

## **EIGHTH DIVISION**

**[ CA-G.R. SP NO. 125968, February 25, 2014 ]**

### **DATEM INCORPORATED, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION, LABOR ARBITER JOEL S. LUSTRIA AND JESSIE S. OGBAC, RESPONDENTS.**

#### **D E C I S I O N**

##### **REYES, JR., J.C., J.:**

Assailed in the instant petition filed under Rule 65 of the 1997 Rules of Civil Procedure are the following:

- a) The NLRC (Fifth Division) Resolution (Rollo, pp. 47-50) dated April 25, 2012 which Denied the appeal of petitioner;
- b) The Resolution (Rollo, pp. 63-65) dated May 31, 2012 which denied petitioner's motion for reconsideration likewise issued by public respondent NLRC (Fifth Division) in NLRC NCR-00-08-1287811; NLRC LAC-04-001188-12.

The facts:

The case for illegal dismissal, underpayment-ecola, non-payment of separation pay and attorney's fees arose from herein private respondent Jessie S. Ogbac's complaint against herein petitioner, Datem Inc., a company engaged in the construction business.

Private respondent alleged that he was hired on July 13, 2007 as a mason and was allegedly dismissed on August 18, 2011 without a valid cause by petitioner company's president, Arch. Lesley P. Espiritu. Private respondent rendered continuous service for more than four (4) years with a daily wage of P450.00 and working hours from Monday to Saturday 7:00 a.m. to 4:00 p.m. From the time that private respondent was hired, he was not informed that at a certain time, his services will be discontinued. He was asked to sign a three (3) month Employment Contract and several more employment contracts even if it was for one and the same project. Due to his refusal to sign a resignation letter forced upon him, he was told that his services were no longer needed by the company.

Meanwhile, petitioner averred that private respondent was hired for a specific project only and he is notified whenever there is a temporary lay off after every project completion. They also filed a Notice of Termination at the nearest DOLE office to comply with the requirements of Policy Instruction No. 20 and Department Order No. 19, series of 1993. Petitioner alleged that private respondent got a wrong impression regarding his entitlement to a separation pay after his temporary lay off every project completion. Private respondent was not aware that he is a project employee, meaning his job is co-terminous to every project completion.

Petitioner further declared that private respondent did not report for work on August 16 and 18 without a valid leave of absence. On August 19, 2011, private respondent reported back for work and asked for a lay-off paper from the time keeper, Mr. Abraham Carpena. However, private respondent was not issued with such since his services are still needed for the project yet to be completed. Private respondent then discontinued to report for work and filed the instant complaint since he believes that he is a regular employee of petitioner and was dismissed without a valid reason.

On February 27, 2012, Labor Arbiter Joel S. Lustria ruled in favor of private respondent ruling that the latter was a regular employee and there was illegal dismissal for failure of petitioner to observe due process of law. The dispositive portion of the said decision reads:

"WHEREFORE, premises considered, judgment is hereby rendered, declaring respondents guilty of illegal dismissal. Accordingly, respondents are ordered jointly and severally liable:

- 1) To pay complainant the amount of P76,711.95, representing his backwages, computed only up to the promulgation of this decision;
- 2) To pay complainant the amount of P55,380.00, representing his separation pay;
- 3) To pay complainant the amount of P1,088.10, representing his underpayment of wages;
- 4) To pay complainant an amount equivalent to ten (10%) percent of the total judgment award, as and for attorney's fees.

Other claims are dismissed for lack of merit.

SO ORDERED." (Rollo, p. 29)

On April 10, 2012, petitioner filed an appeal before the public respondent National Labor Relations Commission (NLRC) together with the Motion to Reduce the Bond. Petitioner deposited with the NLRC a partial cash bond in the amount of Thirty Thousand (P30,000.00) Pesos.

For failure of the petitioner to post a reasonable amount of bond, the NLRC issued the appealed Resolution dated April 25, 2012, the dispositive portion of which states:

"WHEREFORE, premises considered, the Motion to Reduce Bond is hereby DENIED and the appeal of respondent is DISMISSED for non-perfection.

SO ORDERED." (Rollo, p. 50)

A Motion for Reconsideration was filed on May 14, 2012 of the decision of the public respondent NLRC. However, said Motion was denied on May 31, 2012. Hence, this appeal before Us with the following issues:

I.

PUBLIC RESPONDENT COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION IN DISMISSING THE APPEAL ON PURE TECHNICAL GROUND INSTEAD OF REQUIRING THE PETITIONER TO POST ADDITIONAL AMOUNT OF BOND AND RESOLVE THE CASE BASED ON ITS MERIT IN THE INTEREST OF JUSTICE AND FAIR PLAY.

II.

PUBLIC RESPONDENT LABOR ARBITER ACTED WITHOUT AND IN EXCESS OF JURISDICTION IN DECLARING PRIVATE RESPONDENTS AS REGULAR EMPLOYEE DESPITE THE CLEAR PROVISION OF ART.280 OF THE LABOR CODE AND POLICY INSTRUCTION NO.20 OF THE DEPARTMENT OF LABOR AND EMPLOYMENT AND DEPARTMENT ORDER NO.19 SERIES OF 1993 AND IN DISREGARDING THE EXISTING JURISPRUDENCE ON MATTER IN ISSUE.

In a special civil action for certiorari, the petitioner carries the burden of proving not merely reversible error, but grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the public respondent for its issuance of the impugned decision. (*Suliguin v. Commission on Elections*, 485 SCRA 219, 233 [2006]) The term grave abuse of discretion, in its juridical sense, connotes capricious, despotic, oppressive or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse must be of such degree as to amount to an evasion of positive duty or a virtual refusal to perform a duty enjoined by law, as where the power is exercised in an arbitrary and capricious manner by reason of passion and hostility. The word capricious, usually used in tandem with the term arbitrary, conveys the notion of willful and unreasoning action. Thus, when seeking the corrective hand of certiorari, a clear showing of caprice and arbitrariness in the exercise of discretion is imperative. (*Torres v. Abundo, Sr.*, 512 SCRA 564, 565 [2007] )

Applying the foregoing criterion in the case at bench, this court finds no grave abuse of discretion committed by the public respondent.

Petitioner contends that the NLRC erred when it dismissed the appeal when they were not able to post a bond equivalent to the monetary award of the labor arbiter. Petitioner claims that the posting of a partial appeal bond was justified by their allegation that it was due to financial reason since petitioner is just a small construction company whose income is derived from the projects it is able to contract. Its income is still unexpected and unrealized until full completion of the projects. Hence, the filing of a reduce bond in the amount of P30,000.00 is a reasonable amount in relation to the monetary award of P133,179.65 as required by Section 6, Rule VI of the 2011 Revised Rules of Procedure of the NLRC. (Rollo, p. 9)

The NLRC has full discretion to grant or deny the motion to reduce bond. (*McBurnie v. Ganzon*, 600 SCRA 658, 671 [2009]) Hence, at the time of the filing of the motion to reduce bond and posting of a bond in a reasonable amount, there is no assurance whether petitioner's motion is indeed based on "meritorious ground" and whether the bond it posted is of a "reasonable amount." Petitioner runs the risk of failing to perfect an appeal in not posting the required bond.