

## SECOND DIVISION

[ CA-G.R. SP. No. 134723, February 25, 2015 ]

**JONAS MARCOS BRIONES, JR., PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION, TIGERLAND SECURITY AND INVESTIGATION AGENCY, INC., DAVID P. ZAPANTA AND CECILIA L. ZAPANTA, RESPONDENTS.**

### DECISION

**GONZALES-SISON, M., J.:**

Before the employer must bear the burden of proving that the dismissal was legal, the employee must first establish by substantial evidence the fact of his dismissal from service. If there is no dismissal, then there can be no question as to the legality or illegality thereof.<sup>[1]</sup>

This Petition for Certiorari filed by Jonas Marcos Briones, Jr. (Briones) under Rule 65 of the Rules of Court assails the December 27, 2013<sup>[2]</sup> and January 30, 2014<sup>[3]</sup> resolutions of the National Labor Relations Commission (NLRC) in NLRC-LAC No. 12-003397-13(8), affirming the dismissal by the Labor Arbiter of petitioner's complaint against respondents Tigerland Security and Investigation Agency, Inc. (Tigerland), David P. Zapanta and Cecilia L. Zapanta in NLRC-NCR Case No. 01-01549-13.

### The Facts

In September 2011, respondent Tigerland hired petitioner as one of its security guards. During his employment, petitioner was assigned to respondent's various clients, the last of which was Salve Regina Hospital.

On January 3, 2013, petitioner did not report for duty.

On January 29, 2013, petitioner filed a complaint for illegal dismissal, underpayment of wages and thirteenth month pay, non-payment of overtime pay, holiday pay, holiday premium, rest day premium, service incentive leave pay and night shift differential, payment of separation pay and refund of an illegal deduction for "*abuloy sa patay*" as well as of deducted but unremitted SSS, Philhealth and Pag-ibig contributions.

Since April 2012, petitioner was assigned as reliever or "extra guard" due to the lack of available regular post for duty detail. Tigerland had not heard from petitioner until the latter's wife, Cynthia Briones, went to Tigerland's office to secure the release of petitioner's cash bond and unclaimed salary for the period December 16, 2012 to January 2, 2013 and to request for the issuance of a certificate of employment.<sup>[4]</sup> Tigerland informed petitioner, through Cynthia, that his post is still open and required him to report for work. Petitioner, however, failed to comply.

Tigerland denied that it dismissed petitioner from service and averred that he could only be placed on floating status. Tigerland argued that the filing of the complaint on January 29, 2013 is premature as petitioner had only been on floating status below six months.

### **The Labor Arbiter's Decision**

On September 30, 2013, the Labor Arbiter rendered a Decision<sup>[5]</sup>, disposing of the case as follows:

**WHEREFORE**, a decision is hereby rendered dismissing the complaint for illegal dismissal. Respondent Tigerland Security and Investigation Agency, Inc. is however directed to pay complainant P2,280.00 as service incentive leave pay. Other claims are denied.

**SO ORDERED.**

### **The NLRC Ruling**

Petitioner appealed before the NLRC. On December 27, 2013, the NLRC rendered a Resolution<sup>[6]</sup>, the *fallo* of which states:

WHEREFORE, the appeal is DISMISSED. The Labor Arbiter's Decision is AFFIRMED.

SO ORDERED.

The NLRC held that petitioner abandoned his job. The NLRC considered the repeated request of petitioner for the refund of his cash bond, which is given only upon an employee's separation from employment, and for the issuance of a certificate of employment as manifestations of his intent to leave the company and seek employment elsewhere. It also affirmed the finding of the Labor Arbiter that the salaries and benefits being claimed by petitioner were already paid. On the alleged unremitted contributions, the NLRC said that it had no jurisdiction to decide on the matter.

Petitioner moved for reconsideration, which the NLRC denied on January 30, 2014.

### **The Issue**

Hence, this petition. The lone issue submitted for resolution is:

**WHETHER THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN RULING THAT THE PETITIONER WAS NOT ILLEGALLY DISMISSED AND IS NOT ENTITLED TO HIS MONETARY CLAIMS.**

### **The Court's Ruling**

The petition lacks merit.

The Court agrees with the ruling of the Labor Arbiter and the NLRC that petitioner was not constructively dismissed but only placed on a floating status. Placing a

security guard on a floating status does not automatically result to a constructive dismissal. Such a "floating status" is lawful and not unusual for security guards employed in security agencies as their assignments primarily depend on the contracts entered into by the agency with third parties.<sup>[7]</sup> The temporary inactivity or "floating status" of security guards should continue only for six months.<sup>[8]</sup> A floating status can ripen into constructive dismissal only when it goes beyond the six-month maximum period allowed by law.<sup>[9]</sup> The failure of the agency to give the security guard a work assignment beyond the reasonable six-month period makes it liable for constructive dismissal. No less than the Constitution<sup>[10]</sup> guarantees the right of workers to security of tenure, thus, employees can only be dismissed for just or authorized causes and after they have been afforded the due process of law.<sup>[11]</sup>

The discussion of the Supreme Court in *Leopard Security and Investigation Agency, Inc. v. Quito*<sup>[12]</sup> is instructive with regard to "**floating status**" *vis-à-vis* **constructive dismissal** of a security guard:

Applying Article 286<sup>[13]</sup> of the Labor Code of the Philippines by analogy, this Court has repeatedly recognized that security guards may be temporarily sidelined by their security agency as their assignments primarily depend on the contracts entered into by the latter with third parties. Temporary "off-detail" or "floating status" is the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one. It takes place when, as here, the security agency's clients decide not to renew their contracts with the agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster. **For as long as such temporary inactivity does not continue for a period exceeding six months, it has been ruled that placing an employee on temporary "off-detail" or "floating status" is not equivalent to dismissal.** [*Emphasis ours.*]

In this case, petitioner filed the complaint for illegal dismissal even before the lapse of the six-month period. Hence, his claim of illegal dismissal lacks basis. Moreover, it was in fact petitioner who intended to terminate his relationship with respondents as bolstered by his prayer in his complaint where he sought for separation pay and not for reinstatement.

We are not unmindful of the rule in labor cases that the employer has the burden of proving that the termination was for a valid or authorized cause; however, it is likewise incumbent upon the employees that they should first establish by competent evidence the fact of their dismissal from employment. The one who alleges a fact has the burden of proving it and the proof should be clear, positive and convincing.<sup>[14]</sup> In the present case, however, the facts and the evidence do not establish a *prima facie* case that petitioner was dismissed from employment.

Other than his unsubstantiated allegation that he was terminated from work, petitioner proffered no evidence to show that he was indeed dismissed from work or otherwise prevented from returning to work. In the absence of any showing of an overt or positive act proving that respondents had dismissed petitioner, the latter's