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# FIRST DIVISION

# [ G. R. No. 163061, June 26, 2013 ]

## ALFONSO L. FIANZA, PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION (SECOND DIVISION), BINGA HYDROELECTRIC PLANT, INC., ANTHONY C. ESCOLAR, ROLAND M. LAUTCHANG, RESPONDENTS.

## D E C I S I O N

**SERENO, C.J.:**

This is a Petition for Review on Certiorari under Rule 45 of the Rules of Court, appealing the Decision[1] of the Court of Appeals (CA) dated 12 June 2003 in CA-G.R. SP No. 72181 and its Resolution[2] dated 19 March 2004 on the same case.

The dispute was initiated by a Complaint for illegal dismissal, which revolved around the determination of the employment status of petitioner Alfonso Fianza, ex-mayor of Itogon, as the "Social Acceptance Officer" of respondent Binga Hydroelectric Plant, Inc.

As a preliminary observation, the Court notes that certain factual allegations are in dispute, principally because the factual account of the CA and the National Labor Relations Commission (NLRC) slightly differs from that of the Labor Arbiter (LA). However, they do have mutually agreed facts that can facilitate the discussion and determination of the case.

The following facts are undisputed:

On 3 June 1997, petitioner Fianza was employed as Officer for Social Acceptance of respondent Binga Hydroelectric Plant, Inc. The details of his employment are embodied in Memorandum 97-10[3] dated 2 June 1997[4] issued by Mr. Catalino Tan, the president and chairperson of the board at that time.

In February 1999, petitioner did not receive his salary of P15,000 for the first 15 days of the month of February. He was advised not to report for work until his status was officially clarified by the Manila office.[5]

After petitioner made several other inquiries concerning his status,[6] he was told by a supervisor to report for work.[7] However, he was also told that the new management committee had to concur in his reappointment before he could be reinstated in the payroll.[8] It also wanted an opportunity to determine whether his services would still be necessary to the company.[9] Meanwhile, the chief of the rehabilitation department of the company recommended his return.[10]

As the management committee did not act on his inquiries for several months, on

24 May 1999 petitioner filed a Complaint for illegal dismissal before the LA.[11]

Ruling in favour of the petitioner, the LA applied the jurisprudentially-established control test to show that the petitioner and respondent company had a prevailing employer-employee relationship.[12] The arbiter thought that since petitioner was hired directly by the president of the company, he was entitled to a fixed income of P30,000. Moreover, despite the existence of a controversy in respect of the corporation's ownership and rehabilitation, the employer-employee relationship subsisted on the basis of the doctrine of successor employer.[13]

As to petitioner's dismissal, the LA recognized the obligation of the company to maintain complete records of its personnel and transactions.[14] It was further opined that there was no abandonment because of respondent company's failure to comply with the strict requirements of the law for a declaration of abandonment.[15]

Finally, for purposes of determining liability, the LA deemed petitioner a "supervisory employee" and accordingly granted the benefits pertaining thereto. The LA nonetheless denied the prayer for moral damages, having seen no proof of malice on the part of respondent.[16]

On appeal, the NLRC reversed the LA's Decision. It decided that the employer-employee relationship was not sufficiently established,[17] since the appointment letter recognized the probationary status of petitioner.[18] It found circumstances that allegedly negated his permanent and regular employment, such as his direct reporting to the hiring authority, his direct hiring which bypassed the existing hiring procedures of the company, his lack of a daily time record, the absence of the position "Social Acceptance Officer" from the organizational table of the company, the characterization of his salary as "retainer's fees," and the non-inclusion of his appointment in the company records. The CA affirmed the NLRC's reversal, and denied[19] his Motion for Reconsideration.[20]

Petitioner thus filed this Petition for Review under Rule 45 before this Court.[21]

On 11 August 2008, this Court resolved to have the parties submit memoranda within 30 days from notice.[22] Petitioner duly filed his Memorandum.[23] However, respondent company was not properly notified of the pleadings filed before the Court, and the Orders issued in the case because it was allegedly under new management as a result of the ongoing rehabilitation of the company.[24] Thus, its Memorandum was submitted nearly a year later.[25]

After a review of the arguments raised in the Memoranda, there are in essence, two important questions to be answered: first, whether petitioner abandoned his work; and second, whether his employment was regular.

In his pleadings, petitioner argues that he was a supervisory employee, as shown by the evidence he presented and the nature of his work.[26] He further contends that he did not abandon his work, because he always made sure he followed up the status of his employment, and he was willing to go back to work once he was re-enrolled in the payroll.[27]

Respondent company asserts in its Memorandum that petitioner was a confidential consultant of its former president and chairperson Catalino Tan. As such, petitioner's tenure was therefore co-terminus with that of Mr. Tan.[28]

At the outset, it is clear that the requisites for a judicial declaration of abandonment are absent in this case. Suffice it to say that abandonment is a fact that must be proven in accordance with the standard set by this Court:[29]

> It is well-settled in our jurisprudence that "For[30] abandonment to constitute a valid cause for termination of employment, there must be ***a deliberate, unjustified refusal*** of the employee to resume his employment. This refusal must be clearly shown. Mere absence is not sufficient, it must be accompanied by overt acts unerringly pointing to the fact that the employee does not want to work anymore" (Emphasis and italics supplied)[31]

Abandonment as a fact and a defense can only be claimed as a ground for dismissal if the employer follows the procedure set by law.[32] In line with the burden of proof set by law, the employer who alleges abandonment "has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning."[33] As this Court has stated in *Agabon v. National Labor Relations Commission*:

> For a valid finding of [34] abandonment, these two factors should be present: (1) the failure to report for work or absence without valid or justifiable reason; and (2) a clear intention to sever employer-employee relationship, with the second as the more determinative factor which is manifested by overt acts from which it may be deduced that the employees has no more intention to work. The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified.[35]

From the foregoing, it is clear that respondent company failed to prove the necessary elements of abandonment. Additionally, the NLRC and the CA failed to take into account the strict requirements set by jurisprudence when they determined the existence of abandonment on the basis of mere allegations that were contradicted by the evidence shown.

The very act of filing the Complaint for illegal dismissal should have negated any intention on petitioner's part to sever his employment.[36] In fact, it should already have been sufficient evidence to declare that there was no abandonment of work. Moreover, petitioner went back to the company several times to inquire about the status of his employment.[37] The fact that his inquiries were not answered does not prejudice this position.

Throughout the entire ordeal, petitioner was vigilant in protecting himself from any claim that he had abandoned his work. The following circumstances evinced his intent to return to work:

1. His continuous inquiry with respondent about the status of his work.[38]

2. His willingness to return to work at any time, subject to the approval of respondent, and his visits to the plant to apply for work.[39]

3. His filing of an illegal dismissal case.[40]

Considering all these facts, established by the LA and confirmed by the NLRC and the CA, we conclude that both appellate bodies were remiss in declaring the existence of abandonment.

Since the first question has been disposed of, the second one now becomes the core issue, because the existence of an employer-employee relationship in the nature of regular employment will determine whether or not the company dismissed petitioner illegally.

Respondent company claims that because petitioner was a confidential employee of its former president, his tenure was co-terminus with that of his employer.[41] To establish this contention, respondent cites the CA's determination of the facts, as follows:

1. Petitioner directly reported to Mr. Tan, the hiring authority.

2. The hiring did not pass through the existing procedure.

3. The position of officer for social acceptance was absent from the company's table of organization and position title.

4. Petitioner did not submit any daily time record.

5. Monthly fees received from Mr. Tan were denominated as retainer fees and subjected to 10% deductions.

6. Petitioner was not included in the payroll.

7. The taxes on the fees were paid by respondent company on behalf of petitioner.

8. Petitioner's name was absent from respondent's records.[42]

These facts allegedly proved that petitioner was the confidential employee of Mr. Tan, respondent's former president.[43] All of this occurred in the context of a rehabilitation receivership conducted by the Securities and Exchange Commission Management Committee.[44]

Respondent company failed to realize however that Mr. Tan, being its president, was clothed with authority to hire employees on its behalf. This was precisely the import of petitioner's appointment papers, which even carried the letterhead of the company.[45] There is no indication from the facts that his employment was of a confidential nature. The wording of his appointment itself does not bear out that conclusion, viz: