

TENTH DIVISION

[CA-G.R. SP NO. 132637, February 27, 2015]

**ANSCOR SWIRE SHIP MANAGEMENT CORP., SWIRE PACIFIC
SHIP MANAGEMENT LTD., PETITIONERS, VS. NATIONAL LABOR
RELATIONS COMMISSION (FIFTH DIVISION) AND FRANCIS
HINA-UT, RESPONDENTS.**

D E C I S I O N

DIAMANTE, FRANCHITO N., J.:

This Petition for *Certiorari* under Rule 65 of the 1997 Rules of Civil Procedure seeks to annul and set aside the Decision dated August 30, 2013^[1] of the public respondent National Labor Relations Commission (NLRC), Fifth Division, in NLRC Case No. (M) 07-10271-12/ NLRC LAC (OFW-M) No. 01-000113-13.

The facts, as found by the NLRC, are as follows:

"xxx xxx

Respondent Anscor Swire Ship Management Corporation (Anscor) is a domestic corporation engaged in the business of recruiting and employing Filipino seafarers for its foreign principals, with Eduardo P. Pertierra (Pertierra) as its responsible officer. One of its foreign principals is co-respondent Swire Pacific Shipmanagement Ltd. (Swire), operator of the vessel, M/V Pacific Tenacity" (the vessel).

On January 12, 2012, Anscor, in behalf of Swire, entered into a contract of employment with complainant Francis D. Hina-ut (Hina-ut), a seafarer by profession, under the following terms and conditions:

- "1.1 Duration of Contract: 5 MONTH(S)
- 1.2 Position: GENERAL PURPOSE II/DECK
- 1.3 Average Monthly Salary: USD 757.00
- xxx
- 1.7 Point of Hire: MANILA, PHILIPPINES"

On February 29, 2012, complainant departed from the point of hire to join the vessel. After four (4) months, complainant was repatriated. On July 6, 2012, Hina-ut filed a complaint for constructive dismissal, non-payment of salaries, moral and exemplary damages, and attorney's fees against respondents.

Complainant averred that in the course of his employment on board the vessel, it had to transport exploration materials to Basrah, Iraq for its client Shell Ali. While in Iraq, he and the other crewmembers of the ship were prohibited from leaving the vessel because Iraq then was a danger

zone. Even from afar, they could hear gunfire and bombings. They then returned to Sharjah, United Arab Emirates (UAE) to reload exploration materials for another delivery to Iraq.

Fearing that his life would be endangered anew upon his return to Iraq, complainant requested for his repatriation with the master of the vessel, Alberto Alferan (Alferan). When Alferan conveyed the request of complainant to the principal office of Swire, the latter rejected his request. Instead, he was told that if he would return home, he would bear the cost of his and his reliever's transportation.

It was, then, when complainant sought the assistance of the Philippine Consulate in Dubai where the principal office of Swire is located. Officers in the consulate told complainant that they would talk to the principal's representative in Dubai.

On June 10, 2012, complainant was repatriated.

Believing that his assignment in then war-torn Iraq was tantamount to his constructive dismissal, he filed the complaint.

For their part, respondents narrated that on April 27, 2012, the Philippine Overseas Employment Administration (POEA) issued Memorandum Circular No. 4, series of 2012 banning the deployment of Filipino overseas workers to Iraq except in the province of Kurdistan. On two (2) occasions, Anscor sought exemption from the ban. They requested that their barges, manned by Filipino sailors, be permitted to deliver to the port of Iraq reasoning that offshore terminals were relatively safe.

On June 1, 2012, POEA considered Anscor's request but directed respondents to increase security measures to ensure the safety of the crew. POEA also conditioned the grant on the undertaking of the master of the vessel not to allow its crewmembers to be on shore leave while in Iraq.

Before complainant left the Philippines, he attended the pre-deployment orientation seminar (PDOS). During the seminar, he was made aware that his vessel might transit in Iraqi waters.

As it was, complainant sought for his immediate repatriation after an assignment on Iraqi shores. He represented that he heard gunshots and bomb explosions during his brief stay in an Iraqi port.

Respondents argue that since it was complainant who requested for the pre-termination of his contract, he cannot validly claim for his salaries equivalent to the the unexpired portion of his term. He should also bear the cost of his repatriation.”^[2]

On October 19, 2012, Labor Arbiter Jose Antonio Ferrer rendered a Decision,^[3] the dispositive portion of which provides:

"WHEREFORE, premises considered, judgment is hereby rendered finding respondents to have constructively dismissed the complainant. Consequently, respondents are ordered, jointly and severally, to pay the complainant: a) the sum of US\$985.00 representing his salary for the unexpired portion of the contract or its equivalent in Philippine Peso at the time of payment; b) Php100,000.00 as moral damages; c) Php100,000.00 as exemplary damages; and, d) attorney's fees equivalent to ten (10%) of the monetary award.

SO ORDERED."

Aggrieved, petitioners appealed to the NLRC. The NLRC (5th Division), however, dismissed petitioners' Appeal due to non-perfection for failure to comply with all of the requirements of appeal under the NLRC Rules.^[4]

Petitioners subsequently filed a Motion for Reconsideration of the above decision.^[5] On August 30, 2013, the NLRC, Fifth Division, issued a Resolution granting petitioner's Motion for Reconsideration but denying the Appeal and affirming the decision dated October 19, 2012 of the Labor Arbiter, thus:

"**WHEREFORE**, premises considered, judgment is hereby rendered:

1. **GRANTING** the Motion for Reconsideration of respondents; and
2. **DENYING** their Appeal. The Decision of Labor Arbiter Jose Antonio C. Ferrer dated October 19, 2012 is **AFFIRMED**.

SO ORDERED."^[6]

Thus, petitioners filed before this Court a Petition for *Certiorari* under Rule 65 on November 12, 2013.^[7]

In their petition, petitioners assigned the following errors:

i.

PUBLIC RESPONDENT NLRC GRAVELY ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THAT RESPONDENT WAS NOT CONSTRUCTIVELY DISMISSED IN THIS CASE.

ii

PUBLIC RESPONDENT NLRC HAS CLEARLY ABUSED ITS DISCRETION WHEN IT ALLOWED PRIVATE RESPONDENT TO CLAIM DAMAGES AND ATTORNEY'S FEES.^[8]

In affirming the findings of the Labor Arbiter, the public respondent NLRC held that the present case passed the test of constructive dismissal.^[9] The danger in Iraq then was clear and present when petitioners still allowed the vessel of private respondent to stop in Iraq for almost a month amidst the terrorist threats. It, therefore, rendered the continued employment of private respondent impossible and unreasonable.^[10] Private respondent's deployment to Iraq contrary to government

policy of total deployment ban in that country likewise entitled him to recover moral damages and attorney's fees.^[11]

Petitioners, however, stressed that private respondent was not constructively dismissed as his resignation or pre-termination of contract was brought about by his own independent judgment and free will.^[12] Also, private respondent was made aware of his transit in Iraq, for which he failed to protest in the beginning, and that it was private respondent, who later on, volunteered to pre-terminate his contract.^[13]

The petition is unmeritorious.

It is well-settled in this jurisdiction that factual findings of the NLRC, particularly when they coincide with those of the Labor Arbiter, are accorded respect, even finality, and will not be disturbed for as long as such findings are supported by substantial evidence.^[14]

Upon a judicious examination of the records, We find no cogent reason to modify or reverse the factual findings of public respondent NLRC which to Our mind were supported by substantial evidence.^[15]

In a plethora of cases, the High Court has defined constructive dismissal as a cessation of work because continued employment is rendered impossible, unreasonable or unlikely; when there is a demotion in rank or diminution in pay or both; or when a clear discrimination, insensibility, or disdain by an employer becomes unbearable to the employee.^[16]

The test of constructive dismissal is whether a reasonable person in the employee's position would have felt compelled to give up his position under the circumstances. It is an act amounting to dismissal but made to appear as if it were not. Constructive dismissal is, therefore, a dismissal in disguise.^[17] The employer is, concededly, charged with the burden of proving that its conduct and action were for valid and legitimate grounds.^[18]

In the case at bench, We are one with the lower tribunals in finding that petitioners' actions constituted constructive dismissal. True, private respondent asked for his repatriation but it cannot be denied that he did so only because he feared for his life. Given the unsafe and hazardous working conditions, private respondent may have felt compelled to give up his employment. His decision to leave the vessel, was, therefore, not voluntary as it was brought about by his instinct of self-preservation and his concern for his safety.

Moreover, there can be no question that private respondent's fear was well-founded. As aptly found by public respondent NLRC, the danger in Iraq was clear and present but petitioners still allowed the vessel of private respondent to stop in Iraq for almost a month amidst the terrorist threats.^[19] With the said factual circumstance, it is clear that private respondent was placed in a risky and unsafe situation created by the petitioners. There is, therefore, a sufficient basis for Us to conclude that private respondent had not left the vessel out of his own free will and volition, but due to a real threat to his life.