SUPREME COURT
THIRD DIVISION

ATCI OVERSEAS CORPORATION,
Petitioner,

-versus-

G.R. No. 143949
August 9, 2001

COURT OF APPEALS, DR. MARISSA ALCANTARA and DR. ROSANNA E. CABATBAT,
Respondents.
x----------x

D E C I S I O N

GONZAGA-REYES, *J.*:

Petitioner ATCI Overseas Corporation (ATCI) and the Ministry of Public Health of Kuwait (Ministry) entered into a Memorandum of Understanding, by virtue of which the former would recruit medical professionals for the latter in order to work in Kuwait. Pursuant thereto, private respondents Marissa Alcantara and Rosanna E. Cabatbat were hired as dental hygienists by the Ministry for a period of two years with a monthly salary of 210 KD.

Before leaving, private respondents underwent a physical and medical examination in an accredited clinic of the Philippine Overseas Employment Administration (POEA) and both were found to be physically fit. On 19 August 1991, private respondents departed for Kuwait. However, shortly after arriving in Kuwait, they were

again subjected to another physical examination and, after having worked for only two months, private respondents were terminated from their employment. Upon inquiry, private respondents were informed that they were physically unfit for their jobs. Seven months after they had ceased to work, private respondents were repatriated to the Philippines on 16 May 1992.

Feeling aggrieved, private respondents filed a complaint with the POEA against petitioner and its surety, Prudential Guarantee & Assurance, Inc., for illegal dismissal and non-payment of salaries, alleging that, despite their requests, they were not given by their foreign employer copies of the result of their medical examination and written notice of termination. In its defense, petitioner claimed that the Ministry had the right to dismiss private respondents because they were found to be physically unfit to work; that the dismissal of private respondents by the Ministry is the act of a foreign government which may not be declared illegal by any instrumentality of the Philippine Government; and that it interceded in behalf of private respondents, but its efforts had failed.[1]

On 4 October 1993, the POEA rendered its decision finding petitioner and its surety solidarily liable to private respondents for illegal dismissal. Its decision is reproduced in part, *viz* –

> We find the charge of illegal dismissal meritorious. The alleged just cause which triggered complainants' dismissal, i.e., lung defects was not satisfactorily established. There is no notice in writing informing complainants of the reasons why they were not allowed to work anymore. Moreover, granting that they have "lung defects", the same should have been accompanied by a doctor's report or a medical certificate to attest to their "unfitness" to work. Respondent cannot hide under the mantle of "act of state doctrine" to escape liability. It may be true that it is a standard procedure to have new employees medically examined to determine their fitness to work. The results thereof should be given to them so that appropriate measures may be taken. When complainants were deployed they were found physically fit and actually worked for 2 months. Complainants therefore deserve to be informed of their actual health conditions.

It appears on record that complainants were just not allowed to work anymore. They were not notified in writing of the causes thereof, neither were they allowed the opportunity to contest the alleged medical findings, if any. The alleged decision of the Ministry of Health of Kuwait was not proffered. Their dismissal is therefore arbitrary.

The certification issued by the Philippine Labor Attache in Kuwait cannot correct the findings of arbitrary dismissal. The alleged "lung defects" suffered by complainants remained a general conclusion. The basis thereof should have been emphasized by the Labor Attache. Moreover, the said "representations" made by the Labor Attache to the officials of the Ministry of Health were not substantiated. The "appeal" made should have been documented.

Complainants should therefore be paid their salaries from the time they stopped working until the expiry date of their contracts or from October 17, 1991 to August 19, 1993, as follows:

Unexpired portion of contract – 1 year, 10 months and 2 days

monthly salary – 210 KD
210.00 KD x 22 months + 210.00/30 days x 2 days
= 4,620.00 KD + 14 KD
= 4,634.00 KD each

Prudential Guarantee and Assurance Inc. was impleaded as party respondent being the surety of respondent-agency. As such, it guaranteed compliance by its bonded principal, respondent agency, with the terms and conditions of the employment contracts. It should therefore be held jointly and severally liable with respondent agency.

For having sought the services of their counsel to prosecute their valid claims, complainants should be awarded an equivalent of 10% of the judgment award as and by way of attorney's fees.

WHEREFORE, premises considered, respondents ATCI

> Overseas Corporation and Prudential Guarantee and Assurance Inc. are hereby ordered, jointly [and] severally to pay complainants the following:
>
> > Marissa V. Alcantara – KD 4,634.00 representing salaries for the unexpired portion of the contract.
> >
> > Ma. Rosanna E. Cabatbat – KD 4,634.00 representing salaries for the unexpired portion of the contract plus attorney's fees equivalent to 10% of the total award.
> >
> > It is understood that the award should be in Philippine Currency, at the prevailing rate of exchange at the time of payment.
>
> SO ORDERED.[2]

Private respondents appealed to the National Labor Relations Commission (NLRC). On 22 August 1994, the NLRC set aside the POEA's decision and dismissed private respondents' complaint against petitioner. The NLRC[3] decision states –

> In support of their appeal respondents submitted additional evidence consisting of the alleged letter from the Ministry of Health of Kuwait stating that the complainants were found to be positive of tuberculosis and heart sickness; which letter contains the English translation and certification by the Office of Consular Affairs *(Records p. 100-104)*.
>
> x x x
>
> It is well to underscore that under Article 221 of the Labor Code, in the proceedings before the Commission, the rules of evidence prevailing in court of law or equity are not controlling and it is the spirit and intention of the Code that the Commission shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without regard to technicalities of law or procedure all in the interest of due process.

> It is for this reason that the Commission cannot simply disregard or set aside the evidence now on record consisting of [the] Certification issued by the Ministry of Public Health of Kuwait with appropriate translations and consular authentications tending to show that complainants were found to be not fit for employment *(Record, p. 103)*. We find no cogent reason not to accord respect or weight to the said certification by the Ministry of Public Health of Kuwait, it being issued buy [sic] a government entity whose function is presumed to be regular in the absence of any evidence to the contrary. As the records show, such findings by the Ministry of Public Health of Kuwait was verified by the Philippine Labor Attache Lamberto L. Marin who certified to the effect that complainants/contract workers *(Records p. 125)*:
>
> x x x
>
> > 'were subjected to the required Medical Examination, after their arrival on 20 August 1991, and were found to be not fit for employment in Kuwait due to lung defects.
> >
> > This Office made representations to officials of the Ministry of Public Health of Kuwait to reconsider its decision and allow the above-named OCW's to stay and undergo medication until they are fit to work but the appeal was denied by the Ministry.'

In the absence of any evidence to show that the Philippine Labor Attache is [sic] issuing his certification was not fair, impartial or biased [sic] the same should be accorded weight and evidence as the official duty is presumed to have been regularly performed and that ordinary course of business had been followed *(Rules 130 Sec. 5 Rules of Court)*.

Contrary therefore to the POEA findings that 'the alleged just cause which triggered complainant's dismissal i.e. lung defects was not satisfactorily established', the records show that based on the certification by the Ministry of Public Health of Kuwait complainants 'had undergone medical examination and found to be positive of tuberculosis and heart sickness and are unfit to work *(Record, p.*

103). This finding was supported by the Certification issued by the Philippine Labor Attache in Kuwait. The cause of the complainant's dismissal having, thus, been sufficiently established, the monetary award granted by the POEA having lost its legal and factual basis is hereby set aside."[4]

In a resolution dated 2 June 1995, the NLRC denied private respondents' motion for reconsideration. Private respondents filed a petition for certiorari with this Court, which we referred to the Court of Appeals, pursuant to our ruling in St. Martin Funeral Homes vs. NLRC.[5] In its decision[6] rendered on 10 March 2000, the Court of Appeals[7] reversed the ruling of the NLRC, thus reinstating the POEA's 4 October 1993 decision. On 29 June 2000, the Court of Appeals denied petitioner's motion for reconsideration.[8]

Petitioner claims that private respondents were merely probationary employees who were dismissed for failure to qualify as regular employees, pursuant to Article 281 of the Labor Code, since they were found to be inflicted with pulmonary tuberculosis after being subjected to a physical examination in Kuwait. It is petitioner's contention that the Court of Appeals erred in applying Article 284 and its implementing rules. Furthermore, petitioner insists that the requirements of due process were satisfied since private respondents availed of the services of the Philippine labor attache in requesting the Ministry to reverse its decision, although such request was eventually denied.[9]

The petition is devoid of merit.

First of all, there is nothing in the record that would attest to petitioner's claim that private respondents were merely probationary employees at the time they were summarily dismissed from employment. Petitioner could not cite any provision in the employment contract providing for a probationary period, nor was such a stipulation included in the Memorandum of Understanding concluded between petitioner and the Ministry, although the Memorandum of Understanding provided for the general terms of employment. Neither is there any finding of probationary employment in the decisions of the POEA,[10] NLRC[11] and Court of Appeals.[12] Moreover, the records do not show that private

respondents were apprised of the fact that they were to be placed on probationary status and the requirements that they should comply with in order to qualify as regular employees. In the absence of such evidence, no other conclusion can be drawn but that private respondents were regular employees at the time they were dismissed by the Ministry.[13]

Being regular employees, the dismissal effected by petitioner must comply with the requirements of Article 284 of the Labor Code. It is not disputed that an employer may terminate the services of his employee who has been found to be suffering from a disease when the latter's continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees. However, the dismissal may not be summarily carried out. The employer must comply with certain prerequisites contained in Sec. 8, Rule I, Book VI, of the Omnibus Rules Implementing the Labor Code, which states–

> Where the employee suffers from a disease and his continued employment is prohibited by law or prejudicial to his health or to the health of his co-employees, the employer shall not terminate his employment unless there is a certification by a competent public health authority that the disease is of such nature or at such a stage that it cannot be cured within a period of six (6) months even with proper medical treatment. If the disease or ailment can be cured within the period, the employer shall not terminate the employee but shall ask the employee to take a leave. The employer shall reinstate such employee to his former position immediately upon the restoration of his normal health.
>
> Thus, there must be a prior certification from a competent public authority that the disease afflicting the employee sought to be dismissed is of such nature or at such stage that it cannot be cured within six (6) months even with proper medical treatment before an employer can dismiss an employee for health reasons. The burden of proving the existence of such a certificate is upon the employer, not the employee. *(Tan vs. NLRC, 271 SCRA 216 [1997]; Cebu Royal Plant vs. Deputy Minister of Labor, 153 SCRA 38 [1987]).*

There is nothing in the records to show that petitioner complied with Sec. 8, Rule I, Book VI, of the Omnibus Rules before private respondents were dismissed. In the proceedings before the POEA, petitioner did not present any certification whatsoever. It was only when the case was appealed to the NLRC that petitioner belatedly introduced in evidence a letter from the Ministry stating that private respondents were found to be positive for tuberculosis and heart disease. In addition, petitioner presented a certification issued by the Philippine Labor Attache Lamberto L. Marin attesting to the fact that private respondents were subjected to a medical examination after their arrival in Kuwait and were found be to be unfit for employment due to lung defects.[14] The letter from the Ministry and the certification by the Philippine labor attache fall short of the demands of the Omnibus Rules. First of all, there is no finding that the disease allegedly afflicting private respondents is of such nature or at such a stage that it cannot be cured within a period of six (6) months with proper medical treatment. Secondly, even assuming that the letter from the Ministry complied with the Omnibus Rules, petitioner has not proven that the same was presented to private respondents *prior* to their termination. Rather, the letter appears to have been an afterthought, a belated, yet grossly unsuccessful attempt at compliance with Philippine laws, produced by petitioner after an adverse judgment was rendered against it by the POEA. Clearly, Sec. 8, Rule I, Book VI, of the Omnibus Rules was not complied with, thus making private respondents' dismissal illegal.

In order to give substance to the constitutional right of labor to security of tenure, Article 279 provides that the illegally dismissed employee shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full backwages, inclusive of allowances, and to his other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.[15]

The award of backwages is intended to restore to the employee the earnings which he lost due to his illegal dismissal.[16] The POEA[17] held that the backwages to be awarded to private respondents should be computed from the time they were illegally dismissed until the expiration of their contract of employment, or from 17 October 1991

to 19 August 1993. We concur for this is the amount which private respondents would have received had they not been unlawfully dismissed.

As to the second remedy granted by Article 279, nowhere in the records does it appear that private respondents desire to be reinstated to their former employment.[18] But more significantly, any order of reinstatement issued by this Court will be difficult for private respondents to enforce against the Ministry of Public Health of Kuwait. Therefore, in lieu of reinstatement, private respondents are entitled to separation pay.[19] The illegally dismissed employee is granted separation pay in order to provide him with "the wherewithal during the period that he is looking for another employment."[20] Prevailing jurisprudence dictates that the employee be given one month pay for every year of service, as an alternative to reinstatement.[21] Considering that private respondents herein have only worked for two months, they are entitled to a separation pay equivalent to one-sixth of their monthly salary.

The award of attorney's fees is legally justified. In actions for recovery of wages or where an employee is compelled to litigate and thus incur expenses to protect his rights and interests, an award of attorney's fees equivalent to ten percent (10%) of the total award is legally and morally justifiable.[22]

The liability of petitioner for the amounts awarded herein are beyond contest. Private employment or recruitment agencies are jointly and severally liable with its principal, the foreign-based employer, for all claims filed by recruited workers which may arise in connection with the service agreements or employment contracts.[23] The basis for such solidary liability is found in Section 1 (f), Rule II, Book II, of the Rules and Regulations Governing Overseas Employment which requires the private employment agency to submit an undertaking under oath stating, among others, that it shall assume joint and solidary liability with the employer for all claims and liabilities which may arise in connection with the implementation of the contract.

WHEREFORE, the 10 March 2000 Decision and 29 June 2000 Resolution of the Court of Appeals are hereby AFFIRMED.

SO ORDERED.

Melo, *J.*, *(Chairman)*, Vitug, and Panganiban, *JJ.*, concur. Sandoval-Gutierrez, *J.*, on leave.

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[1] Rollo, 63-65.
[2] Ibid., 32-34.
[3] Second Division, with Commissioner Rogelio Rayala as ponente.
[4] Rollo, 67-69.
[5] 295 SCRA 494 (1998).
[6] Rollo, 63-72.
[7] Eleventh Division, composed of J. Marina L. Buzon, ponente, J. Ramon A. Barcelona, and J. Edgardo P. Cruz.
[8] Rollo, 86-88.
[9] Ibid., 125-137.
[10] 4 October 1993.
[11] 22 August 1994.
[12] 10 March 2000.
[13] A.M. Oreta & Co., Inc. vs. NLRC, 176 SCRA 218 (1989).
[14] Rollo, 67-68.
[15] Santos vs. NLRC, 154 SCRA 166 (1987).
[16] (St. Theresa's School of Novaliches Foundation vs. NLRC, 289 SCRA 110 [1998]).
[17] Rollo, 33.
[18] Labor vs. NLRC, 248 SCRA 183 (1995).
[19] Mark Roche International vs. NLRC, 313 SCRA 356 (1999); Dela Cruz vs. NLRC, 299 SCRA 1 (1998); Kathy-O Enterprises vs. NLRC, 286 SCRA 729 (1998).
[20] Torillo vs. Leogardo, Jr., 197 SCRA 471 (1991); Santos vs. NLRC, 154 SCRA 166 (1987).
[21] Rutaquio vs. NLRC, 317 SCRA 1 (1999).
[22] Consolidated Rural Bank (Cagayan Valley), Inc. vs. NLRC, 301 SCRA 223 (1999).
[23] (Banawa vs. NLRC, 251 SCRA 515 [1995]; Royal Crown Internationale vs. NLRC, 178 SCRA 569 [1989]; Catan vs. NLRC, 160 SCRA 691[1988]).
