

SAN MIGUEL CORPORATION, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION AND RODOLFO CALAYAG, RESPONDENTS.

G.R. No. 60067. August 19, 1982

Ponente: AQUINO, J.

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AQUINO, J.:

This is a case on termination of employment. A Labor Arbiter in his decision of December 15, 1980 ordered San Miguel Corporation to reinstate immediately Rodolfo Calayag to his for-mer position of receiver/issuer in the containers section, materials department of the company's plant at Polo (Valenzuela), Bulacan without loss of seniority rights and other benefits but without backwages (p. 43, Rollo).

San Miguel Corporation appealed from that decision but withdrew its appeal in a motion dated March 9, 1981 (p. 106, Rollo). Calayag also appealed from that decision only for the purpose of getting backwages but he did not apprise San Miguel Corporation of his appeal.

The company allegedly learned of the appeal only on January 13, 1982 when it was served with a copy of the decision of the National Labor Relations Commission dated November 11, 1981, granting Calayag backwages from November 1, 1979 up to his reinstatement.

On March 31, 1982, San Miguel Corporation filed in this Court the instant petition for certiorari wherein it prayed for the annulment of the NLRC's decision and the dismissal of Calayag's complaint for alleged illegal termination of employment.

It is obvious that the NLRC erred in deciding Calayag's appeal without hearing San Miguel Corporation. It was entitled to present its side of the case.

Section 7, Rule XIII (NLRC Procedures) of the Rules and Regulations implementing the Labor Code provides that the appel-lant should furnish the appellee with a copy of his appeal. Undoubtedly, that rule was ordained in the interest of fair play and to preclude the NLRC from making an ex parte resolution of the appeal which it did in this case.

Calayag was dismissed by San Miguel Corporation for repeated absences without leave. The dismissal was effected after the assistant director of the National Capital Region of the Ministry of Labor had given clearance for such dismissal (pp. 39--40, Rollo).

The Labor Arbiter found that Calayag was absent without leave for ten days (p. 41, Rollo). It is a rule of the company that for nine absences without leave within a calendar year an employee may be dismissed. Notwithstanding that rule, the Labor Arbiter ordered Calayag's reinstatement but without backwages.

The NLRC directed the payment of backwages in addition to reinstatement. As Calayag was receiving P1 ,040 a month, his backwages as of February, 1982 amounted already to P29,120 (p. 49, Rollo).

Both the Labor Arbiter and the NLRC opined that the nine absences rule means that the prior absences, which had

already been penalized with suspension without pay, should be excluded from the computation of the nine absences required for dismissal because their inclusion would supposedly place the employee "twice in jeopardy of punishment for the same offense".

That opinion is not correct. The rule prescribes graduated or cumulative penalties (culminating in dismissal) for each day of absence without leave. It is immaterial that the absences included in the nine absences required for dismissal had already been penalized with suspension. They are included in the computation of the nine absences.

The Labor Arbiter chose to reinstate Calayag in spite of the fact that he could be dismissed. He did so presumably because dismissal would be a very drastic penalty under the facts of this case. (See *San Miguel Corporation vs. Secretary of Labor*, L-39195, May 16, 1975, 64 SCRA 56, 62.)

On the other hand, to grant Calayag backwages in addition to reinstatement is not a just and equitable solution of the controversy.

WHEREFORE, the decision of the NLRC is set aside and that of the Labor Arbiter is affirmed. No costs.

SO ORDERED.

Concepcion, Jr., Guerrero, Abad Santos, De Castro, and Escolin, JJ., concur.

Barredo, (Chairman), J., I concur because San Miguel was notified with Calayag's appeal and the appeal of San Miguel was withdrawn anyway.

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