KING OF KINGS TRANSPORT, INC., CLAIRE DELA FUENTE, AND MELISSA LIM, PETITIONERS, VS. SANTIAGO O. MAMAC, RESPONDENT.

G.R. NO. 166208. June 29, 2007

Ponente: VELASCO, JR., J.

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VELASCO, JR., J.:

Is a verbal appraisal of the charges against the employee a breach of the procedural due process? This is the main issue to be resolved in this plea for review under Rule 45 of the September 16, 2004 Decision[1] of the Court of Appeals (CA) in CA-GR SP No. 81961. Said judgment affirmed the dismissal of bus conductor Santiago O. Mamac from petitioner King of Kings Transport, Inc. (KKTI), but ordered the bus company to pay full backwages for violation of the twin-notice requirement and 13th-month pay. Likewise assailed is the December 2, 2004 CA Resolution[2] rejecting KKTI's Motion for Reconsideration.

The Facts

Petitioner KKTI is a corporation engaged in public transportation and managed by Claire Dela Fuente and Melissa Lim.

Respondent Mamac was hired as bus conductor of Don Mariano Transit Corporation (DMTC) on April 29, 1999. The DMTC employees including respondent formed the Damayan ng mga Manggagawa, Tsuper at Conductor-Transport Workers Union and registered it with the Department of Labor and Employment. Pending the holding of a certification election in DMTC, petitioner KKTI was incorporated with the Securities and Exchange Commission which acquired new buses. Many DMTC employees were subsequently transferred to KKTI and excluded from the election.

The KKTI employees later organized the Kaisahan ng mga Kawani sa King of Kings (KKKK) which was registered with DOLE. Respondent was elected KKKK president.

Respondent was required to accomplish a "Conductor's Trip Report" and submit it to the company after each trip. As a background, this report indicates the ticket opening and closing for the particular day of duty. After submission, the company audits the reports. Once an irregularity is discovered, the company issues an "Irregularity Report" against the employee, indicating the nature and details of the irregularity. Thereafter, the concerned employee is asked to explain the incident by making a written statement or counter-affidavit at the back of the same Irregularity Report. After considering the explanation of the employee, the company then makes a determination of whether to accept the explanation or impose upon the employee a penalty for committing an infraction. That decision shall be stated on said Irregularity Report and will be furnished to the employee.

Upon audit of the October 28, 2001 Conductor's Report of respondent, KKTI noted an irregularity. It discovered that respondent declared several sold tickets as returned tickets causing KKTI to lose an income of eight hundred and ninety pesos. While no irregularity report was prepared on the October 28, 2001 incident, KKTI nevertheless

asked respondent to explain the discrepancy. In his letter,[3] respondent said that the erroneous declaration in his October 28, 2001 Trip Report was unintentional. He explained that during that day's trip, the windshield of the bus assigned to them was smashed; and they had to cut short the trip in order to immediately report the matter to the police. As a result of the incident, he got confused in making the trip report.

On November 26, 2001, respondent received a letter[4] terminating his employment effective November 29, 2001. The dismissal letter alleged that the October 28, 2001 irregularity was an act of fraud against the company. KKTI also cited as basis for respondent's dismissal the other offenses he allegedly committed since 1999.

On December 11, 2001, respondent filed a Complaint for illegal dismissal, illegal deductions, nonpayment of 13th-month pay, service incentive leave, and separation pay. He denied committing any infraction and alleged that his dismissal was intended to bust union activities. Moreover, he claimed that his dismissal was effected without due process.

In its April 3, 2002 Position Paper,[5] KKTI contended that respondent was legally dismissed after his commission of a series of misconducts and misdeeds. It claimed that respondent had violated the trust and confidence reposed upon him by KKTI. Also, it averred that it had observed due process in dismissing respondent and maintained that respondent was not entitled to his money claims such as service incentive leave and 13th-month pay because he was paid on commission or percentage basis.

On September 16, 2002, Labor Arbiter Ramon Valentin C. Reyes rendered judgment dismissing respondent's Complaint for lack of merit.[6]

Aggrieved, respondent appealed to the National Labor Relations Commission (NLRC). On August 29, 2003, the NLRC rendered a Decision, the dispositive portion of which reads:

> WHEREFORE, the decision dated 16 September 2002 is MODIFIED in that respondent King of Kings Transport Inc. is hereby ordered to indemnify complainant in the amount of ten thousand pesos (P10,000) for failure to comply with due process prior to termination.
>
> The other findings are AFFIRMED.
>
> SO ORDERED.[7]

Respondent moved for reconsideration but it was denied through the November 14, 2003 Resolution[8] of the NLRC.

Thereafter, respondent filed a Petition for Certiorari before the CA urging the nullification of the NLRC Decision and Resolution.

The Ruling of the Court of Appeals

Affirming the NLRC, the CA held that there was just cause for respondent's dismissal. It ruled that respondent's act in "declaring sold tickets as returned tickets x x x constituted fraud or acts of dishonesty justifying his dismissal."[9]

Also, the appellate court sustained the finding that petitioners failed to comply with the required procedural due process prior to respondent's termination. However, following the doctrine in Serrano v. NLRC,[10] it modified the award of PhP 10,000 as indemnification by awarding full backwages from the time respondent's employment was terminated until finality of the decision.

Moreover, the CA held that respondent is entitled to the 13th-month pay benefit.

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Hence, we have this petition.

The Issues

Petitioner raises the following assignment of errors for our consideration:

> Whether the Honorable Court of Appeals erred in awarding in favor of the complainant/private respondent, full back wages, despite the denial of his petition for certiorari.
>
> Whether the Honorable Court of Appeals erred in ruling that KKTI did not comply with the requirements of procedural due process before dismissing the services of the complainant/private respondent.
>
> Whether the Honorable Court of Appeals rendered an incorrect decision in that [sic] it awarded in favor of the complaint/private respondent, 13[th] month pay benefits contrary to PD 851.[11]

The Court's Ruling

The petition is partly meritorious.

The disposition of the first assigned error depends on whether petitioner KKTI complied with the due process requirements in terminating respondent's employment; thus, it shall be discussed secondly.

Non-compliance with the Due Process Requirements

Due process under the Labor Code involves two aspects: first, substantive—the valid and authorized causes of termination of employment under the Labor Code; and second, procedural—the manner of dismissal.[12] In the present case, the CA affirmed the findings of the labor arbiter and the NLRC that the termination of employment of respondent was based on a "just cause." This ruling is not at issue in this case. The question to be determined is whether the procedural requirements were complied with.

Art. 277 of the Labor Code provides the manner of termination of employment, thus:

> Art. 277. Miscellaneous Provisions.—x x x
>
> (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause without prejudice to the requirement of notice under Article 283 of this Code, the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer.

Accordingly, the implementing rule of the aforesaid provision states:

> SEC. 2. Standards of due process; requirements of notice.—In all cases of termination of employment, the following standards of due process shall be substantially observed:
>
> I. For termination of employment based on just causes as defined in Article 282 of the Code:
> (a) 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.
>
> (b) 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.

(c) 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. [13]

In case of termination, the foregoing notices shall be served on the employee's last known address.[14]

To clarify, the following should be considered in terminating the services of employees:

(1) The first written notice to be served on the employees should contain the specific causes or grounds for termination against them, and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. "Reasonable opportunity" under the Omnibus Rules means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense.[15] This should be construed as a period of at least five (5) calendar days from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint. Moreover, in order to enable the employees to intelligently prepare their explanation and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. A general description of the charge will not suffice. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Art. 282 is being charged against the employees.

(2) After serving the first notice, the employers should schedule and conduct a hearing or conference wherein the employees will be given the opportunity to: (1) explain and clarify their defenses to the charge against them; (2) present evidence in support of their defenses; and (3) rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, this conference or hearing could be used by the parties as an opportunity to come to an amicable settlement.

(3) After determining that termination of employment is justified, the employers shall serve the employees a written notice of termination indicating that: (1) all circumstances involving the charge against the employees have been considered; and (2) grounds have been established to justify the severance of their employment.

In the instant case, KKTI admits that it had failed to provide respondent with a "charge sheet."[16] However, it maintains that it had substantially complied with the rules, claiming that "respondent would not have issued a written explanation had he not been informed of the charges against him."[17]

We are not convinced.

First, respondent was not issued a written notice charging him of committing an infraction. The law is clear on the matter. A verbal appraisal of the charges against an employee does not comply with the first notice requirement. In Pepsi Cola Bottling Co. v. NLRC,[18] the Court held that consultations or conferences are not a substitute for the actual observance of notice and hearing. Also, in Loadstar Shipping Co., Inc. v. Mesano,[19] the Court, sanctioning the employer for disregarding the due process requirements, held that the employee's written explanation did not excuse the fact that there was a complete absence of the first notice.

Second, even assuming that petitioner KKTI was able to furnish respondent an Irregularity Report notifying him of his offense, such would not comply with the requirements of the law. We observe from the irregularity reports against respondent for his other offenses that such contained merely a general description of the charges against him. The reports did not even state a company rule or policy that the employee had allegedly violated. Likewise, there is no mention of any of the grounds for termination of employment under Art. 282 of the Labor Code. Thus, KKTI's "standard" charge sheet is not sufficient notice to the employee.

Third, no hearing was conducted. Regardless of respondent's written explanation, a hearing was still necessary in order for him to clarify and present evidence in support of his defense. Moreover, respondent made the letter merely to explain the circumstances relating to the irregularity in his October 28, 2001 Conductor's Trip Report. He was unaware that a dismissal proceeding was already being effected. Thus, he was surprised to receive the November 26, 2001 termination letter indicating as grounds, not only his October 28, 2001 infraction, but also his previous infractions.

Sanction for Non-compliance with Due Process Requirements

As stated earlier, after a finding that petitioners failed to comply with the due process requirements, the CA awarded full backwages in favor of respondent in accordance with the doctrine in Serrano v. NLRC.[20] However, the doctrine in Serrano had already been abandoned in Agabon v. NLRC by ruling that if the dismissal is done without due process, the employer should indemnify the employee with nominal damages.[21]

Thus, for non-compliance with the due process requirements in the termination of respondent's employment, petitioner KKTI is sanctioned to pay respondent the amount of thirty thousand pesos (PhP 30,000) as damages.

Thirteenth (13th)-Month Pay

Section 3 of the Rules Implementing Presidential Decree No. 851[22] provides the exceptions in the coverage of the payment of the 13th-month benefit. The provision states:

> SEC. 3. Employers covered.—The Decree shall apply to all employers except to:
>
> x x x x
>
> e) Employers of those who are paid on purely commission, boundary, or task basis, and those who are paid a fixed amount for performing a specific work, irrespective of the time consumed in the performance thereof, except where the workers are paid on piece-rate basis in which case the employer shall be covered by this issuance insofar as such workers are concerned.

Petitioner KKTI maintains that respondent was paid on purely commission basis; thus, the latter is not entitled to receive the 13th-month pay benefit. However, applying the ruling in Philippine Agricultural Commercial and Industrial Workers Union v. NLRC,[23] the CA held that respondent is entitled to the said benefit.

It was erroneous for the CA to apply the case of Philippine Agricultural Commercial and Industrial Workers Union. Notably in the said case, it was established that the drivers and conductors praying for 13th- month pay were not paid purely on commission. Instead, they were receiving a commission in addition to a fixed or guaranteed wage or salary. Thus, the Court held that bus drivers and conductors who are paid a fixed or guaranteed minimum wage in case their commission be less than the statutory minimum, and commissions only in case where they are over and above the statutory minimum, are entitled to a 13th-month pay equivalent to one-twelfth of their total earnings during the calendar year.

On the other hand, in his Complaint,[24] respondent admitted that he was paid on commission only. Moreover, this fact is supported by his pay slips[25] which indicated the varying amount of commissions he was receiving each trip. Thus, he was excluded from receiving the 13th-month pay benefit.

WHEREFORE, the petition is PARTLY GRANTED and the September 16, 2004 Decision of the CA is MODIFIED by deleting the award of backwages and 13th-month pay. Instead, petitioner KKTI is ordered to indemnify respondent the amount of thirty thousand pesos (PhP 30,000) as nominal damages for failure to comply with the due process requirements in terminating the employment of respondent.

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No costs.

SO ORDERED.

Quisumbing, (Chairperson), Carpio, Carpio-Morales, and Tinga, JJ., concur.

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[1] Rollo, pp. 59-72. The Decision was penned by Associate Justice Delilah Vidallon-Magtolis and concurred in by Associate Justices Eliezer R. Delos Santos and Arturo D. Brion.

[2] Id. at 84.

[3]Id. at 102.

[4]Id. at 100-101.

[5] Records, pp. 58-63.

[6]Rollo, p. 115.

[7]Id. at 151.

[8]Id. at 152.

[9]Id. at 67.

[10] GR No. 117040, January 27, 2000, 323 SCRA 445.

[11] Rollo, p. 207; original in capital letters.

[12] Agabon v. National Labor Relations Commission, GR No. 158693, November 17, 2004, 442 SCRA 573, 612.

[13] The same provision is also found in Section 2(d) of Rule I of Book VI of the Omnibus Rules Implementing the Labor Code.

[14] Omnibus Rules Implementing the Labor Code, Book V, Rule XXIII.

[15]Ruffy v. National Labor Relations Commission, GR No. 84193, February 15, 1990, 182 SCRA 365, 369-370.

[16]Rollo, p. 212.

[17] Id. at 215.

[18]GR No. 101900, June 23, 1992, 210 SCRA 277.

[19] GR No. 138956, August 7, 2003, 408 SCRA 478.

[20]Supra note 10

[21]Supra note 12, at 617.

[22] "Requiring All Employers to Pay Their Employees a 13th-Month Pay (13th-Month Pay Law)," (1976).

[23] GR No. 107994, August 14, 1995, 247 SCRA 256.

[24]Records, pp. 2-3.

[25] Id. at 28-33.

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