

**EXODUS INTERNATIONAL CONSTRUCTION CORPORATION AND
ANTONIO P. JAVALERA, PETITIONERS, VS. GUILLERMO BISCOCHO,
FERNANDO PEREDA, FERDINAND MARIANO, GREGORIO BELLITA
AND MIGUEL BOBIL...**

G.R. No. 166109. February 23, 2011

Ponente: DEL CASTILLO, J.

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DEL CASTILLO, J.:

In illegal dismissal cases, it is incumbent upon the employees to first establish the fact of their dismissal before the burden is shifted to the employer to prove that the dismissal was legal.

This Petition for Review on Certiorari[1] assails the Decision[2] dated August 10, 2004 of the Court of Appeals (CA) in CA-G.R. SP No. 79800, which dismissed the petition for certiorari challenging the Resolutions dated January 17, 2003[3] and July 31, 2003[4] of the National Labor Relations Commission (NLRC) in NLRC NCR CASE Nos. 30-11-04656-00[5] and 30-12-04714-00.

Factual Antecedents

Petitioner Exodus International Construction Corporation (Exodus) is a duly licensed labor contractor for the painting of residential houses, condominium units and commercial buildings. Petitioner Antonio P. Javalera is the President and General Manager of Exodus.

On February 1, 1999, Exodus obtained from Dutch Boy Philippines, Inc. (Dutch Boy) a contract[6] for the painting of the Imperial Sky Garden located at Ongpin Street, Binondo, Manila. On July 28, 1999, Dutch Boy awarded another contract[7] to Exodus for the painting of Pacific Plaza Towers in Fort Bonifacio, Taguig City.

In the furtherance of its business, Exodus hired respondents as painters on different dates with the corresponding wages appearing opposite their names as hereunder listed:

NAME

DATE EMPLOYED

DAILY SALARY

1. Guillermo B. Biscocho

Feb. 8, 1999

P 222.00

2. Fernando S. Pereda

Feb. 8, 1999

235.00

3. Ferdinand M. Mariano

April 12, 1999

235.00

4. Gregorio S. Bellita

May 20, 1999

225.00

5. Miguel B. Bobillo

March 10, 2000

220.00

Guillermo Biscocho (Guillermo) was assigned at the Imperial Sky Garden from February 8, 1999 to February 8, 2000. Fernando Pereda (Fernando) worked in the same project from February 8, 1999 to June 17, 2000. Likewise, Ferdinand Mariano (Ferdinand) worked there from April 12, 1999 to February 17, 2000. All of them were then transferred to Pacific Plaza Towers.

Gregorio S. Bellita (Gregorio) was assigned to work at the house of Mr. Teofilo Yap in Ayala Alabang, Muntinlupa City from May 20, 1999 to December 4, 1999. Afterwards he was transferred to Pacific Plaza Towers.

Miguel B. Bobillo (Miguel) was hired and assigned at Pacific Plaza Towers on March 10, 2000.

On November 27, 2000, Guillermo, Fernando, Ferdinand, and Miguel filed a complaint[8] for illegal dismissal and non-payment of holiday pay, service incentive leave pay, 13th month pay and night-shift differential pay. This was docketed as NLRC NCR CASE No. 30-11-04656-00.

On December 1, 2000, Gregorio also filed a complaint[9] which was docketed as NLRC NCR CASE No. 30-12-04714-00. He claimed that he was dismissed from the service on September 12, 2000 while Guillermo, Fernando, Ferdinand, and Miguel were orally notified of their dismissal from the service on November 25, 2000.

Petitioners denied respondents' allegations. As regards Gregorio, petitioners averred that on September 15, 2000, he absented himself from work and applied as a painter with SAEI-EEI which is the general building contractor of Pacific Plaza Towers. Since then, he never reported back to work.

Guillermo absented himself from work without leave on November 27, 2000. When he reported for work the following day, he was reprimanded for being Absent Without Official Leave (AWOL). Because of the reprimand, he worked only half-day and thereafter was unheard of until the filing of the instant complaint.

Fernando, Ferdinand, and Miguel were caught eating during working hours on November 25, 2000 for which they were reprimanded by their foreman. Since then they no longer reported for work.

Ruling of the Labor Arbiter

On March 21, 2002, the Labor Arbiter rendered a Decision[10] exonerating petitioners from the charge of illegal dismissal as respondents chose not to report for work. The Labor Arbiter ruled that since there is neither illegal dismissal nor abandonment of job, respondents should be reinstated but without any backwages. She disallowed the claims for premium pay for holidays and rest days and nightshift differential pay as respondents failed to prove that actual service was rendered on such non-working days. However, she allowed the claims for holiday pay, service incentive leave pay and 13[th] month pay. The dispositive portion of the Labor Arbiter's Decision reads:

WHEREFORE, premises considered, respondents Exodus International Construction Corporation and/or Antonio Javalera are hereby ordered to reinstate complainants to their former positions as painters without loss of seniority rights and other benefits appurtenant thereto without any backwages.

Respondents are likewise hereby ordered to pay complainants the following:

1.

Guillermo Biscocho

P 1,968.75

-

Service Incentive Leave Pay

10,237.50

-

13[th] Month Pay

3,600.00

-

Holiday Pay

P 15,806.25

-

Sub-Total

+ 1,580.87

-

10%Attorney's Fees

P 17,386.86

Total

2.

Fernando Pereda

P 2,056.25

-

Service Incentive Leave Pay

10,692.50

-

13[th] Month Pay

3,525.00

-

Holiday Pay

P 16,273.75

-

Sub-Total

+ 1,627.37

-

10% Attorney's Fees

P 17,901.12

Total

3.

Miguel Bobillo

P 3,813.34

-

13[th] Month Pay

1,320.00

-

Holiday Pay

P 5,133.34

-

Sub-Total

+ 513.33

-

10% Attorney's Fees

P 5,646.67

Total

4.

Ferdinand Mariano

P 1,860.42

-

Service Incentive Leave Pay

9,674.19

-

13[th] Month Pay

3,055.00

-

Holiday Pay

P 14,589.61

-

Sub-Total

+ 1,458.96

-

10% Attorney's Fees

P 16,048.57

Total

5.

Gregorio Bellita

P 1,500.00

-

Service Incentive Leave Pay

7,800.00

-

13[th] Month Pay

2,700.00

-

Holiday Pay

P 12,000.00

-

Sub-Total

+ 1,200.00

-

10% Attorney's Fees

P 13,200.00

Total

or the total aggregate sum of Seventy Thousand, One Hundred Eighty Three and 23/100 (P70,183.23) Pesos, inclusive of the ten (10%) percent of the award herein by way of attorney's fees, all within ten (10) days from receipt hereof;

The rest of complainants' claims for lack of merit are hereby Dismissed.

SO ORDERED.[11]

Ruling of the National Labor Relations Commission

Petitioners sought recourse to the NLRC limiting their appeal to the award of service incentive leave pay, 13[th] month pay, holiday pay and 10% attorney's fees in the sum of P70,183.23.

On January 17, 2003, the NLRC dismissed the appeal. It ruled that petitioners, who have complete control over the records of the company, could have easily rebutted the monetary claims against it. All that it had to do was to present the vouchers showing payment of the same. However, they opted not to lift a finger, giving an impression that they never paid said benefits.

As to the award of attorney's fees, the NLRC found the same to be proper because respondents were forced to litigate in order to validate their claim.

The NLRC thus affirmed the Decision of the Labor Arbiter, viz:

Accordingly, premises considered, the decision appealed from is hereby AFFIRMED and the appeal DISMISSED for lack of merit.

SO ORDERED.[12]

Petitioners filed a Motion for Reconsideration[13] which was denied by the NLRC in a Resolution[14] dated July 31, 2003.

Ruling of the Court of Appeals

Aggrieved, petitioners filed with the CA a petition for certiorari. The CA through a Resolution[15] dated October 22, 2003, directed the respondents to file their comment. On December 4, 2003, respondents filed their comment.[16] On January 12, 2004, petitioners filed their reply.[17]

On August 10, 2004, the CA dismissed the petition and affirmed the findings of the Labor Arbiter and the NLRC. It opined that in a situation where the employer has complete control over the records and could thus easily rebut any monetary claims against it but opted not to lift any finger, the burden is on the employer and not on the complainants. This is so because the latter are definitely not in a position to adduce any documentary evidence,

the control of which being not with them.

However, in addition to the reliefs awarded to respondents in the March 21, 2002 Decision of the Labor Arbiter which was affirmed by the NLRC in a Resolution dated January 17, 2003, the petitioners were directed by the CA to solidarily pay full backwages, inclusive of all benefits the respondents should have received had they not been dismissed.

The dispositive portion of the CA Decision reads:

WHEREFORE, the instant petition for certiorari is dismissed. However, in addition to the reliefs awarded to private respondents in the decision dated March 21, 2002 of Labor Arbiter Aldas and resolution of the NLRC dated January 17, 2003, the petitioners are directed to solidarily pay private respondents full backwages, inclusive of all benefits they should have received had they not been dismissed, computed from the time their wages were withheld until the time they are actually reinstated. Such award of full backwages shall be included in the computation of public respondents' award of ten percent (10%) attorney's fees.

SO ORDERED.[18]

Petitioners moved for reconsideration,[19] but to no avail. Hence, this appeal anchored on the following grounds:

Issues

I.

The Honorable Court of Appeals erred and committed grave abuse of discretion in ordering the reinstatement of respondents to their former positions which were no longer existing because its findings of facts are premised on misappreciation of facts.

II.

The Honorable Court of Appeals also seriously erred and committed grave abuse of discretion in affirming the award of service incentive leave pay, 13th month pay, and holiday pay in the absence of evidentiary and legal basis therefor.

III.

The Honorable Court of Appeals likewise seriously erred and committed grave abuse of discretion in affirming the award of attorney's fees even in the absence of counsel on record to handle and prosecute the case.

IV.

The Honorable Court of Appeals also seriously erred and gravely abused its discretion in holding individual petitioner solidarily liable with petitioner company without specific evidence on which the same was based.[20]

Petitioners' Arguments

Petitioners contend that, contrary to their allegations, respondents were never dismissed from the service. If respondents find themselves no longer in the service of petitioners, it is simply because of their refusal to report for work. Further, granting that they were dismissed, respondents' prolonged absences is tantamount to abandonment which is a valid ground for the termination of their employment. As to respondents monetary claims, it is incumbent upon them to prove the same because the burden of proof rests on their shoulders. But since respondents failed to prove the same, their claims should be denied.

Respondents' Arguments

Respondents, in support of their claim that they were illegally dismissed, argue that as painters, they performed activities which were necessary and desirable in the usual business of petitioners, who are engaged in the business of contracting painting jobs. Hence, they are regular employees who, under the law, cannot just be dismissed from the service without prior notice and without any just or valid cause. According to the respondents, they did not abandon their job. For abandonment to serve as basis for a valid termination of their employment, it must first be established that there was a deliberate and unjustified refusal on their part to resume work. Mere absences are not sufficient for these must be accompanied by overt acts pointing to the fact that they simply do not want to work anymore. Petitioners failed to prove this. Furthermore, the filing of a complaint for illegal dismissal ably defeats the theory of abandonment of the job.

Our Ruling

The petition is partly meritorious.

"[T]his Court is not unmindful of the rule that in cases of illegal dismissal, the employer bears the burden of proof to prove that the termination was for a valid or authorized cause."^[21] But "[b]efore the [petitioners] must bear the burden of proving that the dismissal was legal, [the respondents] must first establish by substantial evidence" that indeed they were dismissed. "[I]f there is no dismissal, then there can be no question as to the legality or illegality thereof."^[22]

There was no dismissal in this case, hence, there is no question that can be entertained regarding its legality or illegality.

As found by the Labor Arbiter, there was no evidence that respondents were dismissed nor were they prevented from returning to their work. It was only respondents' unsubstantiated conclusion that they were dismissed. As a matter of fact, respondents could not name the particular person who effected their dismissal and under what particular circumstances.

In *Machica v. Roosevelt Services Center, Inc.*,^[23] this Court sustained the employer's denial as against the employees' categorical assertion of illegal dismissal. In so ruling, this Court held that:

The rule is that one who alleges a fact has the burden of proving it; thus, petitioners were burdened to prove their allegation that respondents dismissed them from their employment. It must be stressed that the evidence to prove this fact must be clear, positive and convincing. The rule that the employer bears the burden of proof in illegal dismissal cases finds no application here because the respondents deny having dismissed the petitioners.

In this case, petitioners were able to show that they never dismissed respondents. As to the case of Fernando, Miguel and Ferdinand, it was shown that on November 25, 2000, at around 7:30 a.m., the petitioners' foreman, Wenifredo Lalap (Wenifredo) caught the three still eating when they were supposed to be working already. Wenifredo reprimanded them and, apparently, they resented it so they no longer reported for work. In the case of Gregorio, he absented himself from work on September 15, 2000 to apply as a painter with SAEI-EEI, the general contractor of Pacific Plaza Towers. Since then he never reported back to work. Lastly, in the case of Guillermo, he absented himself without leave on November 27, 2000, and so he was reprimanded when he reported for work the following day. Because of the reprimand, he did not report for work anymore.

Hence, as between respondents' general allegation of having been orally dismissed from the service vis-a-vis those of petitioners which were found to be substantiated by the sworn statement of foreman Wenifredo, we are

persuaded by the latter. Absent any showing of an overt or positive act proving that petitioners had dismissed respondents, the latter's claim of illegal dismissal cannot be sustained. Indeed, a cursory examination of the records reveal no illegal dismissal to speak of.

There was also no abandonment of work on the part of the respondents.

The Labor Arbiter is also correct in ruling that there was no abandonment on the part of respondents that would justify their dismissal from their employment.

It is a settled rule that "[m]ere absence or failure to report for work x x x is not enough to amount to abandonment of work." [24] "Abandonment is the deliberate and unjustified refusal of an employee to resume his employment." [25]

In *Northwest Tourism Corporation v. Former Special 3rd Division of the Court of Appeals* [26] this Court held that "[t]o constitute abandonment of work, two elements must concur, [namely]:

- (1) the employee must have failed to report for work or must have been absent without valid or justifiable reason; and
- (2) there must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act."

"It is the employer who has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning." [27] It is therefore incumbent upon petitioners to ascertain the respondents' interest or non-interest in the continuance of their employment. However, petitioners failed to do so.

Respondents must be reinstated and paid their holiday pay, service incentive leave pay, and 13th month pay.

Clearly therefore, there was no dismissal, much less illegal, and there was also no abandonment of job to speak of. The Labor Arbiter is therefore correct in ordering that respondents be reinstated but without any backwages.

However, petitioners are of the position that the reinstatement of respondents to their former positions, which were no longer existing, is impossible, highly unfair and unjust. The project was already completed by petitioners on September 28, 2001. Thus the completion of the project left them with no more work to do. Having completed their tasks, their positions automatically ceased to exist. Consequently, there were no more positions where they can be reinstated as painters.

Petitioners are misguided. They forgot that there are two types of employees in the construction industry. The first is referred to as project employees or those employed in connection with a particular construction project or phase thereof and such employment is coterminous with each project or phase of the project to which they are assigned. The second is known as non-project employees or those employed without reference to any particular construction project or phase of a project.

The second category is where respondents are classified. As such they are regular employees of petitioners. It is clear from the records of the case that when one project is completed, respondents were automatically transferred to the next project awarded to petitioners. There was no employment agreement given to respondents which clearly spelled out the duration of their employment, the specific work to be performed and that such is made clear to them at the time of hiring. It is now too late for petitioners to claim that respondents are project employees

whose employment is coterminous with each project or phase of the project to which they are assigned.

Nonetheless, assuming that respondents were initially hired as project employees, petitioners must be reminded of our ruling in *Maraguinot, Jr. v. National Labor Relations Commission*[28] that "[a] project employee x x x may acquire the status of a regular employee when the following [factors] concur:

- There is a continuous rehiring of project employees even after cessation of a project; and
- The tasks performed by the alleged "project employee" are vital, necessary and indispensable to the usual business or trade of the employer."

In this case, the evidence on record shows that respondents were employed and assigned continuously to the various projects of petitioners. As painters, they performed activities which were necessary and desirable in the usual business of petitioners, who are engaged in subcontracting jobs for painting of residential units, condominium and commercial buildings. As regular employees, respondents are entitled to be reinstated without loss of seniority rights.

Respondents are also entitled to their money claims such as the payment of holiday pay, service incentive leave pay, and 13[th] month pay. Petitioners as the employer of respondents and having complete control over the records of the company could have easily rebutted the monetary claims against it. All that they had to do was to present the vouchers or payrolls showing payment of the same. However, they decided not to provide the said documentary evidence. Our conclusion therefore is that they never paid said benefits and therefore they must be ordered to settle their obligation with the respondents.

Respondents are also entitled to the payment of attorney's fees.

Even though respondents were not represented by counsel in most of the stages of the proceedings of this case, the award of attorney's fees as ruled by the Labor Arbiter, the NLRC and the CA to the respondents is still proper. In *Rutaquio v. National Labor Relations Commission*,[29] this Court held that:

It is settled that in actions for recovery of wages or where an employee was forced to litigate and, thus, incur expenses to protect his rights and interest, the award of attorney's fees is legally and morally justifiable.

In *Producers Bank of the Philippines v. Court of Appeals*[30] this Court ruled that:

Attorney's fees may be awarded when a party is compelled to litigate or to incur expenses to protect his interest by reason of an unjustified act of the other party.

In this case, respondents filed a complaint for illegal dismissal with claim for payment of their holiday pay, service incentive leave pay, and 13[th] month pay. The Labor Arbiter, the NLRC and the CA were one in ruling that petitioners did not pay the respondents their holiday pay, service incentive leave pay, and 13[th] month pay as mandated by law. For sure, this unjustified act of petitioners had compelled the respondents to institute an action primarily to protect their right

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