SUPREME COURT
FIRST DIVISION

C. ALCANTARA & SONS, INC.,
***Petitioner*,**

-versus-

G.R. No. 73521
January 5, 1994

NATIONAL LABOR RELATIONS COMMISSION and RODOLFO DURAN,
***Respondents*.**
x----------x

D E C I S I O N

BELLOSILLO, *J.*:

Petitioner C. ALCANTARA & SONS, INC., was declared by public respondent NATIONAL LABOR RELATIONS COMMISSION[1] to have illegally dismissed private respondent RODOLFO DURAN. Petitioner however argues that there is no basis for such declaration. It contends that private respondent was never terminated but merely placed under preventive suspension. The claim of petitioner was timely brought to the attention of public respondent. The latter ignored it.

The antecedents: On 3 August 1974, petitioner hired private respondent to work as crawler operator for its logging operations in

Malalag, Davao del Sur. He was later assigned to operate Crawler No. CT-49.

On 1 July 1983, while bulldozing certain portions of the logging road, private respondent hit a soft spot which caused the crawler to tilt heavily to the right. The crawler got stuck in this position and could not move on its own power. There was likewise oil spillage.

What transpired thereafter is disputed by the parties. Petitioner claims that private respondent simply abandoned the crawler and failed to exercise precautionary and safety measures, e.g., turning the engine off.[2] On the other hand, private respondent manifests that he did in fact turn the engine off.[3]

At any rate, private respondent, together with his assistant operator, went down to the camp site and informed their supervisors of the incident. They then returned to the logging road to stand watch over the crawler.

On 6 July 1983, a tractor arrived at the logging road to pull out the crawler. Private respondent then checked the engine and refilled it with oil before resuming bulldozing operations. His assistant operator took the first shift as private respondent cut down some residual trees for matting. The assistant operator ran the unit for about four (4) hours before private respondent took over. After operating the crawler for some 1-½ hours, private respondent noticed unusual sounds emanating from the engine and promptly turned it off. A mechanic called to check the unit found engine failure. The cost of repairs ultimately reached P19,050.96[4] and private respondent was held responsible for the breakdown.[5]

On 13 July 1983, private respondent was placed under preventive suspension effective 14 July 1983 pending final investigation of the incident.[6]

On 25 July 1983, private respondent filed a Complaint for Illegal Dismissal before the Regional Arbitration Branch of public respondent. Hearings were conducted thereon and the parties were required to submit their respective position papers.

On 22 March 1984, the Labor Arbiter proceeded to decide the case only on the basis of the position paper of private respondent as petitioner failed to file its own within the extended period. The Labor Arbiter declared as illegal the dismissal of private respondent and ordered his reinstatement as well as the payment of full back wages from 14 July 1983 up to his actual reinstatement.[7]

On 18 April 1984, petitioner lodged an appeal with public respondent, arguing for the first time that private respondent was never dismissed from its employment but merely placed under preventive suspension. Petitioner likewise contended that the failure of its counsel to submit the requisite position paper was mainly due to excusable negligence.

On 1 August 1985, private respondent dismissed the appeal for lack of merit. The allegation of excusable neglect was rejected because of "the feebleness of the reasons" stated in support thereto.[8] Aggrieved, petitioner commenced the instant proceedings.

Petitioner vehemently insists that it did not terminate its employer-employee relationship with private respondent. After all, he was merely placed under preventive suspension pending termination of the investigation re the engine failure of Crawler No. CT-49. In fact, it was private respondent who severed the relationship when he instituted a Complaint for Illegal Dismissal against the company. Since private respondent did not wait for the outcome of the investigation, petitioner maintains that private respondent was deemed to have abandoned his work.

The rule is that before abandonment can be considered a valid cause for dismissal, there must be a concurrence of the intention to abandon and some overt acts from which an employee may be deduced as having no more intention to work.[9]

But, in this case before us, no such intention to abandon his work can be discerned from the actuations of private respondent. Neither are there overt acts which could be considered manifestations of his desire to abandon his work. On the contrary, the actions of private respondent demonstrate a desire on his part to continue his employment with petitioner rather than to abandon it. For, the charge of abandonment does not square with the recorded fact that

twelve (12) days after being served a copy of Personnel Action Form No. 3-08-3 placing him under preventive suspension effective 14 July 1983, private respondent filed a complaint with the labor authorities.[10] And, if it was true that private respondent simply left his job, petitioner could have very well charged him for abandonment. But, it did not. The filing of the case for illegal dismissal therefore negates the allegation of abandonment.[11]

While it may be that a cursory reading of Personnel Action Form No. 03-08-3 shows that private respondent was merely placed under preventive suspension, it is likewise readily evident that such preventive suspension was more apparent than real. Private respondent was given the impression that the final investigation still to be conducted on the incident of 1 July 1983 would only be a mere formality and that his termination was imminent. Otherwise, private respondent would not have initiated the instant complaint. In effect, there was constructive dismissal.

Besides, the preventive suspension of private respondent was not for a definite period; it was to be indefinite, i.e., "pending final investigation of (his) case."[12] And, it would appear that petitioner never intended to conduct a final investigation on the matter. As the record shows, the Labor Arbiter held several hearings on the complaint. But the alleged preventive suspension of private respondent as well as the result of the final investigation imputing the blame for the premature engine failure of Crawler No. CT-49 to private respondent was never disclosed. It was only after an adverse decision was rendered against it that petitioner raised the issue before public respondent. Thus, public respondent did not err in ignoring the evidence. As the Solicitor General succinctly puts it —

> "Sadly, petitioner only made known the adverse findings in its alleged investigation of the incident on April 14, 1984, or almost one (1) year after private respondent filed his complaint for illegal dismissal, when it filed its Appeal with public respondent. Under the circumstances, such findings are a ruse to justify the illegal dismissal of private respondent."[13]

Indeed, it would seem that the result of the investigation against private respondent, which attributed the premature engine failure to

oil starvation caused by the failure to shut off the engine,[14] was but a mere afterthought. The report was ostensibly dated 30 August 1983 but it was introduced as evidence almost one (1) year after the complaint was filed and only after an adverse decision was rendered against petitioner. The investigation was likewise conducted ex-parte, i.e., private respondent was deprived of the opportunity to present his side of the incident. Hence, it must be rejected. It cannot be given credence. Indeed, public respondent did not commit any abuse of discretion, much less grave, in declaring petitioner to have illegally dismissed private respondent.

Even assuming ex argumenti that private respondent was responsible for the premature engine failure, which we are not prepared to accept, considering his length of service with petitioner of almost nine (9) years, the penalty of dismissal is too harsh and disproportionate to the infraction committed specially since it was his very first.[15]

Anent the manifestation of petitioner that private respondent unlawfully entered its premises and thereafter punched an administrative supervisor whom he suspected of being responsible for his preventive suspension as well as another person in an incident which occurred on 11 March 1984, suffice it to say that an issue which was neither alleged in the pleadings nor raised during the proceedings below cannot be ventilated for the first time before this Court. It would be offensive to the basic rule of fair play, justice and due process.[16] Petitioner could have very well apprised public respondent of the incident during the proceedings before it. But, it failed to do so.

Private respondent having been illegally dismissed, he should be reinstated to his former position with payment of back wages for a period of three (3) years without qualification and deduction,[17] not full back wages from 14 July 1983 to actual reinstatement as his illegal dismissal took place on 14 July 1983, well before 21 March 1989, the date of effectivity of R.A. No. 6715. However, if reinstatement is no longer feasible, as petitioner claims it has since 30 June 1991 closed its logging operations upon expiration of its Timber License Agreement with the Department of Environment and Natural Resources, private respondent must be paid, in addition to

the 3-year back wages herein stated, separation pay computed on the basis of one (1) month salary for every year of service.[18]

WHEREFORE, the Resolution of 1 August 1985 of the National Labor Relations Commission is **AFFIRMED**, with the **MODIFICATION** that the amount of back wages to be paid by petitioner to private respondent shall be for a period of three (3) years without qualification and deduction, and if reinstatement is no longer feasible, petitioner must pay private respondent, in addition to back wages for three (3) years, separation pay in an amount equivalent to his one (1) month salary for every year of service.

SO ORDERED.

Cruz, Davide, Jr. and Quiason, *JJ.*, concur.

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[1] NLRC Resolution of 1 August 1985 penned by Commissioner Guillermo C. Medina, concurred in by Commissioners Gabriel K. Gatchalian and Miguel B. Varela, Annex "A", Petition; Rollo, pp. 9-10.
[2] Petition, pp. 1-2.
[3] Comment of private respondent, p. 2.
[4] Annex "1," Petition; Rollo, p. 6.
[5] Petition, pp. 1-2.
[6] Personnel Action Form No. 03-08-3; Annex "5," Petition; Rollo, p. 11.
[7] Decision of 22 March 1984 penned by Labor Arbiter Jose O. Libron; Rollo, pp. 24-26.
[8] NLRC Resolution of 1 August 1985, p. 2; Rollo, p. 10.
[9] People's Security, Inc. vs. National Labor Relations Commission, G.R. No. 96451, 8 September 1993.
[10] See Ranara vs. National Labor Relations Commission, G.R. No. 100969, 14 August 1992; 212 SCRA 631.
[11] Hua Bee Shirt Factory vs. National Labor Relations Commission, G.R. No. 80389, 18 June 1990; 186 SCRA 596.
[12] See Note 6.
[13] Comment, p. 6; Rollo, p. 48.
[14] Annex "2," Petition; Rollo, p. 7.
[15] Philippine Airlines, Inc. vs. National Labor Relations Commission, G.R. No. 106374, 17 June 1993.
[16] Medida vs. Court of Appeals, G.R. No. 98334, 8 May 1992; 208 SCRA 887.
[17] Maranaw Hotels and Resort Corporation vs. Court of Appeals, G.R. No. 103215, 6 November 1992; 215 SCRA 501.

[18] Sunset View Condominium Corporation vs. National Labor Relations Commission, G.R. No. 87799, 15 December 1993.