SUPREME COURT
SECOND DIVISION

LEAH ICAWAT and ROMEO ICAWAT,
***Petitioners*,**

-versus-

G.R. No. 133573
June 20, 2000

NATIONAL LABOR RELATIONS COMMISSION, LABOR ARBITER ARIEL CADIENTE SANTOS and JOSE F. YAPE,
***Respondents*.**
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D E C I S I O N

BUENA, *J.*:

This Petition for Certiorari seeks to nullify the Decision[1] dated January 26, 1998 of public respondent National Labor Relations Commission (NLRC), Third Division, in Case No. 013573-97 which affirmed the Labor Arbiter's Decision[2] finding private respondent Jose Yape's dismissal illegal, as well as the Resolution[3] dated March 11, 1998, denying reconsideration thereof.

The facts of the case as culled from the pleadings disclose that private respondent started working with petitioners as driver of their passenger jeepneys.

On December 27, 1994, private respondent lost his driver's license. To secure a new one, he sought petitioners permission to go on vacation leave. After obtaining his license, private respondent reported for work but was informed by petitioners that another driver had already taken his place. Aggrieved, private respondent, on January 27, 1995, filed a complaint[4] for illegal dismissal against herein petitioners before the Department of Labor and Employment (DOLE) praying that he be reinstated and be paid his 13th month pay and service incentive leave credits.

In their position paper,[5] petitioners contended that private respondent is not a regular employee but only an alternate driver; that he drives the jeepney only on Tuesdays, Thursdays and Saturdays on a half day shifting basis; that in October 1994, private respondent went on vacation and came back to work only after three months; and that petitioners told him that they have already hired regular drivers.

On the basis of the pleadings submitted by the parties, Labor Arbiter Ariel Cadiente Santos, on July 3, 1997, rendered judgment in favor of herein private respondent, portions of which reads:

> "It is not plausible to believe that respondents did not have control over the half day shifting of complainant during Tuesdays, Thursdays and Saturdays when they allowed complainant to work under the aforesaid set-up for an unreasonable length of time. To pass now the control to the regular drivers is not reasonable because the regular drivers themselves are employees by respondents, not employer, of complainant.
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> "The fact that complainant worked with respondents on a part time basis only does not detract from the circumstances that complainant started as regular driver of respondents in 1987 and as such, he cannot just simply be removed from work without due process of law which is totally wanting in this case.
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> "WHEREFORE, premises considered, respondents are hereby directed to reinstate complainant immediately to his former

position with full backwages limited to his average monthly earning from the time of dismissal until actual reinstatement.

"Finally, 10% of all sums owing to complainant is adjudged as attorney's fees.

"SO ORDERED."[6]

On July 23, 1997, a computation of the award for backwages and 13th month pay amounting to P127,541.70[7] was submitted by Ms. Patricia B. Pangilinan, Financial Analyst II to the Labor Arbiter.

On September 1, 1997, petitioners appealed to respondent NLRC arguing inter alia: (a) that there is no employer-employee relationship between the parties; (b) that private respondent is not her regular employee; and (c) that being a spare driver of the regular employees, private respondent is a redundancy to the business operations of the petitioners.[8]

On January 26, 1998, the respondent NLRC rendered judgment modifying the labor arbiter's decision. The NLRC sustained the labor arbiter's finding that an employer-employee relationship exists between the parties and the computation of the back wages but deleted the award representing the 13th month pay and the award of attorney's fees.[9]

In their motion for reconsideration, petitioners conceded to the respondent NLRC's ruling that an employer-employee relationship exists but disagreed with the finding that private respondent was dismissed without just cause and without due process. Petitioners argue that the prolonged absence of private respondent constitute abandonment or lack of interest to work. They likewise assail the award of backwages claiming that said award has no factual basis.[10]

On March 11, 1998, respondent NLRC denied petitioners' motion for reconsideration.[11] Aggrieved, petitioners filed this present petition essentially reiterating their arguments in their motion for reconsideration.

We modify the decision of the NLRC.

To constitute abandonment, two elements must concur: (1) the failure to report for work or absence without valid or justifiable reason, and (2) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor and being manifested by some overt acts. Mere absence is not sufficient. To prove abandonment, the employer must show that the employee deliberately and unjustifiably refused to resume his employment without any intention of returning.[12]

Private respondent, after his vacation leave, immediately reported back for work but was not allowed by the petitioners on the ground that he was already replaced by regular drivers. After he was notified of his termination, private respondent lost no time in filing the case for illegal dismissal against petitioners. He cannot, therefore, by any reasoning, be said to have abandoned his work or had no intention of going back to work.[13] It would be illogical for him to have left his job and later on file said complaint.

We have consistently ruled that a charge of abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal.[14]

But even assuming that private respondent abandoned his work, petitioners should have served him with a notice of termination on the ground of abandonment. Section 2, Rule XVI Book V, Rules and Regulation Implementing the Labor Code provides that any employer who seeks to dismiss a worker shall furnish him a written notice stating the particular acts or omission constituting the grounds for his dismissal. In cases of abandonment of work, the notice shall be served at the worker's last known address.

Hence, before termination of employment can be legally effected, the employer must furnish the worker with two (2) written notices, i.e. a notice which apprises the employee of the particular acts or omissions for which his dismissal is sought, and the subsequent notice which informs the employee of the employer's decision to dismiss him.[15]

Petitioners failed to give private respondent written notice of his termination on the ground of abandonment. Failure to do so makes the termination illegal.[16]

Finally, the dismissal of private respondent being illegal, he is entitled to the payment of backwages. We do not, however, agree with the amount awarded to herein private respondent in the absence of any factual basis thereof. Private respondent has not presented any evidence to warrant such award. The statement in his complaint that he is earning P800.00 to P1,000.00 when he is driving petitioners' jeepney on a "straight" basis, or P500.00 when driving on "half shift" basis, is purely self-serving and speculative.

WHEREFORE, the decision of the National Labor Relations Commission ordering the reinstatement of Jose Yape is **AFFIRMED**. The determination of the amount of backwages to which Jose Yape is entitled is hereby remanded to the Labor Arbiter for appropriate action.

SO ORDERED.

Bellosillo, Mendoza, Quisumbing, and De Leon, Jr., *JJ.*, concur.

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[1] Annex "L", pp. 53-58, Rollo.
[2] Annex "F", pp. 32-34, Id.
[3] Annex "N", p. 75, Id.
[4] Annex "A", p. 18, Rollo.
[5] Annex "C", pp. 23-26, Id.
[6] Annex "F", pp. 32-34.
[7] Annex "F-1", p. 35, Id.
[8] Annex "G", pp. 36-41, Rollo.
[9] Annex "L", pp. 53-58, Id.
[10] Annex "M", pp. 65-72, Id.
[11] Annex "N", p. 75, Id.

> "We have reviews at length respondent's Motion for Reconsideration of our Decision promulgated on January 26, 1998 and We find no valid reason to disturb the same as the issues raised in said Motion have been already ruled upon in the questioned Decision.
> "ACCORDINGLY, the instant Motion for Reconsideration is hereby DENIED for lack of merit.

"No further Motion for Reconsideration shall be entertained.
"SO ORDERED."

[12] Artemio Labor vs. NLRC, 248 SCRA 183 [1995]; Cindy and Lynsy Garment vs. NLRC, 284 SCRA 38 [1998]; Hagonoy Rural Bank, Inc. vs. NLRC, 285 SCRA 297 [1998].
[13] Labor vs. NLRC, supra.
[14] Hda. Dapdap I vs. NLRC, 285 SCRA 9 [1998]; Philtranco Service Enterprises, Inc. vs. NLRC, 288 SCRA 585 [1998].
[15] Stolt-Nielsen Marine Services [Phil.], Inc. vs. NLRC, 264 SCRA 307 [1996].
[16] Cocoland Development Corp. vs. NLRC, 259 SCRA 51 [1996]; Midas Touch Food Corp. vs. NLRC, 259 SCRA 652 [1996].