

## FIRST DIVISION

[ G.R. No. 175365, October 23, 2013 ]

**CANDIDO S. GEMINA, JR., PETITIONER, VS. BANKWISE, INC. (THRIFT BANK), LAZARO LL. MADARA, PERFECTO M. PASCUA AND OSMENIO R. GALAPATE, RESPONDENTS.**

### DECISION

**REYES, J.:**

This is a Petition for Review on *Certiorari*<sup>[1]</sup> filed under Rule 45 of the Rules of Court, assailing the Decision<sup>[2]</sup> dated July 17, 2006 and Resolution<sup>[3]</sup> dated November 7, 2006 of the Court of Appeals (CA) in CA-G.R. SP No. 89343. In the assailed decision, the CA affirmed the Decision<sup>[4]</sup> dated December 29, 2004 of the National Labor Relations Commission (NLRC) in NLRC NCR 00-02-02298-2003.

#### Factual Antecedents

On August 9, 2002, petitioner Candido S. Gemina, Jr. (Gemina) signed an employment contract<sup>[5]</sup> with respondent Bankwise, Inc. (Bankwise) as Marketing Officer with the rank of Senior Manager, with an annual salary of P750,000.00 based on a fifteen-month scheme or P50,000.00 per month and a service vehicle for his field work. The same contract stipulated for a fund level commitment of P100,000,000.00 for the first six (6) months of employment.

In his Memorandum,<sup>[6]</sup> Gemina alleged that during his first three (3) months at work, he had a satisfactory performance and was able to bring in new and former clients to Bankwise. However, when Bankwise was embroiled in a controversy involving the deposits of Foreign Retirees Association, he started to experience difficulty in soliciting new depositors. To alleviate the situation, he suggested innovations in Bankwise's marketing strategies to his immediate superiors, respondents Perfecto Pascua (Pascua) and Osmenio Galapate (Galapate), who then worked out promotional schemes without his participation. The schemes, however, failed to materialize and he was blamed for the failure. Thereafter, he was subjected to several forms of harassment by some officers of Bankwise by forcing him to file an indefinite leave of absence, demanding for the return of his service vehicle and intentionally delaying the release of his salaries and allowances.<sup>[7]</sup>

When the acts of harassment became intolerable, Gemina went on leave for eleven (11) days from January 17 to January 31, 2003. Upon his return to work, however, his salary for the period of his leave was withheld and was released only after he confronted Pascua and Galapate on the matter.<sup>[8]</sup> Subsequently, his salary for the payroll period of February 1 to 15, 2003 was again withheld and was released only on March 23, 2003, but only half of the amount he was entitled to, or P12,411.67 instead of P25,000.00.<sup>[9]</sup>

On February 17, 2003, Bankwise, through Pascua and Galapate, wrote a letter to Gemina, directing him to turn over the service vehicle provided to him by the company to Mr. Joselito Hogar, Head of the Corporate Services Department. [10]

On February 19, 2003, Gemina filed a complaint [11] for constructive dismissal against Bankwise.

For its part, Bankwise pointed out that Gemina's employment contract stipulated for a fund level commitment of P100,000,000.00 for the first six (6) months of employment. It also contained a provision stating that his performance relative to his ability to generate deposits shall be monitored monthly starting from his 6<sup>th</sup> month. As of December 27, 2002, after almost five (5) months from his employment, Gemina had the lowest performance level among the members of the fund management group, contributing only P2,915,282.97 of deposits out of the P100,000,000.00 stipulated fund level commitment. Thus, Bankwise, through its concerned officers called his attention. [12]

In January 2003, Gemina's supervisors sternly warned him that his inability to perform his commitment under the employment contract constitutes a breach or violation of his contractual obligation. Notwithstanding this warning, Gemina went on leave for eleven (11) days from January 17 to 31, 2003. Thereafter, he incurred absences without leave from February 1 to 15, 2003 and did not bother to inform the bank regarding the reason therefor. Pascua and Galapate tried to contact him to inquire about the reason of his long absence and requested him to return the company vehicle but to no avail. [13]

On February 17, 2003, Pascua and Galapate formally issued a memorandum, ordering Gemina to turn over the service vehicle assigned to him. Still, he refused to heed. On the following day, he submitted to Pascua his call report, reflecting his work schedule for the period of February 1 to 18, 2003. Even then, he did not report back to work and instead filed a complaint for illegal dismissal against Bankwise. [14]

### **The Ruling of the Labor Arbiter**

On April 30, 2004, the Labor Arbiter (LA) rendered a Decision [15] holding that Gemina was illegally dismissed. The dispositive portion of the decision reads as follows:

WHEREFORE, premises considered, judgment is hereby rendered finding complainant to have been illegally dismissed. Accordingly, respondents are hereby ordered to reinstate the complainant to his former position without loss of seniority rights and benefits and payment of backwages from date of dismissal until actual reinstatement which up to the date of this decision already amounts to P725,000.00 plus 10% attorney's fees of the total monetary awards due to the complainant.

All other claims are dismissed.

SO ORDERED.<sup>[16]</sup>

The LA held that the officers of Bankwise performed acts of harassment constituting constructive dismissal against Gemina by: (1) depriving him of his duties, benefits and privileges; (2) delaying the release of his salary; and (3) demanding for the return of his service vehicle, in order to make him feel uncomfortable and unwanted in the company.<sup>[17]</sup> It was also ruled that the fund level commitment stated in Gemina's employment contract was merely a standard by which the latter's performance shall be evaluated. It is not the basis of his employment.

### **The Ruling of the NLRC**

On appeal, the NLRC reversed the decision of the LA in its Decision<sup>[18]</sup> dated December 29, 2004, holding that Gemina was not constructively dismissed but rather abandoned his employment. The pertinent portions of the decision read:

Anent the alleged delay and/or refusal in the payment of salary, [Gemina] claim[s] that he was not paid his salary for the second quincina of January 2003 (January 17 to 31, 2003) as well as his salary for the period of February 1 to 15, 2003.

In this case, [Gemina] filed a leave of absence for eleven (11) days from January 17 to 31, 2003. Appellants clearly pointed out that during that period, [Gemina's] salary was still on process because the personnel department has yet to determine whether there were remaining available accrued leave credits. The plausible reason therefor was, if there were no remaining available leave credits, consequently [Gemina] is not entitled to the salary covering the said period. x x x.

As regards [Gemina's] salary for the period February 1 to 15 2003, it has been shown that after his leave of absence for the period January 17 to 31, 2003, he started to incur absences without leave (AWOL). x x x.

Relative to the appellant[s'] demand to [Gemina] to surrender the service vehicle, we note that the said vehicle was temporarily assigned to [Gemina's] care as a service unit in the performance of [his] duties (Annex "2", Memorandum dated 04 October 2002). As aptly stressed upon by the appellants, the demand to return the service vehicle was made at that time that [Gemina] has no attendance record and went on AWOL. x x x.

x x x x

Anent the finding that the fund level commitment in [Gemina's] contract of employment is not a contractual duty on his part, the same is untenable. One crucial fact to consider is that the fund level commitment is part and parcel of the employment contract (ANNEX "1"). Apropos, [Gemina] has the contractual obligation to fulfill and accomplish the said fund level commitment. We note that [Gemina] was hired by respondent

bank as Marketing Officer with the rank of Senior Manager in view of his representation that he has a deposit portfolio of more than One Hundred Million Pesos (P100,000,000.00) and was [to] further generate deposits. It appears that after several months, [Gemina] has not delivered his promised (sic) deposit portfolio of more than [P]100M. x x x

x x x x

There is no occasion, therefore, to delve into the question whether there was a constructive dismissal because there was never even any dismissal in the first place. [Gemina's] situation only constitutes a pure and clear case of abandonment of work. Although clear grounds existed to definitely cause the termination of [Gemina], it was [Gemina] who disassociate himself from respondent bank. Hence, there can be no substance to his present claim that he was constructively dismissed. In effect, [Gemina] is deemed to have abandoned his work.

x x x x

**WHEREFORE**, premises considered, the appealed decision dated 30 April 2004 is hereby **REVERSED** and **SET ASIDE** and a new one entered **DISMISSING** this case.

**SO ORDERED.**<sup>[19]</sup>

### **The Ruling of the CA**

Undeterred, Gemina filed a petition for *certiorari* with the CA, praying that the Decision dated December 29, 2004 of the NLRC be annulled and set aside. However, in its Decision<sup>[20]</sup> dated July 17, 2006, the CA denied the petition. The CA held:

The Contract of Employment, to which [Gemina] had agreed to be bound, specified as a condition therefor the fund level commitment of P100,000,000.00 for the first six months from the date of employment. The pertinent section thereof further provides that [Gemina's] performance relative to his ability to generate deposits shall be monitored monthly and reviewed on the sixth month. As of December 27, 2002, or on his fifth month at work, [Gemina] had the lowest performance level among the fund management group. He was able to generate only the amount of P2,915,282.97.

Upon the foregoing premises, it cannot be said that the warnings received by [Gemina] from his immediate supervisors vis-à-vis his deposit portfolio were calculated to harass him. His performance was merely monitored pursuant to the Contract. Unquestionably however, [Gemina] failed to deliver his fund level commitment. The fact that not one among the marketing managers attained the P100-million mark is of no moment. Having agreed to commit himself to generate that much deposits, [Gemina] cannot now be heard to complain about the impossibility of fulfillment thereof.

Neither can [Gemina] claim that his salary for the period of February 1 to 15, 2003 was intentionally withheld from him. By his own admission, the personnel[-]in-charge received his Daily Time Record and Attendance Record for the said period only on February 18, 2003. [Gemina], however, filed the complaint *a quo* on February 19, 2003 without giving private respondent sufficient opportunity to compute his salary on the basis of his attendance and to credit the same to his account. x x x

x x x x

**WHEREFORE**, premises considered, the instant petition for certiorari is hereby **DENIED**.

**SO ORDERED.**<sup>[21]</sup> (Citations omitted)

On July 31, 2006, Gemina filed a Motion for Reconsideration<sup>[22]</sup> of the foregoing decision but the CA denied the same in its Resolution<sup>[23]</sup> dated November 7, 2006.

On January 2, 2007, Gemina filed the instant petition for review on *certiorari* with this Court. He contends that the CA erred in finding that he was not constructively dismissed despite the circumstances demonstrating that he had been subjected to several forms of harassment by some officers of Bankwise to make his employment unbearable. To cite a few instances, he claims that Bankwise deleted his name from the organizational chart as early as January 2003 while the names of other officers who also failed to comply with their respective deposit portfolio of P100,000,000.00 in six (6) months were retained. Further, his salaries for months of January and February were withheld. He was also ordered to return his service vehicle for no apparent reason at all.<sup>[24]</sup>

Gemina further argues that the CA erred in ruling that the fund level commitment of P100,000,000.00 stipulated in his employment contract is a condition for employment. He rebuffs the CA's insinuation that he left his employment and filed a complaint for illegal dismissal in order to preempt his termination.<sup>[25]</sup>

Meanwhile, in 2008, Bankwise was declared insolvent and the Philippine Deposit Insurance Corporation (PDIC) was designated as its receiver. Subsequently, on February 29, 2008, the PDIC entered its appearance on behalf of Bankwise.

### **The Ruling of this Court**

**The fund level commitment is a condition for Gemina's employment.**

One of the points in which the LA had a conflicting resolution with the NLRC and the CA is the nature of the stipulation about the fund level commitment of P100,000,000.00 in Gemina's employment contract. The LA opined that the mentioned stipulation was not the basis of Gemina's employment such that he