

SPECIAL TWENTIETH DIVISION

[CA-G.R. CEB SP NO. 08505, January 29, 2015]

**ABLE SERVICES, INC./ EDWIN ORTIZ, PETITIONERS, VS.
NATIONAL LABOR RELATIONS COMMISSION 7TH DIVISION AND
DIOSITIO BARAZON, RESPONDENTS.**

DECISION

QUIJANO-PADILLA, J.:

Before Us is a petition for *certiorari* assailing the Decision^[1] dated February 28, 2014 of the National Labor Relations Commission, 7th Division, Cebu City in NLRC Case No. VAC-12-000737-2013 affirming the Decision^[2] dated November 15, 2013 of the Regional Arbitration Branch VII, Cebu City in RAB VII-07-1461-2013 for Illegal Dismissal, Underpayment of Salary and Separation Pay.

The Facts

Petitioner Able Services Inc. [Able for brevity] is a duly organized and existing corporation engaged in providing skilled manpower, janitorial and utility services to the general public. Private respondent Diositio Barazon [Barazon for brevity] started his employment with Able on May 10, 2007 as a janitor and was assigned at Fairchild Semiconductor. His assignment ended sometime in February 2009. Thereafter, he was given a new assignment, still as a janitor, at PAREF Springdale School [PAREF for brevity] from July 3, 2009 until July 6, 2013.

The assignment of Barazon at PAREF was cut short since the latter requested for his replacement because he deliberately failed to attend weekly meetings on three [3] occasions and per incident report dated July 5, 2013, said act constituted as insubordination.^[3] So on that very same day, Able sent a recall notice to Barazon informing the latter that he was relieved of services at PAREF which would take effect the next day or on July 6, 2013. He was further directed to report at Able's office for further instructions. This notice was duly received by Barazon.^[4]

The next day, on July 6, 2013, Able sent another notice^[5] to Barazon, placing him on floating status, the notice reads:

"Considering the incident [that] happened to you (sic), our client PAREF SPRINGDALE requested in our office that they were no longer accepting you. With this, you will be placed under Floating Status for not more than six (6) months. Further, if there will be possible vacant position that you may fit in during the said period then you will be processed for that position provided that the outcome of the investigation is favorable to you.

However, if an (sic) and when you will be get (sic) hired with another company during the said period then automatically you [are] voluntarily disconnected with Able Services, Inc. in which case we are no longer obliged to post you to another vacant position because such shall be considered as deemed resigned."

Subsequently, on July 8, 2013, Able sent a Notice of Assignment^[6] to Barazon, which reads:

"You are hereby directed to report to the office upon receipt of this notice for a possible new assignment of work in another company in which Able Services, Inc. will be serving as a Service Provider. Be it noted that you have to follow and abide the company's usual procedure on screening and hiring.

Please affirmed (sic) and confirmed (sic) by affixing your signature herein below provided as an indication of your acceptance of the new assignment and your employment is subject to the accepted and existing policy of the company."

Thus, on July 25, 2013, Barazon filed a complaint against Able for illegal dismissal, underpayment of salary and separation. He alleged that Able's HR, Penelope Fuentes told him that he will be given a new assignment provided he will sign a new employment contract. Barazon refused to sign because he was already a regular employee of Able.

Able, on the other hand, asserted that Barazon was not dismissed from work but rather he was the one who refused to accept his new assignment. The requirement for him to sign a new employment contract was pursuant to Department Order No. 18-A which took effect on December 4, 2011, particularly Section 9 thereof, which reads:

"Section 9. Required contracts under these Rules.

(a) Employment contract between the contractor and its employee. Notwithstanding any oral or written stipulations to the contrary, the contract between the contractor and its employee shall be governed by the provisions of Articles 279 and 280 of the Labor Code, as amended. It shall include the following terms and conditions:

- i. The specific description of the job, work or service to be performed by the employee;
- ii. The place of work and terms and conditions of employment, including a statement of the wage rate applicable to the individual employee; and
- iii. The term or duration of employment that must be co-extensive with the Service Agreement or with the specific phase of work for which the employee is engaged.

The contractor shall inform the employee of the foregoing terms and conditions of employment in writing on or before the first day of his/her employment."

Following that directive, Able contends that there is a need for a new employment contract to be signed by Barazon because the failure to do so would mean the cancellation of their registration as an independent contractor.

The Labor Arbiter in its Decision^[7] dated November 15, 2013 ruled that Barazon was illegally dismissed for to require him to sign a new employment contract as a condition for a new assignment would circumvent his right to security of tenure as a regular employee. While he was placed under floating status pending a new assignment, this could not be a reality because such new assignment could only be given if and when he signs a new employment contract. The dispositive portion of the said decision, reads:

“WHEREFORE, premises considered, judgment is hereby rendered declaring the constructive dismissal of complainant.

Respondent Able Services, Inc. is hereby ordered to pay complainant Diositio Barazon the following:

1.Backwages	P36,881.67
2.Separation Pay	59,514.00
3.Attorney's Fees	<u>9,639.56</u>
Total	P106,035.23

All other claims are dismissed for lack of merit.

SO ORDERED.”

The NLRC in its Decision^[8] dated February 28, 2014, affirmed the decision of the Labor Arbiter with a modification on the monetary awards, the *fallo* thereof reads:

“WHEREFORE, premises considered, respondents appeal is DISMISSED as We find no compelling reason to deviate from the findings of the Labor Arbiter. The Decision appealed from is hereby AFFIRMED reiterating the finding of constructive dismissal but adjusting the amount of backwages and attorney's fees granted, computing the same tentatively until promulgation of this Decision on 30 January 2014. Thus, respondent Able Services, Inc. is liable to pay complainant the amount of P129,060.36 in concept of separation pay, backwages and attorney's fees.

SO ORDERED.”

Petitioner Able's motion for reconsideration was denied.^[9] Hence, via a petition for *certiorari*, Able comes before Us with the following assignment of errors, to wit:

“I. THE HONORABLE COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHICH IF NOT CORRECTED, WOULD CAUSE GRAVE OR IRREPARABLE DAMAGE TO THE PETITIONERS, IN AFFIRMING THE ARBITER'S RULING THAT THE PRIVATE RESPONDENT WAS CONSTRUCTIVELY DISMISSED, IN THAT:

(i) THE COMPANY IS A LEGITIMATE CONTRACTOR UNDER D.O. 18-A. AS SUCH, IT ENTERS INTO SERVICE AGREEMENTS WITH VARIOUS PRINCIPALS, AND ASSIGNS CONTRACTUAL WORKERS SUCH AS THE PRIVATE RESPONDENT, TO ACCOMPLISH THE JOB, WORK OR SERVICE. THE PRIVATE RESPONDENT WAS RECALLED FROM HIS ASSIGNMENT AT PAREF SPRINGDALE PURSUANT TO THE REQUEST OF THE LATTER.

(ii) PRIVATE RESPONDENT ADMITS IN HIS POSITION PAPER THAT AFTER HE WAS RECALLED, THE COMPANY'S HR OFFICER ASSURED HIM THAT HE WILL BE RE-ASSIGNED TO ANOTHER PRINCIPAL, PALACIEGO CONDOMINIUM IN ESCARIO ST., CEBU CITY, BUT THE PRIVATE RESPONDENT STATED THAT HE REFUSED BECAUSE HE DOES NOT WANT TO SIGN A NEW EMPLOYMENT CONTRACT. HE LIKEWISE ADMITTED THAT DURING THE MANDATORY CONFERENCE, SUCH OFFER OF RE-ASSIGNMENT WAS REITERATED BY THE COMPANY, BUT HE STILL REFUSED.

(iii) WITH ALL DUE RESPECT, PUBLIC RESPONDENT NLRC GRAVELY ABUSED ITS DISCRETION IN RULING THAT A NEW EMPLOYMENT CONTRACT BETWEEN THE COMPANY AND PRIVATE RESPONDENT IS NOT NECESSARY OR REQUIRED UNDER SEC.9 OF DO 18-A. PRIVATE RESPONDENT'S NEW ASSIGNMENT WILL BE PURSUANT TO ANOTHER SERVICE CONTRACT WITH ANOTHER PRINCIPAL, THUS, THE PLACE OF WORK, TERMS AND CONDITIONS OF EMPLOYMENT AND DURATION OF HIS EMPLOYMENT (WHICH MUST BE CO-EXTENSIVE WITH RELEVANT SERVICE AGREEMENT) WILL NECESSARILY BE CHANGED. FURTHER, NON-COMPLIANCE WITH THE REQUIRED EMPLOYMENT CONTRACT IS A GROUND FOR CANCELLATION OF REGISTRATION OF THE PETITIONER COMPANY AS AN INDEPENDENT CONTRACTOR, UNDER SEC. 23(g) OF DO 18-A. IN FINE, THERE IS A NEED FOR A NEW EMPLOYMENT CONTRACT TO BE SIGNED BY THE PRIVATE RESPONDENT, ALBEIT, THIS NEW CONTRACT WILL STILL BE GOVERNED BY ARTS. 279-280 OF THE LABOR CODE, AS AMENDED.

(iv) PRIVATE RESPONDENT FILED AN ILLEGAL DISMISSAL COMPLAINT BARELY A MONTH AFTER RECEIPT OF THE COMPANY'S NOTICE PUTTING HIM ON A 6-MONTH FLOATING STATUS PERIOD. IN HIS COMPLAINT, HE ONLY ASKED PAYMENT OF SEPARATION PAY IN LIEU OF REINSTATEMENT. HE ADMITTEDLY REFUSED RESPONDENT'S (sic) OFFER OF REINSTATEMENT BEFORE AND DURING THE MANDATORY CONFERENCE IN THIS CASE. ALL THESE UNDISPUTED FACTS INDUBITABLY SHOW THAT PRIVATE RESPONDENT WAS NOT DISMISSED.

(v) PRIVATE RESPONDENT HAS NOT EFFECTIVELY DISCHARGED THE BURDEN OF PROVING THAT HE WAS CONSTRUCTIVELY DISMISSED. THUS, THE BURDEN OF EVIDENCE HAS NOT SHIFTED ON THE PETITIONERS TO PROVE A VALID DISMISSAL. INDEED, PETITIONERS HAVE CONSISTENTLY ASSERTED THAT PRIVATE RESPONDENT WAS NOT DISMISSED FROM SERVICE AT ALL.

II. THE HONORABLE COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION, AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN

AFFIRMING THE ARBITER'S AWARD OF SEPARATION PAY. THERE IS IN FACT, NO BASIS OR FINDING IN THE ASSAILED DECISION, WHY THE HONORABLE COMMISSION CONSIDERS REINSTATEMENT AS NO LONGER FEASIBLE IN THIS CASE.

III. THE HONORABLE COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AWARDING BACKWAGES, IN THAT, THERE IS NO FACTUAL OR LEGAL BASIS FOR SUCH AN AWARD, AS THE PRIVATE RESPONDENT WAS NOT DISMISSED.

IV. THE HONORABLE COMMISSION COMMITTED GRAVE ABUSE OF DISCRETION, AMOUNTING TO LACK OR EXCESS OF JURISDICTION, IN AFFIRMING THE ARBITER'S AWARD FOR ATTORNEY'S FEES AS THERE IS NO BASIS FOR SUCH AWARD."^[10]

Our Ruling

Stripped of the non-essentials, Able contends that the NLRC erred in ruling that Barazon was illegally dismissed because one, he was the one who refused to sign an employment contract for his re-assignment despite making the offer unconditional and reiterating the same during their mandatory conference. Second, the requirement of the employment contract is mandated under Department Order No. 18-A. Third, Barazon after being placed under "floating status" for less than a month had no basis in law to claim that he was dismissed constructively.

We agree.

We are aware that the rule is settled that the original and exclusive jurisdiction of this Court to review a decision of respondent NLRC in a petition for *certiorari* under Rule 65 does not normally include an inquiry into the correctness of its evaluation of the evidence. Errors of judgment, as distinguished from errors of jurisdiction, are not within the province of a special civil action for *certiorari*, which is merely confined to issues of jurisdiction or grave abuse of discretion.^[11] However, by way of exception, in *Tan, Jr. v. Matsuura, et al.*,^[12] the Supreme Court ruled that "grave abuse of discretion refers not merely to palpable errors of jurisdiction; or to violations of the Constitution, the law and jurisprudence. It also refers to cases in which, for various reasons, there has been a gross misapprehension of facts."

We find that both the Labor Arbiter and the NLRC had misapprehended the factual antecedents of the instant case.

As an independent contractor pursuant to Department Order No. 18-A which took effect on December 4, 2011, among the required contract pursuant to Section 9 thereof is the employment contract, thus:

"Section 9. Required contracts under these Rules.

(a) Employment contract between the contractor and its employee. Notwithstanding any oral or written stipulations to the contrary, the contract between the contractor and its employee shall be governed by the provisions of Articles 279 and 280 of the Labor Code, as amended. It