

DENNIS D. INTACTO, PETITIONER, VS. THE NATIONAL LABOR RELATIONS COMMISSION (6TH DIVISION) AND ANTONIO S. MARIN, RESPONDENTS.

Ponente: LOPEZ, J.

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LOPEZ, J.:

This petition for certiorari[1] assails the decision[2] of the National Labor Relations Commission (NLRC) setting aside the decision[3] of the Labor Arbiter and ordering the petitioner to pay backwages and separation pay.

The case stems from an illegal dismissal complaint filed by private respondent Antonio S. Marin (Marin) against petitioner Dennis D. Intacto, a sole proprietor engaged in the operation of two (2) taxi units. Marin alleged that he was hired as a taxi driver on a boundary basis on August 3, 2007.[4] On June 5, 2012, he was summoned to petitioner's office and was asked to surrender his taxi.[5] Later, he was told that his services were terminated. Marin claimed that there is no just cause for his termination and that due process was not observed since no investigation was conducted and he was denied the opportunity to defend himself.[6]

On the other hand, petitioner maintained that there was no illegal dismissal because Marin abandoned his job. Besides, there is no employer-employee relationship because Marin is an independent contractor who had full control of the taxi he was driving.[7] Petitioner alleged that Marin failed to remit his boundary for two (2) weeks prompting the demand to surrender the taxi. Marin returned the taxi on June 5, 2012 without explaining why he failed to remit daily boundaries for two weeks, and he never showed up again.[8]

In a Decision[9] dated September 30, 2013, the Labor Arbiter dismissed the case for lack of jurisdiction because there is no employer-employee relationship. Marin is an independent contractor who operates his business independently with his passengers.

On Marin's appeal, the NLRC reversed the Labor Arbiter. It ruled that there is employer-employee relationship between Marin and the petitioner. The NLRC discredited petitioner's contention that Marin abandoned his work considering that immediate protest is inconsistent with abandonment.[10] It held that Marin was illegally dismissed and the petitioner was ordered to pay backwages and separation pay which, as of January 9, 2014, amount to P256,187.88 and attorney's fees in the amount of P25,618.78, or a total P281,806.66. The NLRC later denied petitioner's motion for reconsideration.[11]

Petitioner now ascribes grave abuse of discretion on the NLRC when it a) disregarded the driver's repeated failure to pay the owner the daily P900 boundary as a just and lawful cause for which the driver was dismissed; b) made a ruling that there was no valid reason to terminate the employment of the driver notwithstanding its unequivocal finding that the driver indeed repeatedly failed to remit the daily boundary; c) disregarded driver's own incriminating documentary evidence of his repeated failure to pay the daily P900 boundary.[12]

Petitioner now argues that Marin's dismissal is based on a just cause. Marin repeatedly failed to remit his daily boundary of P900.00 as shown by the two (2) deposit slips dated 5/21/2012 and 06/04/2012 representing the

accumulated lump sum payments of P5,000.00 and P3,900, respectively.

The petition lacks merit.

Prefatorily, We note that in his Position Paper[13] and Reply[14] submitted to the Labor Arbiter, and in his Opposition[15] to Marin's Memorandum of Appeal before the NLRC, petitioner claimed that Marin abandoned his job. In this petition, however, he contends that Marin was dismissed on just cause for repeated failure to remit his boundary. This change of stance should not be countenanced. When a party deliberately adopts a certain theory, and the case was tried and decided on that theory, the party is not permitted to change his position on appeal because it is unfair to the adverse party.[16] Consequently, We shall only rule on original issues raised by the parties, particularly, the claim of abandonment.

Petitioner stressed that Marin abandoned his job since he did not return to work after surrendering the taxi on June 5, 2012. Marin did not respond to petitioner's letter dated June 13, 2012 that informed him of his infractions and gave him five (5) days to explain. Thus, petitioner sent another letter dated June 22, 2012 terminating his services.[17] We are not convinced.

Abandonment is a matter of intention that cannot be lightly presumed from equivocal acts. 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 intent, manifested through overt acts, to sever the employer-employee relationship. The employer bears the burden of showing the employee's deliberate and unjustified refusal to resume employment without intention of returning.[18]

Here, petitioner failed to prove that Marin deliberately refused to report for work. It is of record that, after Marin surrendered the taxi on June 5, 2012 and his subsequent termination, he immediately filed the case for illegal dismissal on June 21, 2012 with prayer for reinstatement. Thus, Marin did not abandon work because abandonment is totally inconsistent with immediate filing of an illegal dismissal complaint.[19]

Likewise, there is no indication that Marin committed an overt act intended to sever employer-employee relationship. We note that Marin's principal source of livelihood since 2009 has been driving petitioner's taxi. It is unlikely that he would simply abandon his job for no reason. We must emphasize that there should be clear proof of deliberate and unjustified intent to sever employer-employee relationship for abandonment to prosper.[20] This operative act does not obtain in this case.

Assuming Marin abandoned his job, petitioner is still obliged to serve him a notice of termination. Any employer seeking to dismiss a worker shall furnish him written notice stating particular acts or omission constituting the grounds for his dismissal. In cases of abandonment, notice shall be served at the worker's last known address. Failure to do so makes the termination illegal.[21]

Petitioner did not convince Us that he sent Marin two letters, one dated June 13, 2012 and another dated June 22, 2012, to comply with the requisite notice of termination. The letter dated June 13, 2012 apprising him of his infractions and giving him five days to explain was not received by Marin. The letter was returned to the sender because the address was insufficient. This was noted by the postman in the photocopy of the mailing envelope submitted by petitioner himself.[22] Besides, the contents of the letter are not credible. Petitioner claimed that he did not see the taxi anymore because Marin stopped communicating.[23] However, petitioner was already in possession of the taxi, as of June 5, 2012, when Marin surrendered it. Petitioner's own sworn statement incorporated in his Position Paper admitted that "[c]omplainant returned the taxi to respondent on June 5, 2012." [24]

It is settled that in a petition for certiorari, the inquiry is confined to issues of jurisdiction or grave abuse of

discretion amounting to lack or in excess of jurisdiction. It is not intended to correct a lower tribunal's evaluation of the evidence and factual findings. In other words, it is not a remedy for mere errors of judgment, which are correctible by an appeal or a petition for review under Rule 45 of the Rules of Court.[25] Here, the NLRC did not act with grave abuse of discretion in finding that there is no abandonment, which is based on substantial evidence.

FOR THESE REASONS, the petition is DISMISSED.

SO ORDERED.

Tijam, N.G. Chairperson and Garcia-Fernandez, JJ., concur.

[1] Under Rule 65 of the Rules of Court.

[2] Rollo, Annex "A", Decision dated February 28, 2014, penned by Presiding Commissioner Herminio V. Suelo, pp. 17-26.

[3] Id., Annex "F", Decision dated September 30, 2013, penned by Labor Arbiter Marie Josephine C. Suarez, pp. 45-48.

[4] Id., p. 49.

[5] Id., p. 50.

[6] Id., p. 51.

[7] Id., pp. 58-61.

[8] Id., p. 60.

[9] Id., pp. 45-48.

[10] Id, p.22.

[11] Id., pp. 32-34.

[12] Id., p. 8.

[13] Id., pp. 58-61.

[14] Id., pp. 70-73.

[15] Id., pp. 40-44.

[16] Sari-Sari Group of Companies, Inc. v. Piglas Kamao, et al., G.R. No. 164624, August 11, 2008.

[17] Rollo, pp. 58-61.

[18] Pentagon Steel Corporation v. Court of Appeals, et al., G.R. No. 174141, June 26, 2009.

[19] Leiden Fernandez, et al. v. NLRC, et al., G.R. No. 105892, January 28, 1998.

[20] Samarca v. ARC-Men Industries Inc., G.R. No. 146118, October 8, 2003.

[21] Section 2, Rule XVI Book V, Rules and Regulation Implementing the Labor Code.

[22] Rollo, p. 77. The envelope bears a mark, Returned to Sender, Insufficient Address, 6-20-2012.

[23] *Id.*, p. 76.

[24] *Id.*, p. 59.

[25] *Sadikul Sahali v. COMELEC, et al.*, G.R. No. 134169, February 2, 2000.

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