

**F.R.F. ENTERPRISES, INC. AND VICTOR EUGENIO, PETITIONERS, VS.
THE HONORABLE NATIONAL LABOR RELATIONS COMMISSION
(2ND DIVISION) AND RODOLFO SORIANO, RESPONDENTS.**

G.R. No. 105998. April 21, 1995

Ponente: MENDOZA, J.

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MENDOZA, J.:

This is a petition for certiorari to set aside the decision,[1] dated March 25, 1992, of the Second Division of the National Labor Relations Commission, the dispositive portion of which reads,

PREMISES CONSIDERED, the Decision appealed from is hereby, Modified. Respondents are ordered to pay the complainant's backwages and other benefits from the time he was illegally terminated on March 17, 1990, up to the promulgation of this Decision. However, we feel that the reinstatement of the complainant to his former position would not be in the interest of both parties. Obviously, the relationship between the complainant and the respondent, particularly the Operation Manager, is already strained. The complainant's return to his former job would not be conducive to industrial harmony because of mutual antipathy and antagonism between the parties. In lieu of reinstatement, we award a separation pay equivalent to one month salary for each year of service. The decision awarding 13th month pay to the complainant is hereby AFFIRMED.

Petitioner F.R.F. Enterprises, Inc. is a trucking company engaged in hauling and delivering lubricating oil. In July 1988, it employed private respondent Rodolfo N. Soriano as helper to go with its tank truck in its trips to Limay, Bataan to unload its cargo of lube oil products to waiting barges belonging to the Philippine National Oil Co. Part of private respondent's job was to clean the truck upon its return to petitioner's office-terminal in Pandacan, Manila.

It appears that many times in the past the attention of private respondent was called to his failure to clean the truck, especially the dirt which accumulated on the tank's outer portion. On those occasions, the Operations Manager, Victor Eugenio, gave private respondent appropriate warnings.

On March 17, 1990, Eugenio again noticed that Soriano had not washed the truck after its arrival from Bataan. For this reason Eugenio asked him to clean the truck immediately, but private respondent apparently wanted to take his time in order to rest. As Eugenio insisted that he clean the vehicle at once, an exchange of words took place between them, during which private respondent called Eugenio a "dictator." This angered Eugenio who ordered private respondent not to work that day. Private respondent thereupon left and never reported for work again.

On March 21, 1990, private respondent wrote Victor Eugenio a letter[2] in which he explained that dirt formed around the tank truck as a result of oil sprinkled during unloading and that it was not possible to clean the truck, as the Operations Manager wanted him to do, because the PNOC prohibited the cleaning of trucks at the pier in Limay to prevent the pollution of the waters. Private respondent complained that he was never allowed to explain his side and simply made to follow the "coercive, repressive and dictatorial ways of management." He asked that

his dismissal be formally made and that he be given termination pay in the amount of P5,000.00, based on two years of continuous service.

Eugenio refused to receive the letter, which private respondent had sent by registered mail. Instead petitioner F.R.F. Enterprises applied for clearance to the Department of Labor to terminate the services of private respondent on the ground of abandonment of work.

On April 4, 1990, private respondent filed a complaint,[3] charging petitioner with illegal dismissal and praying that petitioner be ordered to pay separation pay, moral and exemplary damages, backwages and 13th month pay with legal interest. On May 22, 1990, private respondent filed an amended complaint[4] in which he asked additionally for reinstatement and payment of attorney's fees.

In its comment, petitioner claimed that private respondent had not been dismissed but only told not to work on March 17, 1990 for disobeying Operations Manager, Victor Eugenio, and that it was private respondent who did not report for work anymore after March 17, 1990. It was contended that after private respondent had failed to report for work, petitioner was justified in asking for a clearance from the Department of Labor to terminate his services for abandonment of work.

On November 29, 1990, the labor arbiter rendered a decision[5] declaring private respondent to have been illegally dismissed. He held that the order given to private respondent on March 17, 1990 not to go out with the truck to which he was assigned and the filing by him of the instant case belied any claim that he had abandoned his job. Moreover, the labor arbiter noted, no notice of abandonment of work had been given to private respondent as required by law. Nor was he given a written notice of the charges against him and heard in his defense. For this reason the labor arbiter gave him an award of separation pay in the amount of P2,000.00 based on one-half month pay for every year of service. In addition, the labor arbiter ordered him paid P4,166.00 as his 13th month pay for the period July 1988 to March 1990.

Private respondent moved for a reconsideration insofar as his prayer for reinstatement and backwages was not granted. His motion was denied, but, on appeal to the NLRC, he won. In its decision dated March 25, 1992,[6] the NLRC held that since private respondent "did not abandon his work and . . . was not afforded due process before his dismissal was effected" he should be reinstated with backwages.

Petitioner in turn moved for a reconsideration but its motion was denied on June 5, 1992 for lack of merit.[7] Hence, this petition. F.R.F. Enterprises, Inc. contends that the NLRC gravely abused its discretion in giving judgment for private respondent because the evidence shows that he had abandoned his job.

We find the petition to be without merit.

Abandonment means the deliberate, unjustified refusal of the employee to resume his employment.[8] The burden of proof is on the employer to show "a clear and deliberate intent" on the part of the employee to discontinue employment without any intention of returning. Mere absence is not sufficient.[9]

In this case, petitioner claims that private respondent was told not to work only on March 17, 1990, as penalty for disobeying an order to him, but private respondent instead did not report for work anymore after that date. The letter he wrote four days later, in which private respondent demanded payment of separation pay, is cited as proof of his decision not to work anymore. What petitioner does not say, however, is that its Operations Manager, Victor Eugenio, was apparently incensed by what he thought was private respondent's disobedience, as a result of which the two had an altercation with private respondent calling petitioner a "dictator." The epithet, as private respondent explained in his letter, referred to Eugenio's refusal in the past to let private respondent explain why it was not possible for him to clean the tank truck before leaving Limay, Bataan.

Given this background of the incident, it is clear that Eugenio did not only suspend private respondent for one day but actually dismissed him. Indeed that private respondent understood Eugenio's order to be not to report for work anymore is clear from private respondent's letter which makes references to the "verbal termination of my employment" and "your unjust, baseless and illegal termination of my employment." Private respondent's demand for separation pay was an acknowledgment by him that because of the strain in his relation with his employer, reinstatement was no longer feasible.

On the other hand, the refusal of Eugenio to accept private respondent's letter, coupled with petitioner's application for clearance from the Department of Labor to terminate the employment of private respondent, indicates quite clearly petitioner's intention to dismiss private respondent. Petitioner's claim that it applied for a clearance only after private respondent had failed to report for work is a mere pretext. What stands out is that petitioner refused to receive private respondent's letter and did not give him notice that it considered him to have abandoned his work before it sought the clearance to terminate private respondent's services.

An employee who loses no time in protesting his lay off cannot by any reasoning be said to have abandoned his work.[10] In this case the circumstances, starting from the sending of the letter of protest of private respondent and petitioner's refusal to accept it to the filing by petitioner of an application for authority to terminate the services of private respondent, belie petitioner's claim that private respondent had abandoned his work. Considering the hard times in which we are, it is unlikely that private respondent, who is the sole breadwinner of a family with six children, would simply leave his work, unless it was to transfer to a better-paying job.[11] There is no evidence that such was the case.

Not only was private respondent's dismissal without cause. It was, in addition, made without notice and hearing in violation of Rule XIV, §2 of the Rules Implementing the Labor Code which provides that -

An employer who seeks to dismiss a worker shall furnish him a written notice stating the particular acts or omission constituting the grounds for dismissal. In cases of abandonment of work, the notice shall be served at the worker's last known address.

Art. 279 of the Labor Code provides that an employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to full backwages. As explained in the case of *Torillo v. Leogardo*: [12]

Backwages and reinstatement are two reliefs given to an illegally dismissed employee. They are separate and distinct from each other. However, in the event that reinstatement is no longer possible, separation pay is awarded to the employee. Thus, the award of separation pay is in lieu of reinstatement and not of backwages. In other words, an illegally dismissed employee is entitled to (1) either reinstatement, if viable, or separation pay if reinstatement is no longer viable and (2) backwages.

In this case, the NLRC cited the strained relationship between petitioner, particularly its Operations Manager Victor Eugenio, and private respondent as basis for increasing the rate of separation pay awarded to private respondent in lieu of reinstatement, from 1/2 month for every year of service to 1 month pay for every year of service. For reinstatement would indeed only aggravate the strain in the relation of the parties.

The award of backwages by the NLRC is likewise fully justified. This is a form of relief intended to restore income lost by reason of unlawful dismissal.[13]

WHEREFORE, the petition is hereby DISMISSED, with costs against the petitioner.

SO ORDERED.

Narvasa, C.J., (Chairman), Regalado, and Puno, JJ., concur.

[1] Per Commissioner Domingo H. Zapanta, with Presiding Commissioner Edna Bonto-Perez and Commissioner Rustico L. Diokno concurring.

[2] Rollo, p. 46.

[3] NLRC-NCR-00-04-02025-90.

[4] Rollo, p. 33.

[5] Rollo, p. 66.

[6] Rollo, p. 23.

[7] Rollo, p. 32.

[8] De Ysasi III v. NLRC, 231 SCRA 173 (1994); Batangas Laguna Tayabas Company v. NLRC, 212 SCRA 792 (1992).

[9] Kingsize Mfg. Corp. v. NLRC, G.R. No. 110452-54, Nov. 24, 1994. See also A Prime Security Services, Inc. v. NLRC, 220 SCRA 142 (1993).

[10] Batangas Laguna Tayabas Bus Co. v. NLRC, supra note 8 at 800.

[11] Lagniton Sr. v. NLRC, 218 SCRA 457 (1993).

[12] 197 SCRA 471, 477 (1990).

[13] Santos v. NLRC, 154 SCRA 166 (1987).

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