

JAM TRANSPORTATION, CO. INC., PETITIONER, VS. LUIS HERMOSA FLORES AND NATIONAL LABOR RELATIONS COMMISSION, RESPONDENTS.

G.R. No. 82829, March 19, 1993

Ponente: NOCON, J.

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NOCON, J.:

Petitioner complains to Us that the respondent National Labor Relations Commission affirmed[1] the Labor Arbiter's ruling[2] that private respondent was physically unfit to work and was thus awarded separation pay in addition to backwages based on a thirty (30) day month instead of his actual -- as claimed by petitioner -- eleven (11) working days per month. Petitioner insists that private respondent was physically fit to work.

As succinctly summarized by the Office of the Solicitor General, the facts of the case are as follows:

"Complainant, in his position paper and supplemental position paper, avers that he was employed by the respondent company as a conductor since 1967. He was paid on percentage basis and received a commission of about P40.00 to P50.00 a day. Sometime in 1985, complainant further alleges that he had an accident, which burned his body partially necessitating his hospitalization for several days. After hospitalization, complainant reported to respondent Josefina Alon-Alon Mercado, in compliance with the letter dated May 20, 1986 of the respondent ordering him to immediately report for work, but was told to wait. For several days he kept on reporting but the Operations Manager just kept promising to give him a route assignment which did not materialize. Finally, complainant was able to talk to respondent Joselito Medrano who told him that he will be accepted back to work as a new employee. Complainant rejected the offer since it would mean losing his eighteen (18) years of service with the respondents. Because of his refusal, he was allegedly told in the presence of some other employees: "Balik ka pa ng balik. Ang kapal naman ng mukha mo." Feeling aggrieved, complainant instituted the present complaint charging the respondents with illegal dismissal, unfair labor practice, non-payment of overtime pay, legal holiday pay and violations of Presidential Decrees No. 525 and 851.

Respondents, in its position paper contend that in 1986, complainant, for unknown reasons, failed to report for work for about a month. No notice was given to the company for such continued absence. On May 20, 1986, respondent company, thru its Personnel Manager, Joselito Medrano sent a letter to the complainant advising him to immediately report for work, otherwise, his continued absence will be construed as a ground for his dismissal and separation from the service. Respondents further alleged that complainant failed to respond to its demand that he immediately report for work, hence, they filed a termination report with the Ministry of Labor on June 4, 1986, terminating the services of the complainant for 'AWOL' (Absent Without Official Leave)."[3]

After hearing, the Executive Labor Arbiter rendered judgment "in favor of complainant and against respondents ordering the latter to pay complainant separation pay equivalent to one-half (1/2) the average daily commission per every year of service, in the amount of TWELVE THOUSAND ONE HUNDRED FIFTY PESOS (P12,150.00) computed as follows: (P45.00 x 30 = P1350.00 ÷ 2 = P675 x 18 = P12,150.00)."[4]

On appeal by both parties, the respondent NLRC (First Division) set aside the Labor Arbiter's decision and ordered therein respondent (herein petitioner) "to pay the complainant limited backwages of six (6) months without qualification and deduction, and separation pay equivalent to one-half (1/2) of his average monthly commission per each year of service in the amount of Twelve Thousand One Hundred Fifty (P12,150.00) Pesos computed as follows: $(P45.00 \times 30 = P1,350.00 \div 2 = P675 \times 18 = P12,150.00)$." [5]

Thus, this petition where petitioner claims that public respondent NLRC acted in excess of jurisdiction and/or gravely abused its discretion (1) in affirming the Labor Arbiter's finding that private respondent is physically unfit to work and consequently entitled to separation pay; and (2) in adopting the Labor Arbiter's finding pegging at '30' private respondent's average working days per month.

I

With regard to its first assignment of error, petitioner claims that:

"[T]he matter of private respondents' physical capacity to work was never a point of controversy between the parties. It was not at all an issue in the proceeding. The complaint was one for illegal dismissal anchored on the question of abandonment. There was never an occasion in the course of the proceeding that the angle of 'termination due to illness' ever cropped up. And the Labor Arbiter on his part did not so much as attempt to get the parties to thresh out such inexistent/non controversial issue.

"There was no controversy on the aspect of private respondent physical fitness for work; therefore, as a matter of course, such inexistent controversy was never brought before the Labor Arbiter for adjudication. In view of the foregoing, the Labor Arbiter was bereft of 'judicial power' to rule *motu proprio* that private respondent was not physically capacitated to work. x x x." [6]

Private respondent, however, counters that such ruling "was or may have been done in good faith and without malice on the part of Labor Arbiter Guevarra." [7]

Petitioner is correct.

Executive Labor Arbiter Alvarez held that private respondent was constructively dismissed, [8] i.e., he was illegally dismissed, when, after petitioner informed private respondent that if he wanted to work again with petitioner, he would have to start as a new employee, private respondent, considering his 18 years of service with petitioner, refused to start anew. Executive Labor Arbiter Alvarez, reasoned out as follows:

"[W]e are, however, of the considered view and we hold that complainant was constructively dismissed. Notified in writing that complainant would lose his job for abandonment if he fails to return, complainant reported for work only to be refused because respondent wanted him to be hired as a new employee. Naturally, complainant had to object considering that his length of service had already run for 18 years. What we are saying is that complainant had signified his intention to return to his job, and, abandonment is negated when the employee manifests his intention to return to his job. Moreover, after working for 18 years, we find it difficult to believe that he would abandon his job more so that he is married and job nowadays is difficult to find." [9]

Private respondent's re-employment as a new employee would be very prejudicial to him as it would mean a demotion in rank and privileges, retirement benefits, for example, as his entire previous eighteen (18) years of service with petitioner, would simply be considered as non-existent.

But instead of resolving whether petitioner accorded private respondent due process in constructively dismissing him [10] Executive Labor Arbiter Alvarez, however, ruled in this wise:

"It appears, however, on record that complainant is suffering from heart ailment which, on two occasions, was

the reason for canceling the scheduled hearings or conciliation. Thus, on July 21, 1986 and on August 5, 1986, complainant manifested to have the setting transferred to another date because he (complainant) is suffering from heart ailment.

We have perused the record and we found no medical certificate attesting to his fitness to return to his work as indicated in position paper. Complainant's termination, therefore, would be justified under Article 285 of the Labor Code as amended, which provides:

'An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees; Provided, That he is paid separation pay equivalent to at least one (1) month salary or to one-half (1/2) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.'"[11]

which ratiocination was glaringly off-tangent to the issue posed before him.

Clearly, petitioner has a valid reason to gripe. We cannot, however, order the reinstatement of private respondent with petitioner as relations between the two are now strained[12] after private respondent was humiliated and embarrassed by petitioner's Mr. Medrano when he tried to report back to work.[13]

II

With regard to its second assignment of error, petitioner claims that:

"Petitioner hereby manifests that it does not question the NLRC's ruling awarding six-month backwages in favor of private respondent. It, however, respectfully takes exception to the computation of private respondent's average monthly commission pay, which the NLRC adopted from the Labor Arbiter's finding.

The computation provides as follows:

'P45.00 x 30 = P1,350.00.'

The 'P45.00' pertains to private respondent's average daily pay while the '30' to his supposed average working days per month. The Honorable Arbiter duly established the basis for the 'P45.00' as follows:

'Since as aforesaid complainant was paid on percentage basis and that he earned between P40.00 to P50.00 daily the computation of his separation would be based on the average commission per day of forty-five (P45.00) pesos a day.' (p. 5, Decision)

But he failed to do so in regard to the '30'. A careful perusal of his Decision (Annex 'B') reveals that nowhere therein has reference ever been made to the average working days per month of private respondent. The reason is simply that the parties completely overlooked the matter during the proceeding. No allegation was made let alone evidence introduced thereon.

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The maximum number of working days per month of private respondent was only eleven (11). The Certification attached to private respondent's NLRC Appeal as Annex 'B-2' thereof (copy of said Appeal together with cited annex attached as Annex "D" hereof), reveals that for the period from January 1984 to March 1986, i.e., two (2) years prior to his dismissal, the maximum amount of his SSS premium payment was P35.70 pertaining to the month March 1985. Under the SSS Table of Rates, copy attached as Annex "E" hereof, which this Honorable Court may take judicial notice of, it is shown in the portion bracketed as Annex "E-1" that premium payment of P35.70 corresponds to a monthly salary wage bracket of 'P350.00 - P499.99'. The implication is that the maximum monthly commission pay that private respondent received during his last two (2) years of employment with petitioner was P499.99. As his average daily commission pay was P45.00, it means that his maximum working days per month was eleven (11) days which is arrived at by simply dividing

P499.99 by P45.00.

x x x. But as a concession to private respondent, petitioner is willing to use the maximum aforesaid for purpose of computing his 'average' monthly commission pay. Thus, the 'average' monthly commission pay may be computed as follows: $P45.00 \times 11 = P495.00$. And the six-month backwages awarded in favor of private respondent will thereby amount to P2,970.00.

Petitioner hereby manifests willingness and readiness to pay said amount of P2,970.00 upon issuance of the appropriate resolution by this Honorable Court."^[14]

As to this second assigned error, private respondent says that:

"To use as basis the Certification issued by petitioner marked as Annex 'B', 'B--1' to 'B-3' particularly Annex 'B-2' attached to private respondent's appeal for the years 1884 to 1986 will be most unfair to private respondent. What about the years 1967 to 1983. How could anyone or employee for that matter live and support a family if he works only 11 days in a month?"^[15]

Petitioner, itself, provides the solution to its own problem. Under Sections 10, 11 and 12 of Rule X, Book III, Omnibus Rules Implementing the Labor Code, amended as of 1986,^[16] petitioner is supposed to keep employment records of its employees. Such records could have been AND SHOULD HAVE BEEN used by petitioner in clarifying the number of days petitioner actually worked per month. Unfortunately for petitioner, it did not for "the parties completely overlooked the matter during the proceeding. No allegation was made let alone evidence introduced thereon."^[17]

Petitioner is asking Us to make a new finding of fact on private respondent's actual working days in a month from evidence that it is presenting for the first time on appeal-- and here in this Court. It is well-settled, too well-settled to require a citation of jurisprudence, that this Court does not make findings of facts specially on evidence raised for the first time on appeal. We cannot countenance petitioner's ploy to make Us commit this double heresy.

III

Following the general rule that where the illegal dismissal transpired before the effectivity of RA 6715, or before March 21, 1989, the award of backwages in favor of its dismissed employee is limited to three (3) years without deduction or qualification,^[18] this Court grants private respondent three (3) years backwages.

Since, however, private respondent cannot be reinstated, he is entitled to separation pay equivalent to at least one (1) month for every year of service.^[19]

Both awards,^[20] to be computed on the basis of a 30-day month, will come out as follows:

(1) Three Years Backwages = $P45.00/\text{day} \times 30 \text{ days/month} \times 12 \text{ months/year} \times 3 \text{ years} = P48,600.00$.

(2) Separation pay for Eighteen Years = $P45.00/\text{day} \times 30 \text{ days/months} \times 18 \text{ months} = P24,300.00$.

WHEREFORE, in view of all the foregoing, judgment is hereby rendered SETTING ASIDE the questioned respondent NLRC's decision. A new decision is entered where private respondent is awarded three years backwages in the amount of P48,600.00 and separation pay in the amount of P24,300.00. Costs against petitioner. SO ORDERED.

Narvasa, C.J., (Chairman), Padilla, Regalado, and Campos, Jr., JJ., concur.

[1] Decision, NLRC Case No. RB-IV-10-1977-86, Flores vs. JAM Transportation, March 30, 1988; penned by Commissioner Encarnacion and concurred in by Guinto-Perez, Presiding Commissioner and Maglaya,

Commissioner; Rollo, pp. 40-46.

[2] Decision, NLRC Case No. RB-IV-10-1977-86, *Flores vs. JAM Transportation*, January 29, 1987, penned by Executive Labor Arbiter Alvarez; *Ibid.*, pp. 47-51.

[3] Rollo, pp. 189-190.

[4] *Ibid.*, p. 51.

[5] *Ibid.*, p. 46.

[6] *Ibid.*, pp. 28-29.

[7] Private respondent's Memorandum, pp. 3-4; Rollo, pp. 168-169.

[8] "A constructive discharge is defined as: 'A quitting because continued employment is rendered impossible, unreasonable or unlikely; as an offer involving a demotion in rank and a diminution in pay.' (Moreno's Philippine Law Dictionary, 2nd Ed., p. 129, citing the case of *Alia vs. Salani Una Transportation Co.*, 39527-R, January 29, 1971.)" (*Philippine Japan Active Carbon Corp. vs. NLRC*, 171 SCRA 164, 167, 168).

[9] Rollo, pp. 49-50.

[10] "Article 278(b) - xxx xxx xxx. [T]he employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Ministry of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer. The Ministry may suspend the effects of the termination pending resolution of the case in the event of a prima facie finding by the Ministry that the termination may cause a serious labor dispute or is in implementation of a mass lay-off." (Amended as of 1986)

[11] Rollo, p. 50.

[12] "Indeed, 'strained relations' may be invoked only against employees x x x whose differences with their employer are of such nature or degree as to preclude reinstatement." [*Maranaw Hotels and Resorts Corp. (Century Park Sheraton Manila) vs. Court of Appeals*, G.R. No. 103215, Nov. 6, 1992.]

[13] "Balik ka pa ng balik. Ang kapal naman ng mukha mo." (Private respondent's Memorandum, 2; Rollo, p. 167).

[14] *Ibid.*, pp. 33-35.

[15] Rollo, p. 170.

[16] "Sec. 10. Records of workers paid by results. - Where the employees are paid on piece, pakiao, takay, task, commission or other non-time basis, the employer shall keep and maintain their production records showing their daily output, gross earnings and the actual number of working hours spent by the employees on the job bearing the signature or thumbmark of the employee concerned. x x x.

"Sec. 1. Place of records. - All employment records of the employees of an employer shall be kept and maintained in or about the premises of the workplace. The premises of a workplace shall be understood to mean the main or branch office or establishment, if any, depending upon where the employees are regularly assigned. The keeping

of the employee's records in another place is prohibited.

"Sec. 12. Preservation of records. - All employment records required to be kept and maintained by employers shall be preserved for at least three (3) years from the date of the last entry in the records."

[17] See page 8, *supra*.

[18] *Maranaw Hotels and Resorts Corp. (Century Park Sheraton Manila) vs. CA, et al.*, G.R. No. 103215, Nov. 6, 1992.

[19] *Radio Communications of the Philippines, Inc. vs. NLRC*, G.R. No. 101181-84, June 22, 1992.

[20] "Backwages and separation pay are reliefs distinct and separate from each other. Payment of backwages in the form of relief that restores the income that was lost by reason of unlawful dismissal is distinguished from separation pay which provides the employee money during the period in which he is locating a new job." (*Octaviano vs. NLRC*, 202 SCRA 332, 338).

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