

## **SPECIAL NINETEENTH DIVISION**

**[ CA-G.R. SP NO. 06637, July 15, 2014 ]**

**MARY JOY LOPEZ VICTORIANO, PETITIONER, VS. THE HON.  
COMMISSIONERS OF THE NATIONAL LABOR RELATIONS  
COMMISSION, SEVENTH DIVISION, CEBU CITY AND ATLAS DIVE  
RESORT, ANDY POPE, GEORGE BENDER AND BRIGET EGGERT,  
RESPONDENTS.**

### **D E C I S I O N**

**LAGURA-YAP, J.:**

This is a Petition for Certiorari under Rule 65 of the 1997 Rules of Civil Procedure of the Decision<sup>[1]</sup> dated August 26, 2011 and Resolution<sup>[2]</sup> dated November 29, 2011 of the National Labor Relations Commission, 7<sup>th</sup> Division. The NLRC in the assailed Decision, granted private respondents' Motion for Reconsideration and partially granted their appeal. The NLRC declared that petitioner was not illegally dismissed and thus, it modified the Decision<sup>[3]</sup> of the Labor Arbiter dated December 20, 2010. The assailed Resolution denied the Motion for Reconsideration filed by herein petitioner, hence this Petition.

#### ***The antecedent facts:***

Petitioner Mary Joy L. Victoriano (petitioner) was hired by private respondent Atlantis Dive Resort (Atlantis Dive Resort) on June 3, 2005 as a massage therapist. She had a starting monthly salary of seven thousand pesos (PhP 7,000) which was subsequently increased to ten thousand pesos (PhP 10,000). She worked from two o'clock in the afternoon until eleven o'clock in the evening every day<sup>[4]</sup>.

Petitioner and private respondents have different versions of the facts and circumstances surrounding the events which led to the former's (Victoriano) severance from her employment with Atlas Dive Resort. Both sides will be told narrated as hereunder:

Petitioner recalls that sometime in November of 2005, private respondent George Bender saw her use the resort's telephone. Because of this she was charged one thousand pesos (PhP 1,000.00 pesos) which was deducted from her payroll. On July 3, 2006, she was accused of selling properties to a resort guest and was subsequently suspended for seven (7) days without pay from October 13 to 27, 2006. Again, on December 5, 2006, she was accused of violating the resort's mission and vision statement and was suspended for fourteen (14) days without pay. In February 2007, she was fined an amount of one thousand pesos (PhP 1,000.00) for assisting a guest in going to the grocery, although, according to her, it was done after her working hours. Petitioner asserts that in all these instances, she was not given due process<sup>[5]</sup>.

Petitioner alleges that the management of private respondent Atlas Dive Resort decided to change her employment status from regular employee to commission-based employee sometime in July 2007. She was told to go home and that she would just be called back should her services be needed. However, after November 4, 2007, no such call was ever made. She was made to sign a pre-formatted resignation letter which she refused to submit<sup>[6]</sup>.

Private respondents on the other hand, contend that complainant resigned from her job sometime in August 2007 and that she submitted her resignation letter. However, they said that the resignation letter could no longer be presented because the former Human Resource Manager of the Resort, Ms. Taryn Teves, failed to completely turn over all documents which were in her possession when she resigned sometime in March 2009. To prove her resignation, private respondents presented the affidavits of George Benderland and Briget, Anabel Metro and Herdita Barandog. With Victoriano's resignation, she has no cause of action against the private respondents. Private respondents were surprised to know that Victoriano filed an illegal dismissal case against them after almost three (3) years since her resignation.

It could not be possible that private respondents would simply terminate the complainant in the manner described in her pleadings. She had a balance of sixteen thousand and two hundred fifty pesos (Php 16,250.00) from her loan of twenty thousand pesos (Php 20,000.00) which she obtained from the Atlantis Foundation, a foundation created by the Resort for the benefit of its qualified employees. The existence of Victoriano's loan runs counter to her theory that she was illegally dismissed.

Granting without conceding that complainant was indeed dismissed from her job, private respondents argue that there were just causes for her termination as she was involved in various infractions committed against the company. She was guilty of neglect of duty and wilful disobedience to the lawful orders of the respondents. She engaged herself into selling real estate to some guests which was expressly prohibited and thus warranting her dismissal. Should that be the case, private respondents concede that they would only be liable for nominal damages and not for back wages and complainant's other money claims<sup>[7]</sup>.

On December 23, 2009, petitioner Victoriano filed a complaint for illegal dismissal, illegal suspension, illegal deduction, non-payment of overtime pay, premium pay for rest day and night shift pay and separation pay against private respondents before the National Labor Relations Commission, Sub-Regional Arbitration Branch No. VII, Dumaguete City. On December 20, 2010, Labor Arbiter Leo Montenegro rendered a decision declaring that petitioner Victoriano was illegally dismissed, upon which private respondents were ordered to pay five hundred thirty one thousand three hundred eighty three pesos (PhP 531,383.00).

Private respondents received a copy of the decision on January 18, 2011 through their previous counsel. However, as the records would show, they filed their appeal through LBC, a private courier, which was received by NLRC Sub-RAB VII of Dumaguete City only on January 31, 2011<sup>[8]</sup>. The NLRC subsequently issued a Resolution dated May 31, 2011 dismissing the appeal for being filed out of time.

Upon receipt of the copy of the Resolution on July 8, 2011, private respondents filed a Motion for Reconsideration before the NLRC on July 18, 2011, which was granted in the assailed Decision dated August 26, 2011<sup>[9]</sup>. The NLRC partially granted the appeal and modified the decision of the Labor Arbiter with respect to the 13th month pay in the amount of twenty thousand pesos (PhP 20,000.00) that private respondents are liable for. The NLRC set aside and vacated the rest of the Decision of the Labor Arbiter.

Aggrieved, petitioner filed a Motion for Reconsideration of the NLRC Decision, but this was denied on November 29, 2011<sup>[10]</sup>.

The case is now brought before Us via this Petition for Certiorari.

### **THE ISSUES**

Petitioner raises the following assignment of errors:

1. Public respondent gravely abused its discretion amounting to lack or excess of jurisdiction when it granted the Motion for Reconsideration of private respondents by considering them to have perfected their appeal.
2. Public respondent gravely abused its discretion amounting to lack or excess of jurisdiction when it conducted *trial de novo* on appeal and shifted the burden of proof of illegal dismissal to the petitioner.

### **OUR RULING**

At the outset, it must be emphasized that decisions of the NLRC are deemed final and executory, thus, not subject to ordinary appeal. The remedy of the aggrieved party therefore is to file a Petition for Certiorari under Rule 65 of the 1997 Rules of Civil Procedure pursuant to the landmark case of ***St. Martin Funeral Home v. NLRC***.<sup>[11]</sup> Verily, the instant petition is the proper recourse.

Grave abuse of discretion defies exact definition, but it generally refers to capricious or whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion and hostility<sup>[12]</sup>.

On this score, We find and so hold that public respondent gravely abused its discretion when it granted the Motion for Reconsideration of Atlas Dive Resort of the Resolution<sup>[13]</sup> dated May 31, 2011. The Resolution denied the latter's appeal for being filed out of time. The Notice of Appeal with Memorandum of Appeal of the Labor Arbiter's Decision of private respondents was filed beyond the reglementary period. Thus, public respondent should not have granted the assailed Motion for Reconsideration.

We quote the findings of fact stated in public respondent's Resolution dated May 31, 2011, viz: