

**TRYBPO.COM.INCORPORATED, JOSEPH WILLIAM MAGNOTTI
PETITIONERS, VS. NATIONAL LABOR RELATION COMMISSION, MAE
KRISTINE CORDENILLO AND RODINI TUVILLA, RESPONDENTS.**

Ponente: CAMELLO, J.

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CAMELLO, J.:

This is a Petition for Certiorari[1] assailing the twin Resolutions dated April 25, 2011[2] and July 29, 2011[3] of public respondent National Labor Relations Commission (NLRC) which reversed and set aside the Decision[4] dated November 30, 2010 of the Labor Arbiter of NLRC-Regional Arbitration Branch XI, Davao City.

THE FACTS

The facts as borne by the records are as follows:

Petitioner TryBPO.Com.Inc (TryBPO) is a domestic corporation engaged in Business Process Outsourcing, while petitioner Joseph William Magnotti (Magnotti) is the Chief Executive Officer of TryBPO.[5]

Private respondents, spouses Mae Kristine Cordenillo (Cordenillo) and Rodini Tuvilla (Tuvilla), on the other hand, were employees of TryBPO, holding the positions of Operation Manager and Head of General Services, respectively. Cordenillo received a monthly salary of P48,000.00, and Tuvilla P22,500.00. Both were also incorporators, directors and stockholder of TryBPO, along with Magnotti.[6]

Cordenillo and Tuvilla alleged that they were illegally dismissed. Cordenillo claimed that from Operation Manager, she was relegated to an employee with floating status. Her salary of P48,000.00 a month was reduced to P10,000.00 after she refused to submit her resignation letter.[7]

Tuvilla, for his part, alleged that his relationship with Cordenillo was the sole reason Magnotti dismissed him from office. Accordingly, his dismissal from work is illegal there being no valid ground for it. Besides he alleged, he was denied the opportunity to be heard and to defend himself.[8]

So they both sued for illegal dismissal with money claim before the Labor Arbiter.[9]

In their Answer, TryBPO and Magnotti argued that Cordenillo and Tuvilla were not dismissed from work. They just both stopped reporting for work after their long leaves of absence.[10]

Petitioners also contend that Cordenillo and Tuvilla were incorporators, directors and stockholders of the corporation. Being such corporate officers, their case is an intra-corporate controversy, over which the regular courts have exclusive jurisdiction.[11]

As regards the money claim, to wit: a) overtime pay; b) premium pay for rest day/holiday pay; and c) service incentive leave pay, petitioners posited that Cordenillo and Tuvilla are not entitled to them because they are managerial and field personnel, respectively.[12]

Private respondents' claim for 13[th] month pay has no basis either, because – according to petitioners - it has

already been paid.[13]

On November 30, 2010, the Labor Arbiter dismissed the case for lack of jurisdiction rationating that:

“xxx, when the one dismissed for employment is not an ordinary employee but a corporate officer, the suit for illegal dismissal is deemed non-labor and, therefore, the NLRC and its Labor Arbiters do not have jurisdiction over the subject-matter and the dispute is considered an intracorporate controversy falling under the jurisdiction of the Securities and Exchange Commission but now transferred to the appropriate regional trial court under RA 8799.”[14]

Aggrieved, Cordenillo and Tuvilla appealed that Decision to the NLRC which rendered the first assailed Resolution, the dispositive portion of which states:

“WHEREFORE, the instant appeal is GRANTED for being meritorious.

Accordingly, the assailed decision of 30 November 2010 is REVERSED and SET ASIDE.

Respondents are ordered to pay the complainants the following benefits:

1) MAE KRISTINE CORDENILLO:

a) Separation Pay

P144,000.00

b) Backwages

768,000.00

c) 13th Month Pay

160,000.00

d) SILP

27,692.00

TOTAL P1,099,692.30

2) RODINI TUVILLA:

a) Separation Pay

P 67,500.00

b) Backwages

360,000.00

c) 13th Month Pay

71,250.00

d) SILP

12,980.77

TOTAL P511,730.77

All other claims are dismissed for lack of factual basis and/or legal merit.”[15]

Petitioners’ ensuing Motion for Reconsideration was denied in the second assailed Resolution dated June 29, 2011. Thus, this Petition for Certiorari raising the following:

I

PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF OR EXCESS OF JURISDICTION IN HOLDING THAT IT HAS JURISDICTION OVER THE SUBJECT MATTER/CASE;

II

PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF OR EXCESS OF JURISDICTION IN HOLDING THAT PETITIONER MAGNOTTI IS JOINTLY LIABLE WITH THE PETITIONER CORPORATION;

III

PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF OR EXCESS OF JURISDICTION IN GRANTING THE MONEY CLAIMS OF PRIVATE RESPONDENTS;

IV

PUBLIC RESPONDENT NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF OR EXCESS OF JURISDICTION IN HOLDING THAT PRIVATE RESPONDENTS WERE ILLEGALLY DISMISSED.[16]

Petitioners submit that Cordenillo and Tuvilla were not employees but corporate officers. As such, their alleged dismissals constitute intra-corporate controversies, not labor disputes. Petitioners argued that pursuant to the Supreme Court ruling in the case of *Tabang v. NLRC*,[17] when the person is dismissed from employment is not an ordinary employee but a corporate officer, the suit for illegal dismissal is considered an intra-corporate dispute, jurisdiction over which controversy does not lie with the NLRC/Labor Arbiter but with the appropriate regular court.[18]

This brings us to the core issue: were Cordenillo, as Operations Manager, and Tuvilla, Head of General Services, corporate officers of TryBPO? Should they be so as petitioners claim they are, then their alleged illegal dismissals are indeed intra-corporate disputes cognizable only by appropriate regular courts.

Corporate officers are elected or appointed by the directors or stockholders, and are those who are given that character either by the Corporation Code or by the corporation's by-laws. This is the clear import of Section 25 of the Corporation Code which provides:

Section 25. Corporate officers, quorum.--Immediately after their election, the directors of a corporation must formally organize by the election of a president, who shall be a director, a treasurer who may or may not be a director, a secretary who shall be a resident and citizen of the Philippines, and such other officers as may be provided for in the by-laws. Any two (2) or more positions may be held concurrently by the same person, except that no one shall act as president and secretary or as president and treasurer at the same time.

xxx xxx xxx

The corporate officers enumerated by this Section are limited to the President, Secretary, Treasurer and such other officers as may be provided for in the By-Laws. Expounding on the phrase such other officers as may be provided for in the By-Laws, the Supreme Court in *Barba v. Liceo de Cagayan University*[19] said:

“xxx, a position must be expressly mentioned in the By-Laws in order to be considered as a corporate office. Thus, the creation of an office pursuant to or under a By-Law enabling provision is not enough to make a position a corporate office. *Guerrea v. Lezama*, the first ruling on the matter, held that the only officers of a corporation were those given that character either by the Corporation Code or by the By-Laws; the rest of the corporate officers could be considered only as employees or subordinate officials. Thus, it was held in *Easycall Communications Phils., Inc. v. King*:

An “office” is created by the charter of the corporation and the officer is elected by the directors or stockholders. On the other hand, an employee occupies no office and generally is employed not by the action of the directors or stockholders but by the managing officer of the corporation who also determines the compensation to be paid to such employee.

In this case, respondent was appointed vice president for nationwide expansion by Malonzo, petitioner's general manager, not by the board of directors of petitioner. It was also Malonzo who determined the compensation package of respondent. Thus, respondent was an employee, not a “corporate officer.” The CA was therefore correct in ruling that jurisdiction over the case was properly with the NLRC, not the SEC (now the RTC).

In addition, the Supreme Court made it clear that corporate officers in the context of PD No. 902-A are exclusively those who are given that character either by the Corporation Code or by the corporation's By-Laws.

Persistently, petitioners argue that the records of the case is replete with evidence that private respondents are incorporators, stockholders and directors of TryBPO, and so the case calls for the application of the *Tabang* ruling.

We do not agree.

As held in *Barba*,[20] the creation of an office pursuant to or under a By-Law enabling provision is not enough to make a position a corporate office; this, despite the fact that the board of directors may create appointive positions other than the positions of corporate officers because the persons occupying such positions cannot be deemed corporate officers within the contemplation of Section 25 of the Corporation Code.

Significantly, petitioners did not submit the corporation's By-laws to form part of the records. Consistent with the settled rule that he who alleges must prove, petitioners miserably failed to substantiate that the positions of an Operation Manager and Head of General Services are indeed created and given such character by the corporation's By-Laws.

Apart from that, the employment contract[21] signed by Magnotti himself cannot be more clear on this point: private respondents are employees hired/employed by the managing officer of the corporation, that is Magnotti, and not by the action of the directors or stockholders.

Given all these, private respondents are not corporate officers but mere employees of TryBPO. NLRC is correct. It has jurisdiction over the illegal dismissal case a quo.

Now to the next issue: were private respondents illegally dismissed from their employment.

As a rule, in cases of illegal dismissal, it is the employer who bears the burden of proof that the termination was for a valid or authorized cause.[22] Yet, before the employer takes up that burden of proving the legality of a dismissal, the distressed employee must first establish by substantial evidence that indeed he/she was dismissed, for there can be no question as to legality or illegality of dismissal if there is no such dismissal in the first place.[23] In fact, in sustaining the employer's denial as against the employees' categorical assertion of illegal dismissal, the Supreme Court ruled in *Machica v. Roosevelt Services Center, Inc.*[24]:

“The rule is that one who alleges a fact has the burden of proving it; thus, petitioners were burdened to prove their allegation that respondents dismissed them from their employment. It must be stressed that the evidence to prove this fact must be clear, positive and convincing. The rule that the employer bears the burden of proof in illegal dismissal cases finds no application here because the respondents deny having dismissed the petitioners.”

Here, petitioners denied having dismissed Cordenillo and Tuvilla. They averred that both refused to report back to work after a long leave of absence. There was neither oral nor written order dismissing the two (2). Further, even petitioners themselves said that instead of reporting back to work, they filed the instant case.

Indeed, there was no evidence that Cordenillo and Tuvilla were prevented from returning to work. In fact, petitioners were consistently asking Cordenillo when they should report back to work. Apparently, there was no actual dismissal that transpired. This is especially true in the case of Tuvilla who alleged that he was actually dismissed from his employment on November 17, 2009, an allegation which has remained an unsubstantiated conclusion. Absent any overt or positive act indicating that petitioners had dismissed Tuvilla, the latter's claim of illegal dismissal cannot fly.

Necessarily, since no basis exists for a finding of illegal dismissal, We cannot sustain the award for backwages to Tuvilla. But, would his reinstatement be proper under the circumstances?

It has been settled that mere failure to report for work does not amount to abandonment of work. Abandonment, says the Supreme Court in *Diamond Taxi v. Llamas*,[25] is the deliberate and unjustified refusal of an employee to resume his employment. In order that Tuvilla's failure to report to work may ripen into abandonment of work, petitioners must be able to establish its two constitutive elements, to wit:

1. The employee must have failed to report for work or must have been absent without valid or justifiable reason; and
2. There must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.[26]

Petitioners failed in that respect. In *Exodus International Construction Corporation v. Biscocho*,[27] it is said:

“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 to ascertain the respondents' interest or non-interest in the continuance of their employment.”

A cursory examination of the records reveals that petitioners did nothing to ascertain whether or not Tuvilla is still interested to continue his employment with them. While private respondents did not deny the alleged electronic conversation that transpired in the month of November 2009 between Cordenillo and Cooke, an excerpt of that electronic conversation reveals that the topic of the conversation pertains mostly to Cordenillo. Nothing was said about Tuvilla. Most importantly, the filing of illegal dismissal negates that he abandoned his work. He is therefore entitled to be reinstated, but without backwages.

Next question, is he entitled to 13th month pay and service incentive leave pay?

Employers have complete control over the records of their company. Allegation of this type could be rebutted by presenting the pertinent vouchers or payrolls showing payment^[28] as petitioners did in this case. They submitted a voucher showing that they had issued a check in the amount of P12,562.50 in payment of Tuvilla's 13th month pay, but none was presented for SILP.^[29] With this, our conclusion could only be that they paid Tuvilla his 13th month pay but not his SILP. They must therefore be ordered to settle their SILP obligation to Tuvilla.

On the other hand, We find Cordenillo's case of constructive dismissal meritorious. As aptly defined, constructive dismissal is quitting because continued employment is rendered impossible, unreasonable or unlikely, or because of a demotion in rank or a diminution of pay. In addition, constructive dismissal exists when there is a clear act of discrimination, insensibility or disdain by an employer which becomes unbearable for the employee to continue his employment.^[30]

It is needful to note that Cordenillo' allegation of diminution in pay, that is from her 48,000.00 monthly salary down to P10,000.00 a month should she not submit her resignation letter, was not in any way rebutted or refuted by petitioners. In fact, it was even bolstered by their own voucher showing that indeed they reduced Cordenillo's salary to P10,000.00 beginning December 2009.

Also, petitioners' insensibility to the tasks delegated to Cordenillo which include processing of documents required by Business Bureau, Social Security System, Bureau of Internal Revenue, Bureau of Immigration and other government agencies, and other papers needed by the company accountant and company lawyer had become unbearable for Cordenillo to continue her employment. This was clearly shown in the excerpt of the electronic conversation between Cordenillo and TryBPO's Chief Finance Officer Justin Cooke, to wit:

“Justin Cooke says: If you have someone that could run errands and do those tasks they should be sent, not you

Kristine Cordenillo says: yeah I got that[,] problem is Joe wants everything asap and leaving someone [to] do it will not really make it fast and in the end Joe will still come back to me asking me about it.

Kristine Cordenillo says: so better to do it and know why there are delays so that I can answer him when he is asking me rather that just say I don't know...

Justin Cooke says: That's a cultural thing, Kristine... it's MUCH slower to get things done in the Philippines that it is in most western countries

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Kristine Cordenillo says: sometimes I would actually wonder and ask myself why he is blaming me about things when I am not the bank, the government etc...

xxx

Kristine Cordenillo says: xxx I was actually turned into a robot and I cannot decide for things properly right now...”^[31]

Moreover, in a letter claimed to have been sent by Cordenillo to Magnotti, the former categorically said:

“You cannot blame me Joe for acting as if I did not care and you cannot blame me if I will leave the company because all these years not until July it was not what I expected. When you came in last July you just don’t know it but I cried so many nights. I gave up a few clients even those that contacted me for more than two years already, just for the sake of running your office and this is all I get – a thank you and a word saying you’re just an employee. It would have been okay still and I continued to work but it is too much that you and the employees blame me for some honest mistakes in the set up of the office. Sorry because it was not easy to set up legal matters of a company, manage crews and operations, buy stuff for basic functions of the office, continue client relations with eLocal, manage vendor relations even to the point of bribing people for the sake of completing everything fast xxx. So, finally Joe, we left and it was a great relief. It felt like I was able to breath fresh air again even if our situation is not okay for now at least I know that I am free from false expectations.”[32]

Thus, We are in full agreement with NLRC, Cordenillo was constructively dismissed. That is the only logical conclusion.

Likewise, We find the awards for separation pay, backwages and SILP proper. We also find that Cordenillo is entitled to 13th month pay, but since she had been paid her 13[th] moth pay for 2009, the balance must be re-computed.

What about Magnotti being jointly liable?

We hold in the negative.

In *Aliling v. Feliciano*,^[33] the Supreme Court reiterated the settled rule that, in labor cases, corporate directors and officers may be held solidarily liable with the corporation for the termination of employment of employees only if it is done with malice or in bad faith. The High Court held that even if the action of the respondent officers were ill-advised and erroneous, these corporate cannot be held jointly and solidarily with the corporation absent satisfactory proof that they acted in bad faith or with malice in effecting the termination of its employees. In the present case, malice or bad faith on the part of Magnotti, as CEO, was not sufficiently proven to justify a ruling in favor of solidarily liability.

FOR THESE REASONS, the instant Petition for Certiorari is PARTLY GRANTED. The assailed Resolutions promulgated on April 25, 2011 and July 29, 2011 are MODIFIED in part as follows:

- The award of 13[th] month pay to private respondent Mae Kristine Cordenillo is set aside only insofar as it relates to the year 2009 for which the petitioner’s obligation had been paid, or extinguished.
- As regards Rodini Tuvilla’s complaint, the assailed Orders of public respondent are SET ASIDE for lack of evidence of dismissal from employment. Private respondent Tuvilla’s complaint for illegal dismissal and for backwages should be, as it is DISMISSED for lack of merit. Respondent Tuvilla may, if he be so disposed report back to his work and re-assume his former position, rank and status in petitioner corporation which is directed to admit him accordingly.
- The assailed orders are set aside in so far as they hold petitioner Magnotti solidarily liable with the corporation.

SO ORDERED.

Inting and Perez, JJ., concur.

- [1] Rollo, pp. 4-34
- [2] Id., pp. 39-45
- [3] Id., p. 47
- [4] Id., pp. 50-53
- [5] Id., p. 10, 58
- [6] Id., pp. 78-79
- [7] Id., p. 79
- [8] Ibid.,
- [9] Id., pp. 55-56
- [10] Id., p. 91
- [11] Id., pp. 88-89
- [12] Id., p. 91
- [13] Id., pp. 91, 126
- [14] Id., p. 53
- [15] Id., pp. 44-45
- [16] Id., p. 16
- [17] G.R. No. 121143, January 21, 1997
- [18] Id., pp. 17-21
- [19] G.R. No. 193857, November 28, 2012; citing *Matling Industrial and Commercial Corporation v. Coros*,
- [20] *Supra*
- [21] Rollo, pp. 69-71
- [22] *Exodus International Construction Corporation v. Biscocho*, G.R. No. 166109, February 23, 2011
- [23] *Philippine Rural Reconstruction Movement v. Pulgar*, G.R. No. 169227, July 5, 2010
- [24] G.R. No. 168664, May 4, 2006
- [25] G.R. No. 190724, March 12, 2014
- [26] Ibid
- [27] *Supra* at Note 18
- [28] *MANSION PRINTING CENTER v. BITARA*, G.R. No. 168120, January 25, 2012
- [29] Rollo, p. 126
- [30] G.R. No. 174173, March 7, 2012
- [31] Rollo, p. 117

[32] Id., p. 119

[33] G.R. No. 185829, April 25, 2012

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