TOP RATE CONSTRUCTION AND GENERAL SERVICES, INC. PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION (2ND DIVISION) AND LOPE D. AZUCINAS, RESPONDENTS.

Ponente: PERALTA, JR., E. B., J.

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PERALTA, JR., E. B., J.:

From an assessment of private respondent’s constructive dismissal, the Petition for Certiorari under Rule 65 was utilized by petitioner now before Us intended to re-examine the Resolutions dated December 26, 2011[1] and March 14, 2012[2] of public respondent National Labor Relations Commission, which agreed with the Labor Arbiter's evaluation.[3]

Petitioner Top Rate Construction and General Services, Inc. (hereinafter referred to as petitioner) was an independent contractor primarily engaged in the business of providing janitorial, messengerial and other services to various clients.

On May 19, 2010, private respondent Lope D. Azucinas (hereinafter referred to as private respondent) was hired by petitioner as Maintenance Crew/Janitor.[4] His employment was coterminous with the renewal of the service of agreement[5] between Top Rate and BF Homes, which was from May 19, 2010 to May 18, 2011.

Unfortunately, on November 2, 2010, BF Homes wrote petitioner that on account of streamlining, it will return private respondent to petitioner on November 15, 2010, thusly:[6]

> “Gentlemen:
>
> We are presently undertaking the streamlining of our operations. For this reason, we are turning over to you one of your employee (sic) assigned to us Mr. Lope Azucinas effective November 15, 2010.
>
> Thank You.
>
> Very truly yours,
>
> (Sgd.)
> ATTY. LERMA C. TANCHOCO
> 4[th] AVP/OIC, GSD & HRMD”

For lack of clients to which private respondent could immediately be reassigned, petitioner placed private respondent on floating status, effective November 16, 2010.

On January 11, 2011, private respondent filed a Complaint[7] against petitioner for illegal dismissal, payment of service incentive leave, 13[th] month pay, damages and attorney's fees.

On February 11, 2011, petitioner issued a Memo[8] to private respondent and reminded him of his floating status:

> “This is to reiterate our verbal communication to you last November 16, 2010 regarding your placement on floating status following the decision of BF Homes, Inc. to adopt cost cutting measures by reducing its agency

contracted personnel.

Presently, there are no available positions in other clients of the company to which you can be assigned to. We shall inform you immediately once there is an opening for you to fill. Rest assured that your floating status will not exceed the six (6) month period allowed by law.

In case of change of contact numbers, you are reminded to keep our office updated so we can communicate with you without delay.

Please be guided accordingly."

On May 31, 2011, Labor Arbiter Eduardo J. Carpio rendered a Decision[9] to the effect that private respondent was constructively dismissed and adjudged petitioner to pay private respondent separation pay in the amount of P147,056.00 plus P14,705.60 as attorney's fees, the dispositive portion of which reads:

"WHEREFORE, premises considered, decision is hereby rendered ordering respondent Toprate Construction and General Service, Inc. to pay Lope Azucinas separation pay in the computed amount of Php147,056.00 plus Php14,705.60 as attorney's fees.

All other issues are dismissed for lack of merit.

SO ORDERED."

On August 8, 2011, petitioner appealed[10] the Decision of the Labor Arbiter to the NLRC, docketed as LAC No. 09-002399-11.

On December 26, 2011, the NLRC issued the assailed Resolution,[11] which affirmed the Decision of the Labor Arbiter:

"WHEREFORE, premises considered, in view of the foregoing, the Decision appealed from is hereby, AFFIRMED in toto. The instant appeal is hereby DISMISSED for lack of merit.

SO ORDERED."[12]

Petitioner sought reconsideration of the NLRC Decision on January 19, 2012, but it was denied in the assailed Resolution[13] dated March 14, 2012.

Unfazed, petitioner filed a Petition for Certiorari[14] anchored on these ascriptions of grave abuse of discretion:

"...IN UPHOLDING THE LABOR ARBITER'S RULING OF RESPONDENT AZUCINAS AS A REGULAR EMPLOYEE AND IN THE PROCESS DISREGARDING RESPONDENT AZUCINAS'S STATUS AS A CONTRACTUAL EMPLOYEE WITH A FIXED PERIOD AND PETITIONER'S STATUS AS A LEGITIMATE INDEPENDENT JOB CONTRACTOR.

...IN UPHOLDING THE LABOR ARBITER'S AWARD TO RESPONDENT AZUCINAS OF HIS FULL SEPARATION PAY NOTWITHSTANDING THE PROVISIONS OF DEPT ORDER NO. 18, SERIES OF 2002 WHICH CATEGORICALLY PROVIDED FOR NON-PAYMENT OF SEPARATION PAY FOR TERMINATION DUE TO TERMINATION OF THE PRINCIPAL CONTRACT BETWEEN THE CLIENT AND THE INDEPENDENT JOB CONTRACTOR.

EVEN GRANTING ARGUENDO RESPONDENT AZUCINAS'S [sic] ENTITLEMENT TO SEPARATION PAY UNDER PAR 1, SEC. 10, OF DEPT ORDER NO. 18-02, SERIES OF 2002, STILL THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION IN UPHOLDING THE LABOR ARBITER'S COMPUTATION OF SEPARATION PAY RECKONED FROM RESPONDENT AZUCINAS'S' [sic] DATE OF FIRST HIRE INSTEAD OF JUST AWARDING AT MOST ONE (1) MONTH SEPARATION PAY ON

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> ACCOUNT OF THE ONE (1) YEAR FIXED TERM EMPLOYMENY CONTRACT EXECUTED BY RESPONDENT AZUCINAS."[15]

The bedrock of the Petition is whether private respondent was illegally dismissed from employment by petitioner.

Petitioner averred that private respondent was not terminated but merely placed on floating status due to absence of clients to which private respondent could be reassigned.

On the other hand, private respondent maintained that he was not placed on floating status but was terminated from the service. He stated that his position as maintenance crew was necessary and desirable in the usual business of petitioner. Moreover, he was employed for more than 15 years from October 18, 1996 until his dismissal on November 15, 2010.

In upholding the factual findings of the Labor Arbiter, the NLRC opined:

> "...it cannot be denied that complainant-appellee's position as Maintenance Crew/Janitor is necessary and desirable in the business of respondent-appellant Top Rate Construction and general Services, Inc.
>
> Foregoing considered, it cannot be denied therefore that complainant-appellee be deemed a regular employee pursuant to Article 280 of the Labor Code, as amended, which provides 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."[16]

As reiterated all too often, factual findings of the NLRC, particularly when they coincide with those of the Labor Arbiter, are accorded respect, even finality, and will not be disturbed for as long as such findings are supported by substantial evidence. However, this Court can hardly sustain the findings of both the Labor Arbiter and the NLRC.

It must be underscored that even assuming that private respondent was not given any assignment after he was relieved from his post on November 15, 2010, his filing of the Complaint for illegal dismissal on January 11, 2011 or less than six months from the time he was placed on floating status was premature. The rule is settled that "off-detailing" is not equivalent to dismissal, so long as such status does not continue beyond a reasonable time[17] and that it is only when such a "floating status" lasts for more than six months that the employee may be considered to have been constructively dismissed.[18]

Therefore, a Complaint for illegal dismissal filed prior to the lapse of said six months is generally considered as prematurely filed.[19]

Anent private respondent's monetary claims, We are of the view that these were devoid of merit. Evidence on record showed that private respondent's 13[th] month pay and service incentive leave were duly paid by petitioner. Hence, these demands must be denied for failure of private respondent to adduce evidence to the contrary.

Similarly, for lack of factual or legal bases, We find no cause to award attorney's fees.

Viewed in the light of the foregoing discussion, We are of the firm impression that the NLRC committed grave abuse of discretion in sustaining the Labor Arbiter's Decision that private respondent was constructively dismissed from his employment. Due to absence of illegal dismissal, the payment of separation pay was not in order. Well-settled is the rule that separation pay may be awarded only in cases when the termination of employment is due to (a) installation of labor-saving devices, (b) redundancy, (c) retrenchment, (d) closing or cessation of business operations, (e) disease of an employee and his continued employment is prejudicial to

himself or his co-employees, or (f) when an employee is illegally dismissed but reinstatement is no longer feasible.[20]

WHEREFORE, premises considered, the Petition for Certiorari is GRANTED. Accordingly, the assailed Resolutions dated December 26, 2011[21] and March 14, 2012[22] of the National Labor Relations Commission are hereby ANNULLED and SET ASIDE. Necessarily, the Complaint for illegal dismissal is hereby DISMISSED.

SO ORDERED.

De Leon, M. M., (Chairperson), and Cruz, S.C., JJ., concur.

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[1] Resolution dated December 26, 2011, Rollo, pp. 30-36.

[2] Resolution dated March 14, 2012 Rollo, pp. 37-38.

[3] Decision dated May 31, 2011, Rollo, pp. 166-172.

[4] Contract of Employment, Rollo, p. 101.

[5] See Agreement dated May 19, 2010, Rollo, pp. 88-92.

[6] Letter dated November 2, 2010, Rollo, p. 119.

[7] Complaint dated January 11, 2011, See Complainant's Position Paper, p. 2, Rollo, p. 153.

[8] Memo dated February 11, 2011, Rollo, p. 120.

[9] Decision dated May 31, 2011, Rollo, pp. 166-172.

[10] See Memorandum on Appeal dated August 8, 2011, Rollo, pp. 173-188.

[11] Resolution dated December 26, 2011, Rollo, pp. 210-216.

[12] See Resolution dated December 26, 2011, Rollo, p. 215.

[13] Resolution dated March 14, 2012, Rollo, pp. 217-218.

[14] Petition for Certiorari dated May 21, 2012, Rollo, pp. 3-29.

[15]See page 9 of the Petition for Certiorari, Rollo, p. 12.

[16] See page 4 of the Resolution dated December 26, 2011, Rollo, p. 33.

[17] Agro Commercial Security Services Agency, Inc. vs. NLRC, 175 SCRA 790.

[18] Superstar Security Agency, Inc. vs. NLRC, 184 SCRA 74.

[19] Nippon Housing Phil., Inc. v. Leynes, G.R. No. 177816, August 3, 2011, 655 SCRA 77.

[20] Hinatuan Mining Corporation vs. NLRC, 268 SCRA 622.

[21] Resolution dated December 26, 2011, Rollo, pp. 30-36.

[22] Resolution dated March 14, 2012 Rollo, pp. 37-38.

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