

THIRD DIVISION

[G.R. No. 217732, June 15, 2016]

**EMILIO S. AGCOLICOL, JR., PETITIONER, VS. JERWIN CASIÑO,
RESPONDENT.**

D E C I S I O N

VELASCO JR., J.:

The Case

Before the Court is a Petition for Review on Certiorari under Rule 45 of the Rules of Court, questioning the Resolution^[1] of the Court of Appeals (CA) dated September 30, 2014 in CA-G.R. SP No. 137026 and its Resolution dated March 26, 2015 which denied reconsideration. The CA Decision dismissed petitioner Emilio S. Agcolicol, Jr.'s appeal and affirmed the National Labor Relations Commission's (NLRC) April 30, 2014 Resolution in NLRC Case LAC No. 02-000498-14.

The Facts

Respondent Jerwin Casiño (Casiño) was hired by petitioner in 2009 as Stock Custodian and Cook in the latter's Kubong Sawali Restaurant. Upon discovery of theft involving company property where respondent was allegedly a conspirator, a criminal complaint for qualified theft against him and his co-employees was filed on November 26, 2012 before the Office of the City Prosecutor of Baguio City. Additionally, he and his co-employees were preventively suspended indefinitely pending investigation. He was informed of the suspension through a Memorandum Order dated November 27, 2012, effective November 28, 2012, by the restaurant's Human Resource Manager, Henry Revilla. The said Memorandum Order reads:

**"TO: MS. JESSICA VDAMULLOG
MR. JERWIN CASIÑO
MR. ROSENDO [LOMBOY]**

FROM: HUMAN RESOURCE MANAGER

SUBJECT: MEMORANDUM ORDER

You are hereby notified that starting tomorrow, November 28, 2012, a preventive suspension will be imposed indefinitely while investigation is still under going on the case filed to you by the Owner, Mr. Sonny S. Agcolicol, Jr. with [regard] to "Qualified Theft" based on the evidences

gathered by under cover agents and questionable documents on the inventory and delivery reports found out by outside auditing group.

Your assigned [tasksf will then [cease] and the Management will assign its own personnel to handle your previous job description.

For your reference and strict guidance!

(signed)

HENRY G. REVILLA

Human Resource Manager

Cc: MR. SONNY S. AGCOLICOL, JR.

Operations Manager "[2]

Meanwhile, the criminal complaint for qualified theft was later dismissed for lack of basis.

According to respondent, sometime thereafter, he received a letter-dated January 10, 2013 where he was made to explain why his services should not be terminated.

[3] Said letter, in its entirety, reads:

January 10, 2013

ROSENDO LOMBOY
No. 64 Dominican Hill
Baguio City

Dear Mr. Lomboy

We have not heard from you since November 27, 2012. After you have received the subpoena from the office of the City Prosecutor on the said date you simply walked out of the establishment and have never reported back to work. Notwithstanding the case filed against you with the said office of the City Prosecutor of Baguio, we have not dropped you from the rolls of employees though you are considered as absent without leave (AWOL).

We are giving you three (3) days from receipt hereof to explain in writing why you should not be dropped from the rolls of employees for being AWOL. Likewise[,] please include in your written explanation why [you] should not be terminated for grave misconduct arising from the pilferages committed. We are adopting the complaint before the City Prosecutor as the charges against you. Failure on your part to do so shall constrain us to act accordingly.

For your compliance.

HENRY G. REVILLA
Human Resource Manager

cc. MR. SONNY S. AGCOLICOL, Jr.
Operations Manager^[4]

The letter was clearly addressed only to Lornboy but it appears from respondent's allegations in his complaint that he considered said letter as a directive for him to give said explanation.^[5]

On May 17, 2013, respondent filed with the NLRC a complaint for illegal dismissal, illegal suspension, and non-payment of monetary benefits.^[6]

For his part, petitioner denies having dismissed respondent, arguing that they were prevented from completing the investigation because respondent stopped reporting for work after Reynante Camba, his co-employee, was arrested. This, according to petitioner, prevented him from complying with the twin-notice rule. Nevertheless, petitioner insists, respondent was never dismissed from work notwithstanding the audit team's finding that his participation in the scam was extensive. Furthermore, petitioner contends that respondent's monetary claims were speculative.

Meanwhile, respondent's co-employee, Rosendo Lomboy, suspected to be involved in the incident, also filed a separate complaint against petitioner, allegedly based on the same set of facts, before the NLRC.^[7] Petitioner sought a consolidation of the two cases which motion was granted.

Decision of the NLRC First Division in the *Lomboy* case

Despite said consolidation, however, Labor Arbiter Monroe C. Tabingan resolved the case involving Lomboy ahead of that of respondent Casiño, since it was filed first. In said Decision, the Labor Arbiter ruled in favor of Lomboy, holding that the latter was illegally dismissed.

Later, upon elevation of the case to the NLRC, the NLRC First Division partially granted the appeal and reversed the Labor Arbiter's ruling on the illegality of Lomboy's dismissal.

The NLRC disagreed with the Labor Arbiter's finding that respondent was illegally dismissed. There, the Commission held that Lomboy's services were not terminated and that, as a matter of fact, Lomboy was given the opportunity to explain his failure to report for work in the January 10, 2013 letter.^[8] According to the NLRC:

In the instant case, the records would show that [petitioner] did not terminate the services of [Lomboy]. In fact, based on the 10 January 2013 letter, respondents gave [Lomboy] an opportunity to explain in writing why he should not be dropped from the employees' roll for being absent without leave. No termination letter was ever sent to [Lomboy] nor was there any allegation that he was prevented from reporting back for work.^[9]

The NLRC First Division then went on to rule that Lomboy "interpreted the letter of preventive suspension [as] tantamount to termination to which the Commission does not agree."^[10] In so ruling, the First Division relied on this Court's pronouncement in *MZR Industries v. Colambot* that "[i]n the absence of any showing of an overt or positive act proving that petitioners had dismissed respondent, the latter's claim of illegal dismissal cannot be sustained - as the same would be self-serving, conjectural and of no probative value."^[11]

Thus, according to the NLRC First Division, petitioner's error was that he failed to comply with the provisions of the Omnibus Rules Implementing the Labor Code, particularly on the 30-day limit in imposing a preventive suspension.^[12]

The NLRC accordingly dismissed the complaint for illegal dismissal but affirmed the grant of salary differentials, service incentive leave pay, and 13th month pay, disposing of the case in this manner:

WHEREFORE, the instant appeal is hereby PARTIALLY GRANTED. The decision of Labor Arbiter Monroe C. Tabingan dated 10 August 2013 is hereby SET ASIDE and a new one entered dismissing the complaint for illegal dismissal. However, respondent Kubong Sawali Restaurant is hereby ordered to reinstate complainant to his former position but without backwages and to pay the complainant Three Thousand Nine Hundred Twenty (Php3,920.00) representing his salaries and benefits for fourteen (14) days - the period he was placed under illegal suspension. Furthermore, respondent Kubong Sawali Restaurant is ordered to pay complainant the following amounts as awarded by the labor arbiter:

(1) Salary differentials on account of underpaid wages	= Php 2,275.00
(2) Service incentive leave pay	= Php 4,200.00
(3) 13 th month pay	= <u>Php</u> <u>18,330.00</u>
TOTAL	= Php 24,805.00

All other monetary claims are dismissed for lack of merit.

SO ORDERED.^[13]

The parties no longer questioned the Decision after petitioner's motion for reconsideration was denied.

Labor Arbiter's Decision^[14] in Casiño's case

As for Casiño, finding merit in his complaint, the Labor Arbiter also held that Casiño was constructively dismissed and disposed of the case in this wise:

WHEREFORE, premises all considered, judgment is hereby rendered ordering respondents Emilio Agcolicol, Jr. and Kubong Sawali Restaurant jointly and severally liable to pay complainant JERWIN CASIÑO the following:

(1) Separation pay of one (1) month pay for every year of service in the amount of P280.00 x 26 days x 4 years **P29,120.00**;

(2) Full backwages from the time he was illegally dismissed up to the finality of the decision, in the amount of **P107,021.10**;

Computation

P280.00 x 26 days x 13.5 months = P98,280.00

13th Month Pay: P243 x 26 x 13.5/12 = 7,107.75

SILP: P280.00 x 5 days x 1 yr. + 2 months = 1,633.35

(3) Salary differentials on account of underpaid wages in the amount of **P8,216.00**

Computation:

Jan. 1, 2011 -June 17, 2012

P272.00 - 260 x 26 x 17.5 months = P5,460.00

June 18, 2012-Nov. 27, 2012

P280.00 - 260 x 26 x 5.3 months = P2,756.00

P8,216.00

(4) Service incentive leave pay in the amount of P280.00 x 5 days x 1 year and 11 months = **P2,683.35**;

(5) 13th month pay for 2010, 2012 and 2013 in the amount of **P11,700.85**; and

Computation:

2010 = P235 x 26 days x 12/12 = P6,110.00

2012 = P235.00 x 26 x 5.5/12 = 2,800.40

[2013 = P]243.00x 26x5.3/12= 2,790.45

P11,700.85

(6) Attorney's fees in the amount of **P15,874.13**

All other claims are dismissed for lack of merit.

SO ORDERED.^[15]

The Labor Arbiter held that there is no truth to petitioner's defense that respondent abandoned his work thereat since he was clearly suspended indefinitely following his being charged with the crime of qualified theft which was later proved to be baseless. Too, petitioner never lifted said suspension and did not reinstate respondent in his job after the dismissal of the qualified theft case.

**Resolution^[16] of the NLRC Second
Division in Casiño's case**

On appeal, the NLRC affirmed the Labor Arbiter's Decision in this manner:

WHEREFORE, premises considered, the instant Appeal filed by the respondents is hereby DENIED for lack of merit.

The Decision dated January 14, 2014 of Labor Arbiter Monroe C.