

ACRE SECURITY AND/OR JONAS ENAJE, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION, MICHAEL T. DEVELLES, RESPONDENT.

Ponente: DE GUIA-SALVADOR, R., J.

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DE GUIA-SALVADOR, R., J.:

Assailed in this Petition for Certiorari under Rule 65 of the 1997 Rules of Civil Procedure are two issuances of the public respondent National Labor Relations Commission in ("NLRC") NLRC LAC No. 08-002289-12, viz: (a) the Decision[1] dated January 31, 2013, which reversed the Decision[2] dated June 29, 2012 rendered by Labor Arbiter Edgardo M. Madriaga denying the Complaint for illegal dismissal[3]; and, (b) the Resolution[4] dated June 18, 2013 which denied petitioner's motion for reconsideration of the January 31, 2013 Decision.

The Facts

Petitioner Acre Security Agency, Inc. ("Acre") provides security personnel and conducts safety and security measures to protect the lives and properties of its clients, while Jonas Enaje ("Enaje") is the operations manager of Acre.[5] Sometime in March 2004, Acre hired private respondent Michael T. Develles ("Develles") as a security guard and assigned him at Q-Plaza in Quezon City until 2007,[6] and then re-assigned him at Q-Plaza in Cainta, Rizal, until his alleged termination on September 7, 2011.[7] He used to report for work from Monday to Sunday, starting at either 9 A.M. or 9 P.M. for twelve (12) hours, depending on the shift assigned to him for the day.[8]

On September 5, 2011, as Develles was about to report for his work shift which would start at 9 P.M., he received a call from the Security in Charge Joey Verdida ("Verdida") about a theft incident at Q-Plaza, Cainta. Three (3) utility workers/janitors were allegedly found in possession of a plastic bag full of scrap metal that was strategically tucked inside a "sako". Both Develles and Verdida turned over the workers to their Officer-in-Charge Rolando Ricablanca ("Ricablanca") for investigation. Ricablanca insisted that Develles conspired with the thieves, given that the workers were his friends. Develles vehemently denied the allegation and asked why he was being implicated when he was the one who surrendered the workers for investigation.[9]

On September 7, 2011, Develles received a Memorandum from Acre[10] which reads:

"You are hereby reprimanded 5 days suspension effective September 07, 2011 Wednesday for abandoning of Post and Negligence of duty. And you are required to explain in writing within the period of time why you should not be charged administratively/connivance for the incident of THEFT against housekeeping [which] happened last September 5, 2011 Monday.

Failure on your part to explain in writing shall be [be] a waiver of your rights and this office will set drastically."[11]

Develles claimed that he was left with no choice but to abide by the directive of the Memorandum,[12] although he did not submit a written explanation. After serving his suspension of five (5) days, Develles allegedly reported for work only to be told by the Operations Manager Enaje that he has already been dismissed. Develles asked Enaje: "Sir, bakit naman ako tatanggalin kami na nga ni SIC Verdida and nakahuli?" Enaje replied: "Yun ang

order eh. Tanggal ka na."[13]

On November 22, 2011, Develles filed before the NLRC Regional Arbitration Branch No. IV in Calamba, a Complaint[14] for underpayment of wages, non-payment of the following pays: overtime, holiday, holiday premium, service incentive leave, 13th month, night shift differential, ECOLA and separation pay. Prior thereto, he was told that he would have to wait for six (6) months before he could file a case for illegal dismissal against Acre because he might be on floating status.[15]

Conversely, Acre believed that Develles might have had a hand in the theft incident by negligently or connivingly leaving his post. Thus, an investigation was jointly conducted by Acre and the management of Q-Plaza. Meantime, Q-Plaza requested that Develles be replaced pending the investigation. Acre asserted that Develles filed a complaint with the NLRC Calamba office even before the investigation could be concluded.[16] It added that the mediation failed with Develles threatening that he will forward his complaint to the media, i.e. "Tulfo." [17] Acre also maintained that on January 31, 2012, Enaje sent a Report to Duty letter[18] to Develles by registered mail directing him to report to the agency for possible posting within 24 hours upon receipt of such letter. Acre attached a photocopy[19] of the supposed registry receipt dated January 31, 2012 of the said letter in its Reply.

After several failed attempts at seeking Acre's reconsideration,[20] Develles pursued his complaint, which he re-filed at NLRC Quezon City instead of NLRC Calamba (where it was originally filed before the lapse of six months).

Meanwhile, on February 12, 2012, Labor Arbiter Patricio P. Libo-on indorsed to NLRC Quezon City the entire records of Develles' complaint for consolidation with payment of moral and exemplary damages included as additional causes of action.[21] On March 12, 2012, Labor Arbiter Napoleon V. Fernando of NLRC Calamba issued an Order[22] stating that since Develles manifested that he will withdraw his complaint, the said case would be considered withdrawn and removed from the business calendar of that Office. On April 23, 2012, Develles amended his complaint to include illegal dismissal as a cause of action against Acre.[23]

Acre, for its part, contended that the complaint which Develles filed with NLRC Quezon City, being similar to the one he had filed in NLRC Calamba, should be perceived as forum shopping.[24] Despite Acre's contention, Labor Arbiter Madriaga took cognizance of the case, given that there was an order from Labor Arbiter Fernando in Calamba that Develles' complaint was withdrawn in that office. Labor Arbiter Madriaga directed the parties to submit their respective pleadings for consideration and decision.

The Decision of the Labor Arbiter

In a Decision dated June 29, 2012, Labor Arbiter Madriaga dismissed the complaint for lack of merit. He found that Develles' belated charge of illegal dismissal lacked factual and legal basis and that instead of being dismissed by Acre, he stopped reporting for work which constituted as abandonment. Develle's monetary claims were also denied, except for the 13th month pay for the year 2011 in the amount of P7,192.83.[25]

Dissatisfied, Develles filed an appeal with the NLRC.[26]

The Decision of the NLRC

In a Decision dated January 31, 2013, the NLRC reversed the ruling of the Labor Arbiter and held that Develles was illegally dismissed.[27] The dispositive portion of the Decision reads:

"WHEREFORE, the appeal is granted. The decision dismissing appellant's complaint for illegal dismissal is REVERSED, and a new one is entered finding that he was illegally dismissed since September 11, 2011. As a consequence of his illegal dismissal, ACRE Security Agency/Jonas Enaje is directed to immediately reinstate

appellant without loss of seniority rights, and to pay him backwages from September 11, 2011 until his reinstatement. His backwages as of the date of this decision, is computed as follows:

Backwages:

Basic Salary (date given)

9/11/11 – 1/28/13 = 16.37 mos.

P513.00 x 26 x 16.37 = P218,343.06

a) 13[th] Month Pay

P218,343.06/12 = 18,195.26

b) SILP

P513.00 x 5/12 x 16.37 = 3,499.09

TOTAL AWARD P240,037.41"[28]

Acre filed a motion for reconsideration but the NLRC denied it for lack of merit.[29] Hence, Acre filed this petition for certiorari.[30]

The Issues

In seeking to nullify and set aside the assailed NLRC Decision and Resolution, Acre imputes grave abuse of discretion amounting to lack or in excess of jurisdiction against public respondent NLRC, thus:

"1. The factual premises upon which public respondent NLRC based its assailed Decision dated 31 January 2013 and Resolution dated 18 June 2013 were totally unsupported by the Records;

2. The assailed Decisions completely ignored the factual findings of Arbiter Madriaga that private respondent indeed abandoned his work as shown by the following, to wit:

a. Petitioner properly served upon private respondent a notice of suspension pending investigation and with a show cause order to explain why he should not be removed from his post.

b. A written letter dated 31 January 2012 was sent to private respondent to return to work after suspension through registered mail only because he did not report for work anymore.

c. Private respondent filed his complaint only after the lapse of six (6) months.

d. The Complaint filed never alleged at the outset a case for illegal dismissal."[31]

The Court's Ruling

We find the petition devoid of merit.

Prefatorily, Acre's contention that the Complaint filed by Develles at the outset did not state illegal dismissal as a cause of action is flawed. Rule V Section 11(b) of the NLRC Rules of Procedure provides that: "[N]o amendment of the complaint or petition shall be allowed after the filing of position papers, unless with leave of the Labor Arbiter." [32] In this case, the complaint was amended to include illegal dismissal as a cause of action on April 23, 2012. Develles' position paper was filed on May 7, 2012 while Acre's was filed on May 9, 2012. Clearly the amendment of the complaint was done before the position papers of the respective parties were filed; hence, the inclusion of illegal dismissal as a cause of action was in order.

As a rule, in certiorari proceedings under Rule 65 of the Rules of Court, this Court does not assess and weigh the sufficiency of evidence upon which the Labor Arbiter and the NLRC based their conclusion. The query in such proceedings before this Court is limited to whether or not the NLRC acted without or in excess of its jurisdiction or with grave abuse of discretion in rendering its decision. It is not for the Court to reexamine conflicting

evidence, reevaluate the credibility of witnesses nor substitute the findings of fact of an administrative tribunal which has gained expertise in its specialized field.[33] However, when the findings of the Labor Arbiter and the NLRC are at variance, as in this case, there is a need to look into the records of the case as well as the parties' submissions, and reexamine the questioned findings to determine which of them should be preferred as more conformable to the evidentiary facts.[34]

Claiming that he was not illegally dismissed, Acre contended that Develles abandoned his work when he failed to respond to the Report to Duty letter that was sent to him through registered mail. Acre noted that it also issued a Memorandum asking Develles to submit a written explanation with regard to the theft incident, which he failed to do. Thus, Acre insisted that Develles abandoned his work most likely because of the theft incident where he could have been involved.[35]

Develles countered that he was illegally dismissed by Acre because when he tried to go back to work after his 5-day suspension, he was told by Operations Manager Enaje that he had already been terminated. Develles noted that Acre's defense of abandonment was negated by his prompt filing of an illegal dismissal complaint. Disputing Acre's argument that his failure to submit a written explanation in response to the Memorandum signified abandonment, Develles stressed that it only meant that he was waiving his opportunity to be heard, but not that he was no longer interested to continue with his employment. Develles also denied receipt of the Report to Duty letter and questioned the sufficiency of Acre's submission of a photocopy of the registry receipt as proof of the former's receipt of said letter. Because he did not receive the letter, Develles contended that he was dismissed without due process.

Abandonment of position cannot be lightly inferred, much less legally presumed from certain equivocal acts. For abandonment to exist, two requisites must concur: (1) the failure to report for work or absence without valid or justifiable reason; and (2) a clear intention to sever employer-employee relationship, with the second element as the more determinative factor being manifested by some overt acts.[36] Acre, as 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.[37]

Acre failed to discharge its burden of proving that Develles is guilty of abandonment.

There is no dispute that Acre issued a Memorandum to Develles which placed him under preventive suspension and asked him to submit a written explanation, so that Acre and Q-Plaza could conduct an investigation, especially as it involved the crime of theft. The Memorandum clearly stated that Develles would be suspended for five (5) days, which is well within the 30-day period provided by the Omnibus Rules Implementing the Labor Code during which an employee can be placed under preventive suspension if his continued employment would pose a serious threat to the life or property of the employer or its other employees.[38]

However, when Develles tried to go back to work at the end of his 5-day suspension, he was told that he was already dismissed. Acre could have cited the on-going investigation of the theft incident to justify the extension of his preventive suspension even beyond thirty (30) days but with the corresponding pay in accordance with the Omnibus Rules Implementing the Labor Code,[39] but it did not. Be that as it may, the supposed investigation went on for months, even exceeding six (6) months, without any clear and definitive outcome. Therefore, Develles' prolonged suspension and non-posting to a different job, owing to Acre's deliberate neglect to conclude the investigation against him, had ripened to constructive dismissal.[40] Such is akin to keeping a security guard on floating status for more than 6 months without giving him a work assignment,[41] even if there is no pending investigation against him.

Moreover, Develles repeated efforts to seek for Acre's reconsideration regarding his posting during the time he

was supposed to be on floating status and his prompt filing of a complaint for illegal dismissal are inconsistent with the intention to abandon work.[42] Rather than abandonment, given his vehement denial of involvement in the theft incident and the absence of any indication that he failed to report for work in bad faith,[43] Develles' acts unmistakably show his desire to be reinstated.

It must be stressed that while abandonment of work, which is merely a form of neglect of duty and refusal to heed a company directive, constitutes just causes for termination of employment, they do not per se sever the employment relationship. The operative act that will ultimately put an end to this relationship is the dismissal of the employee after complying with the procedure prescribed by law.[44] Consequently, for purposes of legitimately terminating the services of an employee, the law requires that the dismissal must be properly done,[45] i.e., the employee must be afforded due process.[46] Anent the latter requirement, jurisprudence is to the effect that the following notices are required before an employee may be validly dismissed: (a) a written notice containing a statement of the cause for termination, to afford the employee an opportunity to be heard and defend himself with the assistance of his representative, if he desires; and (b) if the employer decides to terminate the services of the employee, a written notice stating clearly the reasons therefor.[47] To our mind, Acre's failure to discharge these evidentiary burdens necessarily mean that Develles' dismissal from employment was not justified and, therefore, illegal.[48] Beyond the failure to comply with the two-notice requirement, the security agency also failed to comply with Section 7, Rule XXII, Book V of the Rules Implementing the Labor Code[49] which requires the employer to notify the Department of Labor and Employment of such fact.

As to Acre's allegation that it sent a Return to Duty letter to Develles, We hold that Acre's attachment of a mere photocopy of the registry receipt in the records does not suffice to prove receipt of such letter by the addressee. Looking at the registry receipt alone, there is no indication that Develles or his authorized representative received the Return to Duty letter. To confirm receipt of registered mail, the return card and the registry receipt should be presented. Jurisprudence is replete with ruling to the effect that to establish receipt of registered letters, such letters together with the return card, should be properly authenticated.[50] Here, there was no effort on Acre's part to produce the return card, let alone submit an affidavit from the postmaster or any other document to prove that Develles indeed received the letter.[51] Absent substantial evidence to prove Develles' receipt of the letter, Acre's defense that it was Develles' choice not to return to work despite notice must necessarily fail.

Acre further questions the filing of the complaint six (6) months after Develles was dismissed. It further theorizes that the concept of floating status is not applicable because such "requires the dire exigency of the employer's bonafide suspension of operation, business or undertaking,"[52] which do not obtain in this case.

Acre's contention fails to persuade.

For one, Develles convincingly clarified that he waited for six (6) months before filing his complaint because he was advised that he could just be on floating status as a security guard and was simply not yet assigned a post in the meantime. In any event, he claimed that since during that 6-month period, Acre did not assign him to any post, it could only mean that he had actually been dismissed from employment when he was told by Enaje "Tangal ka na." [53]

On the concept of floating status, when applied to security guards, jurisprudence holds as follows:

"Temporary 'off-detail' or 'floating status' is the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one. xxx

For as long as such temporary inactivity does not continue for a period exceeding six months, it has been ruled that placing an employee on temporary 'off-detail' or 'floating status' is not equivalent to dismissal." [54]

Such concept stemmed from Article 286 of the Labor Code:

"When employment not deemed terminated. - The bona fide suspension of the operation of a business or undertaking for a period not exceeding six (6) months, or the fulfillment of the employee of a military or civic duty shall not terminate employment. In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty."[55]

The above-quoted provision which requires that the employer's business operation is validly suspended, however, does not necessarily apply to security agencies, thus:

"... this [floating status] happens when the security agent's clients which do not renew their contracts are more than those that do and the new ones that the agency gets. Also, in instances when contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it even for want of cause, the replaced security guard may be placed on temporary 'off-detail' if there are no available posts under respondent's existing contracts."[56]

In the case at bar, Acre averred that due to the theft incident, its client, Q-Plaza, requested that Develles be removed, hence, he was placed on floating status. This would have been valid were it not for the length of time that he was supposed to be on floating status, which exceeded six (6) months without him being directed to report for new posting. Even if Develles initially filed a complaint before the lapse of 6 months, he withdrew it nonetheless upon being advised that he might be merely on floating status and that there was a possibility that he would be called for posting. Believing this to be the case, he made an effort to follow-up his status with Acre but to no avail. And since more than 6 months had already passed since his dismissal from his post at Q-Plaza without receiving from Acre any notice to report for duty and without the theft investigation having been resolved, Develles was justified in pursuing his complaint for illegal dismissal.

In view of Acre's failure to either recall or permanently retrench him after being placed on floating status for more than 6 months, Develles was correctly found by the NLRC to have been constructively dismissed and thus entitled to backwages and separation pay. Reinstatement is not warranted in the case at bench since antagonism had already caused a strain in the relationship between the parties in view of the still unresolved investigation initiated by Acre against Develles, not to mention the considerable length of time that he had been out of the former's employ,[57] as well as the fact that he already found work elsewhere.[58] We thus uphold Develles' entitlement to the grant of separation pay and full backwages[59] in line with the settled rule that an illegally dismissed worker, like Develles, is entitled to: (1) either reinstatement if viable or separation pay if reinstatement is no longer viable; and (2) backwages.[60] Finally, We sustain the NLRC's award of service incentive leave pay and 13[th] month pay, as petitioner failed to discharge the burden of proving payment of such monetary claims.[61]

WHEREFORE, premises considered, the petition is DISMISSED. The assailed Decision dated January 31, 2013 of the NLRC is hereby AFFIRMED with MODIFICATION that private respondent Michael T. Develles should be granted separation pay in lieu of reinstatement.

SO ORDERED.

Rosario, and Dimagiba, JJ., concur.

[1] Rollo, pp. 18-25.

[2] Id., pp. 112-120.

[3] Id., pp. 126-128.

[4] Id., pp. 28-30.

[5] Id., pp. 4, 216.

[6] Id., p. 42.

[7] Id., pp. 4, 62.

[8] Id., pp. 42-43.

[9] Id., p. 43.

[10] Id., p. 19.

[11] Id., p. 55.

[12] Id., p. 43.

[13] Id. pp. 19, 43.

[14] Id., pp. 126-128.

[15] Id., p. 43.

[16] Id., pp. 19-20, 62-63.

[17] Id., pp. 62-63.

[18] Id., p. 110.

[19] Id., p. 111.

[20] Id., p. 43.

[21] Id., p. 112.

[22] Id., p. 102.

[23] Id., p. 19.

[24] Id., p. 64.

[25] Id., pp. 119-120.

[26] Id., pp. 122-124.

[27] Id., pp. 18-25.

[28] Id., pp. 23-24.

[29] Id., pp. 28-30.

[30] Id., pp. 3-14, 146-156.

[31] Id., p. 7.

[32] 2011 NLRC Rules of Procedure, Rule V, § 11(b).

[33] General Milling Corporation vs. Viajar, G.R. No. 181738, January 30, 2013, German Machineries Corporation vs. Endaya, G.R. No. 156810, November 25, 2004, citing ComSavings Bank vs. NLRC, 257 SCRA 307, 317

[34] Bascon, et al. vs. Court of Appeals, G.R. No. 144899, February 5, 2004; Phil. Employ Services and Resources, Inc. vs. Joseph Paramio, et al., 427 SCRA 732, April 15, 2004.

[35] Rollo., pp. 218-220.

[36] Garden of Memories Park and Lifeline Inc., vs. NLRC, G.R. No. 160278, February 8, 2012.

[37] Ibid.

[38] Omnibus Rules Implementing the Labor Code, Rule XXIII, Book V, Sec. 8:

SEC. 8. Preventive Suspension. - The employer may place the worker concerned under preventive suspension if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers.

[39] Omnibus Rules Implementing the Labor Code, Rule XXIII, Book V, Sec. 9:

SEC. 9. Period of Suspension. - No preventive suspension shall last longer than thirty (30) days. The employer shall thereafter reinstate the worker in his former or in a substantially equivalent position or the employer may extend the period of suspension provided that during the period of suspension, he pays the wages and other benefits due to the worker. In such case, the worker, shall not be bound to reimburse the amount paid to him during the extension if the employer decides, after completion of the hearing, to dismiss the worker.

[40] Pido vs. NLRC, et. al., G.R. No. 169812, February 23, 2007, citing Maricalum Mining Corporation vs. Decorion, G.R. No. 158637, April 12, 2006.

[41] Emeritus Security and Maintenance Systems, Inc. vs. Dailig, G.R. No. 204761, April 2, 2014.

- [42] Pido vs. NLRC, *supra*; MZR Industries, et al., vs. Colambot, *supra*.
- [43] Tegimenta Chemical Phis. and Garcia vs. Oco, G.R. No. 175369, February. 27, 2013
- [44] De Paul/King Philip Customs Tailor vs. NLRC, G.R. No. 129824, March 10, 1999
- [45] Gabisay vs. National Labor Relations Commission, 307 SCRA 141
- [46] Austria vs. National Labor Relations Commission, 312 SCRA 446
- [47] Rodriguez, Jr. vs. National Labor Relations Commission, 393 SCRA 511
- [48] CMP Federal Security Agency, Inc. vs. National Labor Relations Commission, 303 SCRA 99
- [49] Section 7. Report of dismissal. – The employer shall submit a monthly report to the Regional Office having jurisdiction over the place of work all dismissals effected by it during the month, specifying therein the names of the dismissed workers, the reasons for their dismissal, the dates of commencement and termination of employment, the position last held by them and such other information as may be required by the Department for policy guidance and statistical purposes.
- [50] San Mateo vs. People, G.R. No. 200090, March 6, 2013, citing Svendsen vs. People, G.R. No. 175381, February 26, 2008.
- [51] Resterio v. People, G.R. No. 177438, September 24, 2012
- [52] Rollo ., p. 222.
- [53] *Id.*, pp. 242-243.
- [54] Leopard Security and Investigation Agency vs. Quitoy, et. al, G.R. No. 186344, February 20, 2013, citing Veteran's Security Agency, Inc. vs. Gonzalvo, 514 Phil. 488 (2005); Superstar Security Agency, Inc. and/or Col. Andrada vs. NLRC, 262 Phil. 930 (1990).
- [55] LABOR CODE, art. 286
- [56] Pido vs. NLRC, *supra*; citing Maricalum Mining Corp. vs. Decorion, *supra*.
- [57] Jardine Davies, Inc. vs. National Labor Relations Commission, 311 SCRA 289
- [58] Tan Brothers vs. Escudero, G.R. No. 188711, July 8, 2013
- [59] Anino vs. National Labor Relations Commission, 290 SCRA 489
- [60] Bongar vs. National Labor Relations Commission, 294 SCRA 536
- [61] SLL International Cables Specialist vs. NLRC, G.R. No. 172161, March 2, 2011.

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