

**RTG CONSTRUCTION, INC. AND/OR ROLITO GO/RUSSET
CONSTRUCTION AND DEVELOPMENT CORPORATION, PETITIONERS,
VS. ROBERTO FACTO, RESPONDENT.**

G.R. No. 163872. December 21, 2009

Ponente: PERALTA, J.

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PERALTA, J.:

Before the Court is a petition for review on certiorari under Rule 45 of the Rules of Court assailing the Decision[1] and Resolution[2] of the Court of Appeals (CA) dated August 21, 2003 and June 3, 2004, respectively, in CA-G.R. SP No. 73789.

The factual and procedural antecedents of the case are as follows:

Petitioner RTG Construction, Inc. is a domestic corporation engaged in the construction business. Petitioner Rolito Go is its principal stockholder.

In March 1982, private respondent Roberto Facto was employed by RTG Construction as helper mechanic. In 1985, he was promoted to the position of junior mechanic. In the course of Facto's employment, RTG Construction changed its corporate name to Russet Construction and Development Corporation.

During Facto's employment, more particularly between April 1997 and May 1998, he was suspended on four occasions because of various infractions ranging from absenteeism to creating disturbance in the workplace. Separate memoranda were issued on different dates apprising him of such suspensions.[3]

On June 7, 2000, Facto was again suspended on the ground that he went to work under the influence of alcohol. Pertinent portions of the Memorandum which was issued to Facto on the same date by reason of such offense read as follows:

Last Saturday June 03, 2000 – you reported to work obviously under the influence of intoxicating liquor. As per report of your immediate supervisor, you have some arguments and confrontation with regards to the assigned works to you. To avoid prolonged arguments, you were advised by your supervisor to go back home and return to work when you are on your normal condition, but you refused to do so. Your supervisor instructed our company guard to escort you out of the company premises. Under Article No. 6 of our company's rules and regulations "Any employee under the influence of liquor will not be permitted to work. The mere fact that you have violated the above-mentioned rules and regulations, you are hereby suspended for fourteen (14) working days without pay and will take effect tomorrow June 08 to June 24, 2000.

Repetition of same offense may cause your dismissal from the service.

Strict compliance is hereby enjoined.

(Sgd.)

ELSA A. GO

Officer-in-Charge[4]

On August 10, 2000, Facto again received a Memorandum of even date, this time informing him that he was terminated from his employment effective that same day. The Memorandum reads, thus:

MEMORANDUM

DATE : August 10, 2000

TO : Mr. ROBERTO FACTO

Jr. Mechanic

FROM : THE MANAGEMENT

SUBJECT : "TERMINATION"

This is in view of the memorandum issued to you last June 07, 2000, wherein you were given a final warning stating that repetition of same offense committed by you will cause your dismissal from service.

It seems that you had intentionally ignored said final warning and had committed the same offense again yesterday August 09, 2000. Therefore, the management has decided to terminate your services effective today, August 10, 2000.

(Sgd.)

ELSA A. GO

Officer-in-Charge[5]

On August 24, 2000, Facto files a Complaint[6] for illegal dismissal against RTG Construction and Go. The Complaint was later amended to implead Russet Construction.

Facto alleged in his Position Paper[7] that his termination was illegal, as the same was not based on just or authorized cause. He also alleged that he was denied his right to due process because he was not given the chance to explain his side.

Herein petitioners filed their Position Paper[8] contending that Facto's dismissal was not illegal. Petitioners claimed that since 1994, Facto had continuously committed violations of company rules, and that his termination from employment was due to this series of infractions.

Facto filed his Reply[9] asserting, among others, that the allegations of petitioners were all fabrications concocted by his supervisor who was mad at him.

The case was then submitted for decision.

On May 31, 2001, the Labor Arbiter handling the case rendered a Decision in favor of Facto, the dispositive portion of which reads as follows:

WHEREFORE, consistent with the foregoing tenor, judgment is hereby rendered finding the dismissal of complainant from employment illegal. Respondents RTG Construction, Inc., Russet Construction and Development Corporation and/or Rolito Go are ordered to pay complainant jointly and severally the amount of P128,227.69 representing his backwages and separation pay in lieu of reinstatement.

Respondents are further ordered to pay the sum of P7,682.50 as and by way of complainant's service incentive leave pay and proportionate 13[th] month pay for the year 2000, and an equivalent amount of P13,591.01 as complainant's ten percent (10%) attorney's fees based on the total judgment award of P135,910.19.

SO ORDERED.[10]

Aggrieved, petitioners filed an appeal with the National Labor Relations Commission (NLRC).

On February 21, 2002, the NLRC promulgated a Resolution[11] dismissing petitioners' appeal and affirming the Labor Arbiter's Decision in toto.

Petitioners filed a Motion for Reconsideration, but the NLRC denied it in an Order[12] dated July 30, 2002.

Petitioners then filed a special civil action for certiorari with the CA assailing the February 21, 2002 Resolution and July 30, 2002 Order of the NLRC.[13]

On August 21, 2003, the CA rendered judgment, disposing as follows:

WHEREFORE, premises considered, the decision of the Labor Arbiter dated 31 May 2001 is MODIFIED in that: (1) the dismissal of private respondent is LEGAL; (2) backwages, 13[th] month pay and service incentive leave pay are hereby awarded; plus (3) five (5%) percent of the total amount awarded herein, as and for attorney's fees.

For computing the amounts due, this case is REMANDED to the Labor Arbiter, who is directed to act with dispatch.

SO ORDERED.[14]

Unsatisfied with the CA Decision, petitioners filed a Motion for Reconsideration, but the CA denied it in its Resolution[15] dated June 3, 2004.

Hence, the instant petition raising the following assignment of errors:

- THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT THE NLRC DID NOT ABUSE ITS DISCRETION AND THAT PETITIONERS FAILED TO ADDUCE CONVINCING EVIDENCE IN SUPPORT THEREOF;
- THE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT THE FACTS AND FINDINGS OF THE NLRC ARE ALL IN ACCORDANCE WITH THE EVIDENCE; and
- THE COURT OF APPEALS COMMITTED A GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF OR IN EXCESS OF JURISDICTION IN AFFIRMING IN TOTO THE APPEALED DECISION OF THE NLRC DESPITE THE PRESENCE OF PALPABLE AND PATENT ERRORS THEREIN.[16]

Petitioners submit that the errors raised are interrelated; thus, these are jointly discussed.

Petitioners' main contention is that the CA erred in finding that they were guilty of violating respondent's right to due process. They argue that the series of memoranda issued to Facto clearly satisfies the requirements of fairness

and due process.

The Court is not persuaded.

Procedural due process in the dismissal of employees requires notice and hearing.[17] The employer must furnish the employee two written notices before termination may be effected.[18] The first notice apprises the employee of the particular acts or omissions for which his dismissal is sought, while the second notice informs the employee of the employer's decision to dismiss him.[19] The requirement of a hearing, on the other hand, is complied with as long as there is an opportunity to be heard; an actual hearing need not necessarily be conducted.[20]

In the present case, while petitioners complied with the second notice, apprising Facto of petitioner's decision to terminate him from his employment, the records are bereft of any evidence to prove that there was compliance with the first notice as well as with the requirement of a hearing.

Undoubtedly, the various memoranda issued to Facto between April 1997 and May 1998 did not satisfy the requirement of first notice, as these referred to different offenses and only served to inform him of his suspension. Neither did the Memorandum dated June 7, 2000 serve as the first notice contemplated under the law. The acts being referred to therein were committed on June 3, 2000, on the bases of which Facto was suspended. On the other hand, the Memorandum dated August 10, 2000, informing Facto of his dismissal, referred to a different act or violation that was allegedly committed only a day earlier or on August 9, 2000. Thus, Facto was never given the first notice, required by law, of the particular act or omission upon which his dismissal was based.

Moreover, petitioner failed to afford Facto his right to be heard in connection with the aforementioned charge. Section 2(d), Rule 1, Book VI of the Omnibus Rules Implementing the Labor Code states that:

Sec. 2. Security of Tenure. – x x x

(d) In all cases of termination of employment, the following standards of due process shall be substantially observed:

For termination of employment based on just causes as defined in Article 282 of the Labor Code:

x x x x x x x x

(i)

A written notice served on the employee specifying the ground or grounds for termination, and giving said employee reasonable opportunity within which to explain his side.

(ii)

A hearing or conference during which the employee concerned, with the assistance of counsel if he so desires, is given opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him.

(iii)

A written notice of termination served on the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination. (Emphases supplied.)

From the afore-cited provision, it is implicit that these requirements afford the employee an opportunity to explain

his side, respond to the charge, present his or her evidence and rebut the evidence presented against him or her. In the instant case, compliance with these requirements are absent.

Petitioners also question the award of backwages by the CA to Facto. In ruling that Facto was entitled to backwages by reason of petitioners' denial of his right to due process, the CA cited *Serrano v. National Labor Relations Commission*.^[21] However, the doctrine in the said case has already been abandoned. The prevailing rule now is enunciated in the leading case *Agabon v. National Labor Relations Commission*,^[22] wherein it was held that if the dismissal was for a just cause but procedural due process was not observed, the dismissal should be upheld; however, in lieu of payment of backwages, the employer shall be made liable to pay indemnity in the form of nominal damages, the amount of which is addressed to the sound discretion of the court, taking into account relevant circumstances. Prevailing jurisprudence sets the amount of nominal damages at P30,000.00, which the Court finds proper and sufficient in the present case.^[23]

Petitioners further contend that since Facto's dismissal was found by the CA to be legal, the appellate court should not have awarded service incentive leave pay, 13[th] month pay and attorney's fees.

The Court does not agree.

The Court notes that although it has already been settled with finality that Facto's dismissal was based on a just cause, this has no bearing on the issue of awarding him service incentive leave pay and 13[th] month pay. Prior to his dismissal, Facto performed work as a regular employee of petitioners, and he is entitled to the benefits provided under the law.^[24] Thus, in *Agabon*,^[25] even while the Court found that the dismissal was for a just cause, the employee was still awarded his monetary claims.

With respect to the award of service incentive leave pay, the first paragraph of Article 95 of the Labor Code provides that every employee who has rendered at least one year of service shall be entitled to a yearly incentive leave of five days with pay. In the present case, since Facto had been in the employ of petitioners for more than eight (8) years at the time that he was dismissed, he is undoubtedly entitled to service incentive leave benefits.

As regards the 13[th] month pay, an employee who has resigned, or whose services were terminated at any time before the payment of the 13[th] month pay, is entitled to this monetary benefit in proportion to the length of time he worked during the year, reckoned from the time he started working during the calendar year up to the time of his resignation or termination from the service.^[26]

Facto claims that he was not paid the above-mentioned benefits for certain periods during his employment. Where the employee alleges nonpayment, the general rule is that the burden rests on the employer to prove payment, rather than on the employee to prove nonpayment.^[27] The reason for the rule is that the pertinent personnel files, payrolls, records, remittances and similar documents — which will show that the 13[th] month pay, service incentive leave and other claims of workers, have been paid — are not in the possession of the employee, but in the custody and absolute control of the employer.^[28] Since, in the instant case, petitioners have not shown any proof of payment of the correct amount of 13[th] month pay and service incentive leave pay, the Court affirms the rulings of the Labor Arbiter, the NLRC and the CA, awarding Facto's monetary claims.

Finally, we find no error committed by the CA in affirming the award of attorney's fees. Settled is the rule that in actions for recovery of wages, or where an employee was forced to litigate and, thus, incur expenses to protect his rights and interests, a monetary award by way of attorney's fees is justifiable under Article 111 of the Labor Code;^[29] Section 8, Rule VIII, Book III of its Implementing Rules;^[30] and paragraph 7, Article 2208 of the Civil Code.^[31] The award of attorney's fees is proper, and there need not be any showing that the employer acted maliciously or in bad faith when it withheld the wages.^[32] There need only be a showing that the lawful wages

were not paid accordingly.[33]

WHEREFORE, the petition is PARTLY GRANTED. The Decision of the Court of Appeals dated August 21, 2003 is MODIFIED by deleting the award for backwages. In lieu thereof, petitioners are ORDERED to pay respondent nominal damages in the amount of Thirty Thousand Pesos (P30,000.00). In all other respects, the assailed Decision and Resolution of the Court of Appeals are AFFIRMED.

SO ORDERED.

Corona (Chairperson), Velasco, Jr., Nachura, and Del Castillo,[*] JJ., concur.

[1] Penned by Associate Justice Buenaventura J. Guerrero, with Associate Justices Renato C. Dacudao and Mario L. Guarina III, concurring; rollo, pp. 23-32.

[2] Id. at 43.

[3] See Annexes "C", "D", "E" and "G" to Respondent's Position Paper; records, pp. 22-24, 26.

[4] Records, p. 28.

[5] Id. at 30.

[6] Id. at 2.

[7] Id. at 8.

[8] Id. at 17.

[9] Id. at 79-80.

[10] Id. at 103-104.

[11] Id. at 325-327.

[12] Id. at 352-353.

[13] CA rollo, pp. 2-14.

[14] Id. at 136.

[15] Id. at 155.

[16] Rollo, p. 13.

[17] *Herminigildo Inguillo v. First Philippine Scales, Inc., et al.*, G.R. No. 165407, June 5, 2009, citing *Landtex Industries v. Court of Appeals*, 529 SCRA 631, 652 (2007).

[18] Id.

[19] Id.

[20] Id.

[21] 380 Phil. 416 (2000).

[22] 485 Phil. 248 (2004).

[23] *Faeldonia v. Tong Yak Groceries*, G.R. No. 182499, October 2, 2009; *Mantle Trading Services, Inc. and/or Bobby del Rosario v. NLRC and Pablo S. Madriaga*, G.R. No. 166705, July 28, 2009; *Inguillo v. First Philippine Scales, Inc., et al.*, *supra* note 17.

[24] *Mantle Trading Services, Inc., et al. v. NLRC, et al.*, *supra*.

[25] *Supra* note 22.

[26] See No. 6, Revised Guidelines on the Implementation of the 13[th] Month Pay Law (Presidential Decree No. 851); *Mantle Trading Services, Inc., et al. v. NLRC, et al.*, *supra* note 23.

[27] *Id.*

[28] *Id.*

[29] Art. 111. Attorney's fees. – (a) In cases of unlawful withholding of wages the culpable party may be assessed attorney's fees equivalent to ten percent of the amount of wages recovered. x x x

[30] SEC. 8. Attorney's fees – Attorney's fees in any judicial or administrative proceedings for the recovery of wages shall not exceed 10% of the amount awarded. The fees may be deducted from the total amount due the winning party.

[31] Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:

x x x x x x x x

(7) In actions for the recovery of wages of household helpers, laborers and skilled workers.

[32] *Baron Republic Theatrical v. Peralta*, G.R. No. 170525, October 2, 2009.

[33] *Id.*

[*] Additional member per Special Order No. 805 dated December 4, 2009.

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