PANFILO MACASERO, PETITIONER, VS. SOUTHERN INDUSTRIAL GASES PHILIPPINES AND/OR NEIL LINDSAY, RESPONDENTS.

G.R. No. 178524. January 30, 2009

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

The services of Panfilo Macasero (petitioner) were engaged by Southern Industrial Gases, Philippines (respondent company) as Carbon Dioxide Bulk Tank Escort since September 1995. For every 24-hour work rendered by him in escorting respondent company's tanks while they were being shipped from Cebu and to other areas in the Visayas and Mindanao, petitioner earned P200, aside from receiving transportation, accommodation, and meal allowances.

On January 5, 1999, petitioner filed before the National Labor Relations Commission (NLRC) Regional Arbitration Branch No. VII a Complaint[1] against respondent company and/or its co-respondent General Manager Neil Lindsay, for illegal dismissal with prayer for reinstatement, backwages, unpaid benefits, and attorney's fees, alleging that in September 1998, he was advised that his services were no longer needed and was in fact prevented from entering the company premises.

In their Position Paper,[2] respondents contended that no employer-employee relationship existed between respondent company and petitioner because his services were only occasionally required, he having worked 287 days in the 3 years that he was connected with it; that petitioner was never subject to respondent company's supervision and/or control; and that petitioner had no fixed work schedule, hence, at most, he was an "unsupervised pakiaw or task worker."

By Decision of December 7, 1999, the Labor Arbiter held that petitioner was a regular employee but that he was not illegally dismissed, no particulars of the fact of dismissal having been proffered. The Labor Arbiter thereupon ordered respondent to pay petitioner separation pay equivalent to one month salary for every year of service plus 13[th] month pay.

Petitioner appealed to the NLRC, questioning the computation of the monetary award and the non-award of backwages, attorney's fees, and costs of litigation.

Respondents appealed too, insisting that no employer-employee relationship existed between respondent company and petitioner who it claimed was actually an independent contractor or, at best, a task worker.

By Decision[3] dated October 28, 2002, the NLRC affirmed the labor arbiter's ruling that petitioner was a regular employee and that there was no illegal dismissal. It, however, modified the Arbiter's computation of separation pay.

Acting on the separate motions for reconsideration of the parties, the NLRC, by Resolution[4] of December 15, 2003, modified the computation of the separation pay to one half month salary for every year of service, thus, lowering the amount to P15,700.

By Decision[5] dated August 10, 2006, the appellate court affirmed the NLRC modified Decision, holding that there was no evidence to show that petitioner's employment was terminated, much less that the same was illegal. Citing CALS Poultry Supply v. Roco,[6] the appellate court held that petitioner failed to prove the fact of dismissal. Petitioner's motion for reconsideration having been denied by Resolution dated March 16, 2007, the present recourse was filed.

Petitioner contends that it is respondent company, as the employer, which has the burden of proving that he was not dismissed, or if dismissed, that the dismissal was not illegal; and that he having proved that he was dismissed and that it was illegal, he is entitled to backwages and reinstatement, or separation pay of one month for every year of service, not just one half month, there being no allegation nor proof of serious financial reverses on the part of respondent company.

In their Comment,[7] respondents aver that the petition raises questions of fact and maintain that no employer-employee relationship existed between respondent company and petitioner.

In any event, relying on Chong Guan Trading v. National Labor Relations Commission,[8] respondents contend that petitioner was never given a notice of dismissal nor was he prevented from returning to work, hence, there could be no illegal dismissal.

At the outset, the Court notes that while it is axiomatic that only questions of law can be raised in a petition for review on certiorari under Rule 45, the same is not without exceptions, thus:

> Rule 45 of the Rules of Civil Procedure provides that only questions of law shall be raised in an appeal by certiorari before this Court. This rule, however, admits of certain exceptions, namely, (1) when the findings are grounded entirely on speculations, surmises, or conjectures; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) when there isa grave abuse of discretion; (4) when the judgment is based on misappreciation of facts; (5) when the findings of fact are conflicting; (6) when in making its findings, the same are contrary to the admissions of both appellant and appellee; (7) when the findings are contrary to those of the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; and (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record.[9] (Emphasis supplied)

As shall be discussed shortly, a review of the records of the case and the bases of the findings of the Arbiter, the NLRC and the appellate court shows that the petition comes within the purview of the above-highlighted exceptions, hence, the Court resolves to give it due course.

There being uniformity in the findings of the labor tribunals and the appellate court that an employer-employee relationship existed between petitioner and respondent company and that he was a regular employee, the only issue left for determination is whether petitioner was dismissed and, if in the affirmative, if it was legally effected.

Respondents reiterate their claim that its act of not providing work to petitioner starting September 1995 was "due principally to a slump in the market and the dwindling demand by the Visayas-Mindanao clients."[10] This claim was credited by the Arbiter, the NLRC and the appellate court. The Court does not.

In illegal dismissal cases, the onus of proving that the employee was not dismissed or, if dismissed, that the dismissal was not illegal, rests on the employer, failure to discharge which would mean that the dismissal is not justified and, therefore, illegal.[11]

Indeed, a party alleging a critical fact must support his allegation with substantial evidence, for any decision based on unsubstantiated allegation cannot stand without offending due process. [12]

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Respondents' claim that there was a business slump, hence, petitioner could not be given any escorting assignment has remained just that. The records are bereft of any documentary evidence showing that it was indeed suffering losses or a decline in orders which justified its admitted failure to give assignments to petitioner.

The appellate court ratiocinated that before respondent company could be burdened with proving the legality of dismissal, "there has to be details of acts attributed to [respondents] constituting illegal dismissal if only to give [petitioner] the opportunity to adduce evidence to defend himself from or disprove occurrence of such act or inaction," but that petitioner failed to do so. Respondents must not, however, only rely on the seeming weakness of petitioner's evidence, but must stand on the merits of their own defense.

The Court finds incongruous the crediting by the labor tribunals and the appellate court of respondents' claim that petitioner must prove the fact of his dismissal with particularity and at the same time accept respondents' above-said unsubstantiated claim that business slump prevented it from giving petitioner escorting assignment.

While both labor tribunals and the appellate court held that petitioner failed to prove the fact of his dismissal, they oddly ordered the award of separation pay in lieu of reinstatement in light of respondent company's "firm stance that [herein petitioner] was not its employee [vis a vis] the unflinching assertion of [herein petitioner] that he was which do[es] not create a fertile ground for reinstatement." It goes without saying that the award of separation pay is inconsistent with a finding that there was no illegal dismissal, for under Article 279[13] of the Labor Code and as held in a catena of cases, an employee who is dismissed without just cause and without due process is entitled to backwages and reinstatement or payment of separation pay in lieu thereof:

> Thus, an illegally dismissed employee is entitled to two reliefs: backwages and reinstatement. The two reliefs provided are separate and distinct.In instances where reinstatement is no longer feasible because of strained relations between the employee and the employer, separation pay is granted. In effect, an illegally dismissed employee is entitled to either reinstatement, if viable, or separation pay if reinstatement is no longer viable, and backwages.
>
> The normal consequences of respondents' illegal dismissal, then, are reinstatement without loss of seniority rights, and payment of backwages computed from the time compensation was withheld up to the date of actual reinstatement. Where reinstatement is no longer viable as an option, separation pay equivalent to one (1) month salary for every year of service should be awarded as an alternative. The payment of separation pay is in addition to payment of backwages.[14] (Emphasis and underscoring supplied)

And in Velasco v. National Labor Relations Commission:[15]

> The accepted doctrine is that separation pay may avail in lieu of reinstatement if reinstatement is no longer practical or in the best interest of the parties. Separation pay in lieu of reinstatement may likewise be awarded if the employee decides not to be reinstated.

In fine, the Court finds that petitioner was, contrary to the conclusion of the labor tribunals and the appellate court, dismissed without just cause.

Petitioner having been compelled to litigate in order to seek redress, he is entitled, as he had prayed early on, to the award of attorney's fees equivalent to 10% of the total monetary award.

Respecting petitioner's claim for moral and exemplary damages, there being no clear showing that the dismissal was effected in a malevolent or oppressive manner, petitioner is not entitled thereto.

WHEREFORE, the petition is GRANTED. The challenged Decision of the Court of Appeals is SET ASIDE, and a new one ENTERED declaring illegal the dismissal of petitioner, and accordingly ordering respondent company to reinstate petitioner, Panfilo Macasero, to his former position as Carbon Dioxide Bulk Tank Escort without loss

of seniority rights and other privileges, and to pay him full backwages and other benefits from the time his compensation was withheld (from September, 1998) up to his actual reinstatement, as well as attorney's fees equivalent to 10% of the monetary award. Should reinstatement be no longer possible due to strained relations, respondent company is ordered to grant separation pay at one (1) month per year of service from 1995-1998.

SO ORDERED.

Quisumbing, (Chairperson), Corona[*], Tinga, and Chico-Nazario[**], JJ., Concur.

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[*]Additional member per Special Order No. 558 dated January 15, 2009 in lieu of Justice Presbitero J. Velasco, Jr. who is on official leave.

[**]Additional member per Special Order No. 562 dated January 21, 2009 in lieu of Justice Arturo D. Brion who is on leave.

[1] NLRC records, p. 1.

[2]Id. at 22-42.

[3]Id. at 181-188. Penned by Commissioner Edgardo M. Enerlan and concurred in by Presiding Commissioner Irenea L. Ceniza and Commissioner Oscar S. Uy.

[4]Id. at 249-252. Penned by Commissioner Edgardo M. Enerlan and concurred in by Presiding Commissioner Gerardo C. Nograles and Commissioner Oscar S. Uy.

[5] Penned by Associate Justice Marlene Gonzales-Sison and concurred in by Associate Justices Panfilo Abarintos and Priscilla Baltazar-Padilla. CA rollo, pp. 240-246..

[6] G.R. No. 150660, July 30, 2002, 385 SCRA 479. 485.

[7] Rollo, pp. 138-193.

[7]G.R. No. 81471, April 26, 1989, 172 SCRA 831.

[9] Uy v. Villanueva, G.R. No. 157851, June 29, 2007, 526 SCRA 73, 83-84.

[10] Vide respondents' Position Paper, NLRC records, p. 33.

[11] AFI International Trading Corporation v. Lorenzo, G.R. No. 173256, October 9, 2007, 535 SCRA 347, 349.

[12] Vide Great Southern Maritime Services Corporation v. Acuña, G.R. No. 140189,February 28, 2005, 452 SCRA 422, 437.

[13] Art. 279. Security of Tenure. - x x x

In cases of regular employment the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.

[14] Mt. Carmel College v. Resuena, G.R. No. 173076, October 10, 2007, 535 SCRA 518, 541.

[15]G.R. No. 161694, June 26, 2006, 492 SCRA 686, 699.

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