

# THIRTEENTH DIVISION

[ CA-G.R. SP NO. 126583, March 23, 2015 ]

## SILVERIO'S SEAFOODS & RESTAURANT REPRESENTED BY TERESA C. NEIHUM,<sup>[1]</sup> PETITIONER, VS. JUPITER T. BALINES AND NATIONAL LABOR RELATIONS COMMISSION RESPONDENTS.

### DECISION

#### CORALES, J.:

This is a Petition for *Certiorari*<sup>[2]</sup> under Rule 65 of the Rules of Court assailing the April 30, 2012 Decision<sup>[3]</sup> and the June 26, 2012 Resolution<sup>[4]</sup> of the National Labor Relations Commission (NLRC) in NLRC LAC No. 10-002757-11. The assailed Decision affirmed with modification the August 31, 2011 Decision<sup>[5]</sup> of the Labor Arbiter ordering Silverio's Seafoods & Restaurant (Silverio's Seafoods) and Teresa C. Neihum (Neihum) to pay private respondent Jupiter T. Balines' (Balines) his backwages, separation pay, salary differential, and service incentive leave pay (SILP). The questioned Resolution denied the subsequent motion for reconsideration of Silverio's Seafoods and Neihum.

#### The Antecedents

Silverio's Seafoods is a restaurant owned and managed by Neihum. It hired Balines on March 1997 as a waiter with a daily rate of P190.00 for a two (2)-shift work schedule.

Balines failed to report for his shifts on February 22 and 23, 2011. When he returned to work on February 26, 2011, Neihum blurted in anger "I could not afford to see him now".

Allegedly, Balines sought clarification from the management regarding his employment status but the same went unheeded. Feeling aggrieved, he filed on May 18, 2011 a complaint for illegal dismissal, underpayment of salary, and nonpayment of separation pay and SILP against both Silverio's Seafoods and Neihum.<sup>[6]</sup>

According to Balines, he drove for Alvin Coquia, one of the owners of Silverio's Seafoods, on February 21, 2011. He was so tired that he was not able to report for his second shift on February 22, 2011 and his first shift on February 23, 2011. Since February 24 and 25, 2011 were his official day-off, he only reported to work on February 26, 2011 but Neihum told him that she would have to think it over before accepting him back. He went to Neihum's house after several days to inquire the status of his employment but she refused to talk to him. On March 1, 2011, Balines served as an extra-waiter upon the request of Neihum's son, Marvin Carvajal, but Neihum questioned his presence in the event. The management of Silverio's

Seafoods also ignored his query regarding his employment status.<sup>[7]</sup>

In their position paper,<sup>[8]</sup> Silverio's Seafood and Neihum clarified that there was no intention to dismiss Balines when he was told that "I could not afford to see him now". At that time, Neihum was still studying Balines' infractions and the corresponding disciplinary measures to adopt because he had incurred frequent absences without permission, committed an act of dishonesty sometime in July 2010 when he failed to give the money intended for BPI-MS payment, indulged in gambling, always drunk, and displayed bad temper and mood that ended up in mauling his wife who also works in Silverio's Seafoods. Several memoranda were given to Balines to address these series of violations.<sup>[9]</sup> In fact, on February 28, 2011, a memorandum was issued to Balines suspending him for one (1) month due to his absence on February 22 and 23, 2011.<sup>[10]</sup> Balines was not dismissed from employment but was merely suspended, and assuming that they really intended to terminate his employment, there were valid cause for his dismissal considering his habitual unauthorized absences amounting to habitual neglect and his repeated infractions which constitute gross misconduct.

### **The Rulings of the Labor Arbiter and the NLRC**

In the August 31, 2011 Decision,<sup>[11]</sup> the Labor Arbiter doubted the validity of the memorandum of suspension allegedly given to Balines and held that he was constructively dismissed from employment. There was no evidence showing that Balines received the memorandum of suspension or that he was notified to resume his work after the alleged one (1)-month suspension expired on March 26, 2011. The Labor Arbiter also opined that the imposition of the one (1)-month suspension without requiring Balines to explain his side violated his right to due process. The dispositive portion of the Labor Arbiter's Decision reads:

**WHEREFORE,** all the foregoing premises being considered, judgment is hereby rendered ordering the respondents to pay complainant, as follows: a) P41,912.00 as backwages; P87,360.00 as separation pay; P44,408.00 as salary differential; and P3,600.00 as service incentive leave pay.

The claim for night differential pay is dismissed for want of merit.

### **SO ORDERED.**

On appeal,<sup>[12]</sup> the NLRC, through its April 30, 2012 Decision,<sup>[13]</sup> affirmed the Labor Arbiter's findings that Balines was illegally dismissed from employment because he was prevented from reporting to work following his absences on February 21, 22, and 23, 2011. It held that the memorandum of suspension was self-serving and a mere afterthought as there was no indication that Balines was served with a copy of the said memorandum or at least informed of his supposed suspension despite the fact that his wife is also an employee of Silverio's Seafoods. The NLRC did not find any just cause warranting Balines' dismissal from service. There is no habitual absenteeism or gross neglect of duty because he only incurred 11 absences in a span of three (3) years. It further ruled that dismissal from service was too harsh a penalty for Balines' consecutive unjustifiable absences from February 21 to 23, 2011. However, the NLRC concluded that under the prevailing circumstances,

Silverio's Seafoods acted in good faith when it dismissed Balines. Accordingly, it deleted the award of backwages in favor of Balines and disposed the case as follows:

**WHEREFORE**, premises considered, the appealed Decision is **AFFIRMED** with a **MODIFICATION** that the award of backwages is set-aside.

**SO ORDERED.** (Emphasis appears in the original text of the Decision)

Silverio's Seafoods and Neihum sought reconsideration but the NLRC denied the same in its June 26, 2012 Resolution.<sup>[14]</sup>

Undeterred, petitioner Silverio's Seafoods filed the instant petition for *certiorari* imputing grave abuse of discretion on the part of the NLRC for disregarding the memorandum of suspension and ruling that Balines was illegally dismissed from employment. It insists on the regularity of the memorandum of suspension which was received by the Department of Labor and Employment (DOLE), Dagupan District Office on February 28, 2011 and claims that the discontinuance of Balines' employment was due to his failure to make himself available for work even after the expiration of his suspension. Lastly, it harps on the management prerogative to discipline and impose penalty to erring employees like Balines who committed habitual absenteeism and was shown to be incorrigible despite several stern warnings.<sup>[15]</sup>

Required to comment, Balines echoes the findings of the NLRC but questions the deletion of the award of backwages. He argues that backwages is a normal consequence of illegal dismissal and in the interest of justice, this Court should restore his entitlement to said award.<sup>[16]</sup>

### **This Court's Ruling**

The petition lacks merit.

Grave abuse of discretion has been defined as the capricious and whimsical exercise of judgment amounting to or equivalent to lack of jurisdiction. There is grave abuse of discretion when the power is exercised in an arbitrary or despotic manner by reason of "passion or personal hostility, and must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.<sup>[17]</sup> Thus, the instant petition would prosper only if there is a clear showing of grave abuse of discretion on the part of the public respondent. It is therefore imperative for petitioner to prove that the NLRC capriciously, whimsically, or arbitrarily disregarded evidence which is material to or decisive of the controversy.<sup>[18]</sup>

After a judicious scrutiny of the evidence on records and consideration of the parties respective arguments, We cannot attribute grave abuse of discretion on the part of the NLRC. Its findings are supported by substantial evidence, thus, entitled to great respect and considered final. It also reviewed the rationale of the Labor Arbiter's decision and applied the proper case law,<sup>[19]</sup> except as to the payment of backwages.