

**GENESIS TRANSPORT SERVICE, INC. AND RELY L. JALBUNA,
PETITIONERS, VS. UNYON NG MALAYANG MANGGAGAWA NG
GENESIS TRANSPORT (UMMG), AND JUAN TAROY, RESPONDENTS.**

G.R. No. 182114. April 05, 2010

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

Respondent Juan Taroy was hired on February 2, 1992 by petitioner Genesis Transport Service, Inc. (Genesis Transport) as driver on commission basis at 9% of the gross revenue per trip.

On May 10, 2002, Taroy was, after due notice and hearing, terminated from employment after an accident on April 20, 2002 where he was deemed to have been driving recklessly.

Taroy thus filed on June 7, 2002 a complaint [1] for illegal dismissal and payment of service incentive leave pay, claiming that he was singled out for termination because of his union activities, other drivers who had met accidents not having been dismissed from employment.

Taroy later amended [2] his complaint to implead his herein co-respondent Unyon ng Malayang Manggagawa ng Genesis Transport (the union) as complainant and add as grounds of his cause of action unfair labor practice (ULP), reimbursement of illegal deductions on tollgate fees, and payment of service incentive leave pay.

Respecting the claim for refund of illegal deductions, Taroy alleged that in 1997, petitioner started deducting from his weekly earnings an amount ranging from P160 to P900 representing toll fees, without his consent and written authorization as required under Article 113 of the Labor Code and contrary to company practice; and that deductions were also taken from the bus conductor's earnings to thus result to double deduction.

Genesis Transport countered that Taroy committed several violations of company rules for which he was given warnings or disciplined accordingly; that those violations, the last of which was the April 20, 2002 incident, included poor driving skills, tardiness, gambling inside the premises, use of shabu, smoking while driving, insubordination and reckless driving;[3] and that Taroy's dismissal was on a valid cause and after affording him due process.

In support of its claim that Taroy was afforded due process, Genesis Transport cited his preventive suspension; the directive for him to explain in writing[4] his involvement in the April 20, 2002 accident; and the conduct of a hearing during which the expert opinion of its Maintenance Department, as well as an independent entity - the Columbian Motors Corporation,[5] was considered in the determination of whether the accident was due to his reckless driving or, as he contended, to faulty brakes.

Genesis Transport went on to claim that as the result of the investigation[6] showed that the cause of the accident was Taroy's reckless driving, and his immediate past infraction of company rules on January 25, 2001 - smoking inside the bus - already merited a final warning,[7] it validly terminated[8] his employment.

By Decision[9] of June 30, 2004, the Labor Arbiter found that Genesis Transport discharged the burden of proof that Taroy's dismissal was on a valid cause; that while Taroy's past infractions can not be used against him, still, they showed habituality; and that Genesis Transport complied with the twin requirements of notice and hearing, hence, Taroy's dismissal was effected with due process.

As to the charge of ULP, the Labor Arbiter ruled that the respondent union failed to prove that Taroy's dismissal was due to his union membership and/or activities.

On the claim for service incentive leave pay, the Labor Arbiter ruled that Taroy was not entitled thereto since he was a field personnel paid on commission basis.

With respect to Taroy's claim for refund, however, the Labor Arbiter ruled in his favor for if, as contended by Genesis Transport, tollgate fees form part of overhead expense, why were not expenses for fuel and maintenance also charged to overhead expense. The Labor Arbiter thus concluded that "it would appear that the tollgate fees are deducted from the gross revenues and not from the salaries of drivers and conductors, but certainly the deduction thereof diminishes the take home pay of the employees."

Thus, the Labor Arbiter disposed:

WHEREFORE, premises considered, judgment is hereby rendered dismissing instant complaint for illegal dismissal for lack of merit. However, respondents are hereby ordered to refund to complainant the underpayment/differential due him as a result of the deduction of the tollgate fees from the gross receipts. Actual computation shall be based on and limited to the evidence at hand, which is in the amount of P5,273.16. For having been compelled to litigate, respondents are hereby also ordered to pay complainant 10% attorney's fees. (underscoring supplied)

Both parties appealed to the National Labor Relations Commission (NLRC), petitioners questioning the order for them to refund "underpayment" and pay attorney's fees, and respondents questioning the Labor Arbiter's failure to pass on the propriety of his preventive suspension, dismissal of his complaint for constructive dismissal and ULP, and failure to award him service incentive leave pay.

By Resolution of December 29, 2005, the NLRC affirmed the Labor Arbiter's decision with modification. It deleted the award to Taroy of attorney's fees. It brushed aside Taroy's claim of having been illegally suspended, it having been raised for the first time on appeal.

The parties filed their respective motions for reconsideration which were denied.

On respondents' appeal, the Court of Appeals, by the assailed Decision of August 24, 2007, partly granted the same, it ruling that petitioner Genesis Transport violated Taroy's statutory right to due process when he was preventively suspended for more than thirty (30) days, in violation of the Implementing Rules and Regulations of the Labor Code.

The appellate court thus held Taroy to be entitled to nominal damages in the amount of P30,000. And it reinstated the Labor Arbiter's order for petitioners to refund Taroy "the underpayment."

Their motion for reconsideration having been denied by Resolution of March 13, 2008, petitioners filed the present recourse.

On the issue of refund of "underpayment," petitioners aver that cases of similar import involving also the respondent union have been decided with finality in their favor by the NLRC, viz: UMMGT v. Genesis Transport Service, Inc. (NLRC RAB III Case No. 04-518-03) and Reyes v. Genesis Transport Service, Inc. (NLRC CA No. 04862-04); and Santos v. Genesis Transport Service, Inc. (NLRC CA No. 041869-04).

Petitioners thus pray that the Court accord respect to the rulings of the NLRC in the above-cited cases and apply the principle of *res judicata vis-à-vis* the present case.

On the appellate court's award of nominal damages, petitioners reiterate that Taroy was not entitled thereto, his dismissal having been based on a valid cause, and he was accorded due process.

Further, petitioners note that the issue of preventive suspension, on which the appellate court based its ruling that it violated Taroy's right to due process, was raised only on appeal to the NLRC, hence, it should not be considered.

Finally, petitioners assert that the delay in the service of the Notice of Dismissal (dated May 10, 2002, but received by Taroy only on June 4, 2002) was due to Taroy's premeditated refusal to acknowledge receipt thereof.

The petition is partly meritorious.

Absent proof that the NLRC cases cited by petitioners have attained finality, the Court may not consider them to constitute *res judicata* on petitioners' claim for refund of the "underpayment" due Taroy.

Neither may the Court take judicial notice of petitioners' claim that the deduction of tollgate fees from the gross earnings of drivers is an accepted and long-standing practice in the transportation industry. *Expertravel & Tours, Inc. v. Court of Appeals* [10] instructs:

Generally speaking, matters of judicial notice have three material requisites: (1) the matter must be one of common and general knowledge; (2) it must be well and authoritatively settled and not doubtful or uncertain; and (3) it must be known to be within the limits of the jurisdiction of the court. The principal guide in determining what facts may be assumed to be judicially known is that of notoriety. Hence, it can be said that judicial notice is limited to facts evidenced by public records and facts of general notoriety. Moreover, a judicially noticed fact must be one not subject to a reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questionable.

Things of "common knowledge," of which courts take judicial matters coming to the knowledge of men generally in the course of the ordinary experiences of life, or they may be matters which are generally accepted by mankind as true and are capable of ready and unquestioned demonstration. Thus, facts which are universally known, and which may be found in encyclopedias, dictionaries or other publications, are judicially noticed, provided, they are of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. As the common knowledge of man ranges far and wide, a wide variety of particular facts have been judicially noticed as being matters of common knowledge. But a court cannot take judicial notice of any fact which, in part, is dependent on the existence or non-existence of a fact of which the court has no constructive knowledge. (emphasis supplied)

None of the material requisites for the Court to take judicial notice of a particular matter was established by petitioners.

Albeit the amounts representing tollgate fees were deducted from gross revenues and not directly from Taroy's commissions, the labor tribunal and the appellate court correctly held that the withholding of those amounts reduced the amount from which Taroy's 9% commission would be computed. Such a computation not only marks a change in the method of payment of wages, resulting in a diminution of Taroy's wages in violation of Article 113 *vis-à-vis* Article 100 of the Labor Code, as amended. It need not be underlined that without Taroy's written consent or authorization, the deduction is considered illegal.

Besides, the invocation of the rule on "company practice" is generally used with respect to the grant of additional

benefits to employees, not on issues involving diminution of benefits.

Respecting the issue of statutory due process, the Court holds that Taroy's right thereto was not violated. Sections 8 and 9 of Rule XXIII, Book V of the Implementing Rules and Regulations of the Labor Code provide:

Section 8. Preventive suspension. - The employer may place the worker concerned under preventive suspension if his continued employment poses a serious and imminent threat to the life or property of the employer or his co-workers.

x x x x

Section 9. Period of Suspension - No preventive suspension shall last longer than thirty (30) days. The employer shall thereafter reinstate the worker in his former or in a substantially equivalent position or the employer may extend the period of suspension provided that during the period of extension, he pays the wages and other benefits due to the worker. In such case, the worker shall not be bound to reimburse the amount paid to him during the extension if the employer decides, after completion of the hearing, to dismiss the worker. (emphasis supplied)

To the appellate court, Genesis Transport's act of "placing Taroy under preventive suspension for more than thirty (30) days was a predetermined effort to dismiss [him] from employment, negating the argument that the delay in the service of the notice of dismissal was not an issue and that the same was allegedly due to Taroy's inaction to receive the same." Hence, the appellate court concluded, while there was a just and valid cause for the termination of his services, his right to statutory due process was violated to entitle him to nominal damages, following *Agabon v. NLRC*. [11]

The propriety of Taroy's preventive suspension was raised by respondents for the first time on appeal, however. The well-settled rule, which also applies in labor cases, is that issues not raised below cannot be raised for the first time on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by the reviewing court, as they cannot be raised for the first time at that late stage. Basic considerations of due process impel the adoption of this rule.[12]

In any event, what the Rules require is that the employer act on the suspended worker's status of employment within the 30-day period by concluding the investigation either by absolving him of the charges, or meting the corresponding penalty if liable, or ultimately dismissing him. If the suspension exceeds the 30-day period without any corresponding action on the part of the employer, the employer must reinstate the employee or extend the period of suspension, provided the employee's wages and benefits are paid in the interim.

In the present case, petitioner company had until May 20, 2002 to act on Taroy's case. It did by terminating him through a notice dated May 10, 2002, hence, the 30-day requirement was not violated even if the termination notice was received only on June 4, 2002, absent any showing that the delayed service of the notice on Taroy was attributable to Genesis Transport.

Taroy's statutory due process not having been violated, he is not entitled to the award of nominal damages.

WHEREFORE, the challenged Court of Appeals' Decision of August 24, 2007 and Resolution[13] of March 13, 2008 are AFFIRMED, with the MODIFICATION that the award of nominal damages to respondent Juan Taroy is DELETED.

SO ORDERED.

Puno, C.J., (Chairperson), Leonardo-De Castro, Bersamin, and Villarama, Jr., JJ., concur.

[1] NLRC records, pp. 1-2.

[2] Id. at 7-9.

[3] See various memoranda on infractions, id. at 38-60.

[4] See memorandum dated April 20, 2002, id. at 61.

[5] See memorandum and letter, id. at 77-80.

[6] See written explanation, various minutes/reports as to incident, id. at 62-76.

[7] See memorandum dated January 29, 2001, id. at 60.

[8] See "Desisyon sa Aksidente ng Bus #887" dated May 10, 2002, id. at 81-86.

[9] Id. at 123-136. Penned by Labor Arbiter Leandro M. Jose.

[10] G.R. No. 152392, 26 May 2005, 459 SCRA 147, 162.

[11] G.R. No. 158693, November 17, 2004, 442 SCRA 573.

[12] Pag-Asa Steel Works v. Court of Appeals, G.R. No. 166647, March 31, 2006, 486 SCRA 475.

[13] Rollo, pp. 53-54. Penned by Associate Justice Josefina Guevara-Salonga and concurred in by Associate Justices Ramon R. Garcia and Vicente Q. Roxas.

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