

C.P. REYES HOSPITAL AND ANGELINE M. REYES, PETITIONERS, VS. GERALDINE M. BARBOSA, RESPONDENT.*G.R. No. 228357. April 16, 2024*

Ponente: KHO, JR., J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-228357/>**KHO, JR., J.:**

This resolves the Petition for Review on Certiorari[1] filed by petitioners C.P. Reyes Hospital (C.P. Reyes Hospital) and Angeline M. Reyes[2] (Reyes; collectively, C.P. Reyes Hospital et al.) assailing the Decision[3] dated April 18, 2016 and the Resolution[4] dated November 17, 2016 of the Court of Appeals (CA) in CA-G.R. SP No. 139468, which reversed and set aside the Decision[5] of the National Labor Relations Commission (NLRC) dated September 30, 2014 in NLRC LAC No. 08-002077-14, and accordingly, declared respondent Geraldine M. Barbosa (Barbosa) to have been illegally dismissed by C.P. Reyes Hospital. In turn, the NLRC reversed the Decision[6] of the Labor Arbiter (LA) dated June 24, 2014 in NLRC NCR Case No. RAB IV-01-00097-14-B, which found Barbosa to have been illegally dismissed.

The Facts

On January 22, 2014, Barbosa filed a Complaint[7] for illegal dismissal against C.P. Reyes Hospital et al., praying for reinstatement with full backwages and the award of moral and exemplary damages, as well as attorney's fees.

In her Position Paper,[8] Barbosa alleged that she applied for the position of Training Supervisor with C.P. Reyes Hospital. In September 2013, she was instructed to sign a probationary employment contract[9] for a period of six months, from September 4, 2013 to March 4, 2014. Under the contract, Barbosa would train as a Staff Nurse for the first two months; as Ward Head Nurse and Supervisor for the next two months; and finally, as Training Supervisor for the last two months. The contract required Barbosa to "get or maintain an average of a passing score equivalent to 80% (Satisfactory)."[10] The contract also provided that "[f]ailure to meet the reasonable standard set by this Hospital may warrant the penalty of termination of [Barbosa's] employment." [11]

On October 25, 2013, Barbosa alleged that Human Resource Manager Reyes and Nursing Director Joel M. Lirio (Lirio) told her that she would not be made Training Supervisor because the Intensive Care Unit (ICU) Head Nurse had also applied for the position and was supposedly more qualified than her.[12]

On November 27, 2013, Barbosa received a Notice to Explain[13] from Lirio directing her to explain why no disciplinary action should be taken against her for being absent without official leave (AWOL) on November 4, 7, and 8, 2013. On the same day, Reyes told Barbosa that she will not be made a regular employee.[14]

In a Letter[15] dated November 28, 2013, Barbosa explained that she was able to notify the supervisor on duty regarding her November 4 absence, and that for the absences on November 7 and 8, she submitted a medical certificate, as well as the requisite leave forms.[16]

On November 29, 2013, Barbosa received a Letter[17] from Reyes formally terminating her probationary employment. The Letter stated:

MS. GERALDINE M. BARBOSA

Staff Nurse – Probationary

As stated on your Probationary Contract, continuous employment shall ripen only upon showing of satisfactory performance during your training period. Unfortunately, the negative performance feedback received by this office due to attitude including the attendance records reflects [sic] that you have failed to meet the reasonable standards set by the Hospital. In this regard, please be informed that your probationary contract shall end on the stated date, without renewal or regularization.

Contract Period: September 4, 2013 – March 3, 2014[18]

End Contract: December 30, 2013

....

(signed)

ANGELINE M. REYES

HR Manager

(signed)

PAUL ADRIAN M. REYES, MHA

Hospital Administrator[19]

C.P. Reyes Hospital confirmed that it hired Barbosa on a probationary basis as Training Supervisor. During her employment, Barbosa's evaluators noted that while she gained passing marks,[20] she "lacked initiative, demonstrated poor time management, needed improvement with documentation[,] and more familiarization with common nursing procedure." [21] C.P. Reyes Hospital also alleged that Barbosa was very unreceptive of her performance evaluations and that she even accused her evaluators of deliberately giving her low marks, apparently influenced by a certain "[Ma'am] Flor." [22] Further, they claim that due process was complied with in Barbosa's termination because her employment was probationary, and that the two-notice rule does not apply to probationary employees. [23] Finally, C.P. Reyes Hospital alleged that Barbosa had 13 [24] absences in the course of her employment, some of which were unauthorized. Thus, C.P. Reyes Hospital deemed it proper to terminate the employment of Barbosa. [25]

The LA Ruling

In a Decision [26] dated June 24, 2014, the LA ruled that Barbosa was illegally dismissed, and accordingly, awarded her the amounts of PHP 60,000.00 as backwages and PHP 10,000.00 as separation pay. All other claims were dismissed for lack of basis. [27] The LA considered the passing marks of Barbosa as proof that she successfully met C.P. Reyes Hospital's standards and ruled that she sufficiently explained her alleged unauthorized absences.

Consequently, C.P. Reyes Hospital appealed [28] to the NLRC.

The NLRC Ruling

In a Decision [29] dated September 30, 2014, the NLRC reversed the LA Decision and dismissed the Complaint for lack of merit. [30]

The NLRC held that the LA erred in considering only the numerical grades given to Barbosa and not the feedback and comments from her evaluators, especially the summary of the evaluations written by Lirio. It also ruled that the termination was done properly as the law requires only a written notice of termination served on the employee within a reasonable time from the effective date of termination. [31]

Barbosa filed a Motion for Reconsideration,[32] which was denied in a Resolution[33] dated November 28, 2014. She then filed a Petition for Certiorari[34] under Rule 65 of the Rules of Court before the CA.

The CA Ruling

In a Decision[35] dated April 18, 2016, the CA granted the Petition for Certiorari and reversed the ruling of the NLRC. It reinstated the LA Decision with the following modifications on the monetary awards:

(a)

Separation pay was awarded in lieu of reinstatement, equivalent to one month pay;

(b)

Backwages was awarded, computed from the time of Barbosa's illegal dismissal on November 29, 2013 up to the finality of the Decision; and

(c)

The monetary awards shall earn legal interest at the rate of 6% per annum computed from November 29, 2013 until fully paid.[36]

The CA found that C.P. Reyes Hospital deviated from its own policy of evaluating probationary employees on their first, third, and fifth month of employment when it terminated Barbosa only two months into her employment. It also noted that Barbosa's evaluators, despite their negative feedbacks, saw it fit to give her satisfactory marks for her performance.[37]

On the issue of Barbosa's absences, the CA held that some of them should not be counted against her as they occurred before the start of her probationary employment. At any rate, the CA ruled that these absences were not substantial enough to be considered habitual or proof of gross neglect of duty.[38]

In a Resolution[39] dated November 17, 2016, the CA denied C.P. Reyes Hospital et al.'s Motion for Reconsideration for lack of merit.

Hence, this Petition.

The Issues Before the Court

The core issues for the Court's resolution are whether the CA: (a) correctly ascribed grave abuse of discretion on the part of the NLRC, and accordingly, declared Barbosa's dismissal to be illegal; and (b) correctly awarded backwages computed from the time of Barbosa's illegal dismissal up to finality of the Decision, with legal interest of 6% per annum from the time of illegal dismissal until fully paid.

The Court's Ruling

The Petition is denied.

"[T]o justify the grant of the extraordinary remedy of certiorari, petitioners must satisfactorily show that the court or quasi-judicial authority gravely abused the discretion conferred upon it. Grave abuse of discretion connotes judgment exercised in a capricious and whimsical manner that is tantamount to lack of jurisdiction. To be considered 'grave,' discretion must be exercised in a despotic manner by reason of passion or personal hostility, and must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined by or to act at all in contemplation of law." [40]

Thus, case law instructs that "[i]n labor cases, grave abuse of discretion may be ascribed to the NLRC when its findings and conclusions are not supported by substantial evidence, which refers to that amount of relevant

evidence that a reasonable mind might accept as adequate to justify a conclusion. Thus, if the NLRC's ruling has basis in the evidence and the applicable law and jurisprudence, then no grave abuse of discretion exists and the CA should so declare and, accordingly, dismiss the petition." [41]

Guided by the foregoing considerations, the Court finds that the CA correctly ruled that the NLRC committed grave abuse of discretion when it held that C.P. Reyes Hospital validly terminated Barbosa's employment. Hence, its reversal of the NLRC's ruling is proper.

I.

Barbosa was a probationary employee

The Labor Code, [42] as amended, permits the hiring of employees on a probationary basis, viz.:

ART. 296. [281] Probationary Employment. — Probationary employment shall not exceed six (6) months from the date the employee started working, unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a probationary basis may be terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. An employee who is allowed to work after a probationary period shall be considered a regular employee.

Probationary employment exists where the employee, upon their engagement, is made to undergo a trial period. During said period, the employer determines the employee's fitness to qualify for regular employment based on reasonable standards, which are made known to the employee at the time of engagement. [43]

In her submissions to the LA, [44] the NLRC, [45] the CA, [46] and to this Court, [47] Barbosa consistently maintained that she was a regular employee of C.P. Reyes Hospital who was "confronted with a contract requiring her to undergo training." [48] Nevertheless, she admitted to proceeding with her employment, as evidenced by her signature on the employment contract. [49]

C.P. Reyes Hospital, on the other hand, argued that Barbosa's employment remained probationary up to her dismissal and never ripened into regularization. The status of Barbosa's employment as probationary was upheld by the labor tribunals and the CA. On this score, the Court agrees with their factual findings.

The relevant provision in Barbosa's employment contract states:

Dear Ms. Barbosa,

As a standard Hospital procedure, we present you with these terms and conditions of your employment, for your information and conformity:

- PROBATIONARY PERIOD – your employment shall commence on a probationary status, beginning as of September 4, 2013 for a period of [s]ix (6) months thereafter, and subject to regularization review at the end of the [s]ix (6) months or on or before March 4, 2014... [50] (Emphases in the original)

Barbosa assented to these terms by signing the employment contract. While she insists on her regular status as an employee, she nonetheless conceded that she was "required to undergo probationary employment despite the fact that it was not part of the oral agreement between the parties," [51] and that she "decided to push through with the employment" even though she was "[a]ghast [at] what happened and unmindful of the rationale behind undergoing such trainings." [52]

There is no doubt from the wordings of the contract that there is a six--month trial period to which Barbosa acceded. During that period, Barbosa's employment was clearly probationary in nature.

II.

Barbosa was illegally dismissed from her employment

The termination of probationary employment must be for any of the following grounds: (1) just and authorized causes, or (2) failure to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of engagement.[53]

In this case, C.P. Reyes Hospital insists that Barbosa's probationary employment was validly terminated, contending that not only did Barbosa fail to meet the standards for regularization but her "frequent absenteeism" also constituted a just cause for dismissal.

C.P. Reyes Hospital's contentions are without merit.

a.

The CA correctly ruled that the NLRC committed grave abuse of discretion when it found that Barbosa failed to meet the standards for regularization

The NLRC and the CA differed in their conclusions on the legality of Barbosa's dismissal.

The NLRC held that the dismissal is valid and that the LA "failed to appreciate the numerical result of the evaluations together with the comments and explanations of the evaluators." [54] The NLRC relied on the December 10, 2013 evaluation [55] made by Lirio as proof that Barbosa failed to qualify for regularization.

On the other hand, the CA found that Barbosa was illegally dismissed. It cited Barbosa's passing grades as proof that she qualified to move on to the next stage of her probationary employment. It gave more weight to the numerical results of the evaluations over the comments and explanations of the evaluators because the Staff Nurse Performance Evaluation forms they filled out are "comprehensive enough to include all aspects of performance for which a trainee should be evaluated on." [56]

The Court agrees with the CA's factual findings.

Section 7 of Barbosa's employment contract states:

7. TRAINING AND EVALUATION – you are required to maintain a satisfactory performance based on performance evaluation. You should get or maintain an average of a passing score equivalent to 80% (Satisfactory). Failure to meet the reasonable standard set by this Hospital may warrant the penalty of termination of your employment. [57]

C.P. Reyes Hospital argues that dismissal due to failure to meet the 80% grade requirement is merely a possibility, as the contract states that it may warrant the penalty of dismissal. From there, C.P. Reyes Hospital concludes that it may also consider "other factors apart from the performance evaluation in determining whether a probationary employee is to be terminated." [58] These "other factors," as earlier stated, are those set out in Lirio's

evaluation, the routine written examination on the generic names of drugs, and Barbosa's absences.

C.P. Reyes Hospital's reasoning is without merit.

To reiterate, probationary employment may be terminated, among other grounds, when the employee fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of engagement.

If an employer opts to dismiss an employee on the ground of failure to qualify, the law requires that the reasonable standards for qualification must have been communicated to the employee at the time of engagement.[59] This is to apprise them of what they need to accomplish and how they need to perform their job, failing at which, they will not be regularized.

However, there are exceptions to the rule requiring the communication of reasonable standards to a probationary employee: first, in occupations that are self-descriptive in nature, such as maids, cooks, drivers, and messengers;[60] and second, the Court has ruled that standards of basic knowledge and common sense need not be spelled out to the employee, and the rule on communication should not be used to exculpate employees who act in a manner contrary to either.[61] In these cases, the Court ruled that there was no need to explicitly communicate the reasonable standards that the employees failed to meet.

C.P. Reyes Hospital claims it is allowed to terminate its probationary employees based on factors outside of the reasonable performance standards communicated to Barbosa.[62] The Court finds this argument erroneous. Unless these other factors constitute just or authorized causes—themselves allowable grounds for termination—or constitute an exception to the rule laid out by jurisprudence as stated in the previous paragraph, such that there is no need for the C.P. Reyes Hospital et al. to inform Barbosa of them, then they may not be considered as valid grounds for termination.

Relevantly, C.P. Reyes Hospital may not take refuge in these jurisprudential exceptions since Barbosa's position as Training Supervisor is not self-descriptive in nature, governed as it was by a detailed Job Description[63] and subject to evaluation on several competencies and qualities as provided by C.P. Reyes Hospital, as will be discussed. At the same time, the factors that C.P. Reyes Hospital cited as grounds for dismissal are not matters of basic knowledge or common sense. Rather, they refer to Barbosa's interpersonal relationships with her co-workers and her professional competence.

At any rate, this Court finds that the "other factors" C.P. Reyes Hospital cited are actually not outside the standards communicated to Barbosa. The CA correctly found that the Staff Nurse Performance Evaluation forms[64] filled out by Barbosa's evaluators were comprehensive enough to include the concerns addressed by Lirio. Relevantly, these standards are also set out in the employment contract and the accompanying Job Description.

The Staff Nurse Performance Evaluation forms have three major components: (I) Personal Qualifications and Attributes, comprising 14 items on which Barbosa was evaluated using a score from 1 to 3, 3 being the highest; (II) Standards of Clinical Nursing Practice, comprising 35 items; and (III) Professionalism and Documentation, comprising 9 items.

C.P. Reyes Hospital quotes the following portion of Lirio's evaluation, which it claims are "other factors" aside from the standards communicated to Barbosa:

Evaluations were made based on our Nursing Service Protocols which comprises [sic] skills, knowledge and work attitude. To summarize the evaluation report: skill-wise she needs to give more attention that [sic] she should have an [sic] initiative and time management in doing the task of routine nursing care. It was also a

recommendation that she refamiliarize herself in doing routine and common nursing procedure which she ignored by reading the patient's chart unnecessarily repeatedly and noticing other things in the area time after time despite constantly being reminded by her senior nurses of the time and the task that needs to be done. Peer evaluation on work attitude showed that she lacks points on certain nursing care aspects such as not giving the medications and feeding the patient thru the NGT on time because she needs to be kept told over and over again by her senior nurses of the time or letting the other nurses do the work for her; not taking the patient's vital sign[s] just because she said to her senior nurse that she is tired; unable to carry out the doctor's orders completely and on time because she cannot prioritize her work and instead she depends on the other nurses on duty to do the task for her, and if it's not complete, she even blames them for not completing the task when it was her patient's chart in the first place thus it is her responsibility to complete the task. She failed to establish trust and respect for her superiors and co[-]workers because she uses her seniority on the younger nurses and that she kept on implying that she knows already everything because she was an affiliated clinical instructor in our institution placing her on insubordination.[65]

Carefully reading and comparing the evaluation forms and Lirio's evaluation quoted above, the Court finds that the concerns raised in the latter are indeed already part of the standards set out in the former.

For instance, Lirio's evaluation stated that Barbosa failed to establish trust and respect for her superiors. However, Part I, Item 4(c) of the evaluation form rates Barbosa on her "ability to develop and maintain satisfactory interpersonal and inter-professional relationships with clients and co-workers." [66] Item 4(1) also rates her ability to be "respectful to patients, superiors, and co-workers." [67] Thus, trust and respect for one's co-workers form part of one's interpersonal and interprofessional relationship with them.

Further, Lirio's evaluation recommended that Barbosa refamiliarize herself with routine and common nursing procedures. Part I, Item 4(a) of the evaluation forms rates Barbosa on her possession of clinical competencies. [68] Also, the entire Part II rates her application of standard clinical practices. [69] Thus, Barbosa's knowledge of generic names of certain drug brands, notwithstanding the examination given to her, is included in the clinical competencies for which she was evaluated.

In short, Barbosa's evaluators gave her passing marks on the very same concerns raised by Lirio. The records indisputably show that Barbosa's average scores in the two months of her evaluation were 81.68% for the first month and 82.59% for the second month. In fact, Barbosa's average score improved from the first month to the second month.

The Court, in *Tamson's Enterprises, Inc. v. Court of Appeals*, [70] proclaimed that an employer's power to terminate probationary employment is subject to certain limitations, to wit:

First, this power must be exercised in accordance with the specific requirements of the contract. Second, the dissatisfaction on the part of the employer must be real and in good faith, not feigned so as to circumvent the contract or the law; and third, there must be no unlawful discrimination in the dismissal. In termination cases, the burden of proving just or valid cause for dismissing an employee rests on the employer. [71]

The fact that C.P. Reyes Hospital, through its evaluators, gave satisfactory marks to Barbosa then proceeded to dismiss her based on factors that it claims to be outside the reasonable standards made known to her, leads this Court to conclude that C.P. Reyes Hospital's dissatisfaction is not genuine. This is highlighted by the fact that Lirio's evaluation dated December 10, 2013, which embodies C.P. Reyes Hospital's basis for dismissing Barbosa, was issued almost two weeks after Barbosa was dismissed on November 29, 2013. The CA put it correctly:

In addition, [John] Malabanan's [72] and Lirio's explanation letters, dated December 2 and 10, 2013, respectively, cannot likewise be considered because no performance evaluation accompanied them and they were made subsequent to [Barbosa's] receipt of her termination letter. Accordingly, their evaluations cannot be

used as determining factors to validate [C.P. Reyes Hospital's] claim of unsatisfactory performance on account of the negative comments on her attitude. These are obviously mere afterthoughts to give a semblance of truth to the alleged negative attitude of [Barbosa].[73] (Emphasis supplied)

The clear fact remains that Barbosa's evaluators, tasked by C.P. Reyes Hospital with evaluating her performance during the probationary period, saw it fit to give her satisfactory marks despite any misgivings they or C.P. Reyes Hospital might have about her performance thus far.

Even if the Court sets aside the numerical grades given by Barbosa's evaluators and reads their explanations,[74] each of them had given no statement or indication that would justify giving Barbosa a failing grade. This is the reason why the evaluators each gave her a passing grade, except for one, who gave Barbosa a grade of 79.76%. At any rate, for purposes of regularization, an average score of at least 80% is required by C.P. Reyes Hospital, which she obtained.

Thus, the CA was correct in ascribing grave abuse of discretion on the part of the NLRC in holding that Barbosa failed to meet the standards for regularization. Her dismissal on this ground is factually baseless.

b.

The CA correctly ruled that the NLRC committed grave abuse of discretion when it ruled that the supposed absences of Barbosa were a just cause to terminate her employment

C.P. Reyes Hospital relies on another ground to justify the dismissal of Barbosa—her supposed absenteeism. It argues that Barbosa was absent for 12 days during her probationary employment, or one-sixth of her two-month probationary employment.[75] This, to C.P. Reyes Hospital, is a just cause for dismissal.[76]

The Court finds that C.P. Reyes Hospital's claim of Barbosa's absenteeism is not supported by the records. On this issue, the CA's discussion in its Decision is worth reproducing here:

Record shows that there is no truth to [C.P. Reyes Hospital et al.'s] claim that [Barbosa] incurred twelve (12) absences in four (4) months. [Barbosa's] alleged absences on September 1 to 3 should not be counted as the probationary period started only on September 4. For November 1 and 2, [Barbosa] was part of the ICU's skeletal force, per the November 27, 2013 minutes. [Barbosa] was AWOL on November 4, 7, and 8 and on sick leave from November 14 to 17. Verily, [Barbosa] was only absent eight times (8x), one (1) in October with no reason provided, three (3) AWOL in November, and four (4) with approved sick leaves.

[Barbosa] cannot now be penalized for her absence in October as she was never given a notice to explain when the same occurred, thereby giving the impression that [C.P. Reyes Hospital et al.] condoned the said infraction. The same is true with her four (4) absences for they were accompanied by sick leave forms and were never mentioned in the November 27, 2013 Notice to Explain. The only issue the [C.P. Reyes Hospital et al.] had with her alleged poor attendance record was the three (3)-day AWOL mentioned in the Notice to Explain. To reiterate, [Barbosa] had already satisfactorily explained the circumstances surrounding her absences. Moreover, the penalty of dismissal is indubitably too harsh and disproportionate to the infraction she committed. There is also no allegation in the Staff Nurse Performance Evaluation forms that her supposed absences have affected her work to the point that she has grossly neglected her duties. Absent such evidence of gross and habitual neglect of her duties, [Barbosa's] dismissal from her probationary employment due to poor attendance record has no leg to stand on.[77]

The CA ruled that Barbosa was able to explain her three-day absence on November 4, 7, and 8. Further, the CA also pointed to C.P. Reyes Hospital's Code of Conduct to show that the penalty of dismissal in this case was too

severe. In the Code of Conduct, the penalty for being AWOL is a written warning on the first offense, a two-day suspension on the second offense, and dismissal only upon the fifth offense. Finally, the CA held that Barbosa's alleged absences on September 1 and 2 could not be attributed to her as they happened when she was no yet even employed by C.P. Reyes Hospital. In the November 1 and 2 absences, it was shown that she was not absent at all but was instead part of the skeleton workforce. Only one absence went unexplained (in October) for which no notice to explain was issued to Barbosa.[78]

Thus, this Court sustains the findings of the CA that these supposed absences cannot be considered a just cause to terminate Barbosa's employment.

III.

In dismissing Barbosa on the ground of her supposed absenteeism, C.P. Reyes Hospital grossly violated her right to due process

a.

Requirement of due process in cases of termination for just cause

The standards of due process for termination of regular employees (or the "two-notice rule") equally apply to probationary employees in cases of termination for just cause.[79] Thus, the rules state:

SECTION 2. Security of Tenure. —

For termination of employment based on just causes as defined in Article [288] of the Labor Code:

- (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.[80]

The evidence on record shows that C.P. Reyes Hospital served Barbosa a written notice[81] dated November 27, 2013, or the first notice, directing her to explain her absences without leave on November 4, 7, and 8, 2013. Barbosa, on the other hand, immediately sent her explanation the following day.[82] No notices were served regarding the absences on the other dates.

The November 29, 2013 termination Letter issued to Barbosa referred to her "attendance records"[83] as one of the grounds for her termination, with no specific dates of absences mentioned. Thus, as regards her November 4, 7, and 8 absences, it appears that a second notice, the termination notice, was served on her. However, as found by the CA, Barbosa was able to satisfactorily explain her absence on those dates.

Regarding Barbosa's other absences alleged by C.P. Reyes Hospital, given the fact that no first notice was served, it appears to this Court that the ground was used by C.P. Reyes Hospital merely as an afterthought, at the very least, in order to strengthen its position as regards Barbosa's termination. It bears emphasizing that C.P. Reyes

Hospital relied on the total number of Barbosa's absences in claiming that she was guilty of frequent absenteeism. It argued that she was absent 12 days out of the 72 days she worked.[84] Thus, for failing to issue a first notice on the other absences of Barbosa, C.P. Reyes Hospital failed to observe procedural due process in terminating her employment. To reiterate, in case the dismissal of the probationary employee is for a just cause, the employer is required to serve two notices: the first, specifying the ground/s for termination and giving the employee the opportunity to explain, and the second, informing the employee of the decision of the employer to terminate their employment. In this case, C.P. Reyes Hospital clearly did not issue a first notice regarding Barbosa's absences, except for the November 4, 7, and 8 absences, which Barbosa was able to satisfactorily explain.

Thus not only was Barbosa's dismissal on this ground (absenteeism) procedurally defective, but it was also without substantive basis, as explained earlier. C.P. Reyes Hospital clearly failed to observe substantive and procedural due process in dismissing Barbosa due to her supposed absences. Thus, her termination on this ground is illegal.

IV.

Monetary awards due to Barbosa

An illegally dismissed employee is entitled to reinstatement without loss of seniority rights and other privileges, full backwages inclusive of allowances, and other benefits or their monetary equivalent computed from the time their compensation was withheld from them up to the time of their actual reinstatement.[85]

Backwages pertain to "compensation that should have been earned but were not collected because of the unjust dismissal." [86] Stated differently, backwages represent "reparation for the illegal dismissal of an employee based on earnings which the employee would have obtained, either by virtue of a lawful decree or order, as in the case of a wage increase under a wage order, or by rightful expectation, as in the case of one's salary or wage." [87] The law provides that the award of backwages is reckoned from the date of illegal or constructive dismissal until the employee's actual reinstatement.

The CA awarded Barbosa "separation pay, in lieu of reinstatement, equivalent to one (1) month pay, and backwages computed from the time of her illegal dismissal on November 29, 2013 up to the finality of this decision, with legal interest of six percent (6%) per annum on the monetary awards computed from November 29, 2013 until fully paid." [88]

It is on this issue where the C.P. Reyes Hospital, on one hand, and the CA, as well as Barbosa, on the other, diverge in their application and understanding of the law.

In awarding backwages from November 29, 2013 up to the finality of its Decision, the CA, recognizing that reinstatement is no longer possible due to the strained relations between Barbosa and C.P. Reyes Hospital, [89] relied on the rulings of the Court in *Univac Development, Inc. v. Soriano*, [90] *Aliling v. Feliciano*, [91] and in *Lopez v. Hon. Javier*. [92] Barbosa, in her Comment [93] to the Petition, also relied on the Court's ruling in *Univac*. [94]

C.P. Reyes Hospital et al., on the other hand, also recognizing that reinstatement is no longer possible, invoked the Court's ruling in *Robinsons Galleria/Robinsons Supermarket Corporation v. Ranchez*, [95] where the Court awarded backwages only up to the end date of the probationary employment contract.

a.

Conflicting reckoning periods in computing backwages of illegally dismissed probationary employees

As stated earlier, the CA invoked the Court's rulings in *Univac*, *Aliling*, and *Lopez* when it ruled that Barbosa's backwages must be awarded up to the finality of the Decision. Preliminarily, the Court finds *Aliling* and *Univac* to be inapplicable here because in those cases, the respective employments were ultimately held to be regular, whereas in this case, it is undisputed that Barbosa's employment status was and remained probationary.

On the other hand, the factual milieu in *Lopez* is similar to this case. Macario Lopez (Macario) was appointed General Manager of La Union Transport Services Cooperative on a probationary basis. The NLRC found that he was illegally dismissed but limited the award of backwages to the unexpired portion of his probationary employment contract, finding that "[h]ad he not been dismissed[,] [Macario] would have completed his probationary period." [96]

The Court upheld the finding of illegal dismissal but ruled that Macario was entitled to backwages up to the finality of its Decision. The Court arrived at this conclusion by holding, first, that the constitutional guarantee of security of tenure [97] is extended to employees regardless of whether they are regular or probationary, and second, that the Labor Code provision awarding backwages from the time compensation was withheld up to the time of actual reinstatement applies to probationary employees. The provision as amended by Republic Act No. 6715, states:

SEC. 34. Article 279 of the Labor Code is hereby amended to read as follows:

"ART. 279. Security of Tenure. – 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."

Noting that Macario's reinstatement "would not be conducive to industrial harmony," [98] the Court then ruled that backwages must be awarded up to the finality of its Decision instead.

In its 2003 Decision in *Cebu Marine Beach Resort v. NLRC*, [99] the Court affirmed *Lopez*. The employer in that case assailed the CA's award of backwages up to the finality of its Decision, arguing that by such award, the appellate court unilaterally extended the employees' probationary contracts. The Court rejected this argument, citing the "quite explicit" ruling in *Lopez* that probationary employees are entitled to their full backwages up to their actual reinstatement. It then affirmed the CA's award of backwages up to the finality of the Decision in view of the infeasibility of reinstatement. [100]

In 2010, the Court once again cited and affirmed *Lopez* in the case of *SHS Perforated Materials, Inc. v. Diaz*, [101] ruling that "probationary employees who are unjustly dismissed during the probationary period are entitled to reinstatement and payment of full backwages and other benefits and privileges from the time they were dismissed up to their actual reinstatement." [102] Since the employee's reinstatement was no longer feasible, it upheld the CA Decision awarding backwages up to the date of the employee's "supposed actual reinstatement." [103]

A year later, the Court decided differently in *Robinsons Galleria* which *C.P. Reyes Hospital* cited as its basis in assailing the CA's award of backwages. The Court ruled that backwages for an illegally or constructively

dismissed probationary employee must be computed only up to the end of their probationary employment contract, and not the employee's actual reinstatement, viz.:

In this case, since respondent was a probationary employee at the time she was constructively dismissed by petitioners, she is entitled to separation pay and backwages. Reinstatement of respondent is no longer viable considering the circumstances.

However, the backwages that should be awarded to respondent shall be reckoned from the time of her constructive dismissal until the date of the termination of her employment, i.e., from October 30, 1997 to March 14, 1998. The computation should not cover the entire period from the time her compensation was withheld up to the time of her actual reinstatement. This is because respondent was a probationary employee, and the lapse of her probationary employment without her appointment as a regular employee of petitioner Supermarket effectively severed the employer-employee relationship between the parties.[104] (Emphasis supplied)

In *Woodridge School v. Pe Benito*[105] and *Magis Young Achievers' Learning Center v. Manalo*,[106] decided in 2008 and 2009, respectively, the Court also limited the award of backwages due several illegally dismissed probationary teachers only to the unexpired portion of their probationary period and not until reinstatement or finality of the Decision.

In the face of this jurisprudential conflict, the Court deems it necessary to state explicitly that illegally dismissed probationary employees, like regular employees, are entitled to backwages up to their actual reinstatement. In case reinstatement is proven, to be infeasible due to strained relations between the employer and the employee and other analogous causes, backwages shall be computed from the time compensation was withheld up to the finality of the Decision.

This ruling is more in keeping with constitutional and statutory guarantees in favor of labor. As the Court held in *Lopez*, the Constitution did not distinguish between regular and probationary employees in guaranteeing the right to security of tenure. Similarly the Labor Code, as amended by Republic Act No. 6715, made no such distinction in providing that an illegally dismissed employee is entitled to "reinstatement without loss of seniority rights and other privileges and to [their] full backwages, inclusive of allowances, and to [their] other benefits or their monetary equivalent computed from the time [their] compensation was withheld from [them] up to the time of [their] actual reinstatement." [107] As the Constitution and the law did not distinguish, the Court should not as well.

Further, contrary to the findings in *Robinsons Galleria*, the lapse of the probationary contract without an appointment as regular employee does not sever the employer-employee relationship. In fact, a probationary employee who is allowed to work beyond the probationary period is, by force of law, considered a regular employee.[108] In one case, the Court has held that absent any grounds to terminate a probationary employee, there is no reason to sever the employment and, consequently, the employee is entitled to continued employment "even beyond the probationary period." [109]

Significantly, the rulings in *Woodridge* and *Magis* cannot be applied to all probationary employees as the probationary employees in those cases were teaching personnel whose probationary periods are not solely governed by the Labor Code but also by the Manual of Regulations for Private Schools or the Manual of Regulations for Private Higher Education.[110] Thus, in *De La Salle Araneta University, Inc. v. Magdurulang*,[111] the Court held that in probationary employment of academic personnel, the mere completion of the probationary period does not automatically make the employee a permanent employee of the educational institution.[112] This is markedly different from probationary employment in other industries, where the lapse of the probationary period without a valid termination ipso facto renders the employment regular. In contrast with

the facts in *Robinsons Galleria*, it is in *Woodridge and Magis* where the effective severance of the employer--employee relationship upon the lapse of the probationary period is clear.

Chief Justice Alexander G. Gesmundo concurred with the ponencia that Barbosa is entitled to full backwages from the time that compensation was withheld (i.e., January 1, 2014) until the finality of the Decision and that this ruling is in keeping with the constitutional and statutory guarantees in favor of labor. The Chief Justice stated that the computation of the backwages until the finality of the Decision is consistent with the mandate under Article 294 of the Labor Code that "'full backwages' shall be computed from the time the 'compensation was withheld' from the employee up to the time of 'actual reinstatement,' and the jurisprudential pronouncement that if reinstatement is no longer feasible, it would be up to the finality of the decision. This reckoning period applies to regular and probationary employees alike." [113] Further, Chief Justice Gesmundo explained:

Article 296 of the Labor Code states that a probationary employee who "is allowed to work after" a probationary period shall be considered a regular employee. In the present case, Barbosa, a probationary employee, was found to have been illegally dismissed from work. Had she not been illegally dismissed, she would have continued with performing her tasks and therefore "allowed to work" after the probationary period. She would have become a regular employee, and earned compensation as such. Therefore, she is entitled to backwages similar to an illegally dismissed regular employee. This interpretation is more consistent with the State's policy in favor of labor.

Besides, to construe "allowed to work" as purely within the control of the employer would mean that an employer can remove an employee during the probationary period arbitrarily or without any valid ground, and in consequence, the employer would only need to pay backwages for a short duration (i.e. up to the end of the probationary period). The statutorily mandated transition from probationary to regular employee when the reasonable standard are achieved would be rendered futile. This would effectively circumvent the security of tenure protection given to probationary employees. Moreover, In *Equitable Banking Corporation v. Sadac*, full backwages was characterized as "the price or penalty that the employer must pay" for illegally dismissing the employee. If the Court would limit the backwages to cover the probationary period only, then the penalty rationale for backwages would not be served to the same extent as that for illegally dismissed regular employees. [114] (Emphasis in the original)

On the other hand, Justices Alfredo Benjamin S. Caguioa and Amy C. Lazaro-Javier are of the opinion that backwages for illegally dismissed probationary employees must be computed only until the end of the probationary period, as laid down in *Robinsons Galleria*. Justice Caguioa argues that since the security of tenure enjoyed by probationary employees is limited, such that they cannot earn wages beyond the probationary period without actually qualifying for regularization, there is no reason to extend backwages beyond such period. [115]

Justice Lazaro-Javier pointed out that backwages should correspond to the life of the employment relationship. Probationary employees, akin to project and fixed-term employees, should be entitled to backwages only for the unexpired portion of their employment. They also enjoy a limited tenure, one that is not on the same plane as regular employees'; hence, they are not entitled to backwages beyond the probationary period. Further, while probationary employment is not automatically severed upon the lapse of the probationary period, it does not mean that employment is automatically continued; acquiescence of the employer is needed to continue the employment. Without the employer's acquiescence, to award backwages beyond the probationary period would mean deeming the employment regular without the employee actually qualifying for regularization. [116]

As a rule, all illegally dismissed employees are entitled to backwages from the time compensation was unlawfully withheld until their actual reinstatement. However, Justices Caguioa and Lazaro-Javier also opined that in case reinstatement of probationary employment is infeasible, backwages of the probationary employee must be limited to the unexpired portion of the probationary period because the lapse of the period without the employee

qualifying for regular employment necessarily severed the employment.

As previously explained, this is not accurate.

The Court points out two things: First, the mere lapse of the probationary employment without regularization does not, and should not, by itself, sever the employment relationship. In fact, Art. 296 of the Labor Code specifically stated that a probationary employee who is "allowed to work after" the probationary period—that they were not validly dismissed prior to the expiration of the probationary period—shall be considered a regular employee. The change in the status, from probationary to regular, happens ipso facto, or by force and operation of law, without any further act or deed on the part of the employer and the employee. The lapse of the period, to truly sever the employer-employee relationship, must be coupled with a showing that the employee is either validly dismissed for just or authorized causes or has failed to qualify for regularization. Specifically, where there are no valid grounds to terminate a probationary employment, the Court, in *Philippine Manpower Services, Inc. v. NLRC*[117] held that there is no reason to sever the employment and that the probationary employee in that case is entitled to work even beyond the probationary period.

Second, in this case, the lapse of the probationary period was caused by C.P. Reyes Hospital, who decided to dismiss Barbosa well before the period lapsed on specious and unlawful grounds. This fact makes it more crucial for the Court to rule that when the employer illegally dismissed the probationary employee, the mere lapse of probationary employment will not automatically sever the employment relationship as to allow the employer to limit the backwages to which a probationary employee is entitled. The Court will not permit an employer to prematurely unshackle itself from the employment relationship and its monetary consequences by the mere expedient of illegally terminating a probationary employee.

Therefore, Barbosa should be entitled to backwages from the time compensation was withheld up to her actual reinstatement. In this case, however, both the LA[118] and the CA[119] recognized that reinstatement was no longer feasible due to the strained relations between the parties, which this Court respects. Hence, backwages must be awarded up to the finality of the Court's Decision.

However, the Court does not agree with the CA that the award must be reckoned from the date of notice of Barbosa's dismissal, November 29, 2013. Rather, it must be computed from the time compensation was withheld. The evidence on record shows that the effective date of the termination is December 30, 2013.[120] Accordingly, substantial evidence was presented—which Barbosa did not rebut—that she received her final salary, covering December 16 to 31, 2013, and pro-rated 13[th] month pay, totaling PHP 5,135.86.[121] This pay was reflected in Check Voucher No. 43285[122] signed by Barbosa.

Thus, backwages should be computed from January 1, 2014, when compensation was withheld from Barbosa, until finality of the Court's Decision.

Further, the Court affirms the CA's award of separation pay, equivalent to one month pay, in lieu of reinstatement, which is deemed proper when reinstatement is no longer practical or in the best interest of the parties, such as when the filing of the illegal dismissal case resulted in strained relations between the parties.[123]

Additionally, pursuant to prevailing jurisprudence, the monetary awards due to Barbosa shall earn interest at the rate of 6% per annum from the finality of this Decision until full payment.[124]

Notably, Barbosa named both C.P. Reyes Hospital and Reyes as respondents in the Complaint for illegal dismissal. Under prevailing case law, Reyes, as a corporate officer, should only be held solidarily liable if there is a finding of bad faith or malice on her part in the illegal dismissal.[125] There being none in this case, the Court

affirms the CA's ruling finding only C.P. Reyes Hospital liable for Barbosa's illegal dismissal.

ACCORDINGLY, the Petition is DENIED. The Decision dated April 18, 2016 and the Resolution dated November 17, 2016 of the Court of Appeals in CA-G.R. SP No. 139468 are hereby AFFIRMED with the following MODIFICATIONS: (a) the backwages awarded to respondent Geraldine M. Barbosa shall be computed from January 1, 2014, the time her compensation was withheld, up to the finality of this Decision, and (b) legal interest at the rate of 6% per annum is hereby imposed on the monetary awards, computed from the finality of this Decision until fully paid. The rest of the ruling STANDS.

Let a copy of the Decision in this case be furnished to the House of Representatives and the Senate of the Philippines for their reference.

SO ORDERED.

Inting, M. Lopez, Rosario, Dimaampao, Marquez, and Singh, JJ., concur.

Gesmundo, C.J., see concurring opinion.

Leonen, SAJ., I concur. See separate opinion.

Caguioa, J., see concurring and dissenting.

Hernando, J., I join concurring and dissenting opinion of J. Caguioa.

Lazaro-Javier, J., see concurrence and dissent.

Zalameda, J., I join the concurring and dissenting opinion of J. Caguioa.

Gaerlan,[*] J., no part.

J. Lopez, J., I join the concurring and dissenting opinion of J. Caguioa.

[*] No part.

[1] Rollo, pp. 10-37.

[2] Reyes is C.P. Reyes Hospital's Human Resources Manager and was referred to as "Co-owner" in the Complaint; see CA rollo, p. 50.

[3] Rollo, pp. 39-55. Penned by Associate Justice Normandie B. Pizarro and concurred in by Associate Justices Samuel H. Gaerlan (now a Member of the Court) and Ma. Luisa C. Quijano-Padilla of the Thirteenth Division, Court of Appeals, Manila.

[4] Id. at 57-58.

[5] CA rollo, pp. 28-36. Penned by Commissioner Romeo L. Go and concurred in by Presiding Commissioner Gerardo C. Nograles and Commissioner Perlita B. Velasco of the National Labor Relations Commission.

[6] Id. at 39-48. Penned by Labor Arbiter Enrico Angelo C. Portillo.

[7] Id. at 50-52.

[8] Rollo, pp. 79-92.

[9] Id. at 234-236. Entitled "Terms and Conditions of Employment."

[10] Id. at 234.

[11] Id.

[12] Id. at 82.

[13] Id. at 269.

[14] Id. at 83.

[15] Id. at 270.

[16] Id.

[17] Id. at 274.

[18] The employment contract signed by Barbosa denotes the period of employment as September 4, 2013 to March 4, 2014; see id. at 234.

[19] Id. at 274.

[20] Barbosa received the following grades from her evaluators (id. at 148);

a. For the first month: 80.95% from Nurse Abegail Gonzales (id. at 241-243); and 82.40% from Nurse Emmanuel Elloso (id. at 244-246), for an average of 81.68%;

b. For the second month: 85.42% from Nurse Mark Anthony Cosico (id. at 247-249); and 79.76% from Nurse Rica N. Robles (id. at 250-252), for an average of 82.59%.

[21] Id. at 16.

[22] Id. at 68.

[23] Id. at 96.

[24] Id. at 74. This was charged to 12 absences in the Petition, see id. at 17.

[25] Id.

[26] CA rollo, pp. 39-48.

[27] Id. at 48.

[28] Id. at 182-199. Memorandum of Appeal filed on July 11, 2014.

[29] Id. at 28-36.

[30] Id. at 36.

[31] Id. at 34, citing *Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 537 (2013) [Per J. Perlas-Bernabe, En Banc].

[32] Id. at 276-283.

[33] Id. at 25-26.

[34] Id. at 3-24.

[35] Rollo, pp. 39-55.

[36] Id. at 54-55.

[37] Id. at 48-50.

[38] Id. at 51-53.

[39] Id. at 57-58.

[40] *Jolo's Kiddie Carts v. Caballa*, 821 Phil. 1101, 1109 (2017) [Per J. Perlas-Bernabe, Second Division], citing *Gadia v. Sykes Asia, Inc.*, 752 Phil. 413, 420 (2015) [Per J. Perlas-Bernabe, First Division].

[41] *Jolo's Kiddie Carts v. Caballa*, 821 Phil. 1101, 1109-1110 (2017) [Per J. Perlas-Bernabe, Second Division], citing *University of Santo Tomas (UST) v. Samahang Manggagawa ng UST*, 809 Phil. 212, 220 (2017) [Per J. Perlas-Bernabe, First Division].

[42] Presidential Decree No. 442 (1974), as amended and renumbered in 2015.

[43] *Agustin v. Alphaland Corporation*, 883 Phil. 177, 186 (2020) [Per J. Carandang, Third Division], citing LABOR CODE, OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Book VI, Rule I, sec. 6.

[44] Rollo, p. 104. Barbosa's Reply (to Respondent's) Position Paper with the LA.

[45] CA rollo, pp. 258-259. Barbosa's Reply (to Respondents-Appellants' Memorandum of Appeal) with the NLRC.

[46] Id. at 12. Barbosa's Petition for Certiorari with the CA.

[47] Rollo, p. 283. Barbosa's Comment to the Petition for Review on Certiorari.

[48] Id. at 104.

[49] Id. at 234-236.

[50] Id. at 234.

[51] Id. at 202.

[52] CA rollo, p. 12.

[53] See *Moral v. Momentum Properties Management Corporation*, 848 Phil. 621, 635 (2019) [Per J. Carpio, Second Division], citing *Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 533 (2013) [Per J. Perlas-Bernabe, En Banc].

[54] CA rollo, pp. 34-35.

[55] Id. at 35. See rollo, p. 273 for Nursing Director Lirio's full evaluation.

[56] Rollo, p. 50.

[57] Id. at 234.

[58] Id. at 21.

[59] *Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 552 (2013) [Per J. Perlas-Bernabe, En Banc].

[60] *Moral v. Momentum Properties Management Corporation*, 848 Phil. 621, 636 (2019) [Per J. Carpio, Second Division], citing *Abbott Laboratories, Philippines v. Alcaraz*, id. at 534.

[61] *Aberdeen Court, Inc. v. Agustin, Jr.*, 495 Phil. 706, 716-717 (2005) [Per J. Azcuna, First Division].

[62] Rollo, pp. 20-21.

[63] Id. at 237-240.

[64] Id. at 241-252.

[65] Id. at 273.

[66] Id. at 241, 244, 247, and 250.

[67] Id.

[68] Id.

[69] Id. at 241-242, 244-245, 247-248, and 250-251.

[70] 676 Phil. 384 (2011) [Per J. Mendoza, Third Division].

[71] Id. at 400, citing *Dusit Hotel Nikko v. Gatbonton*, 523 Phil. 338, 344 (2006) [Per J. Quisumbing, Third Division].

[72] An ICU staff nurse who evaluated Barbosa for three days. No numerical rating given.

[73] Rollo, p. 51.

[74] See Letter from evaluator Abegail R. Gonzales, RN (id. at 257-258); Letter from evaluator Emmanuel C. Ellosa, RN (id. at 259); and Letter from evaluator John Malabanan, RN (id. at 260).

[75] Id. at 17-18.

[76] Id. at 23.

[77] Id. at 52-53.

[78] Id. at 51-53.

[79] *Abbott Laboratories, Philippines v. Alcaraz*, 714 Phil. 510, 537 (2013) [Per J. Perlas-Bernabe, En Banc], citing LABOR CODE, OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Book VI, Rule I, sec. 2, as amended by DOLE Department Order No. 147-15 (2015).

[80] LABOR CODE OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Book VI, rule I, sec. 2. as amended by DOLE Department Order No. 147-15 (2015).

[81] Rollo, p. 269.

[82] Id. at 270.

[83] Id. at 274.

[84] Id. at 17-18.

[85] LABOR CODE, as renumbered in 2015, art. 294 [279], as amended by Republic Act No. 6715 (1989), sec. 34.

[86] *St. Joseph Academy of Valenzuela Faculty Association (SJA VFA)-FUR Chapter-TUCP v. St. Joseph Academy of Valenzuela*, 711 Phil. 46, 53 (2013) [Per J. Reyes, First Division], citing *Aliling v. Feliciano*, 686 Phil. 889, 916 (2012) [Per J. Velasco, Jr., Third Division].

[87] *Philippine Spring Water Resources, Inc. v. CA*, 736 Phil. 305, 321 (2014) [Per J. Mendoza, Third Division].

[88] Rollo, pp. 54-55.

- [89] Id. at 54.
- [90] 711 Phil. 516 (2013) [Per J. Peralta, Third Division].
- [91] 686 Phil. 889 (2012) [Per J. Velasco, Jr., Third Division].
- [92] 322 Phil. 70 (1996) [Per J. Romero, Second Division].
- [93] Rollo, pp. 282-287.
- [94] Id. at 283.
- [95] 655 Phil. 133 (2011) [Per J. Nachura, Second Division].
- [96] Lopez v. Hon. Javier, 322 Phil. 70, 78 (1996) [Per J. Romero, Second Division].
- [97] CONST., art. XIII, sec. 3.
- [98] Lopez v. Hon. Javier, 322 Phil. 70, 81-82 (1996) [Per J. Romero, Second Division].
- [99] 460 Phil. 301 (2003) [Per J. Sandoval-Gutierrez, Third Division].
- [100] Id. at 309-310.
- [101] 647 Phil. 580 (2010) [Per J. Mendoza, Second Division].
- [102] Id. at 600.
- [103] Id. at 591.
- [104] Robinsons Galleria/Robinsons Supermarket Corporation v. Ranchez, 655 Phil. 133, 142 (2011) [Per J. Nachura, Second Division].
- [105] 591 Phil. 154 (2008) [Per J. Nachura, Third Division].
- [106] 598 Phil. 886 (2009) [Per J. Nachura, Third Division].
- [107] LABOR CODE, as renumbered in 2015, art. 294 [279], as amended by Republic Act No. 6715 (1989), sec. 34.
- [108] LABOR CODE, as renumbered in 2015, art. 296 [281].
- [109] Philippine Manpower Services, Inc. v. NLRC, 296 Phil. 596, 607 (1993) [Per J. Romero, Third Division].
- [110] Mercado v. AMA Computer College-Parañaque City, Inc., 632 Phil. 228, 248-249 (2010) [Per J. Brion, Second Division].
- [111] 820 Phil. 1133 (2017) [Per J. Perlas-Bernabe, Second Division].
- [112] Id. at 1149.
- [113] See Chief Justice Gesmundo's Reflections, p. 7.
- [114] Id. at 7-8; citations omitted.
- [115] See Justice Caguioa's Reflections, pp. 2-5.
- [116] See Justice Lazaro-Javier's Reflections, pp. 5-8.
- [117] 296 Phil. 596 (1993) [Per J. Romero, Third Division].

[118] CA rollo, p. 48.

[119] Rollo, p. 54.

[120] Id. at 274.

[121] Id. at 275.

[122] Id. at 276.

[123] *Aliling v. Feliciano*, 686 Phil. 889, 916 (2012) [Per J. Velasco, Jr., Third Division].

[124] See *Lara's Gifts & Decors v. Midtown*, 860 Phil. 744 (2019) [Per J. Carpio, En Banc].

[125] *Ever Electrical Manufacturing, Inc. (EEMI) v. Samahang Manggagawa ng Ever Electrical/NAMAWU LOCAL 224*, 687 Phil. 529, 540 (2012) [Per J. Mendoza, Third Division], citing *Wensha Spa Center and/or Xu Zhi Jie v. Yung*, 642 Phil. 460, 475 (2010) [Per J. Mendoza, Second Division].

CONCURRING OPINION

GESMUNDO, C.J.:

This case involves an illegal dismissal complaint filed by a probationary employee.

Geraldine M. Barbosa (Barbosa) was hired at the C.P. Reyes Hospital (Hospital) as Training Supervisor, for which she signed a six-month probationary employment contract for the period from September 4, 2013 to March 4, 2014. On November 27, 2013, she received a notice directing her to explain why no disciplinary action should be taken against her for being absent for three days without official leave of absence. She explained that she notified her supervisor on duty with regard to her November 4, 2013 absence, while she submitted a medical certificate and the required leave forms for her November 7 and 8 absences. On November 29, 2013, she received a letter formally terminating her probationary employment due to her failure to meet the reasonable standards set by the Hospital. The effective date of the termination of her employment was on December 30, 2013.[1]

The Labor Arbiter declared that Barbosa was illegally dismissed, but the National Labor Relations Commission (NLRC) reversed such ruling and stated that the Labor Arbiter considered only the numerical grades given to Barbosa, and not the feedback and comments from her evaluators. The Court of Appeals (CA), in turn, reversed the NLRC's finding and reinstated the Labor Arbiter's ruling with modifications as to the monetary awards. Hence, this Rule 45 Petition.[2]

The ponencia denies the petition. It affirms the CA's ruling that the NLRC gravely abused its discretion when it held that the Hospital validly terminated Barbosa's employment.

Preliminarily, Barbosa's employment was clearly probationary in nature,[3] and thus, she can only be dismissed on the grounds of just or authorized cause, or failure to meet regularization standards made known to the employee at the time of engagement.

The ponencia rejects the Hospital's contention that Barbosa failed to meet the regularization standards. Barbosa's probationary contract indicated that she needed to maintain an average passing score equivalent to 80% as the reasonable standard for her continued employment. Records show that Barbosa's average scores in the two months of evaluation were 81.68% for the first month and 82.59% for the second month. The ponencia observes that the Nursing Director's feedback was executed only as an afterthought, or after Barbosa was already

terminated. Moreover, the ponencia finds that the claim of Barbosa's absenteeism is not supported by the records. The ponencia finds that only one absence was unexplained for which no notice to explain was issued to Barbosa. Thus, there was no valid ground for the termination of Barbosa's employment.

Anent the monetary awards, the ponencia declares that Barbosa is entitled to separation pay in lieu of reinstatement, and to full backwages to be computed from the time that compensation was withheld (i.e., January 1, 2014) until the finality of the Decision. Resolving the jurisprudential conflict on the reckoning period for the award of backwages, the ponencia declares that illegally dismissed probationary employees are entitled to backwages until their "actual reinstatement" or if reinstatement is no longer viable, until the "finality of the decision," viz.:

In the face of this jurisprudential conflict, the Court deems it necessary to state explicitly that illegally dismissed probationary employees, like regular employees, are entitled to backwages up to their actual reinstatement. In case reinstatement is proven to be infeasible due to strained relations between the employer and the employee, backwages shall be computed from the time compensation was withheld up to the finality of the decision.[4] (Emphasis in the original)

The ponencia explains that this ruling is in keeping with the constitutional and statutory guarantees in favor of labor. Indeed, probationary and regular employees alike enjoy the constitutional right to security of tenure.

I concur in the ponencia.

Barbosa's probationary employment was illegally terminated and her backwages should be computed until the finality of the Decision in the instant case. I write to underscore two points: first, the management's prerogative to terminate probationary employment is circumscribed by the constitutional right to security of tenure of probationary employees; and second, the computation of backwages until the finality of the decision is based on the existing regulatory framework governing probationary employment such that Congress is not precluded from revisiting said framework.

Constitutional right to security of tenure as applied to probationary employees; the management's exercise of its power to terminate employment must be anchored on a valid cause

The provisions on probationary employment balances the employers' prerogative to hire and the employees' right to security of tenure. The Court elucidated on this score, thus:

On the one hand, employment on probationary status affords management the chance to fully scrutinize the true worth of hired personnel before the full force of the security of tenure guarantee of the Constitution comes into play. Based on the standards set at the start of the probationary period, management is given the widest opportunity during the probationary period to reject hirees who fail to meet its own adopted but reasonable standards.[5] (Emphasis in the original)

Employers are "at liberty to choose who will be hired and who will be denied employment." [6] Case law instructs that employers have the exclusive "prerogative to hire someone for the position, either on a permanent status right from the start or place him first on probation." [7] Should employers opt to first place an employee under probationary employment, they may set the period within which the employee may be "placed on trial" [8] during which the employee's conduct may be observed before hiring the latter on a permanent basis. The nature of probationary employment is further explained, thus:

The essence of a probationary period of employment lies primordially in the purpose or objective of both the

employer and the employee during such period. While the employer observes the fitness, propriety, and efficiency of a probationary employee, in order to ascertain whether or not such person is qualified for regularization, the latter seeks to prove to the former that he or she has the qualifications and proficiency to meet the reasonable standards for permanent employment.[9]

Nevertheless, it must be emphasized that an employee's "right to security of tenure immediately attaches at the time of hiring," regardless of whether the employer decides to place the employee immediately on a permanent status, or under probation first.[10] Notably, even a probationary employee enjoys some form of security of tenure, although it is not on the same plane as that of a permanent employee. A probationary employee may be dismissed for just or authorized cause, and as an additional ground of dismissal, due to failure to qualify as a regular employee in accordance with the reasonable standards of the employer which were made known to [them] at the time of engagement.[11] Article 296 of the Labor Code states:

Article 296 [281]. Probationary employment. - Probationary employment shall not exceed six (6) months from the date the employee started working, unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a probationary basis may be terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. An employee who is allowed to work after a probationary period shall be considered a regular employee. (Emphasis supplied)

Generally, the probationary period of employment is limited to six months. The exception to this general rule is when the parties to an employment contract agree otherwise, such as when the same is established by company policy or when the same is required by the nature of work to be performed by the employee.[12]

In this case, Barbosa was hired on a probationary basis. The ponencia explains that Barbosa's employment contract clearly shows that the six-month probationary period and the reasonable standards for her regularization have been communicated to her at the start of her employment, viz.:

As a standard Hospital procedure, we present you with these terms and conditions of your employment, for your information and conformity:

1.

PROBATIONARY PERIOD – your employment shall commence on a probationary status, beginning as of September 4, 2013 for a period of Six (6) months thereafter, and subject to regularization review at the end of the Six (6) months or on or before March 4, 2014. x x x[13]

....

7.

TRAINING AND EVALUATION – you are required to maintain a satisfactory performance based on performance evaluation. You should get or maintain an average of a passing score equivalent to 80% (Satisfactory). Failure to meet the reasonable standard set by this Hospital may warrant the penalty of termination of your employment.[14] (Emphasis supplied)

Barbosa's six-month probationary period started on September 4, 2013, but within a short period of three months, she was apprised that her employment would be terminated on the alleged ground that she failed to meet the reasonable standards set by her employer. In particular, the Hospital cited the "negative performance feedback received" by it "due to attitude including [Barbosa's] attendance records." [15]

In *Dusit Hotel Nikko v. Gatbonton*, [16] the Court enumerated the requisites to validly terminate a probationary employment on the ground of failure to meet the employer's reasonable standards: (1) this power must be

exercised in accordance with the specific requirements of the contract; (2) the dissatisfaction on the part of the employer must be real and in good faith, not feigned so as to circumvent the contract or the law; and (3) there must be no unlawful discrimination in the dismissal.[17]

In the present case, the ponencia masterfully discussed how it reached the conclusion that the Hospital's dissatisfaction with Barbosa's work is not genuine.[18] It underscored the fact that the negative performance evaluation was contained in a letter that was issued in December 2013, which came after the letter dismissing Barbosa from employment which was received on November 29, 2013. More importantly, Barbosa received satisfactory marks that met the 80% threshold required in her employment contract. The ponencia explains:

[T]he evaluators each gave her a passing grade, except for one, who gave Barbosa a grade of 79.76%. At any rate, for purposes of regularization, an average score of at least 80% is required by C.P. Reyes Hospital, which she obtained.[19] (Emphasis in the original)

Hence, there was an objective basis to conclude that Barbosa had complied with the reasonable standard for her regularization as contained in her employment contract, which was to "get or maintain an average of a passing score equivalent to 80%."[20]

The scenario would have been different if Barbosa obtained a score below 80%. In *Cambil v. Kabalikat Para sa Maunlad na Buhay, Inc.*,[21] the probationary employee obtained an overall rating of 67.50%. Hence, the employer was able to show that the dismissal was "not arbitrary, fanciful, or whimsical" and that its dissatisfaction with the probationary employee was "real and in good faith." [22] In *Jaso v. Metrobank & Trust Co.*,[23] the probationary employee was informed that she needed to achieve an overall performance rating of at least 3.0 to become a regular employee, but she obtained a failing mark of 2.21. In these cases, considering the employee's poor performance, the employer cannot be compelled to keep the former in its employ. Indeed, an employer is not precluded from terminating the probationary employment if there is evident showing that its standards were not attained during the trial period.

In termination cases, the burden of proving valid cause for dismissing an employee, rests on the employer.[24] Here, the Hospital was unable to discharge said burden, especially in view of the satisfactory rating received by Barbosa.

It is my view that this ruling does not necessarily take away the prerogative of the employer to choose its employees, particularly, the probationary employees. The Court is simply stating that an employer's prerogative cannot be exercised capriciously, whimsically, and arbitrarily as it will violate the right to security of tenure, even in a limited capacity, of probationary employees. Again, before an employer can dismiss a probationary employee for failing to meet the standards provided in the employment contract, the dissatisfaction on the part of the employer must be real and in good faith. Otherwise, it will not be considered as a valid ground for termination of the probationary employment. Hence, the ponencia correctly held that Barbosa was illegally dismissed.

The computation of backwages until the finality of the decision is based on the existing regulatory framework governing probationary employment; Congress is not precluded from, revisiting such framework

An illegally dismissed employee is entitled to the twin reliefs of full backwages and reinstatement. This is based on Article 294 of the Labor Code viz.:

Article 294. [279] Security of Tenure. — ... 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.[25] (Emphasis supplied)

When reinstatement is no longer feasible, jurisprudence provides that separation pay shall be granted in lieu of reinstatement.[26] Thus, the illegally dismissed employee is granted backwages and separation pay. These monetary awards also apply to probationary employees who have been illegally dismissed. In this case, Barbosa was correctly found to be entitled to both backwages and separation pay, in light of the strained relations between the parties.

The two reliefs of backwages and separation pay are distinct from each other. Backwages represent "compensation that should have been earned but were not collected because of the unjust dismissal" while separation pay is the amount received by an employee at the time of severance from employment, and designed to provide such employee with the means or "wherewithal" while "looking for another employment." [27] Separation pay is "a proper substitute for reinstatement." [28] The basis of computation also differs: for separation pay, it is "usually the length of the employee's past service," while for backwages, it is "the actual period when the employee was unlawfully prevented from working." [29]

In computing the award of backwages, the ponencia notes the conflicting reckoning periods in computing backwages for illegally dismissed probationary employees. On one hand, there are cases where backwages are awarded up to the finality of the decision, similar to those for regular employees. On the other hand, there are cases where backwages are awarded only up to the end of the probationary period, [30] which is the end of the six-month probationary period.

In this case, the ponencia states that the first set of cases should govern – the reckoning periods in computing backwages for illegally dismissed probationary employees should be up to the finality of the decision, similar to those for regular employees.

I agree in the ponencia that the first set of cases should be followed. Hence, backwages for illegally dismissed probationary employees must be computed until the finality of the decision.

It must be emphasized that the computation of the backwages until the finality of the decision is consistent with the mandate under Article 294 of the Labor Code that "full backwages" shall be computed from the time the "compensation was withheld" from the employee up to the time of "actual reinstatement," and the jurisprudential pronouncement that if reinstatement is no longer feasible, it would be up to the finality of the decision. This reckoning period applies to regular and probationary employees alike.

Elementary is the rule in statutory construction that: where the law does not distinguish, the courts should not distinguish. At present, there is no statute or administrative issuance which sets a different reckoning period for computing backwages in favor of probationary employees. Thus, the Court shall adopt the same reckoning period.

Construing the prevailing statutory provisions governing probationary employees, the ponencia correctly holds that backwages should be computed up to actual reinstatement or finality of the decision. I expound below.

Article 296 of the Labor Code states that a probationary employee who is "allowed to work after" a probationary period shall be considered a regular employee. In the present case, Barbosa, a probationary employee, was found to have been illegally dismissed from work. Had she not been illegally dismissed, she would have continued with performing her tasks and therefore "allowed to work" after the probationary period. She would have become a regular employee, and earned compensation as such. Therefore, she is entitled to backwages similar to an illegally dismissed regular employee. This interpretation is more consistent with the State's policy in favor of labor.

Besides, to construe "allowed to work" as purely within the control of the employer would mean that an employer

can remove an employee during the probationary period arbitrarily or without any valid ground, and, in consequence, the employer would only need to pay backwages for a short duration (i.e., up to the end of the probationary period). The statutorily mandated transition from probationary to regular employee when the reasonable standards are achieved would be rendered futile. This would effectively circumvent the security of tenure protection given to probationary employees.

To underscore, while the employer is given discretion on whether to retain or remove a probationary employee upon the expiration of the probationary period, this discretion is not absolute and ultimate. There must still be a valid cause for termination of the probationary employment. Without such cause, the probationary employee would stay employed and would continue to earn from the employment.

The short period of actual service of Barbosa at the Hospital is relevant for the computation not of the backwages, but of separation pay. To recall, separation pay is computed based on the length of the employee's past service. Hence, in this case, considering that her actual service to the Hospital was for six months only, Barbosa is awarded separation pay equivalent only to one month pay.

Viewed from another perspective, it may be argued that it would be unfair to grant backwages to a probationary employee beyond the probationary period. It is the employer who should decide whether an employee should pass the probationary period of six months. To award backwages beyond the six-month period would imply that the courts and tribunals are the ones that exercise discretion to confer full employment status to a probationary employee.

However, this alternative perspective is more apparent than real. Again, while the employer has the discretion to determine who among its probationary employees would become regular employees, this discretion must be exercised in good faith, and not in an arbitrary fashion. If the employer exercises this discretion whimsically, then it is as if the probationary employee was never genuinely terminated within the six-month probationary period. Jurisprudence dictates that when a probationary employee is not terminated within the six-month period, such person becomes a regular employee.^[31] Hence, since the probationary employee becomes a regular employee, then the backwages that must be awarded in their favor should be the same as that of a regular employee. Accordingly, for those probationary employees who were arbitrarily dismissed by their employers within the six-month period, it is not inequitable to award them backwages in the same manner as regular employees.

This notwithstanding, it is my humble opinion that Congress is not precluded from enacting a law that would set a different reckoning period for the payment of backwages in favor of illegally dismissed probationary employees. To reiterate, the existing legal framework governing probationary employees supports the ponencia's conclusion that full backwages must be awarded to such illegally dismissed employee. Currently, there is no statutory basis to anchor the computation of backwages only up to the end of the probationary period. The wisdom on whether to shorten the base period for computing backwages of probationary employees is a matter within the province of the Legislature.^[32] While it can be the subject of a future enactment, the duty of the Court now is to interpret and apply the current law.

ACCORDINGLY, I vote to DENY the Petition and AFFIRM the ruling of the Court of Appeals that respondent Geraldine M. Barbosa was illegally dismissed with MODIFICATION on the monetary awards.

Let a copy of the Decision in this case be furnished to the House of Representatives and the Senate of the Philippines as reference for a possible review of the regulatory framework governing illegally dismissed probationary employees, particularly on the proper computation of their backwages.

- [1] Ponencia, pp. 3, 20.
- [2] Rollo, pp. 10-37.
- [3] Ponencia, pp. 6-8.
- [4] Id. at 19.
- [5] See *Mercado v. AMA Computer College-Parañaque City, Inc.*, 632 Phil. 228, 253 (2010) [Per J. Brion, Second Division].
- [6] *Moral v. Momentum Properties Management Corporation*, 848 Phil. 620, 639 (2019) [Per J. Carpio, Second Division].
- [7] *Philippine National Oil Company-Energy Development Corporation v. Buenviaje*, 788 Phil. 508, 526 (2016) [Per J. Jardeleza, Third Division].
- [8] *Skyway O & M Corporation v. Reinante*, 860 Phil. 668, 674 (2019) [Per J. Inting, Third Division].
- [9] *Moral v. Momentum Properties Management Corporation*, 848 Phil. 620, 634 (2019) [Per J. Carpio, Second Division].
- [10] *Philippine National Oil Company-Energy Development Corporation v. Buenviaje*, 788 Phil. 508, 526 (2016) [Per J. Jardeleza, Third Division].
- [11] Id. at 526-527.
- [12] *Umali v. Hobbywing Solutions, Inc.*, 828 Phil. 320, 334 (2018) [Per J. Reyes, J. Jr., Second Division], citing *Buiser v. Leogardo, Jr.*, 216 Phil. 144 (1984) [Per J. Guerrero, Second Division].
- [13] Ponencia, p. 7. (Emphasis in the original)
- [14] Id. at 9. (Emphasis in the original)
- [15] See ponencia, p. 3.
- [16] 523 Phil. 338 (2006) [Per J. Quisumbing, Third Division]; see also *Tamson's Enterprises, Inc. v. Court of Appeals*, 676 Phil. 384, 400 (2011) [Per J. Mendoza, Third Division].
- [17] *Dusit Hotel Nikko v. Gatbonton*, id. at 344, as cited in *Cambil v. Kabalikat Para sa Maunlad na Buhay, Inc.*, G.R. No. 245938, April 5, 2022 [Per J. Inting, First Division] at 12. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website. (Emphasis supplied)
- [18] See ponencia, p. 12.
- [19] Id. at 13.
- [20] Id. at 9.
- [21] G.R. No. 245938, April 5, 2022 [Per J. Inting, First Division].
- [22] Id. at 16. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.
- [23] G.R. No. 235794, May 12, 2021 [Per J. Inting, Third Division].
- [24] *Tamson's Enterprises, Inc. v. Court of Appeals*, 676 Phil. 384, 400 (2011) [Per J. Mendoza, Third Division].
- [25] LABOR CODE, art. 294 (as renumbered in 2015).

[26] Philippine National Oil Company-Energy Development Corporation v. Buenviaje, 788 Phil. 508. 540 (2016) [Per J. Jardeleza, Third Division].

[27] Genuino Agro-Industrial Development Corporation v. Romano, 863 Phil. 360, 380 (2019) [Per J. Reyes, J. Jr., Second Division].

[28] Id.

[29] Id.

[30] See ponencia, pp. 17-19.

[31] Servidad v. National Labor Relations Commission, 364 Phil. 518, 526 (1999) [Per J. Purisima, Third Division], which states that an employee allowed to work beyond the probationary period is deemed a regular employee.

[32] See Rasonable v. National Labor Relations Commission, 324 Phil. 191, 197-199 (1996) [Per J. Puno, Second Division] on the development of the legal framework on the computation of backwages for illegally dismissed employees. See also Mercury Drug Co. v. Court of Industrial Relations, 155 Phil. 636 (1974) [Per J. Makasiar, En Banc] which simplified the computation of backwages to three years without further qualification or deduction. This rule was changed by the LABOR CODE.

SEPARATE OPINION

LEONEN, SAJ.:

I join the ponencia in holding that respondent Geraldine M. Barbosa was illegally dismissed. However, I write separately to concur with Justice Antonio T. Kho, Jr.'s earlier position in his initial draft where he wrote that the two-notice rule applied in dismissal cases for just cause should also be applied in the dismissal case of a probationary employee when they fail to qualify to be a regular employee. The earlier draft of Justice Kho, Jr.'s ponencia reads:

The records show that C.P. Reyes Hospital served only one notice of termination to Barbosa regarding her alleged failure to meet the hospital's standards for regularization.

The implementing rules and regulations of the Labor Code, as amended by Department of Labor and Employment (DOLE) Department Order No. 010-97 states:

ARTICLE III. Section 2, Rule I, Book VI of the Implementing Rules is hereby amended, to read as follows:

"SEC. 2. Security of tenure. (a) In cases of regular employment, the employer shall not terminate the services of an employee except for just or authorized causes as provided by law and subject to the requirements of due process.

"(b) The foregoing shall also apply in cases of probationary employment; provided, however, that in such cases, termination of employment due to failure of the employee to qualify in accordance with the standards of the employer made known to the former at the time of engagement may also be a ground for termination of employment.

"x x x x

"If the termination is brought about by the completion of a contract or phase thereof, or by failure of an employee to meet the standards of the employer in the case of probationary employment, it shall be sufficient that a written notice is served the employee within a reasonable time from the effective date of termination."

In *Philippine Daily Inquirer vs. Magtibay, Jr., (Magtibay)*, the Court upheld the dismissal of the probationary employee through a single notice, ruling that due process in probationary employment lies in "apprising [the employee] of the standards against which [their] performance shall be continuously assessed, and not in notice and hearing as in the case of [just causes for dismissal]."

In *Abbott Laboratories, Philippines v. Alcaraz (Abbott Laboratories)* the Court ruled the probationary employee's dismissal through a single letter as procedurally valid, noting that the two-notice rule does not apply to probationary employees. Finally, echoing the ruling in *Abbott Laboratories*, the Court, in *Moral v. Momentum Properties Management Corp.*, held that the two-notice rule does not govern in cases of probationary employment.

In its Comment, the Office of the Solicitor General also argued that the one-notice rule in case of failure to meet the standards of regularization is valid, and that imposing the two-notice rule in this case would "render inutile the employer's right or prerogative to choose who will be hired and who will be denied employment." Further, the one-notice rule does not, according to the Solicitor General, violate the guarantee of equal protection of the laws as there is a substantial distinction between a regular and a probationary employee. Finally, the Solicitor General pointed out that a probationary employee, under the current rules, is served two notices that are akin to the notices served on regular employees; the first notice being the communication of standards and the second one being the notice of failure to meet the standards and dismissal.

However, as will be explained below, a careful study of relevant constitutional provisions, statutes, and legal principles constrains the Court to hold that this one-notice rule on probationary employees runs counter to the policies enshrined in the Constitution protecting labor and is thus *ultra vires* and should now be abandoned. Particularly, the Court sees no reason that the "two-notice rule," which is applied in case of just causes for dismissal, should not likewise be applied to dismissal due to failure of a probationary employee to qualify for regularization.

It should be noted that the Labor Code itself does not provide for these rules on notice of termination, delegating the authority instead to the DOLE to promulgate rules and regulations implementing the statute. Thus, both the one-notice and the two-notice rules are set out in the implementing rules and regulations (IRR) of the Labor Code. As instances of delegated legislative power, they must conform to and be consistent with the provisions of the enabling statute. They may not amend the law by abridging or expanding its scope.

Relevantly, the State's policy of affording full protection to labor is enshrined in the Constitution and the Labor Code. The Constitution declares that the State "affirms labor as a primary social economic force" and it "shall protect the rights of workers and promote their welfare." Its article on social justice and human rights devotes a section specific to labor, viz:

Labor

SECTION 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.

The Labor Code also declares the State's basic policy as follows:

Art. 3. Declaration of Basic Policy. — The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work.

Indeed, jurisprudence has also recognized the right of persons vis-à-vis their chosen occupation, recognizing that "[o]ne's employment, profession, trade or calling is a property right within the protection of the constitutional guaranty of due process of law."

Also among the primary labor rights that are protected by the State is the right of workers to security of tenure. "Security of tenure" refers to the right of workers not to be dismissed except for just cause provided by law and after due process.

In *Telus International Philippines, Inc. v. de Guzman*, the Court explained that security of tenure enables workers to "have a reasonable expectation that they are secured in their work and that management prerogative, although unilaterally wielded, will not harm them. Employees are guaranteed that they can only be terminated from service for a just and valid cause and when supported by substantial evidence after due process." Clear from this definition are the following aspects of security of tenure: first, that the cause of a worker's dismissal must be just and valid; second, the cause for dismissal must be based on substantial evidence; and third, that due process must be observed.

Notwithstanding the Labor Code's provision on security of tenure, which defines the right "in cases of regular employment," jurisprudence has consistently and uniformly held that probationary employees similarly enjoy security of tenure. In *Lopez v. Javier (Lopez)*, the Court emphasized that the Constitution, in according the protection of security of tenure, "does not distinguish as to the kind of worker who is entitled to be protected in this right."

Clear to the Court is the fact that security of tenure is available to employees regardless of whether they are regular or probationary. Thus, the Court finds that the due process requirement in probationary employment lies not only in apprising the employee of the reasonable standards for regularization at the time of his employment, but also, in proper cases, in informing an employee of their failure to qualify and in them being allowed the opportunity to be heard thereon prior to termination. In this manner, the Court holds that the ground of failure to qualify to the standards of regularization is akin to a just cause to dismiss an employee.

The similarity between these grounds is evident. In both these cases, the "fault" as it were lies with the employee, such as, in just causes: (a) serious misconduct or willful disobedience; (b) gross and habitual neglect; (c) fraud or willful breach of trust; (d) commission of a crime against the employer or an immediate member of their family; and (e) other analogous causes. In probationary employment, the failure to meet the employer's reasonable standards is obviously attributed to the probationary employee.

In just causes, the employee is given the opportunity to be heard on the charges against them; charges that, if ultimately resolved against them, results in the termination of their employment and in the deprivation of their property right. The same is exactly true for probationary employees, who enjoy the same security of tenure as regular employees. When faced with a circumstance that could potentially deprive them of their property right,

such as their alleged failure to qualify for regular employment based on standards unilaterally set by their employer, they then should be entitled to the same right to be heard as regular employees. The right of employees to their employment, even in cases of probationary employment, is still a right that needs to be protected. As the Court said in *Lopez*, the Constitution does not distinguish between the kind of employment when it extends its protective mantle to employees. The Court must not hold otherwise.

As it stands, the administrative rules implementing the due process requirements for dismissal of probationary employees who fail to qualify for regularization (or the "one-notice rule") do not reflect the constitutional guaranty of security of tenure. This is clearly prejudicial to the rights of probationary employees. In *Chartered Bank Employees Association vs. Ople*, the Court, through Justice Hugo Gutierrez, Jr., held that an administrative interpretation which diminishes the benefits of labor more than what the statute delimits or withholds is obviously *ultra vires* and must be struck down. Here, the one-notice rule exposes probationary employees to an unjust situation where, at the end of the probationary period, their performance is graded poorly and they are perforce dismissed and deprived of their employment without an opportunity to explain their side and be heard by the employer. Requiring the same two-notice rule for probationary employment would be more in keeping with constitutional and statutory policies affording protection to labor.

In *King of Kings Transport, Inc. v. Mamac*, the Court laid out the following procedural considerations in terminating regular employees, viz.:

(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. 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.

These considerations must be taken into account in dismissing probationary employees as well. First, the employer must inform the probationary employee in writing of the fact that based on their evaluation of the latter's performance thus far they will not qualify for regularization. Second, the probationary employee must be given a reasonable opportunity to be heard on any possible defenses they may have as regards their performance. Third, the probationary employment may be terminated through a second notice informing the probationary employee that, after considering the explanation or defenses laid out, their failure to qualify for regularization is

justified.

A fourth consideration must also be kept in mind, which is that the termination must be done before the lapse of the probationary period of employment. For if the probationary employee is allowed to work after the lapse of the probationary period, they will be considered a regular employee. The specifics as regards timing this procedure are left to the prerogative of management, so long as the above are taken into consideration.

Finally, the Court is mindful of the fact that, on appeal, the parties did not raise as an issue the validity of the procedural aspect of Barbosa's dismissal on the ground of her alleged failure to qualify for regularization. Further, before the Court, neither of the parties specifically assailed the validity of the one-notice rule as set out in DOLE Department Order No. 09-097. The Court recognizes that, considering the specialized knowledge and technical expertise involved in their issuance, administrative rules and regulations are accorded great respect. These issuances have in their favor a presumption of legality, and when their validity is not put in issue, courts have no option but to apply the same.

The rule, however, admits exceptions. Though not raised as errors or issues by the parties, the Court has held in *Comilang v. Burcena* that an appellate court is clothed with ample authority to review in the following instances: (a) grounds not assigned as errors but affecting jurisdiction over the subject matter; (b) matters not assigned as errors on appeal but are evidently plain or clerical errors within contemplation of law; (c) matters not assigned as errors on appeal but consideration of which is necessary in arriving at a just decision and complete resolution of the case or to serve the interests of justice or to avoid dispensing piecemeal justice; (d) matters not specifically assigned as errors on appeal but raised in the trial court and are matters of record having some bearing on the issue submitted which the parties failed to raise or which the lower court ignored; (e) matters not assigned as errors on appeal but closely related to an error assigned; and (f) matters not assigned as errors on appeal but upon which the determination of a question properly assigned, is dependent.

In *Unduran, et al. vs. Aberasturi*, the Court, through then Justice Diosdado Peralta, declared as null and void Rule IX, Section 1 of the implementing rules and regulations of Indigenous Peoples' Rights Act (RA 8371), as well as Rule III, Section 5 and Rule IV, Sections 13 and 14 of the rules of the National Commission on Indigenous Peoples (NCIP) for being contrary to the provisions of their enabling law. In that case, the administrative issuances expanded the jurisdiction of the NCIP beyond what is provided in the statute. While neither of the parties in that case directly assailed the validity of the administrative issuances, the Court nonetheless resolved it because they touch on the issue of who between the Regional Trial Court (RTC) and the NCIP had jurisdiction over the dispute.

Similarly, while neither of the parties in *Perez and Doria vs. Philippine Telegraph and Telephone Company* mounted a direct attack on the rules implementing the Labor Code, the Court, speaking through the late Chief Justice Renato Corona, nonetheless saw it fit to discuss whether Section 2 (d), Rule I of the Implementing Rules of Book VI of the Labor Code, on the requirement of a hearing in cases of termination, is in line with Article 277 (b) of the Labor Code, its enabling statute. While the Court stopped short of invalidating the administrative issuance, it found that the administrative requirement of an "actual hearing or conference" is not synonymous with and is in fact stricter than the requirement of the law for an "ample opportunity to be heard." Accordingly, it laid down guiding principles to govern the hearing requirement that is in line with the law itself.

Thus, it is to arrive at a complete and just resolution of this case and to serve the interests of justice that the Court is mandated to review, not only the substantive due process aspect of a probationary employee's dismissal, but also its procedural due process aspect. In doing so, the Court follows the rule set out in *Tamson's Enterprises, Inc.* that the power to terminate probationary employment must not be unlawfully discriminatory. Here, as explained

above, the Court finds that the one-notice rule discriminates against probationary employees in such a manner that runs counter to enshrined constitutional principles protecting labor and security of tenure. To emphasize, these policies are applied to all employees, regardless of whether they are regular or probationary.

Further, before the labor tribunals, the parties raised the issue of whether her dismissal was done in accord with procedural due process. Though this was not raised on appeal, the Court finds that the issue of compliance with due process indeed bears on the issues raised by the parties on appeal, and as such, needs to be resolved here." (Emphasis and underscoring in the original, citations omitted).

I concur with the ponencia's position in its initial draft.

The policy of the Constitution is to give the utmost protection to the working class as enshrined in Article XIII:

SECTION 3. The State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns on investments, and to expansion and growth.[1]

Article III of the Labor Code reiterates the State's basic policy on labor:

Declaration of Basic Policy. — The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work.[2]

Clearly, our Constitution and labor laws want employees to have a reasonable expectation of security in their work.[3] In *Telus International Philippines, Inc., v. De Guzman*,^[4] the Court emphasized that "employees are guaranteed that they can only be terminated from service for a just and valid cause and when supported by substantial evidence after due process."^[5]

This Court is fully committed to that policy and has always been quick to rise in defense of the rights of labor.^[6] While employers do not possess inherent power and right to exploit employees, several factors may create an imbalance in the employer-employee relationship, which could potentially lead to exploitation of employees. The Court must remain vigilant in these cases.

Probationary employees should receive strong protection from employer exploitation considering their increased susceptibility to mistreatment and abuse by management.^[7]

I submit that when a probationary employee fails to meet the reasonable standards for regular employment, it is equivalent to having a justifiable reason to terminate a regular employee. In these cases, the fault lies with the employee.

The grounds for dismissal of just cause lie in the serious misconduct or willful disobedience, gross and habitual

neglect, fraud or willful breach of trust, commission of a crime against the employer or an immediate member of their family, and other analogous causes.[8] In probationary employment, the employee can be legally terminated either: (1) for a just cause; or (2) for failure to meet reasonable standards set by the employer made known to him at the start of employment.[9] Such failure is attributed to the probationary employee.

Article 292 [277] of the Labor Code requires that an employee be furnished with a written notice containing the cause for termination and that the employer must give the employee an opportunity to be heard.[10] A subsequent notice must be given to inform the employee of the employer's decision to dismiss him.[11]

Employees terminated for any just cause are afforded the chance to defend themselves against charges that, if found to be true, could lead to their dismissal and the loss of their property rights. The same rule must apply for probationary employees.

The due process requirement in probationary employment is fulfilled when at the time of employment, the employer informs the probationary employee of the reasonable standards of employment regularization and of the grounds of failure to qualify. A probationary employee is deemed to have been informed by the employer of the standards for regular employment when the employer has exerted reasonable efforts to apprise the employee of what he or she is expected to do or accomplish during the trial period of probation.[12]

In terminating the employment of a probationary employee, the employer must inform the employee in writing that they did not qualify to be a regular employee based on their evaluation of their performance. Afterwards, the probationary employee must be given a reasonable opportunity to be heard and to articulate their defense. After evaluation of defenses and based on reasonable standards, termination is justified. However, it must be done before the end of the probationary period of employment. It must also be noted that a probationary employee who is allowed to work after the lapse of the probationary period shall be considered a regular employee.[13]

The requisites of the two-notice rule are basic requirements of due process in labor law. These meet the constitutional requirement of procedural due process that "contemplates notice and opportunity to be heard before judgment is rendered, affecting one's person or property"[14] and the constitutional guarantee of security of tenure.

As amended by the Department of Labor and Employment (DOLE) Department Order No. 010-9783, the implementing rules and regulations on security of tenure provide:

SEC 2. Security of tenure. (a) In cases of regular employment, the employer shall not terminate the services of an employee except for just or authorized causes as provided by law, and subject to the requirements of due process.

(b) The foregoing shall also apply in cases of probationary employment; provided, however, that in such cases, termination of employment due to failure of the employee to qualify in accordance with the standards of the employer made known to the former at the time of engagement may also be a ground for termination of employment.

....

If the termination is brought about by the completion of a contract or phase thereof, or by failure of an employee to meet the standards of the employer in the case of probationary employment, it shall be sufficient that a written notice is served to the employee within a reasonable time from the effective date of termination.[15]

In *Montinola v. Philippine Airlines*,^[16] this Court emphasized that the right of workers to security of tenure is a

constitutional and statutory protected labor right not to be dismissed without just or valid cause and in the absence of due process:

Security of tenure of workers is not only statutorily protected, but also a constitutionally guaranteed right. Thus, any deprivation of this right must be attended to by due process of law. This means that any disciplinary action that affects employment must pass due process scrutiny in both its substantive and procedural aspects.

The constitutional protection for workers elevates their work to the status of a vested right. It is a vested right protected not only against state action but against the arbitrary acts of the employers as well. This court in *Philippine Movie Pictures Workers' Association v. Premier Productions, Inc.* categorically stated that "[t]he right of a person to his labor is deemed to be property within the meaning of constitutional guarantees." Moreover, it is of that species of vested constitutional right that also affects an employee's liberty and quality of life. Work not only contributes to defining the individual, it also assists in determining one's purpose. Work provides for the material basis of human dignity.[17]

In *Lopez v. Javier*,[18] this Court held that in ensuring the protection of security of tenure, the Constitution "does not distinguish as to the kind of worker who is entitled to be protected in this right." [19] It accords security of tenure to all employees, whether regular or probationary.

While the employer observes the fitness, propriety, and efficiency of a probationer to ascertain fitness for permanent employment, the probationer at the same time seeks to prove to the employer that they have the qualifications to meet the reasonable standards for permanent employment.[20]

Employees who are on probation enjoy security of tenure.[21] During their probationary employment, they cannot be dismissed except for a cause.

In *Holiday Inn Manila v. NLRC*,[22] this Court stressed that the employer holds complete discretion in selecting employees based on their standards of competence and integrity, exercising their prerogative in the hiring process. However, once employed, workers are entitled to legal protection. This legal protection extends to both probationary and regular employees of the workforce.[23] It is also important to note that the employer's freedom in hiring employees does not equate to their freedom in terminating employment.[24]

Furthermore, the differing application of due process between a regular and probationary employee appears arbitrary. This rule places probationary employees in an unfair position where they can be dismissed and deprived of employment regularization without the opportunity to explain and be heard at the end of the probationary period.

In *Central Negros Electric Cooperative, Inc v. NLRC*,[25] this Court emphasized the need for probationary employees' protection:

Rightly so, for if there is any group of employees that needs robust protection from the exploitation of employers, it is the casuals and probationaries. Usually the lowliest of the lowly, they are most vulnerable to abuses of management for they would rather suffer in silence than risk losing their jobs.[26]

With utmost respect to my colleagues, I stand with the ponencia's initial position that the one-notice rule on probationary employees runs counter to the constitutional guarantee of affording full protection to labor and security of tenure. To require the application of the two-notice rule for probationary employment is consistent with our state policy on protecting labor.

To emphasize, we noted the transcendental role of labor in *Globe--Mackay Cable v. NLRC*: [27]

[C]onstitution has gone further than then 1973 Charter in guaranteeing vital social and economic rights to marginalized groups of society, including labor. Given the pro-poor orientation of several articulate

Commissioners of the Constitutional Commission of 1986, it was not surprising that a whole new Article emerged on Social Justice and Human Rights designed, among other things, to "protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good." [28]

The right of probationary employees to employment is a right that needs to be protected. In situations where probationary employees are confronted with circumstances that may jeopardize their property rights, such as being deemed ineligible for employment regularization based on reasonable standards unilaterally established by their employer, they must be afforded the same opportunity to be heard and to present their case, akin to that provided to regular employees. A probationary employee, like a regular employee, enjoys security of tenure. [29]

When the Constitution makes no distinction between the kind of employment in extending its protection to employees, the Court must refrain from making one.

To repeat, the ponencia in its initial draft ruled on the applicability of the two-notice rule to all employees, both regular and probationary, as a prerequisite to a valid dismissal due to the security of tenure they enjoy. However, the ponencia has had to strike out its entire discussion on that issue in deference to the En Banc's decision to wait for a proper case that directly touches on the constitutionality of the one-notice rule for termination of probationary employees, instead of laying down what would merely be an obiter dictum in the present case for entitlement to backwages. Hence, while we wait for the proper case to ripen for resolution, I leave this here for my colleagues to consider when the issue is directly raised to this Court in the future.

ACCORDINGLY, I vote that the Petition be DENIED.

[1] CONST., art. 13, sec. 3.

[2] LABOR CODE, as amended by Presidential Decree No. 442 (2015), art. 3.

[3] *Telus International Philippines, Inc., et al. v. De Guzman*, 867 Phil. 274, 287 (2019) [Per J. Hernando, Second Division].

[4] *Id.* at 274.

[5] *Id.* at 287.

[6] *Holiday Inn Manila v. National Labor Relations Commission*, G.R. No. 109114, September 14, 1993 [Per J. Cruz, First Division].

[7] *Cebu Marine Beach Resort v. NLRC*, G.R. No. 143252, October 23, 2003 [Per J. Sandoval-Gutierrez, Third Division].

[8] LABOR CODE, as amended by Presidential Decree No. 442 (2015), art. 297 [282].

[9] LABOR CODE, as amended by Presidential Decree No. 442 (2015), art. 296 [281].

[10] LABOR CODE, as amended by Presidential Decree No. 442 (2015), art. 292 [277] (b).

[11] *Montinola v. Philippine Airlines*, 742 Phil. 491, 506-507 (2014) [Per J. Leonen, Second Division], citing *Voyeur Visage Studio v. Court of Appeals*, 493 Phil. 831, 840 (2005) [Per J. Garcia, Third Division]. The need for 1) a notice apprising the acts and omissions of the employee for which discipline is sought; 2) a notice informing the penalty of the employer, is referred to as the 'twin notice requirement' in labor law.

- [12] *Jaso v. Metrobank & Trust Co.*, 903 Phil. 213 (2021) [Per J. Inting, Third Division].
- [13] LABOR CODE, as amended by Presidential Decree No. 442 (2015), art. 296 [281].
- [14] *Lopez v. Director of Lands*, 47 Phil. 23-37 (1924) [Per J. Johnson. En Banc].
- [15] DOLE Department Order No. 010-9783 (1997). Amending Rules Implementing Books III and VI of the Labor Code.
- [16] 742 Phil. 491 (2014) [Per J. Leonen, Second Division].
- [17] *Id.* at 501.
- [18] 322 Phil. 73-83 (1996) [Per J. Romero, Second Division].
- [19] *Id.*
- [20] *Escorpizo v. University of Baguio*, G.R. No. 121962, April 30, 1999 [Per J. Quisumbing, Second Division].
- [21] *Dajao v. University of San Carlos, et. al.*, G.R. No. 264418, March 1, 2023 [Notice, Third Division].
- [22] G.R. No. 109114, September 14, 1993 [Per J. Cruz, First Division].
- [23] *Id.*
- [24] *Id.*
- [25] 306 Phil. 118-125 (1994) [Per J. Puno, Second Division].
- [26] *Id.*
- [27] 283 Phil. 652-664 (1992) [Per J. Romero, En Banc].
- [28] *Id.* See also CONST., art. 13, sec. 1, par. 1.
- [29] *Abbott Laboratories v. Alcaraz*, G.R. No. 192571, July 23, 2013 [Per J. Perlas-Bernabe, En Banc].

CONCURRING AND DISSENTING OPINION

CAGUIOA, J.:

I concur in the ponencia insofar as it affirms the illegality of respondent's dismissal. However; I dissent as to the computation of her backwages and the abandonment of the rule in *Robinsons Galleria/Robinsons Supermarket Corporation v. Ranchez*[1] (*Robinsons*).

In *Robinsons*, the Court computed the backwages awarded to an illegally dismissed probationary employee from the time of her illegal dismissal until the end of her probationary employment. According to the Court in *Robinsons*, the lapse of the probationary employment without the employee's regularization effectively severed the employment relationship.[2]

The ponencia abandons this rule and reverts to the prior rule enunciated in *Lopez v. Javier*[3] (*Lopez*) which computes the payment of backwages of an illegally dismissed probationary employee up to actual reinstatement or finality of judgment.[4] The ponencia holds that *Lopez* is more in keeping with the constitutional and statutory guarantees in favor of labor since neither the Constitution nor the Labor Code distinguish between regular and probationary employees in guaranteeing the right to security of tenure.[5] Moreover, the ponencia holds that the

lapse of the probationary period without a valid termination ipso facto renders the employment regular.[6]

With due respect, I disagree and submit that the rule in Robinsons is the more correct view as it is consistent with law.

The award of backwages is tied to the employee's right to security of tenure, which guarantees that employees can only be dismissed for just or authorized causes and after they have been afforded due process of law.[7] In case an employee is unjustly terminated from work, he or she shall be entitled to backwages in accordance with Article 294 of the Labor Code:

ARTICLE 294. [279] Security of Tenure. — 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. (Emphasis supplied)

While Article 294 only speaks of regular employees, it is settled that probationary employees also enjoy security of tenure albeit limited.[8] It is limited in the sense that, aside from just and authorized causes, probationary employees may also be dismissed due to failure to qualify in accordance with the standards of the employer made known to the employee at the time of engagement.[9] However, a probationary employee's right to security of tenure ends upon the expiration of the probationary period.[10] Despite these distinctions, the Court recognizes that illegally dismissed probationary employees are also entitled to backwages.

The payment of backwages allows the employee to recover from the employer that which he or she has lost by way of wages because of his or her dismissal.[11] Hence, backwages is computed from the time of the dismissal or when the salaries were withheld until the employee's actual reinstatement. Where reinstatement is no longer possible, backwages is computed until the finality of judgment because it is at this point that the employment relationship is deemed terminated.[12]

In Robinsons, however, the Court clarified that probationary employment relationship is terminated, not by the finality of judgment, but by the expiration of the probationary period — when the probationary period lapses during the pendency of the illegal dismissal case.

In disagreement, the ponencia holds that the lapse of the probationary period without a valid termination ipso facto renders the employment regular.[13] Consequently, the general rule applies, and such employee becomes entitled to backwages until actual reinstatement or finality of judgment, which may be beyond the probationary period.

This interpretation is not consistent with, overlooks, and unwarrantedly impacts the characterization of probationary employment under Article 296 of the Labor Code:

ARTICLE 296. [281] Probationary Employment. — Probationary employment shall not exceed six (6) months from the date the employee started working, unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a probationary basis may be terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. An employee who is allowed to work after a probationary period shall be considered a regular employee. (Emphasis supplied)

The last sentence of Article 296 provides that "[a]n employee who is allowed to work after a probationary period shall be considered a regular employee." Regularization therefore for a probationary employee does not envision

the mere lapse of the probationary period — rather, it recognizes the rendition of actual service beyond and despite the lapse of the probationary period. By allowing the employee to work after the probationary period, the employer is deemed to have been satisfied with the employee's performance, and the employee is therefore deemed to be a regular employee.

Article 296 works in this manner: the reasonable standards to qualify as a regular employee are made known to the probationary employee at the time of engagement. The probationary period is for the purpose of determining whether the employee is able to qualify as a regular employee. Before the end of the probationary period, the employer will provide the employee with the results of the former's evaluation and inform the latter if he or she qualified as regular employee. The last sentence of Article 296 envisions the situation where the employer does not provide the employee with the results of the evaluation but nonetheless allows the employee to work beyond the probationary period. In this situation, the law steps in and considers the employee as already a regular employee.

The application of the last sentence of Article 296 is akin to that of estoppel. The employer, who allows a probationary employee to work beyond the probationary period, is deemed by law to have bestowed on the employee that status of a regular employee. From the point of view of the employee, it can be said that the employee is made to believe that he or she has passed the standards of regularization, as he or she was allowed to work beyond the probationary period. In effect, the employer's actions provide the basis for the employee's regularization.

I emphasize that this phrase — "allowed to work" — does not give the employer unbridled discretion to remove a probationary employee with or without any valid grounds, and consequently, pay less backwages. It does not provide basis for the employer to "disallow" an employee from working, in violation of the employee's security of tenure. This phrase should always be read in conjunction with the probationary employee's right to security of tenure which, as explained above, proscribes capricious and unjustified termination of probationary employment. At the risk of repetition, being "allowed to work" under Article 296 means that the employee has qualified to become a regular employee.[14]

Regrettably, the ponencia oversimplifies the requirement under the last sentence of Article of 296 and makes a broad statement that a probationary employee who was allowed to work refers to a one who was "not validly dismissed prior to the expiration of the probationary period." [15] The ponencia then concludes that the change in status of employment, from probationary to regular, happens ipso facto, by operation of law, and without need of any act on the part of the employer or employee.[16]

I simply cannot subscribe to the ponencia's interpretation as it clearly deviates from the true meaning of Article 296 and amounts to an introduction of another mode of regularization that is not sanctioned by law, i.e., regularization by mere expiration of the probationary period or passage of time.

Interestingly, despite concluding that the expiration of the probationary period during the pendency of the case will result in regularization, the ponencia nonetheless refrains from explicitly declaring respondent a regular employee of petitioner. It appears that respondent is considered a regular employee, but not in the true sense of the term; rather, only for purposes of computation of her backwages (i.e., she will not be entitled to the statutory compensation and emoluments accorded by law to regular employees). As a result, the Court has practically extended her probationary employment — which began in September 2013 — for more than a decade, in clear contravention of the six (6)-month limit under Article 296.

It is also unreasonable to presume that respondent would have become a regular employee had she not been illegally dismissed. This proposition assumes that respondent would have performed to the satisfaction of

petitioner for the remainder of her probationary period and would then have been allowed to continue working as a regular employee. Unlike in regular employment, there can be no reasonable expectation of continued employment beyond the probationary period for probationary employees.

After all, the decision to regularize employees is a management prerogative. A probationary employee is one who is placed on a "trial period" during which the employee seeks to prove to the employer that he or she has the qualifications to meet the reasonable standards for permanent or regular employment, while the employer observes the fitness and efficiency of the employee to ascertain whether he or she is qualified for permanent or regular employment.[17] This exercise — the determination of a probationary employee's fitness for regular employment — is a management prerogative. Jurisprudence provides that the employer has the right or is at liberty to choose as to who will be hired and who will be declined.[18] It is within the exercise of this right to select employees that the employer may set or fix a probationary period within which the latter may test and observe the conduct of the former before hiring them permanently. Thus, the Court cannot assume that the probationary employee would have been regularized upon the mere lapse of the probationary period.

Let us consider a scenario where an illegally dismissed probationary employee is ordered to be reinstated (and not just given backwages) because the probationary period has not yet expired. In such case, the probationary employee would be reinstated to the same probationary position with the same compensation and emoluments. For the remainder of the probationary period, the employee's performance would again be subject to the same reasonable standards for regularization. Hence, once reinstated, there is no assurance that the employee will, in the end, qualify for regularization. The proposition above discounts these nuances.[19]

Without actually qualifying for regularization, a probationary employee cannot claim to have a right to earn wages beyond the probationary period. There is, therefore, no reason to extend the computation of backwages beyond the probationary period because the rationale behind the award of backwages is to allow an employee to recoup the salaries and benefits which said employee should have earned had he or she not been illegally dismissed. It bears stressing that a probationary employee's right to security of tenure ends upon the expiration of the probationary period. Unless the employer deems him or her qualified for regularization, the probationary employee's right to continued employment also ends.

Thus, I cannot support the ponencia's conclusion, lifted from the Court's pronouncement in *Philippine Manpower Services, Inc. v. NLRC*, [20] (*Philippine Manpower*), that absent valid grounds to terminate a probationary employee, he or she becomes entitled to continued employment even beyond the probationary period. This statement disregards the requirement for regularization discussed above, which — I stress anew — is the only basis for continued employment beyond the probationary period.

Moreover, a full reading of *Philippine Manpower* in fact validates the conclusion that illegally dismissed probationary employees are entitled to backwages only until the end of the probationary period. *Philippine Manpower* involves an illegally dismissed probationary overseas worker. Overseas employment is contractual in nature. Republic Act (R.A.) No. 10022, or the "Migrant Workers and Overseas Filipinos Act of 1995," as amended, provides for the payment of salaries equivalent to the unexpired portion of the contract to illegally dismissed overseas workers, including those with probationary status. It is in this context that the Court in this case held that:

Since as established in the case at bar, petitioners were unable to prove either ground as a basis for terminating Pangan's employment, no reason exists to sever the employment relationship between Adawliah and Pangan. Otherwise stated, absent the grounds for termination of a probationary employee, he is entitled to continued employment even beyond the probationary period. Accordingly, had not Pangan been compelled to return to the Philippines, he could have demanded enforcement of the employment contract.[21] (Emphasis supplied)

Evidently, this case supports the conclusion that an illegally dismissed employee is entitled to salaries corresponding only to the period where there is reasonable expectancy of continued employment, i.e., until the end of the term of a contract or end of the term of a probationary employment.

I recognize that the different views on the computation of backwages stem partly from the fact that there is no statute specifically providing the reckoning periods for the computation of backwages of probationary and regular employees. Be that as it may, the foregoing discussion demonstrates that the law affords a clear distinction between probationary and regular employment, and the Court should have taken these into consideration in the treatment of employees backwages. To emphasize, the Labor Code — particularly Articles 294 in relation to Article 296 — provides legal mooring for the interpretation that the backwages of an illegally dismissed probationary employee should be computed only until actual reinstatement or the end of the probationary period. The ponencia, however, has blurred these distinctions for reasons other than those clearly found in law, i.e., to prevent an employer from evading financial repercussions stemming from the employment relationship.

Indeed, a question on the possible financial exposure of employers may be raised: particularly, that a maximum possible exposure of six months' worth of backwages will not deter employers from arbitrarily dismissing probationary employees to prevent them from attaining regular employment.

Deterrence of deplorable practices is, however, not a function of backwages but of damages.

I am aware of the Court's declaration in *Equitable Banking Corp. v. Sadac*[22] (*Equitable*) that "payment of full backwages is the price or penalty that the employer must pay for having illegally dismissed an employee." This statement, however, should not be taken at face value and should be contextualized. The Court in *Equitable* made this statement in relation to the abandonment of the Mercury Drug Rule which provides that compensation earned by illegally dismissed employees elsewhere should be deducted from their backwages. It was held that payment of "full backwages" (i.e., without deducting the salaries earned from other employment during the pendency of the illegal dismissal case) — not the payment of backwages per se — was no longer seen as amounting to unjust enrichment on the part of the employee but the "price or penalty the employer has to pay." As held by the Court in *Bustamante v. NLRC*,[23] the case cited in *Equitable*, viz.:

... The rationale for such ruling was that, the earnings derived elsewhere by the dismissed employee while litigating the legality of his dismissal, should be deducted from the full amount of backwages which the law grants him upon reinstatement, so as not to unduly or unjustly enrich the employee at the expense of the employer.

The Court deems it appropriate, however, to reconsider such earlier ruling on the computation of backwages as enunciated in said *Pines City Educational Center* case, by now holding that conformably with the evident legislative intent as expressed in Rep. Act No. 6715, above-quoted, backwages to be awarded to an illegally dismissed employee, should not, as a general rule, be diminished or reduced by the earnings derived by him elsewhere during the period of his illegal dismissal. The underlying reason for this ruling is that the employee, while litigating the legality (illegality) of his dismissal, must still earn a living to support himself and family, while full backwages have to be paid by the employer as part of the price or penalty he has to pay for illegally dismissing his employee. The clear legislative intent of the amendment in Rep. Act No. 6715 is to give more benefits to workers than was previously given them under the Mercury Drug rule or the "deduction of earnings elsewhere" rule. Thus, a closer adherence to the legislative policy behind Rep. Act No. 6715 points to "full backwages" as meaning exactly that, i.e., without deducting from backwages the earnings derived elsewhere by the concerned employee during the period of his illegal dismissal. In other words, the provision calling for "full backwages" to illegally dismissed employees is clear, plain and free from ambiguity and, therefore, must be applied without attempted or strained interpretation. *Index animi sermo est*. [24]

Relevantly, in *Albay Electric Cooperative, Inc. v. ALECO Labor Employees Organization*,^[25] the Court had the occasion to rule that backwages were not awarded to penalize the employer but to enforce the obligation to pay the employees their salaries and benefits, viz.:

In consideration of the foregoing, the award of backwages is proper — not as a penalty for non-compliance with the Assumption Order as argued by ALEO — but as satisfaction of ALECO's obligation towards the employees covered by the Assumption Order. On said date, the obligation of the employer to re-admit the striking employees and/or pay them their respective salaries and benefits arose. However, there is no proof that the affected employees were in fact paid by ALECO their corresponding salaries and benefits. Because of ALECO's failure to perform this obligation, and to give the affected employees what has become due to them as of January 10, 2014, backwages should be awarded.

In illegal dismissal cases, backwages refer to the employee's supposed earnings had he/she not been illegally dismissed. As applied in this case, backwages correspond to the amount ought to have been received by the affected employees if only they had been reinstated following the Assumption Order. This shall similarly include not only the employee's basic salary but also the regular allowances being received, such as the emergency living allowances and the 13th month pay mandated by the law, as well as those granted under a CBA, if any.^[26]

To emphasize, therefore, if the objective is to penalize the employer for illegally dismissing an employee, the Court should impose damages.

In labor cases, moral damages are awarded when the employer acted in bad faith or fraudulently, in a manner oppressive to labor, or in a manner contrary to morals, good customs, or public policy.^[27] They are awarded as compensation for actual injury suffered and not as a penalty.^[28]

Meanwhile, exemplary damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages.^[29] They may be awarded if the dismissal was effected in a wanton, oppressive or malevolent manner.^[30] Exemplary damages are "intended to serve as a deterrent to serious wrong doings, and as a vindication of undue sufferings and wanton invasion of the rights of an injured or a punishment for those guilty of outrageous conduct."^[31] They are "a negative incentive to curb socially deleterious actions."^[32] In labor cases, exemplary damages are necessary to deter future employers from committing the same acts.^[33]

Thus, if the Court's objective is to penalize respondent's employer and to discourage other employers from engaging in the practice of terminating probationary employment to prevent regularization, it would be more appropriate to award exemplary damages instead of extending the accrual period of backwages in contravention of the Labor Code.

In this case, however, there is no finding that petitioner dismissed respondent in bad faith or in a wanton, oppressive or malevolent manner. Furthermore, respondent did not appeal the Court of Appeals' ruling which did not award any damages. For these reasons, the imposition of moral and exemplary damages would not be proper in this case.

In conclusion, I submit that the characterization of probationary employment under Article 296 of the Labor Code does not support regularization by mere lapse of the probationary period; it requires the rendition of actual service beyond the probationary period. Thus, contrary to the ponencia's conclusion and consistent with the ruling in *Robinsons*, the lapse of the probationary period during the pendency of the illegal dismissal case should operate to terminate the employment relationship. Consequently, the backwages to which the illegally dismissed probationary employee is entitled to shall only accrue until the end of the probationary period.

I recognize the practice of unscrupulous employers who use the limited security of tenure of probationary employees to skirt their obligations under the law. I maintain, however, that deterrence of unlawful practices is not the purpose of backwages but of damages — specifically, exemplary damages. Thus, the Court should instead impose stiffer exemplary damages as penalty and deterrent when proper. A survey of illegal dismissal cases decided in 2023 and 2022 shows that the Court had awarded exemplary damages ranging from PHP 10,000.00 to PHP 100,000.00.[34] While there is no clear metric in determining the proper amounts to be imposed as damages, the Court should consider whether the amount is commensurate to the fraudulent act committed by the employer and sufficient to send a message to other employers that the commission of similar acts will not be taken lightly by the Court.

I underscore the importance of empathizing with the rights of workers and prioritizing the protection of labor rights. Championing the cause of labor, however, must be done within the clear parameters of law and with equal regard to the rights of the employers.

[1] 655 Phil. 133 (2011) [Per J. Nachura, Second Division].

[2] Id. at 139.

[3] 322 Phil. 70 (1996) [Per J. Romero, Second Division].

[4] Ponencia, p. 19.

[5] Id. at 20.

[6] Id.

[7] See *Reyes v. RP Guardians Security Agency, Inc.*, 708 Phil. 598 (2013) [Per J. Mendoza, Third Division].

[8] See *Philippine National Oil Co.-Energy Development Corp. v. Buenviaje*, 788 Phil. 508 (2016) [Per J. Jardeleza, Third Division].

[9] Id. at 536.

[10] *Biboso v. Victorias Milling*, 166 Phil. 717, 722-723 (1977) [Per J. Fernando, Second Division]; See also *Alcira v. NLRC*, 475 Phil. 455, 464 (2004) [Per J. Corona, Third Division]; *Manlimos v. NLRC*, 312 Phil. 178, 192 (1995) [Per J. Davide, Jr., First Division]; and *Cathay Pacific Airways, Ltd. v. Marin*, 533 Phil. 111, 126 (2006) [Per J. Callejo, Sr., First Division].

[11] *Verdadero v. Barney Autolines Group of Companies Transport, Inc.*, 693 Phil. 646, 659 (2012) [Per J. Mendoza, Third Division]

[12] *Masagana Farm Supply, Inc. v. Tompong*, G.R. No. 266925, June 14, 2023 [Notice, First Division].

[13] Ponencia, p. 20.

[14] Thus, it is not to correct to posit, as the Chief Justice does in his Concurring Opinion, that to construe "allowed to work" as purely within the control of the employer would mean that the employer can remove a probationary employee with or without any valid ground, and consequently only pay backwages for a short duration. This would effectively circumvent their right to security of tenure. Again, being "allowed to work" does not give the employer unbridled discretion to dismiss probationary employees; what it means is that the employee has earned the tacit of the employer.

[15] Ponencia, p. 22-23.

[16] Id. at 23.

[17] *International Catholic Migration Commission v. NLRC*, 251 Phil. 560, 567 (1989) [Per J. Fernan, Third Division].

[18] *Manlimos v. NLRC*, supra note 10, at 192.

[19] Thus, it would be inaccurate to assume, as suggested by the Chief Justice in his Concurring Opinion, that had respondent been "allowed to work" after the probationary period, she would have become a regular employee and, therefore, entitled to backwages similar to an illegally regular employee. Again, this proposition presumes that the respondent would have performed to the satisfaction of her employer for the remainder of the probationary period.

[20] 296 Phil. 596 (1993) [Per J. Romero, Third Division].

[21] Id. at 606-607.

[22] 523 Phil. 781 (2006) [Per J. Chico-Nazario, First Division].

[23] 332 Phil. 833 (1996) [Per J. Padilla, En Banc].

[24] Id. at 842-843.

[25] 883 Phil. 517 (2020) [Per J. Caguioa, First Division].

[26] Id. at 530.

[27] *Beltran v. AMA Computer College-Biñan*, 851 Phil. 134, 151 (2019) [Per J. Caguioa, Second Division].

[28] *Magsaysay Maritime Corporation v. Chin, Jr.*, 731 Phil. 608, 614 (2014) [Per J. Abad, Third Division].

[29] *Beltran v. AMA Computer College-Biñan*, supra note 25, at 151.

[30] *Agabon v. National Labor Relations Commission*, 485 Phil. 248, 367 (2004) [Per J. Santiago, En Banc].

[31] *People v. Dalisay*, 620 Phil. 831, 844 (2009) [Per J. Nachura, Third Division].

[32] *Magsaysay Maritime Corporation v. Chin, Jr.*, supra note 26, at 614.

[33] *Aldovino, et al. v. Gold and Green Manpower Management and Development Services, Inc.*, 854 Phil. 100, 119 (2019) [Per J. Leonen, Third Division].

[34] See *Vestina Security Services, Inc. v. Villanueva*, G.R. No. 256704, March 29, 2023 [Notice, Second Division]; *Causeway Seafood Restaurant Corp. v. Camacho*, G.R. No. 250048, February 1, 2023 [Notice, First Division]; *Añonuevo v. CBK Power Company, Ltd.*, G.R. No. 235534, January 23, 2023 [Per J. Singh, Third Division], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68736>; *Caballero v. Vikings Commissary*, G.R. No. 238859, October 19, 2022 [Per J. Leonen, Second Division], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68775>; *Adstratworld Holdings, Inc. v. Magallanes*, G.R. No. 233679, July 6, 2022 [Per J. Inting, Third Division], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68434>; *Agapito v. Aeroplus Multi-Services, Inc.*, G.R. No. 248304, April 20, 2022 [Per J. Lazaro-Javier, Third Division], available at <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68342>; *Inter-Asia Development Bank v. Pereña*, G.R. No. 213627, April 5, 2022 [Notice, First Division]; and *Traveloka Philippines, Inc. v. Ceballos, Jr.*, G.R. No. 254697, February 14, 2022 [Per J. Perlas-Bernabe, Second Division], available at

<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68289>.

CONCURRENCE AND DISSENT

LAZARO-JAVIER, J.:

The ponencia declared that respondent Geraldine M. Barbosa (Barbosa) was illegally dismissed by petitioner C.P. Reyes Hospital and awarded her backwages computed from January 1, 2014, i.e., the actual date her compensation was withheld, up to the finality of the Decision, subject to legal interest at the rate of 6% per annum from finality of the Decision until fully payment.

In so ruling, the ponencia acknowledged the conflicting state of current jurisprudence on the correct reckoning period in the computation of backwages of illegally dismissed probationary employees, i.e., *Lopez v. Javier*,^[1] *Cebu Marine Beach Resort v. NLRC*,^[2] and *SHS Perforated Materials v. Diaz*,^[3] which reckoned the same from the time compensation was withheld up to the finality of the Decision, while *Robinsons Galleria v. Ranchez*,^[4] *Woodridge School v. Pe Benito and Balaguer*,^[5] and *Magis Young Achievers' Learning Center and Cariño v. Manalo*,^[6] computed the same only up to the end of the probationary period. The ponencia upheld the ruling in *Lopez*, *Cebu Marine*, and *SHS Perforated Materials*, with the following ratio:^[7]

In the face of this jurisprudential conflict, the Court deems it necessary to state explicitly that illegally dismissed probationary employees, like regular employees, are entitled to backwages up to their actual reinstatement. In case reinstatement is proven to be infeasible due to strained relations between the employer and the employee and other analogous cases, backwages shall be computed from the time compensation was withheld up to the finality of the decision.

The ruling is more in keeping with constitutional and statutory guarantees in favor of labor. As the Court held in *Lopez*, the Constitution did not distinguish between regular and probationary employees in guaranteeing the right to security of tenure. Similarly, the Labor Code as amended by [Republic Act No.] 6715 made no such distinction in providing that an illegally dismissed employee is 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." As the Constitution and the law did not distinguish, the Court should not as well.

Further, contrary to the finding in *Robinsons Galleria*, the lapse of the probationary contract without an appointment as regular employee does not necessarily sever the employer-employee relationship. In fact, a probationary employee who is allowed to work beyond the probationary period is, by force of law, considered a regular employee. In one case, the Court has held that absent any grounds to terminate a probationary employee, there is no reason to sever the employment and, consequently, the employee is entitled to continued employment "even beyond the probationary period." (Emphases and italics in the original, citations omitted)

With due respect, while I fully agree that Barbosa was illegally dismissed, I disagree with the reckoning period used by the ponencia in computing her backwages. I submit that the same ought to have been reckoned from the actual date her compensation was withheld, i.e., January 1, 2014, but only up to the end of her probationary period, i.e., March 4, 2014, since, as a probationary employee, she enjoyed security of tenure only during the limited period of her probation.

Award of Backwages, When Proper

Article 294 of the Labor Code clearly provides:

ART. 294. [279] Security of Tenure. – x x x 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. (Emphasis supplied)

The purpose of the award of backwages is to compensate the worker for what he or she has lost because of his or her dismissal, and to set the price or penalty on the employer for illegally dismissing the employee.[8]

Backwages may be awarded only corresponding to the life of the employment relationship

As regards the reckoning period in computing backwages, Article 294 categorically states that the same is reckoned from the time compensation was withheld up to the time of actual reinstatement. This is because backwages are awarded concomitant to a violation of an employee's right to security of tenure. Consequently, backwages may properly accrue only for the duration of the tenure of the employee.

As the learned Justice Ramon Paul L. Hernando stated in *Angono Medics Hospital, Inc. v. Agabin*,^[9] "we may also view the proper computation of backwages (whether based on reinstatement or an order of separation pay) in terms of the life of the employment relationship itself."

To illustrate:

Where the illegally dismissed employee is a permanent and regular employee whose employment does not cease on a certain date but continues until validly terminated, backwages continue to accrue until he or she is reinstated.

Where, however, reinstatement is no longer possible, the Court shall award separation pay in lieu of reinstatement, and backwages shall be computed from the time compensation was withheld until the finality of the decision ordering the payment of separation pay. In *Dumapis v. Lepanto Consolidated Mining Co.*,^[10] the Court explained the rationale for this rule, viz.:

In *CICM Mission Seminaries, et al. v. Perez* citing *Bani Rural Bank, Inc. v. De Guzman*, the Court through the Second Division laid down the rule that the award of separation pay and backwages for illegally dismissed employees should be computed from the time they got illegally dismissed until the finality of the decision ordering payment of their separation pay, in lieu of reinstatement, thus:

The reason for this was explained in *Bani Rural Bank, Inc. v. De Guzman*. When there is an order of separation pay (in lieu of reinstatement or when the reinstatement aspect is waived or subsequently ordered in light of a supervening event making the award of reinstatement no longer possible), the employment relationship is terminated only upon the finality of the decision ordering the separation pay. The finality of the decision cuts-off the employment relationship and represents the final settlement of the rights and obligations of the parties against each other. Hence, backwages no longer accumulate upon the finality of the decision ordering the payment of separation pay because the employee is no longer entitled to any compensation from the employer by reason of the severance of his employment. One cannot, therefore, attribute patent error on the part of the CA when it merely affirmed the NLRC's conclusion, which was clearly based on jurisprudence.^[11] (Emphases supplied, citations omitted)

In fine, an illegally dismissed regular employee is entitled to backwages computed up to the finality of the decision when reinstatement is no longer feasible because his or her employment continues until the same is severed by the decision.

This logic underlying the computation of backwages and separation pay in lieu of reinstatement has been consistently applied by the Court in various cases. Consider:

For project employees whose employment has been fixed for a specified project or undertaking,[12] their backwages are computed from the date of the termination of employment until the actual completion of the work.[13] For fixed-term employees, their backwages are computed only corresponding to the unexpired portion of their fixed-term employment contract.[14]

In both instances, the underlying principle is that illegally dismissed workers are entitled to the payment of their salaries corresponding to the unexpired portion of their employment where the employment is for a definite period.[15]

Meanwhile, in case the illegally dismissed employee has reached the compulsory retirement age, his or her backwages should only cover the time when he or she was illegally dismissed up to the time when the employee reached the compulsory age of retirement,[16] for it is only up to such age when employment could continue.

Similarly, where the employer had already ceased operations, full backwages are computed only up to the date of the closure of the business.[17] In case of the employee's death during the pendency of the case, backwages are reckoned only up until his or her death.[18]

Taking these rules into consideration, I am thus unable to subscribe to the view of the ponencia that Article 294, as it stands, prescribes only one fixed reckoning timeline for the computation of backwages owing to illegally dismissed employees, whether regular or probationary, i.e., starting from the time they were deprived of compensation until they are actually reinstated. This position seems to negate the true meaning of "actual reinstatement" which ought to happen only for the duration of the "life of the employment relationship" such that backwages accumulate only while the employment relationship may validly last.

Probationary employees only enjoy limited tenure, i.e., the probationary period; their backwages may be reckoned only up to the end of said period

Going now to probationary employees like Barbosa, I humbly submit that their full backwages accrue only during the period corresponding to their limited tenure, i.e., the probationary period. For to construe otherwise would unjustifiably convert their status from probationary to regular.

I elucidate.

A probationary employee is one who, for a given period of time not exceeding six months, is being observed and evaluated to determine whether he or she is qualified for permanent employment. The word probationary, as used to describe the period of employment, implies the purpose of the term or period.[19]

Vis-à-vis regular employees, the Court acknowledged that while a probationary employee enjoys security of tenure, it is not on the same plane as that of a permanent employee.[20] This is because a probationary employee's employment status is merely temporary and his or her right to security of tenure covers only such limited period,[21] which may not exceed six months.

Verily, since the award of backwages prescinds from the right of security of tenure, probationary employees would be entitled to the amount of backwages corresponding only to the period covered by their right to security of tenure, which is the probationary period.

The ponencia nonetheless justifies computing backwages of probationary employees until the finality of decision by ratiocinating that they are not automatically terminated upon the end of the probationary period. In fact, probationary employees will be considered regular employees if allowed to work beyond the probationary period.[22]

I focus on the word "allowed" as provided by Article 296 of the Labor Code. To be precise, the law states, "... a probationary employee who is allowed to work beyond the probationary period is, by force of law, considered a regular employee." This is because if the employee was allowed to remain in employment beyond the probationary period, it could be for no other reason than that he or she demonstrated sufficient skill in terms of the ability to meet the standards set by the employer.[23]

Again, the key word here is "allowed" which contemplates acquiescence by the employer to the continued service of the probationary employee. This requisite acquiescence, however, is absent where the employment of a probationary employee continued beyond the probationary period, not because the employer allowed it to, but because in the meantime there is an illegal dismissal case pending before the courts during which it has not yet been determined whether the employment relationship was validly severed.

When the Court thus ultimately rules, after the probationary period had already expired, that probationary employees were illegally dismissed and orders their reinstatement, the Court contemplates restoring said employee to their original status, i.e., as probationary employees. The Court does not reinstate them to a regular position which they, prior to their illegal dismissal, never held. For reinstatement means the restoration to a state or condition from which one had been removed or separated.[24] In effect, the probationary employee shall be reinstated to his or her position as such, but subject to regularization at the end of the probationary period.

Similarly, where reinstatement is no longer feasible, the illegal dismissal of probationary employees does not convert their status to that of regular employees. There is, thus, no basis to award them backwages corresponding to the period beyond his or her probationary employment.

ALL TOLD, I concur in the finding that respondent Geraldine M. Barbosa was illegally dismissed, but dissent on the computation of backwages in reckoning it from the date compensation was actually withheld until the finality of the Decision.

[1] 322 Phil. 70 (1996) [Per J. Romero, Second Division].

[2] 460 Phil. 301 (2003) [Per J. Sandoval-Gutierrez, Third Division].

[3] 647 Phil. 580 (2010) [Per J. Mendoza, Second Division].

[4] 655 Phil. 133 (2011) [Per J. Nachura, Second Division].

[5] 591 Phil. 154 (2008) [Per J. Nachura, Third Division].

[6] 598 Phil. 886 (2009) Per J. Nachura, Third Division].

[7] Ponencia, pp. 19-20.

[8] United Coconut Chemicals, Inc. v. Valmores, 813 Phil. 685, 698 (2017) [Per J. Bersamin, Third Division].

[9] 892 Phil. 89, 104 (2020) [Per J. Hernando, Third Division].

[10] 884 Phil. 156 (2020) [Per J. Lazaro-Javier, En Banc].

[11] Id. at 167-168.

[12] *Inocentes et al. v. R. Syjuco, Construction, Inc., et al.*, 858 Phil. 393, 404 (2019) [Per J. Inting, Third Division].

[13] *Carpio v. Modair Manila*, G.R. No. 239622, June 21, 2021 [Per J. J. Lopez, Third Division].

[14] *Philippine-Singapore Transport Services, Inc. v. NLRC*, 343 Phil. 284 (1997) [Per J. Torres, Jr., Second Division].

[15] *Aro et al. v. NLRC*, 683 Phil. 605, 617 (2012) [Per J. Peralta, Third Division].

[16] *Jaculbe v. Siliman University*, 547 Phil. 352, 359 (2007) [Per J. Corona, First Division].

[17] *Price, et al. v. Innodata Phils. Inc./Innodata Corp., et al.*, 588 Phil. 568 (2008) [Per J. Chico-Nazario, Third Division].

[18] *Maxi Security and Detective Agency v. NLRC*, 514 Phil. 563 (2005) [Per J. Ynares-Santiago, First Division].

[19] *Enchanted Kingdom, Inc. v. Verzo*, 775 Phil. 388, 401 (2015) [Per J. Mendoza, Second Division].

[20] *Moral v. Momentum Properties Management Corp.*, 848 Phil. 621, 635 (2019) [Per J. Caguioa, Second Division].

[21] *Tamson's Enterprises, Inc. et al. v. Court of Appeals*, 676 Phil. 384, 397 (2011) [Per J. Mendoza, Third Division] and *Philippine Daily Inquirer, Inc. v. Magtibay, Jr.*, 555 Phil. 326, 334 (2007) [Per J. Garcia, First Division].

[22] Ponencia, p. 27.

[23] See *Villanueva v. NLRC*, 356 Phil. 638 (1998) [Per J. Davide, Jr., First Division].

[24] *Asian Terminals, Inc. v. Villanueva*, 538 Phil. 197 (2006) [Per J. Carpio, Third Division].

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