597 Phil. 494

SECOND DIVISION

[G.R. No. 178524, January 30, 2009]

PANFILO MACASERO, PETITIONER, VS. SOUTHERN INDUSTRIAL GASES PHILIPPINES AND/OR NEIL LINDSAY, RESPONDENTS.

D E C I S I O N

CARPIO MORALES, J.:

The services of Panfilo Macasero (petitioner) were engaged by Southern Industrial Gases, Philippines (respondent company) as *Carbon Dioxide Bulk Tank Escort* since September 1995. For every 24-hour work rendered by him in escorting respondent company's tanks while they were being shipped from Cebu and to other areas in the Visayas and Mindanao, petitioner earned P200, aside from receiving transportation, accommodation, and meal allowances.

On January 5, 1999, petitioner filed before the National Labor Relations Commission (NLRC) Regional Arbitration Branch No. VII a Complaint[1] against respondent company and/or its co-respondent General Manager Neil Lindsay, for illegal dismissal with prayer for reinstatement, backwages, unpaid benefits, and attorney's fees, alleging that in September 1998, he was advised that his services were no longer needed and was in fact prevented from entering the company premises.

In their Position Paper,[2] respondents contended that no employer-employee relationship existed between respondent company and petitioner because his services were only occasionally required, he having worked 287 days in the 3 years that he was connected with it; that petitioner was never subject to respondent company's supervision and/or control; and that petitioner had no fixed work schedule, hence, at most, he was an "unsupervised *pakiaw* or task worker."

By Decision of December 7, 1999, the Labor Arbiter held that petitioner was a regular employee but that he was not illegally dismissed, no particulars of the fact of dismissal having been proffered. The Labor Arbiter thereupon ordered respondent to pay petitioner separation pay equivalent to one month salary for every year of service plus 13th month pay.

Petitioner appealed to the NLRC, questioning the computation of the monetary award and the non-award of backwages, attorney's fees, and costs of litigation.

Respondents appealed too, insisting that no employer-employee relationship existed between respondent company and petitioner who it claimed was actually an independent contractor or, at best, a task worker.

By Decision[3] dated October 28, 2002, the NLRC affirmed the labor arbiter's ruling that petitioner was a regular employee and that there was no illegal dismissal. It, however, modified the Arbiter's computation of separation pay.

Acting on the separate motions for reconsideration of the parties, the NLRC, by Resolution[4] of December 15, 2003, modified the computation of the separation pay to one half month salary for every year of service, thus, lowering the amount to P15,700.

By Decision[5] dated August 10, 2006, the appellate court affirmed the NLRC modified Decision, holding that there was no evidence to show that petitioner's employment was terminated, much less that the same was illegal. Citing *CALS Poultry Supply v. Roco,*[6] the appellate court held that petitioner failed to prove the fact of dismissal. Petitioner's motion for reconsideration having been denied by Resolution dated March 16, 2007, the present recourse was filed.

Petitioner contends that it is respondent company, as the employer, which has the burden of proving that he was not dismissed, or if dismissed, that the dismissal was not illegal; and that he having proved that he was dismissed and that it was illegal, he is entitled to backwages and reinstatement, or separation pay of one month for every year of service, not just one half month, there being no allegation nor proof of serious financial reverses on the part of respondent company.

In their Comment,[7] respondents aver that the petition raises questions of fact and maintain that no employer-employee relationship existed between respondent company and petitioner.

In any event, relying on *Chong Guan Trading v. National Labor Relations Commission*,[8] respondents contend that petitioner was never given a notice of dismissal nor was he prevented from returning to work, hence, there could be no illegal dismissal.

At the outset, the Court notes that while it is axiomatic that only questions of law can be raised in a petition for review on certiorari under Rule 45, the same is not without exceptions, thus:

> Rule 45 of the Rules of Civil Procedure provides that only questions of law shall be raised in an appeal by *certiorari* before this Court. This rule, however, admits of certain exceptions, namely, (1) when the findings are grounded entirely on speculations, surmises, or conjectures; **(2) when the inference made is manifestly mistaken, absurd, or impossible**; (3) when there isa grave abuse of discretion; (4) **when the judgment is based on misappreciation of facts;** (5) when the findings of fact are conflicting; (6) when in making its findings, the same are contrary to the admissions of both appellant and appellee; (7) when the findings are contrary to those of the trial court; (8) **when the findings are conclusions without citation of specific evidence on which they are based**; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; and (10) **when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record.** [9] **(**Emphasis supplied)

As shall be discussed shortly, a review of the records of the case and the bases of the findings of the Arbiter, the NLRC and the appellate court shows that the petition comes within the purview of the above-highlighted exceptions, hence, the Court resolves to give it due course.

There being uniformity in the findings of the labor tribunals and the appellate court that an employer-employee relationship existed between petitioner and respondent company and that he was a regular employee, *the only issue left for determination is whether petitioner was dismissed and, if in the affirmative, if it was legally effected*.

Respondents reiterate their claim that its act of not providing work to petitioner starting September 1995 was "due principally to a slump in the market and the dwindling demand by the Visayas-Mindanao clients."[10] This claim was credited by the Arbiter, the NLRC and the appellate court. The Court does not.

In illegal dismissal cases, **the *onus* of proving that the employee was not dismissed or, if dismissed, that the dismissal was not illegal, rests on the employer, failure to discharge which would mean that the dismissal is not justified and, therefore, illegal**.[11]

Indeed, a party alleging a critical fact must support his allegation with substantial evidence, for any decision based on unsubstantiated allegation cannot stand without offending due process. [12]

Respondents' claim that there was a business slump, hence, petitioner could not be given any escorting assignment has remained just that. The records are bereft of any documentary evidence showing that it was indeed suffering losses or a decline in orders which justified its admitted failure to give assignments to petitioner.

The appellate court ratiocinated that before respondent company could be burdened with proving the legality of dismissal, "there has to be details of acts attributed to [respondents] constituting illegal dismissal if only to give [petitioner] the opportunity to adduce evidence to defend himself from or disprove occurrence of such act or inaction," but that petitioner failed to do so. Respondents must not, however, only rely on the seeming weakness of petitioner's evidence, but must stand on the merits of their own defense.

The Court finds incongruous the crediting by the labor tribunals and the appellate court of respondents' claim that petitioner must prove the fact of his dismissal with particularity and at the same time accept respondents' above-said unsubstantiated claim that business slump prevented it from giving petitioner escorting assignment.

While both labor tribunals and the appellate court held that petitioner failed to prove the fact of his dismissal, they oddly ordered the award of separation pay in lieu of reinstatement in light of respondent company's "firm stance that [herein petitioner] was not its employee [*vis a vis*] the unflinching assertion of [herein petitioner] that he was which do[es] not create a fertile ground for reinstatement." It goes without saying that the award of separation pay is inconsistent with a finding that there was no illegal dismissal, for under Article 279[13] of the Labor Code and as held in a catena of cases, an employee who is dismissed without just cause and without due