

## SECOND DIVISION

[ G.R. No. 203185, December 05, 2018 ]

**SUPERIOR MAINTENANCE SERVICES, INC., AND MR. GUSTAVO  
TAMBUNTING PETITIONERS, VS. CARLOS BERMEO,  
RESPONDENT.**

### DECISION

**A. REYES, JR., J.:**

This is a Petition for Review on *Certiorari*<sup>[1]</sup> under Rule 45 seeking to reverse and set aside the Decision<sup>[2]</sup> and Resolution<sup>[3]</sup> of the Court of Appeals (CA) in CA-G.R. SP No. 111875, which ordered Superior Maintenance Services, Inc., (Superior Maintenance) and Gustavo Tambunting (collectively, petitioners) to pay respondent Carlos Bermeo (Bermeo) separation pay for having been constructively dismissed from employment.

#### Antecedent Facts

Superior Maintenance is a manpower agency engaged in the business of supplying janitorial services to its clients. In 1991, it hired Bermeo as a janitor for its clients. Through the years, Bermeo was assigned to several establishments. He was last stationed at Trinoma Mall until the end of contract on March 30, 2008.<sup>[4]</sup>

On August 28, 2008, Bermeo was deployed to French Baker at SM Marikina, one of Superior Maintenance's clients; however, French Baker asked for a replacement upon learning that Bermeo was already 54 years old.<sup>[5]</sup>

On September 5, 2008, Bermeo filed a Complaint<sup>[6]</sup> before the Labor Arbiter (LA) against the petitioners for constructive dismissal with claim for separation pay.

#### Ruling of the LA

In a Decision<sup>[7]</sup> dated February 6, 2009, the LA found that Bermeo was constructively dismissed because no work was offered to him even during the pendency of the proceedings before it, such that the period of his floating status had already expired.<sup>[8]</sup> The LA disposed of the case as follows:

WHEREFORE, premises considered judgment is hereby rendered declaring that complainant was constructively dismissed. The respondent Superior Maintenance Security Services Inc. is ordered to pay complainant the amount of **ONE HUNDRED EIGHTY THREE THOUSAND THREE HUNDRED NINETY ONE PESOS and/or 98/100 ([P]183,391.98)** representing separation pay and his unpaid 13<sup>th</sup> month pay.

All other claims are dismissed for lack of merit.

SO ORDERED.<sup>[9]</sup>

### **Ruling of the NLRC**

On appeal, the NLRC reversed the findings of the LA and ruled that Bermeo was not constructively dismissed from work. The NLRC concluded that the complaint was prematurely filed, as Bermeo's floating status was short of the six months required for it to ripen to constructive dismissal.<sup>[10]</sup> This notwithstanding, the grant of 13<sup>th</sup> month pay was retained in the absence of proof that Bermeo received the same. The *fallo* of the Decision<sup>[11]</sup> dated August 13, 2009 reads:

WHEREFORE, the decision appealed from is hereby MODIFIED by deleting the grant of separation pay. The grant of 13<sup>th</sup> month pay is AFFIRMED.

SO ORDERED.<sup>[12]</sup>

The NLRC also denied Bermeo's motion for reconsideration through a Resolution<sup>[13]</sup> dated October 6, 2009.

Bermeo then elevated the case to the CA through a Rule 65 petition for *certiorari*.

### **Ruling of the CA**

On March 30, 2012, the CA promulgated its Decision<sup>[14]</sup> granting the petition. The decretal portion of its judgment states:

**WHEREFORE**, premises considered, the instant petition is **GRANTED**. The NLRC Decision dated August 13, 2009 and the resolution dated October 06, 2009 are hereby **REVERSED** and **SET ASIDE**. The Labor Arbiter's Decision dated 06 February 2009 is hereby **REINSTATED**.

**SO ORDERED.**<sup>[15]</sup>

In its Resolution<sup>[16]</sup> dated July 26, 2012, the CA denied petitioner's motion for reconsideration.

### **Issue:**

Whether Bermeo was constructively dismissed from work

### **Ruling of the Court**

The petition is impressed with merit.

In *Salvalosa v. NLRC*,<sup>[17]</sup> temporary off-detail or floating status was defined as that "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."<sup>[18]</sup> The Court further explained:

It takes place when 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. It also happens in instances where contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it for want of cause, such that the replaced security guard may even be placed on temporary "off-detail" if there are no available posts under the agency's existing contracts.<sup>[19]</sup>

There is no specific provision in the Labor Code which governs the "floating status" or temporary "off-detail" of workers employed by agencies. Thus, this situation was considered by the Court in several cases<sup>[20]</sup> as a form of temporary retrenchment or lay-off, applying by analogy the rules under Article 301 (then Article 286) of the Labor Code,<sup>[21]</sup> viz:

ART. 301. [286] When Employment not Deemed Terminated. The bona fide suspension of the operation of a business or undertaking for a period not exceeding six (6) months, or the fulfillment by the employee of a military or civic duty shall not terminate employment. In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one (1) month from the resumption of operations of his employer or from his relief from the military or civic duty.

This situation applies not only in security services but also in other industries, as in the present case, as long as services for a specific job are legitimately farmed out by a client to an independent contractor.

In all cases however, the temporary lay-off wherein the employees cease to work should not exceed six months, in consonance with Article 301 of the Labor Code. After six months, the employees should either be recalled to work or permanently retrenched following the requirements of the law. Otherwise, the employees are considered as constructively dismissed from work and the agency can be held liable for such dismissal.<sup>[22]</sup>

In the present case, the CA held that Article 301 applies only when there is a bona fide suspension of the employer's operation of business. Citing *Veterans Security Agency, Inc., et al., v. Gonzalvo, Jr.,* (Veterans),<sup>[23]</sup> the CA ruled that since there was no suspension in the petitioners' business operations, Article 301 does not apply to them and they cannot seek refuge in the six-month grace period given thereunder for them to give Bermeo a new assignment.<sup>[24]</sup>

However, *Veterans* is hardly relevant to the present case. First, in *Veterans*, the complainant was a security guard last deployed for assignment in January 1999; he filed his complaint for illegal dismissal only on September 29, 1999, which was *eight months* after he was pulled out from such assignment. Also, the complainant was withdrawn from his post of three years, following his complaint against his employer for non-payment of SSS contributions. Since then, he was tossed to different stations until no assignment was given to him. His employer even concocted a story that he had to be assigned somewhere else because his spouse was a lady guard assigned to the same client, when in fact he was single. These circumstances