Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

GREGORIO "TONGEE" BALAIS, JR.,		**G.R. No. 196557**
	Petitioner,	**Present:**
	- versus -	VELASCO, JR., *J., Chairperson,* PERALTA, PEREZ, REYES, and JARDELEZA,* *JJ.*
SE'LON by AIMEE, AMELITA REVILLA and ALMA BELARMINO,		**Promulgated:**
	Respondents.	June 15, 2016

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D E C I S I O N

PERALTA, *J.*:

This is a Petition for Review *Certiorari*[1] under Rule 45 of the Rules of Court seeking the reversal of the Decision[2] dated February 25, 2011 and Resolution[3] dated April 19, 2011 of the Court of Appeals, respectively, in CA-G.R. SP No. 114899 entitled *"Se'lon by Aimee and/or Amelita Revilla and Alma Belarmino v. NLRC and Gregorio "Tongee" Balais, Jr."*

The instant petition stemmed from a complaint for illegal dismissal, non-payment of 13th month pay, damages and attorney's fees filed by Gregorio "Tongee" Balais, Jr. (*Balais*) against Se'lon by Aimee, Amelita Revilla and Alma Belarmino before the NLRC.

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* On leave.

1 *Rollo,* pp. 9-37.

2 Penned by Associate Justice Amy C. Lazaro-Javier, with Associate Justices Rebecca De Guia-Salvador and Sesinando E. Villon, concurring; *id.* at 38-49.

3 *Id.* at 50.

Balais narrated that he was Salon de Orient's senior hairstylist and make-up artist from October 16, 2004 until November 26, 2007 when respondent Amelita Revilla (*Revilla*) took over the business. Revilla, however, retained his services as senior hairstylist and make-up artist. Under the new management, Salon De Orient became Se'lon by Aimee and respondent Alma Belarmino (*Belarmino*) was appointed as its salon manager, who was in-charge of paying the employees' wages, dismissing erring employees, and exercising control over them. Balais, on the other hand, being the senior hairstylist and make-up artist, allegedly had the discretion to choose from among the junior hairstylist who should assist him in servicing his clients, as customarily observed in beauty salons. He worked during the 10am-7pm shift or 11am-8pm shift, six (6) days a week with Sunday as his regular rest day for a monthly salary of Php18,500.00 paid every two (2) weeks. In June 2008, his salary was reduced to Php15,000.00. Balais claimed that his working relationship with respondents had been harmonious until the evening of July 1, 2008 when Belarmino dismissed him without due process, in the following manner:

> Belarmino angrily shouted: "*You get out of this Company! I do not need you here at Se'lon by Aimee*!"
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> Balais Jr., calmly replied: "*Ibigay mo ang 13th month ko and sweldo ko, at separation pay.*"
>
> Belarmino angrily replied: "*Maghabla ka kahit saan na korte at haharapin kita.*"
>
> Balais Jr. responded: "*Maski ang Jollibee nagbibigay nang 13th month pay, sweldo and separation pay pag may tinatanggal na empleyado*!"
>
> Belarmino retorted: "*Eh di doon ka magtrabaho sa Jollibee kasi doon nagbibigay sila nang 13th month pay, sweldo at separation pay pag may tinatanggal na empleyado.*"

Balais felt humiliated as he was berated in front of his co-workers. The next day, he did not report for work anymore and instead filed the complaint before the NLRC.

For their part, respondents alleged that it was known to all their employees that one of the salon's policies was for junior stylists to take turns in assisting any of the senior stylists for purposes of equalizing commissions. However, Belarmino was told that Balais failed to comply with this policy as the latter allegedly gave preference to only two (2) junior stylists, disregarding the other two (2) junior stylists. When Belarmino asked

Balais for explanation, the latter allegedly snapped and retorted that he would do whatever he wanted. Belarmino reminded him of the salon's policy and his duty to comply with it but petitioner allegedly insisted he would do as he pleased and if they can no longer take it, they would have to dismiss him. After the incident, Balais sued them and never reported back to work.

Respondents insisted that Balais was not terminated from employment but he instead abandoned his work. Respondents explained that even assuming that he was indeed dismissed, there was a valid ground therefor as his acts amounted to serious misconduct against a superior and willful disobedience to reasonable policy related to his work.

On February 11, 2009, the Labor Arbiter rendered a Decision[4] holding respondents liable for illegal dismissal. It gave credence and weight to Balais' version that he was dismissed without cause and notice for merely defending his decision to avail of the services of some selected junior stylist of his choice.

Aggrieved, respondents appealed the decision before the NLRC.

On February 19, 2010, the NLRC affirmed *in toto* the findings of the Labor Arbiter, declaring petitioner to be illegally dismissed.[5] It ratiocinated that Se'lon by Aimee failed to prove that the act of petitioner amounted to gross insubordination. Other than respondents' bare denial of illegal dismissal, the same was unsubstantiated by a clear and convincing evidence. The NLRC further pointed out that respondents failed to produce a copy of the supposed salon policy on the rule of rotation of junior stylists, thus, the veracity of the allegation of insubordination against Balais failed to convince.

Respondents moved for reconsideration, but the same was denied in a Resolution dated April 22, 2010.

Thus, before the Court of Appeals, respondents filed a Petition for *Certiorari* with Prayer for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction seeking to annul or modify the Resolutions of the NLRC.

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4 *Rollo*, pp. 52-67.
5 *Id.* at 68-78.

On February 25, 2011, the Court of Appeals granted the petition and reversed and set aside the NLRC Decision and rendered a Decision[6] sustaining petitioner's dismissal as valid and required respondents to pay Balais his accrued 13th month pay and unpaid salaries.

Petitioner moved for reconsideration, but was denied in a Resolution dated April 19, 2011. Thus, the instant petition for review on *certiorari* raising the following issues:

> I
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> WHETHER THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE BY DECLARING THE PETITIONER AS VALIDLY DISMISSED WHICH IS NOT IN ACCORD WITH LAW AND APPLICABLE DECISION OF THE SUPREME COURT.
>
> II
>
> WHETHER THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND CONTRARY TO THE FINDINGS OF THE LABOR ARBITER AND NLRC.[7]

We find merit in the petition.

The Court's jurisdiction in cases brought before it from the CA via Rule 45 of the Rules of Court is generally limited to reviewing errors of law. The Court is not the proper venue to consider a factual issue as it is not a trier of facts. This rule, however, is not ironclad and a departure therefrom may be warranted where the findings of fact of the CA are contrary to the findings and conclusions of the NLRC and the LA, as in this case. In this regard, there is therefore a need to review the records to determine which of them should be preferred as more conformable to evidentiary facts.[8] In the instant case, the conflict between the NLRC's and the CA's factual findings as shown in the records of this case prompts the Court to evaluate such findings anew.

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6 *Id.* at 38-49.

7 *Id.* at 23.

8 *INC Shipmanagement v. Moradas*, G.R. No. 178564, January 15, 2014.

Whether there was a valid dismissal.

The principle echoed and re-echoed in our jurisprudence is that the *onus* of proving that the employee was dismissed for a just cause rests on the employer, and the latter's failure to discharge that burden would result in a finding that the dismissal is unjustified.[9]

In the instant case, a perusal of the records would show that both parties presented their own versions of stories, not necessarily contradicting but nonetheless lacking in some material points.

Balais alleged that he was illegally dismissed as his dismissal was allegedly made verbally and without due process of law. Yet, Balais failed to explain what possibly prompted said termination or even the likely motive for the same. He nevertheless submitted the Affidavits of Gemma Guerero[10] and Marie Gina A. Toralde,[11] to prove his allegation.

Respondents, on the other hand, alleged that there was no illegal dismissal as it was Balais himself who did not report to work, thus, he abandoned his work.

Interestingly, however, both parties never denied that there was an altercation between them. Without admitting that he violated the salon policy of rotation of the junior stylists, Balais maintained that said policy runs counter with customary salon practice which allows senior hairstylists to choose their preferred junior stylist to assist them. For their part, supplemental to their claim of abandonment, respondents averred that assuming that Balais was dismissed, they insisted that there was a valid ground therefor as he was disrespectful and insubordinate due to his failure to comply with the salon's policy.

Noteworthy is the fact that respondents never denied that the incident narrated by Balais actually happened. In *Solas v. Power & Telephone Supply Phils., Inc.*,[12] this silence constitutes an admission that fortifies the truth of the employee's narration. While respondents were evasive on the complete details of how the reported incident of termination transpired, they never categorically denied that said incident happened or the fact that

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9 *Universal Staffing Services, Inc. v. National Labor Relations Commission*, 581 Phil. 199, 207-208 (2008).

10 CA *rollo*, pp. 86-87.

11 *Id.* at 88-89.

12 585 Phil. 513, 524 (2008).

Belarmino uttered: "*get out of this company! I do not need you here.*" Belarmino attempted to sidestep the fact that she actually said it, yet, raised the defense that assuming she had indeed verbally terminated Balais, she was justified in doing so because of the disrespect shown to her.

Under the rules of evidence, if an allegation is not specifically denied or the denial is a negative pregnant, the allegation is deemed admitted.[13] In fine, the fact that respondents are even raising their own justification for the alleged verbal dismissal means that the said verbal dismissal actually transpired. If in the first place, said incident of verbal dismissal truly never happened, there is nothing to assume anymore or to justify. The fact that Belarmino was offering justification for her action, it follows that indeed said incident of verbally dismissing Balais on-the-spot actually happened.

Putting two versions of the story together, considering that none of the parties categorically deny that an altercation erupted between them which resulted in the dismissal of Balais, and the tenor of Belarmino's statements leaving no room for interpreting it other than a verbal dismissal, we are inclined to believe that there was indeed a dismissal.

This being the case, having established that there was dismissal, it becomes axiomatic that respondents prove that the dismissal was valid.

Respondents averred that there was abandonment as Balais failed to report back to work the following day after the incident.

In this regard, this Court finds that respondents failed to establish that Balais abandoned his work. To constitute abandonment, two elements must concur: (a) the failure to report for work or absence without valid or justifiable reason, and (b) 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.[14] Mere absence is not sufficient. The employer has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning. Respondents, other than their bare allegation of abandonment, failed to prove that these two elements were met. It cannot be said that Balais failed to report back to work without justifiable reason as in fact he was told that he was no longer wanted in the salon.

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[13] *Venzon v. Rural Bank of Buenavista (Agusan del Norte), Inc.*, G.R. No. 178031, August 28, 2013, 704 SCRA 138, 147-148; *Bañares v. Atty. Barican*, 157 Phil. 134, 138 (1974).

[14] *Tatel v. JLFP Investigation Agency*, G.R. No. 206942, February 25, 2015.

Moreover, we likewise note the high improbability of petitioner intentionally abandoning his work, taking into consideration his length of service, *i.e.*, 18 years of service with the salon. It does not make sense for an employee who had worked for his employer for 18 years would just abandon his work and forego whatever benefits he may be entitled, unless he was made to believe or was told that he was already terminated.

Respondents cannot discharge the burden of proving a valid dismissal by merely alleging that they did not dismiss Balais; neither can they escape liability by claiming that Balais abandoned his work. When there is no showing of a clear, valid and legal cause for the termination of employment, the law considers it a case of illegal dismissal.

Thus, respondents, presumably thinking that their claim of abandonment holds no water, it likewise manifested that assuming Balais was indeed terminated, there was a valid ground therefor because of his insubordination.

We disagree.

Willful disobedience of the employer's lawful orders, as a just cause for the dismissal of an employee, envisages the concurrence of at least two requisites: (1) the employee's assailed conduct must have been willful or intentional, the willfulness being characterized by a "wrongful and perverse attitude;" and (2) the order violated must have been reasonable, lawful, made known to the employee and must pertain to the duties which he had been engaged to discharge.[15]

It must be likewise stressed anew that the burden of proving the insubordination as a just and valid cause for dismissing an employee rests on the employer and his failure to do so shall result in a finding that the dismissal is unjustified.

In this case, the salon policy of rotating the junior stylists who will assist the senior stylist appears to be reasonable, lawful, made known to petitioner and pertained to his duty as senior hairstylist of respondent. However, if we will look at Balais' explanation for his alleged disobedience thereto, it likewise appears to be reasonable and lawful, to wit:

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[15] Labor Code, Art. 282 (a); *Gold City Integrated Port Services, Inc. v. National Labor Relations Commission,* 267 Phil. 863, 872 (1990).

x x x x

> The duty of the Senior Stylist has the overall function in seeing to it that the service accorded to the client is excellent, thus, he has the right to refuse service of a junior stylist whom he thinks that such junior stylist cannot give equal or over and above the service that he can give to the client, thus his refusal to obey the respondent does not constitute a just cause for the treatment given by respondent to herein respondent (sic).

x x x x

The fact alone that Balais failed to comply with the salon policy does not establish that his conduct in failing to comply with the salon's policy had been willful, or characterized by a wrongful and perverse attitude. Balais' justification maybe adverse to that of the salon's policy but it was neither willful nor characterized by a perverse attitude. We take note that the alleged non-compliance with the salon policy was brought to the attention of Balais for the first time only during the said incident. There was no showing of prior warnings as to his non-compliance. While respondents wield a wide latitude of discretion in the promulgation of policies, rules and regulations on work-related activities of its employees, these must, however, be fair and reasonable at all times, and the corresponding sanctions for violations thereof, when prescribed, must be commensurate thereto as well as to the degree of the infraction. Given that Balais' preference on who will assist him is based on the junior stylists' competence, the same should have been properly taken into account in the imposition of the appropriate penalty for violation of the rotation policy. Suspension would have sufficed to caution him and other employees who may be wont to violate the same policy.

In adjudging that the dismissal was grounded on a just and valid cause, the totality of infractions or the number of violations committed during the period of employment shall be considered in determining the penalty to be imposed upon an erring employee.[16] Let it not be forgotten that what is at stake is the means of livelihood, the name, and the reputation of the employee. To countenance an arbitrary exercise of the management's prerogative to terminate an employee is to negate the employee's constitutional right to security of tenure.

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16 *Merin v. National Labor Relations Commission*, 590 Phil. 596, 602 (2008).

Whether the dismissal was effected with due process of law.

Under Article 277(b) of the Labor Code, the employer must send the employee who is about to be terminated, a written notice stating the cause/s for termination and must give the employee the opportunity to be heard and to defend himself.

Article 277 of the Labor Code provides, *inter alia*:

> (a) x x x
> (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause and notice under Article 283 of this Code, ***the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires*** in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. x x x

In particular, Rule XXIII, Book V of the Omnibus Rules Implementing the Labor Code states:

> Sec. 2. *Standards of due process: requirements of notice.* – In all cases of termination of employment, the following standards of due process shall be substantially observed:
>
> 1. For termination of employment based on just causes as defined in Article 282 of the Code:
>
> (a) ***A written notice served on the employee specifying the ground or grounds for termination, and giving to said employee reasonable opportunity within which to explain his side;***
> ***(b) A hearing or conference during which the employee concerned, with the assistance of counsel if the employee so desires, is given opportunity to respond to the charge, present his evidence or rebut the evidence presented against him; and***
> ***(c) A written notice of termination served on the employee indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination.***

Thus, to effect the dismissal of an employee, the law requires not only that there be just and valid cause as provided under Article 282 of the Labor Code. It likewise enjoins the employer to afford the employee the opportunity to be heard and to defend himself. On the latter aspect, the employer is mandated to furnish the employee with two (2) written notices: (a) a written notice containing a statement of the cause for the termination to afford the employee ample opportunity to be heard and defend himself with the assistance of his representative, if he so desires; (b) if the employer decides to terminate the services of the employee, the employer must notify him in writing of the decision to dismiss him, stating clearly the reason therefor.

Here, a perusal of the records revealed that, indeed, Belarmino's manner of verbally dismissing Balais on-the-spot fell short of the two-notice requirement. There was no showing of prior warnings on Balais' alleged non-compliance with the salon policy. There was no written notice informing him of his dismissal as in fact the dismissal was done verbally and on-the-spot. Respondents failed to furnish Balais the written notice apprising him of the charges against him, as prescribed by the Labor Code. There was no attempt to serve a notice of dismissal on Balais. Consequently, he was denied due process of law accorded in dismissals.

Reliefs of Illegally Dismissed Employees

Having established that Balais was illegally dismissed, the Court now determines the reliefs that he is entitled to and their extent. Under the law and prevailing jurisprudence, "an illegally dismissed employee is entitled to reinstatement as a matter of right." Aside from the instances provided under Articles 283[17] and 284[18] of the Labor Code, separation pay is, however,

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[17] Article 283. *Closure of establishment and reduction of personnel.* The employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

[18] Article 284. *Disease as ground for termination.* An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees: Provided, That he is paid separation pay equivalent to at least one (1) month salary or to one-half (1/2) month salary for

granted when reinstatement is no longer feasible because of strained relations between the employer and the employee. In cases of illegal dismissal, the accepted doctrine is that separation pay is available in lieu of reinstatement when the latter recourse is no longer practical or in the best interest of the parties.[19]

However, other than the strained relationship between the parties, it appears that respondent salon had already ceased operation of its business, thus, reinstatement is no longer feasible. Consequently, the Court awards separation pay to the petitioner equivalent to one (1) month pay for every year of service, with a fraction of at least six (6) months considered as one (1) whole year, from the time of her illegal dismissal up to the finality of this judgment, as an alternative to reinstatement.[20]

Also, employees who are illegally dismissed are entitled to full backwages, inclusive of allowances and other benefits or their monetary equivalent, computed from the time their actual compensation was withheld from them up to the time of their actual reinstatement but if reinstatement is no longer possible, the backwages shall be computed from the time of their illegal termination up to the finality of the decision. Accordingly, the petitioner is entitled to an award of full backwages from the time he was illegally dismissed up to the finality of this decision.[21]

Balais is likewise entitled to attorney's fees in the amount of 10% of the total monetary award pursuant to Article 111[22] of the Labor Code. It is settled that where an employee was forced to litigate and, thus, incur expenses to protect his rights and interest, the award of attorney's fees is legally and morally justifiable. Finally, legal interest shall be imposed on the monetary awards herein granted at the rate of six percent (6%) *per annum* from the finality of this judgment until fully paid.[23]

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every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.

19 *Cheryll Santos Leus v. St. Scholastica's College Westgrove*, G.R. No. 187226, January 28, 2015.

20 *Id.*

21 *Id.*

22 Art. 111. *Attorney's Fees.*

(a) In cases of unlawful withholding of wages, the culpable party may be assessed attorney's fees equivalent to ten percent of the amount of wages recovered.

(b) It shall be unlawful for any person to demand or accept, in any judicial or administrative proceedings for the recovery of wages, attorney's fees which exceed ten percent of the amount of wages recovered.

23 *Cheryll Santos Leus v. St. Scholastica's College Westgrove,* G.R. No. 187226, January 28, 2015.

WHEREFORE, in consideration of the foregoing, the pctition is **GRANTED**. The Decision dated February 25, 2011 and the Resolution dated April 19, 2011 of the Court of Appeals in CA-G.R. SP No. 114899 are hereby **REVERSED** and **SET ASIDE**.

The respondents are hereby declared **GUILTY OF ILLEGAL DISMISSAL AND ARE** hereby **ORDERED** to pay the petitioner, Gregorio Balais, Jr., the following:

(a) separation pay in lieu of actual reinstatement equivalent to one (1) month pay for every year of service, with a fraction of at least six (6) months considered as one (1) whole year from the time of his dismissal up to the finality of this Decision;

(b) full backwages from the time of his illegal dismissal up to the finality of this Decision; and

(c) attorney's fees equivalent to ten percent (10%) of the total monetary award.

The monetary awards herein granted shall earn legal interest at the rate of six percent (6%) *per annum* from the date of the finality of this Decision until fully paid. The case is **REMANDED** to the Labor Arbiter for the computation of petitioner's monetary award.

SO ORDERED.

DIOSDADO M. PERALTA
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

JOSE PORTUGAL PEREZ
Associate Justice

BIENVENIDO L. REYES
Associate Justice

On leave
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, Third Division

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.

MARIA LOURDES P. A. SERENO
Chief Justice

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JUL 15 2016