



Republic of the Philippines
SUPREME COURT
Manila

CERTIFIED TRUE COPY

WILFREDO V. LAPITAN
Division Clerk of Court
Third Division
DEC 28 2015

THIRD DIVISION

**SMART COMMUNICATIONS, INC.,
MR. NAPOLEON L. NAZARENO,
and MR. RICKY P. ISLA,**
Petitioners,

G.R. No. 197763

Present:

- versus -

JOSE LENI Z. SOLIDUM,
Respondent,

VELASCO, JR., J., Chairperson,
PERALTA,
VILLARAMA, JR.,
REYES, and
JARDELEZA, JJ.

X-----X

JOSE LENI Z. SOLIDUM,
Petitioner,

G.R. No. 197836

- versus -

**SMART COMMUNICATIONS, INC.,
MR. NAPOLEON L. NAZARENO,
and MR. RICKY P. ISLA,**
Respondents.

Promulgated:

December 7, 2015

X-----X

DECISION

VELASCO, JR., J.:

The Case

These are consolidated petitions filed under Rule 45 of the Rules of Court assailing the Decision dated April 4, 2011¹ and Resolution dated July 14, 2011² of the Court of Appeals (CA) in CA-G.R. SP No. 109765 entitled *Jose Leni Z. Solidum v. National Labor Relations Commission (First Division), Smart Communications, Inc., Napoleon L. Nazareno and Ricky P. Isla*. The CA Decision affirmed with modification the Resolution dated January 26, 2009 and Decision dated May 29, 2009 of the National Labor Relations Commission (NLRC) in NLRC Case No. 00-11-09564-05.

¹ *Rollo* (G.R. No. 197763), pp. 44-59. Penned by Associate Justice Mario V. Lopez and concurred in by Associate Justices Magdangal M. De Leon and Edwin D. Sorongon.

² *Id.* at 61-67.

The Facts

The facts as found by the CA are as follows:

In an Employment Contract dated April 26, 2004,³ Smart Communications, Inc. (Smart) hired Jose Leni Solidum (Solidum) as Department Head of Smart Prepaid/Buddy Activations under the Product Marketing Group. Existing company procedures provide that a department head shall approve project proposals coming from his marketing assistants and product managers/officers. Once approved, a finance officer will assign a reference number to the project with a stated budget allocation. If the Company decides to engage the services of a duly accredited creative agency, the department head will coordinate with it to discuss the details of the project. The implementation details and total amount of the project will then be included in a Cost Estimate (CE) submitted to the Company, routed for approval, and returned to the selected agency for implementation. After the project is carried out, the agency will bill the Company by sending the CE with attached invoices and other supporting documents.

On September 21, 2005, Solidum received a Notice to Explain of even date⁴ from the Company charging him with acts of dishonesty and breach of trust and confidence. In summary, he was charged with violating “various company policies by misrepresenting and using his position and influence in his grant plot to defraud Smart by conceptualizing fictitious marketing events, appointing fictitious advertising agencies to supposedly carry out marketing events and submitting fictitious documents to make it appear that the marketing events transpired.”⁵ He was charged with the following infractions: (1) falsification and/or knowingly submitting falsified contents of reports/documents relative to his duties and responsibilities; (2) obtaining through fraudulent means materials, goods or services from the Company; (3) failing or refusing to disclose to the Company any existing or future dealings, transactions, relationships, etc. posing or would pose possible conflict of interest; (4) other forms of deceit, fraud, swindling, and misrepresentation committed by an employee against the company or its representative; and (5) fraud or willful breach of trust in relation to transactions covered by Invoice No. 2921 and CE No. 2005-533 as well as CE Nos. 2005-413, 2005-459, 2005-461, 2005-526, 2005-460, 2005-552 and 2005-527 that were approved/noted by him. Solidum received a copy of the Notice on the same date. Pending administrative investigation, Solidum was placed under preventive suspension without pay for a period of thirty (30) days.

In a letter dated September 26, 2005,⁶ Solidum denied the charges and claimed that he never defrauded nor deceived the Company in his transactions.

³ *Rollo* (G.R. No. 197836), pp. 656-658.

⁴ *Id.* at 597-599.

⁵ *Id.* at 422.

⁶ *Id.* at 601-607.

Continued audit investigation, however, revealed that Solidum approved/noted several CEs covering activities for which payments were made but did not actually carried out. Unaccredited third parties were also engaged in the implementation of the projects. Thus, the Company issued another Notice to Explain dated October 21, 2005⁷ to Solidum, this time covering the following additional CEs: 2005-416, 2005-480, 2005-481, 2005-479, 2005-512, 2005-513, and 2005-533. Solidum was again preventively suspended for another ten (10) days. Further, the Company scheduled the administrative investigation of the case on October 26, 2005.

Solidum then sent a letter dated October 24, 2005⁸ to the Company requesting copies of the pertinent documents so he can prepare an intelligible explanation. In another letter dated October 26, 2005,⁹ Solidum stated that the investigation is highly suspicious and his extended suspension imposed undue burden. He also reserved his right to present evidence. In his last letter dated October 28, 2005,¹⁰ Solidum declared that he shall no longer receive or entertain notices or memorandum, except the final decision resolving the administrative charges against him.

Thereafter, the Company issued a letter dated November 2, 2005, alleging that Solidum refused to accept the documents that he had requested. Using this allegation, the Company imposed an additional preventive suspension of ten (10) days on Solidum.

Based on the available evidence, the Company decided to dismiss Solidum for breach of trust in a Notice of Decision dated November 9, 2005.¹¹ Corollarily, a Notice of Termination was served on him on November 11, 2005.

Aggrieved, Solidum filed a complaint dated November 19, 2005 for illegal suspension and dismissal with money claims before the Arbitration Branch of the NLRC claiming that his extended suspension and subsequent termination were without just cause and due process.

In a Decision dated July 3, 2006,¹² the labor arbiter declared that the extended period of suspension without pay was illegal and that Solidum was unjustly dismissed from work without observance of procedural due process. He was ordered reinstated and was awarded backwages and monetary claims. The labor arbiter ratiocinated that the ground of breach of trust and confidence is restricted to managerial employees; however, no substantial evidence was presented to prove that Solidum has the prerogatives akin to a manager other than his titular designation as department head.

⁷ Id. at 630-633.

⁸ Id. at 639-640.

⁹ Id. at 636-638.

¹⁰ Id. at 666.

¹¹ Id. at 1038-1044.

¹² Id. at 344-403.

The Company appealed the adverse decision of the labor arbiter to the NLRC but was denied for having been filed out of time and/or for non-perfection, thus:

Records show that respondents received a copy of the Decision on “July 10, 2006” (See Registry Return Receipt, p. 561, Record) However, respondents filed their appeal only on “July 25, 2006” x x x already beyond the reglementary ten (10) calendar day period for filing an appeal to the Commission. x x x

Moreover, perusal of the appeal shows that the appeal bond attached to it is not accompanied by a security deposit or collateral. The CERTIFICATE OF NO COLLATERAL x x x that was submitted by the bonding company stating that the bond was issued on (sic) behalf of respondent SMART “without collateral because they are our valued client” and that “[t]he company declares its commitment to honor the validity of the foregoing bond notwithstanding the absence of collateral” does not serve any purpose other than an admission that the security deposit or collateral requirement under Section 6, Rule VI of the Revised Rules of [P]rocedure of the NLRC for perfecting an appeal was not complied with. Needless to state, the absence of a security deposit or collateral securing the bond renders the appeal legally infirm.¹³

In its motion for reconsideration, the Company insisted that the appeal was filed within the reglementary period considering that it received the labor arbiter’s decision only on July 13, 2006 and not July 10, 2006. It presented among others the Certification from Makati Central Post Office, the pertinent page of the letter carrier’s Registry Book, and the respective affidavit of the letter carrier and the Company’s receiving clerk. It added that in case of conflict between the registry receipt and the postmaster’s certification, the latter should prevail. Likewise, the Company maintained that the surety bond was secured by its goodwill and the alleged lack of collateral or security will not render the bond invalid in view of the surety’s unequivocal commitment to pay the monetary award.

Finding merit in the motion, the NLRC issued a Resolution dated January 26, 2009¹⁴ reversing its earlier ruling and giving due course to the appeal. It upheld the certification of the postmaster over the registry receipt and found that there was substantial compliance with the bond requirement, viz:

Given the factual milieu, the Commission rules that respondents’ appeal was indeed filed within the ten (10) day period x x x. Since the Decision [of the Labor Arbiter] dated July 3, 2006 was received by respondents on July 13, 2006, respondents have (sic) effectively until July 25, 2006 (considering that July 23 was a Sunday, and July 24 was a declared nonworking day) x x x.

x x x x

¹³ Id. at 405-406.

¹⁴ Id. at 410-437.

As to the absence of security deposit or collateral, the Commission x x x finds that respondents were able to comply substantially with the pre-requisite for the perfection of appeal.

x x x While the appeal bond was posted without security or collateral, the Certification dated July 20, 2006, issued by the bonding company attests to the latter's "commitment to honor the validity of the foregoing bond notwithstanding the absence of collateral." Otherwise stated, the very purpose of a security or collateral should be deemed served considering the guarantee of the bonding company to pay the entire amount of the bond in the event respondents suffer an adverse disposition of their appeal. It matters not that the bond was issued on behalf of respondents without collateral for after all, the bond is accompanied by a declaration under oath bearing the bonding company's commitment to honor the validity of the surety bond and attesting that the surety bond is genuine and shall be in effect until the final disposition of the case.

The NLRC likewise reversed the labor arbiter's decision. It ruled that the seriousness of Solidum's infractions justified the additional period of suspension. It added that the labor arbiter erred in declaring Solidum's dismissal illegal and without just cause on the basis that he is not a managerial employee. On the contrary, overwhelming evidence showed that Solidum holds a position of trust and has violated various company policies. Finally, the NLRC found that Solidum was accorded procedural due process. The dispositive portion of the Resolution thus reads:

WHEREFORE, the foregoing considered, the Commission hereby resolves as follows:

1. complainant's Motion to Inhibit dated June 13, 2008 is DENIED for lack of merit.
2. respondents' Motion for Reconsideration dated July 27, 2007 is GRANTED and their instant appeal dated July 25, 2006 is given DUE COURSE.
3. the Commission's Resolution dated July 4, 2007 is SET ASIDE and VACATED.
4. the appealed Decision a quo dated July 3, 2006 is SET ASIDE and new one is ENTERED dismissing the complaint below for lack of merit.

SO ORDERED.

Thus, Solidum appealed to the CA. The CA then rendered the assailed Decision dated April 4, 2011 affirming with modification the Decision of the NLRC. The dispositive portion of the CA Decision reads:

FOR THESE REASONS, the Court AFFIRMS the NLRC Resolution dated January 26, 2009 with the MODIFICATION that petitioner Jose Leni Solidum be paid his salaries and benefits which accrued during the period of his extended preventive suspension.

SO ORDERED.

From such Decision both parties moved for reconsideration. The CA denied such Motions in a Resolution dated July 14, 2011. From such ruling of the appellate court, both parties appealed. Hence, the instant petitions.

The Issues

In G.R. No. 197763, Smart raises the following issues:

(A)

The Court of Appeals gravely erred in declaring illegal the second preventive suspension imposed by petitioner Smart upon the respondent.

(B)

The Court of Appeals gravely erred in declaring that petitioner Smart may not place the respondent under another preventive suspension after discovery of additional offenses notwithstanding that the offenses committed by the respondent warrant another preventive suspension.¹⁵

In G.R. No. 197836, Solidum raises the following issues, to wit:

A.

Whether or not the public respondent Court of Appeal's Decision dated April 4, 2011 and Resolution dated July 14, 2011, ruling that the appeal of private respondent Smart filed with public respondent NLRC was well taken within the reglementary period, is in accordance with law, rules and prevailing jurisprudence.

B.

Whether or not the public respondent Court of Appeal's Decision dated April 4, 2011 and Resolution dated July 14, 2011, considering private respondent Smart's appeal with the NLRC as perfected by upholding the validity of the appeal bond posted by said private respondent Smart even if there was no security deposit or collateral, is in accordance with Section 4 and 6, Rule VI of the 2005 NLRC Revised Rules of Procedure, NLRC Memorandum Circular 1-01, series of 2004, and prevailing jurisprudence.

C.

Whether or not the public respondent Court of Appeals gravely erred in failing to consider the evidence petitioner showing that even up to the present, or more than five (5) years after the expiration of the 10-day reglementary period to file a perfected appeal with the NLRC on July 20, 2006, private respondent Smart still fails to provide petitioner with a certified true copy of the surety bond and copy of the security deposit required for the perfection of the appeal under Section 6, Rule VI of the 2005 NLRC Revised Rules of Procedure.

D.

Whether or not the public respondent Court of Appeals committed grave abuse of discretion in upholding the validity of the appeal bond filed by private respondent Smart despite the fact that both the appeal bond and collateral securing the said bond had long expired.

¹⁵ *Rollo* (G.R. No. 197763), pp. 26-27.

E.

Whether or not the public respondent Court of Appeals gravely erred in ruling that the technical rules are not controlling in any proceeding before the NLRC.

F.

Whether or not the public respondent Court of Appeals gravely erred in affirming the Resolution of public respondent NLRC dated January 26, 2009 which set aside the decision of the labor arbiter dated July 3, 2006 declaring that petitioner's preventive suspension for more than 30 days without pay is illegal and tantamount to constructive dismissal.

G.

Whether or not the public respondent Court of Appeals gravely erred in finding that petitioner was afforded procedural due process by private respondent under the Two-Notice Rule.

H.

Whether or not the public respondent Court of Appeals gravely erred in finding that those irregularities committed by petitioner were proven by documentary evidence and testimonies of his product managers and marketing assistants despite the fact that none of those product managers and marketing assistants appeared and testified during the hearings and, most importantly, during the hearing for cross-examination on their submitted affidavits and documentary evidence as scheduled by the labor arbiter upon specific request and manifestation by the petitioner invoking his constitutional right to cross-examine.

I.

Whether or not the public respondent Court of Appeals gravely erred in finding that herein petitioner is a fiduciary employee and is therefore covered by the trust and confidence rule to a wider latitude.

J.

Whether or not the public respondent Court of Appeals gravely erred in finding that petitioner is a managerial employee.

K.

Whether or not the public respondent Court of Appeals gravely erred in finding that there was just and valid cause to terminate the petitioner from the service.¹⁶

The Court's Ruling

The petitions must be denied.

Solidum's 2nd preventive suspension is valid

In G.R. No. 197763, Smart contended:

On the same vein, the respondent was validly placed under second preventive suspension for the reason that pending investigation of separate and distinct set of offenses committed by the respondent as contained in

¹⁶ *Rollo* (G.R. No. 197836), pp. 131-134.

the second Notice to Explain dated 21 October 2005 (Annex F hereof), his continued presence in the company premises during the investigation poses serious and imminent threat to the life or property of the employer and co-workers.¹⁷

On the other hand, Solidum claims that his preventive suspension of 20 days is an extension of his initial 30-day suspension and, hence, illegal and constitutes constructive dismissal.

Smart's position is impressed with merit.

The relevant provisions regarding preventive suspensions are found in Sections 8 and 9 of Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code (Omnibus Rules), as amended by Department Order No. 9, Series of 1997, which read as follows:

Section 8. *Preventive suspension.* The employer may place the worker concerned under preventive suspension only if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers.

Section 9. *Period of suspension.* **No preventive suspension shall last longer than thirty (30) days.** The employer shall thereafter reinstate the worker in his former or in a substantially equivalent position or the employer may extend the period of suspension provided that during the period of extension, he pays the wages and other benefits due to the worker. In such case, the worker shall not be bound to reimburse the amount paid to him during the extension if the employer decides, after completion of the hearing, to dismiss the worker. (emphasis supplied)

By a preventive suspension an employer protects itself from further harm or losses because of the erring employee. This concept was explained by the Court in *Gatbonton v. National Labor Relations Commission*:¹⁸

Preventive suspension is a disciplinary measure for the protection of the company's property pending investigation of any alleged malfeasance or misfeasance committed by the employee. The employer may place the worker concerned under preventive suspension if his continued employment poses a serious and imminent threat to the life or property of the employer or of his co-workers. However, when it is determined that there is no sufficient basis to justify an employee's preventive suspension, the latter is entitled to the payment of salaries during the time of preventive suspension. (emphasis supplied)

Such principle was applied by the Court in *Bluer Than Blue Joint Ventures/Mary Ann Dela Vega v. Esteban*,¹⁹ where it was ruled:

Preventive suspension is a measure allowed by law and afforded to the employer if an employee's continued employment poses a serious and imminent threat to the employer's life or property or of his co-workers. It

¹⁷ *Rollo* (G.R. No. 197763), p. 29.

¹⁸ G.R. No. 146779, January 23, 2006, 479 SCRA 416, 421-422.

¹⁹ G.R. No. 192582, April 7, 2014, 720 SCRA 765, 777.

may be legally imposed against an employee whose alleged violation is the subject of an investigation.

In this case, the petitioner was acting well within its rights when it imposed a 10-day preventive suspension on Esteban. **While it may be that the acts complained of were committed by Esteban almost a year before the investigation was conducted, still, it should be pointed out that Esteban was performing functions that involve handling of the petitioner's property and funds, and the petitioner had every right to protect its assets and operations pending Esteban's investigation.** (emphasis supplied)

While the Omnibus Rules limits the period of preventive suspension to thirty (30) days, such time frame pertains only to one offense by the employee. For an offense, it cannot go beyond 30 days. However, if the employee is charged with another offense, then the employer is entitled to impose a preventive suspension not to exceed 30 days specifically for the new infraction. Indeed, a fresh preventive suspension can be imposed for a separate or distinct offense. Thus, an employer is well within its rights to preventively suspend an employee for other wrongdoings that may be later discovered while the first investigation is ongoing.

As in this case, Smart was able to uncover other wrongdoings committed by Solidum during the investigation for the initial charges against him. These newly discovered transgressions would, thus, require an additional period to investigate. The first batch of offenses was captured in the September 21, 2005 Notice to Explain issued by Smart. The notice covers fraud or willful breach of trust in relation to transactions covered by Invoice No. 2921 and CE No. 2005-533 as well as CE Nos. 2005-413, 2005-459, 2005-461, 2005-526, 2005-460, 2005-552 and 2005-527 that were noted by him. For these offenses, Solidum was issued a preventive suspension without pay for 30 days.

On October 21, 2005, Smart, however, issued another notice to explain to Solidum this time involving additional CEs: 2005-416, 2005-480, 2005-481, 2005-479, 2005-512, and 2005-513. Solidum was again preventively suspended for twenty (20) days. The preventive suspension of 20 days is not an extension of the suspension issued in relation to the September 21, 2005 Notice to Explain but is a totally separate preventive suspension for the October 21, 2005 Notice to Explain. As earlier pointed out, the transactions covered by the 30-day preventive suspension are different from that covered by the 20-day preventive suspension. Such being the case the court *a quo* was incorrect when it treated said suspension as an "extension" and, consequently, it is a miscue to award Solidum the payment of back salaries and benefits corresponding to the 20-day preventive suspension of Solidum.

As to the issues raised by Solidum in G.R. No. 197836, the same are bereft of merit.

**Smart's appeal from the Decision of the labor
arbiter was filed within the reglementary period**

Solidum contends that Smart's motion for reconsideration of the labor arbiter's Decision was filed out of time. The issue here is: When did Smart receive a copy of the Decision? The confusion originated from the date stamped by the receiving clerk of Smart on the receiving copy of the Decision as July 10, 2006. Smart claims that the stamped date was erroneous as it actually received a copy of the Decision only on July 13, 2006. Such claim is supported by the certification from the postmaster of the Makati Central Post Office, the letter carrier's Registry Book, and the affidavits of the letter carrier and Smart's receiving clerk. With such overwhelming evidence, there can be no other conclusion except that Smart received a copy of the Decision on July 13, 2006 and filed their motion for reconsideration within the prescribed 10-day period on July 25, 2006, as July 24, 2006 fell on a Sunday. Thus, Smart's Motion was timely filed.

**Smart substantially complied with
the requirements of an appeal bond**

Next, Solidum questions the validity of the appeal bond filed by Smart, pointing out the lack of a proof of security deposit or collateral necessary to perfect its appeal to the NLRC. To recall, Section 6, Rule VI of the 2005 NLRC Revised Rules of Procedure states:

Section 6. *Bond.* - In case the decision of the Labor Arbiter or the Regional Director involves a monetary award, an appeal by the employer may be perfected only upon the posting of a bond, which shall either be in the form of cash deposit or surety bond equivalent in amount to the monetary award, exclusive of damages and attorney's fees.

In case of surety bond, the same shall be issued by a reputable bonding company duly accredited by the Commission or the Supreme Court, and shall be accompanied by original or certified true copies of the following:

X X X X

c) **proof of security deposit or collateral securing the bond:** provided, that a check shall not be considered as an acceptable security. (emphasis supplied)

Thus, Solidum claims that the lack of proof of security deposit or collateral securing the bond renders the bond irregular and the appeal legally infirm.

We disagree.

As aptly found by the NLRC, substantial compliance with the rules on appeal bonds has been repeatedly held by this Court to be sufficient for the perfection of an appeal:

The perfection of an appeal within the reglementary period and in the manner prescribed by law is jurisdictional, and noncompliance with such legal requirement is fatal and effectively renders the judgment final and executory. As provided in Article 223 of the Labor Code, as amended, in case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from.

However, not only in one case has this Court relaxed this requirement in order to bring about the immediate and appropriate resolution of cases on the merits. In *Quiambao v. National Labor Relations Commission*, this Court allowed the relaxation of the requirement when there is substantial compliance with the rule. Likewise, in *Ong v. Court of Appeals*, the Court held that the bond requirement on appeals may be relaxed when there is substantial compliance with the Rules of Procedure of the NLRC or when the appellant shows willingness to post a partial bond. The Court held that “while the bond requirement on appeals involving monetary awards has been relaxed in certain cases, this can only be done where there was substantial compliance of the Rules or where the appellants, at the very least, exhibited willingness to pay by posting a partial bond.”²⁰

Furthermore, considering that it is the NLRC that has interpreted its own rules on this matter, the Court is inclined to accept such interpretation. The Court has held, “By reason of the special knowledge and expertise of administrative agencies over matters falling under their jurisdiction, they are in a better position to pass judgment on those matters.”²¹ Moreover, the NLRC properly relaxed the rules on appeal bonds.

The NLRC has the power and authority to promulgate rules of procedure under Article 218(a) of the Labor Code. As such, it can suspend the rules if it finds that the interests of justice will be better served if the strict compliance with the rules should be relaxed. In short, a substantial compliance may be allowed by the NLRC especially in this case where the party which submitted the bond is a multibillion company which can easily pay whatever monetary award may be adjudged against it. Even if there is no proof of security deposit or collateral, the surety bond issued by an accredited company is adequate to answer for the liability if any to be incurred by Smart.

Solidum is not entitled to reinstatement

Next, Solidum claims that due to the extension of his period of preventive suspension, he must be considered as having been constructively dismissed and entitled to reinstatement and backwages. To support his claim, Solidum cites *Maricalum Mining Corporation v. Decorion*.²² Such

²⁰ *Pasos v. Philippine National Construction Corporation*, G.R. No. 192394, July 3, 2013, 700 SCRA 608, 622-623.

²¹ *Encinas v. Agustin*, G.R. No. 187317, April 11, 2013, 696 SCRA 240, 266-267.

²² G.R. No. 158637, April 12, 2006, 487 SCRA 182.

case, however, is not factually on all fours with the instant case. In *Maricalum*, the Court ruled that Decorion was illegally constructively dismissed, which is why he was entitled to reinstatement. Here, Solidum was validly dismissed for loss of trust and confidence. Thus, his reliance on *Maricalum* is misplaced and will not justify his reinstatement.

As to Solidum's claim of denial of due process, such issues are factual in nature. This Court, not being a trier of facts, will not pass upon such issues, as ruled in *Nahas v. Olarte*.²³

The Court is not a trier of facts; factual findings of the labor tribunals when affirmed by the CA are generally accorded not only respect, but even finality, and are binding on this Court.

Notably, Solidum's allegation that he was denied his right to counsel was passed upon the NLRC in this wise:

Similarly, the Commission is not convinced with Labor Arbiter Pati's finding that the complainant was deprived on his right to counsel when he was not allowed to be assisted by his counsel at the alleged investigation held on September 21, 2005. **Other than his bare claim, there is no evidence on record buttressing complainant's claim.**²⁴ x x x (emphasis supplied)

Similarly, Solidum contends that he did not receive other documents necessary for him to be apprised of the charges against him. Such are also issues of fact. The NLRC ruled on this matter in this wise:

The Commission is likewise not convinced with the finding of Labor Arbiter Pati that complainant was deprived of due process when he was not furnished copies of the documents he referred to in his letter dated October 24, 2005 thereby prompting him not to attend the hearings on October 26 and 28, 2005. **There is evidence to show that respondents furnished copies of the documents requested by complainant but which the latter refused to receive when they were sent to his residence.**²⁵ x x x (emphasis supplied)

It is not necessary that witnesses be cross-examined by counsel of the adverse party in proceedings before the labor arbiter

Solidum further alleges that he was denied the right to cross-examine the witnesses who submitted affidavits in favor of Smart; thus, the affidavits must be considered hearsay and inadmissible. In support of such contention, Solidum cites *Naguit v. National Labor Relations Commission*.²⁶

Such contention is misplaced.

²³ G.R. No. 169247, June 2, 2014, 724 SCRA 224, 234.

²⁴ *Rollo* (G.R. No. 197836), p. 435.

²⁵ *Id.* at 434.

²⁶ G.R. No. 120474, August 12, 2003, 408 SCRA 617.

The controlling jurisprudence on the matter is the ruling in the more recent *Philippine Long Distance Telephone Company v. Honrado*,²⁷ where the Court ruled:

It is hornbook in employee dismissal cases that “[t]he essence of due process is an opportunity to be heard, or as applied to administrative proceedings, an opportunity to explain one’s side x x x. A formal or trial type hearing is not at all times and in all instances essential to due process, the requirements of which are satisfied where the parties are afforded fair and reasonable opportunity to explain their side of the controversy.” **Neither is it necessary that the witnesses be cross-examined by counsel for the adverse party.** (emphasis supplied)

The Court explained the reason why cross-examination is not required in the proceedings before the labor arbiter in *Reyno v. Manila Electric Company*,²⁸ citing *Rabago v. National Labor Relations Commission*²⁹ where the Court ruled:

x x x The argument that the affidavit is hearsay because the affiants were not presented for cross-examination is not persuasive because the rules of evidence are not strictly observed in proceedings before administrative bodies like the NLRC where decisions may be reached on the basis of position papers only. x x x

Clearly, the alleged denial of Solidum’s request to cross-examine the witnesses of Smart does not render their affidavits hearsay. Thus, these pieces of evidence were properly considered by the labor tribunal.

Solidum was a managerial employee of Smart

Next, Solidum argues that he is not a fiduciary or managerial employee and, therefore, cannot be legally dismissed on the ground of loss of trust and confidence. Article 212(m) of the Labor Code defines a Managerial Employee as:

(m) ‘Managerial employee’ is one who is vested with powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharged, assign or discipline employees. x x x

The NLRC found that Solidum was a managerial employee in this wise:

The facts on hand indubitably show that complainant occupied the position of Department Head and held the same with trust and confidence as required him under his employment contract. As Department Head of the Smart Buddy Activations and Usage Group, complainant led and directed his subordinates composed of product managers, product officers, and senior marketing assistants to achieving the company’s marketing goals. **Moreover, complainant appears to have the authority to devise,**

²⁷ G.R. No. 189366, December 8, 2010, 637 SCRA 778, 783-784.

²⁸ G.R. No. 148105, July 22, 2004, 434 SCRA 660, 667.

²⁹ G.R. No. 82868, August 5, 1991, 200 SCRA 158, 164-165.

implement and control strategic and operational policies of the Department he was then heading. Likewise, it cannot be denied that complainant's Department has a budget of millions of pesos over which he exercises the power to allocate to different marketing projects conceptualized by him and/or his subordinates. The records would also show that for complainant's services, he received a monthly salary in the hefty amount of P233,910.00, monthly allowance of P19,000.00, and bonuses and incentives of more than P7 Million.

Under the foregoing facts, complainant's duties and responsibilities, coupled with the amount of salaries he is receiving and other benefits he is entitled to, certainly show that his position of Department Head is managerial in nature.³⁰ (emphasis supplied)

Solidum denies that he is a managerial employee by stating that just because he directed subordinates, he should be considered a managerial employee. He also argues that just because he had a large salary does not mean that he was a managerial employee. Finally, Solidum denies having the power to lay down and execute management policies.

Notably, however, Solidum does not deny having "the authority to devise, implement and control strategic and operational policies of the Department he was then heading." This is clearly the authority to lay down and execute management policies. Consequently, the CA affirmed these findings. Thus, the NLRC and the CA correctly found that Solidum was a managerial employee. As such, he may be validly dismissed for loss of trust and confidence.

The rulings of trial court in criminal cases generally do not bind the labor tribunals

Further, Solidum alleges that he did not commit any dishonesty-related offense that would justify Smart's loss of confidence in him. He supports such allegation with the rulings of two (2) trial courts of Makati City that ruled that Solidum did not commit any fraud in the subject transactions.

Solidum's reliance on the rulings of the trial courts is misplaced. His acquittal before such courts cannot bind the labor tribunal.

In *Amadeo Fishing Corporation v. Nierra*,³¹ the Court ruled that "an acquittal in criminal prosecution does not have the effect of extinguishing liability for dismissal on the ground of breach of trust and confidence." While in *Vergara v. National Labor Relations Commission*,³² the Court was even more succinct and ruled that the filing of the complaint by the public prosecutor is a sufficient ground for a dismissal of an employee for loss of trust and confidence, to wit:

³⁰ *Rollo* (G.R. No. 197836), p. 421.

³¹ G.R. No. 163099, October 4, 2005, 472 SCRA 13, 32.

³² G.R. No. 117196, December 5, 1997, 282 SCRA 486, 497.

The Court finds adequate basis for private respondent's loss of trust and confidence in petitioner. x x x **Besides, the evidence supporting the criminal charge, found after preliminary investigation as sufficient to show *prima facie* guilt, constitutes just cause for his termination based on loss of trust and confidence.** To constitute just cause, petitioner's malfeasance did not require criminal conviction. Verily, petitioner was dismissed not because he was convicted of theft, but because his dishonest acts were substantially proven. (emphasis supplied)

In the instant case, both the NLRC and the CA found Solidum guilty of the alleged acts that constituted grounds for his dismissal for loss of trust and confidence, which were summarized by the CA as follows:

First, Solidum noted two versions of CE No. 2005-533 with description "Buy SIM Download All You Can" but containing different particulars. Specifically, the second CE included charges from various radio stations which are not found in the first CE. However, the Company discovered that the only projects with approved radio components were the "Mindanao Kolek Mo To Promo" which ended on July 15, 2005; the "Visayas Kolek Mo To Promo" which ended on August 15, 2005, and the "Smart Download and Win" with promo period from August 22 to October 22, 2005. The "Buy SIM Download All You Can" has no approved radio component. Moreover, Solidum submitted certificates of performance from various radio stations which are outside of the promo periods.


Second, in the implementation of several projects, Solidum endorsed unaccredited third parties, which is already a violation of established company policies. One of these corporations is M&M Events, Inc., which turned out as a non-existing corporation. The Smart Senior Product Officer Ma. Luisa Suguitan even testified that she has not worked with an agency such as M&M Events, Inc. Worse, the said entity cannot be found in its declared business address and the VAT registration number appearing on its sales invoice is registered under a different company. Moreover, Solidum approved CE No. 2005-459 and CE No. 2005-460, pertaining to different projects, but with attached invoices from M&M Events, Inc. bearing the same date and amount. Finally, Solidum deviated from the existing company procedures. He presented CEs to his subordinate product manager for signature with his approval already affixed. Later, it was discovered that the duly signed CEs were altered without the knowledge of the product manager. He even dictated to the agency the title to be used and the details that should be included in the CEs. The CEs were then forwarded directly to him instead of the Smart marketing point person. Solidum also charged certain projects against the budget of another approved program.

Such findings of the NLRC and affirmed by the CA are binding on this Court. Thus, Solidum's petition must also fail on this point.

WHEREFORE, the petition of Jose Leni Z. Solidum in G.R. No. 197836 is hereby **DENIED**. The petition of petitioners Smart Communications, Inc, et al. in G.R. No. 197763 is **PARTIALLY GRANTED**. The Court of Appeals Decision dated April 4, 2011 is hereby **AFFIRMED** with **MODIFICATION** that the award of salaries and benefits that accrued during the period of extended preventive suspension is **DELETED**.


No costs.

SO ORDERED.



PRESBITERO J. VELASCO, JR.
Associate Justice

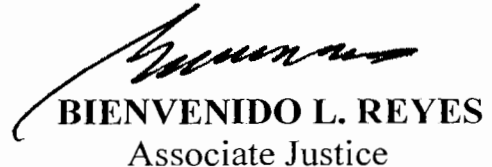
WE CONCUR:



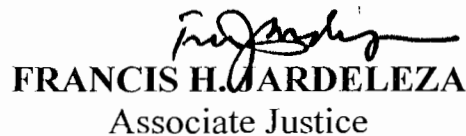
DIOSDADO M. PERALTA
Associate Justice



MARTIN S. VILLARAMA, JR.
Associate Justice



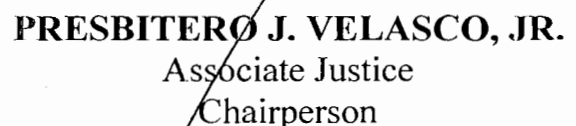
BIENVENIDO L. REYES
Associate Justice



FRANCIS H. JARDELEZA
Associate Justice

ATTESTATION

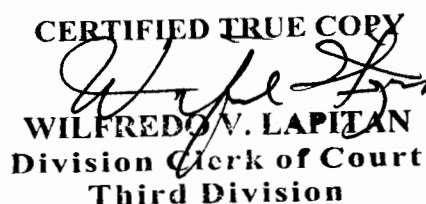
I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

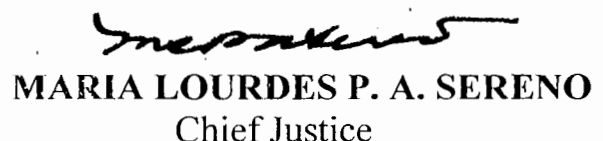


PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

CERTIFIED TRUE COPY

WILFREDO V. LAPITAN
Division Clerk of Court
Third Division



MARIA LOURDES P. A. SERENO
Chief Justice

DEC 28 2015