear mandate of Article 279 of the Labor Code[29] which states that backwages is a legal consequence of illegal dismissal. Besides, in the *Itoyon* case, the Supreme Court deleted the award of backwages because there was an express finding of just cause for the dismissal of the employee concerned; thus, the employer's good faith was taken into consideration. In recent jurisprudence such as *Bani Rural Bank, Inc. v. De Guzman*,[30] it has been held that backwages must be paid as part of the employer's penalty for illegally dismissing the employee. The ruling in the *Bani* case, not the *Itoyon* case, is more applicable herein.

WHEREFORE, the instant petition for certiorari is hereby DISMISSED. The April 30, 2012 Decision and June 26, 2012 Resolution of the National Labor Relations Commission in NLRC LAC No. 10-002757-11 are AFFIRMED with MODIFICATION that the award of backwages in favor of Jupiter T. Balines, as computed by the Labor Arbiter, is hereby reinstated.

SO ORDERED.

Villon, J., Chairperson and Zalameda, JJ., concur.

[1] In the complaint before the Labor Arbiter, Silverio's Seafoods & Restaurant and/or Teresa C. Neihum were impleaded as respondents.

- [2] Rollo, pages 5-20.
- [3] Penned by Presiding Commissioner Herminio V. Suelo and concurred by Commissioners Angelo Ang Palana and Numeriano D. Villena, *ibid.*, pages 24-31.
- [4] *Ibid.*, pages 33-35.
- [5] Penned by Labor Arbiter Jose G. De Vera, *ibid.*, pages 52-55.
- [6] *Ibid.*, page 36.
- [7] See Position Paper for the Complainant, *ibid.*, pages 44-49.
- [8] See Silverio's Seafoods and Neihum's Position Paper, rollo, pages 37-40.
- [9] See July 19, 2010 and June 23, 2009 Memo and the three other undated memoranda addressed to Balines, *ibid.*, pages 77, 78, 79, 80, 81, respectively.
- [10] See February 28, 2011 Memo, *ibid.*, page 82.
- [11] *Supra*, at note 5.
- [12] Memorandum Appeal filed on September 30, 2011, rollo, pages 56-61.
- [13] *Supra*, at note 3.
- [14] *Supra*, at note 4.
- [15] See Petition, *supra*, at note 2.
- [16] See Balines' Memorandum, rollo, pages 160-172.
- [17] See *Bani Rural Bank v. De Guzman*, G.R. No. 170904. November 13, 2013.
- [18] *Odango v. NLRC*, G.R. No. 147420. June 10, 2004.
- [19] See *Malayang Manggagawa ng Stayfast Phils., Inc. v. NLRC*, G.R. No. 155306. August 28, 2013.
- [20] See *E.G. & I. Construction v. Sato*, G.R. No. 182070. February 16, 2001.
- [21] *Nissan Motor Phils., Inc. v. Angelo*, G.R. No. 164181. September 14, 2011.
- [22] *Cavite Apparel, Inc. and Timoteo v. Marquez*, G.R. No. 172044. February 6, 2013.
- [23] See *Premiere Development Bank v. Mantal*, G.R. No. 167716. March 23, 2006.
- [24] See *Acebedo Optical v. NLRC*, G.R. No. 150171. July 17, 2007.
- [25] *Supra*, at note 22.
- [26] See *Philippine Long Distance Company v. Teves*, G.R. No. 1435511. November 15, 2010.
- [27] *Lopez v. NLRC*, G.R. No. 124548. October 8, 1998.
- [28] G.R. No. L-54280. September 30, 1982.
- [29] Art. 279. Security of Tenure – In case 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 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. (Emphasis supplied)

[30] Supra, at note 17.

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