

## SEVENTH DIVISION

[ CA – G.R. SP No. 134066, November 19, 2014 ]

**KENN RIO, PETITIONER, VS. HON. JOSEPH GERARD E. MABILOG (PRESIDING COMMISSIONER), HON. ISABEL G. PANGANIBAN-ORTIGUERRA, HON. NIEVES E. VIVAR-DE CASTRO, COMMISSIONERS OF THE NATIONAL LABOR RELATIONS COMMISSION – SIXTH DIVISION, QUEZON CITY, NORWEGIAN MARITIME FOUNDATION OF THE PHILS. INC., STEIN ERIKSEN AND MERCEDES TORRES, RESPONDENTS.**

### D E C I S I O N

**LOPEZ, J.:**

The main issue in this Petition<sup>[1]</sup> is whether Kenn Rio was illegally dismissed by Norwegian Maritime Foundation of the Phils. Inc. (NMFPI).

The facts are of record.

Rio is a mechanical engineer employed as Head of the Maintenance Section, under the Finance and Administration Department of NMFPI. Sometime in July 2011, NCH Philippines, Inc. (NCH),<sup>[2]</sup> thru Belma Isidro, called Rio to inform him that NMFPI earned sufficient points for redemption of offered items and asked what item NMFPI would like to redeem. Rio requested for a portable inverter type welding machine. However, a different type of welding machine was delivered. Thus, Isidro agreed to replace the welding machine with the correct portable inverter type. On September 29, 2011, NCH delivered the replacement machine and requested that the wrongly delivered one be pulled out. Rio then instructed one of his staff, Dumart Ledisma, to assist the NCH personnel. In the process, they were accosted by NMFPI personnel because the pull out of the equipment was not properly documented. An inquiry was then made by the immediate supervisor of Rio, Mercedes Torres, regarding the welding machines. During the inquiry, Rio claimed that the welding machine being pulled out is his personal equipment.<sup>[3]</sup>

On October 3, 2011, Rio received a Notice to Explain<sup>[4]</sup> from Torres requiring him to explain within 48 hours why he should not be dismissed for concealing receipt of “freebies” from NMFPI’s supplier and declaring that the welding machine from NCH is his personal equipment. On October 6, 2011, Rio asked for an additional seven days within which to submit his reply, which was initially denied by Torres.<sup>[5]</sup> However, in a letter of the same date, Torres granted Rio an extension of three days.<sup>[6]</sup> On October 11, 2011, Rio filed his reply to the Notice to Explain denying the charges against him.<sup>[7]</sup> And, on November 4, 2011, Rio received a Notice of Termination of Employment for Serious Misconduct, Class E-Offense and Willful Breach of Trust.<sup>[8]</sup>

Rio then filed a case against NMFPI for illegal dismissal and money claims.<sup>[9]</sup> On April 25, 2012, NMFPI voluntarily settled Rio's unpaid latest salary, proportionate 13<sup>th</sup> month pay, tax refund for 2011, sick leave conversion, vacation leave conversion, laundry allowance, medicine allowance, rice subsidy, and personal contributions to the provident fund. However, the case for illegal dismissal, share in the provident fund, separation pay, moral and exemplary damages, and attorney's fees were left pending.

On February 18, 2013, the Labor Arbiter rendered a Decision dismissing Rio's complaint for lack of merit.<sup>[10]</sup> The Labor Arbiter reasoned, *viz.* :

After a careful evaluation of the evidences (*sic*) presented by the parties, the Office finds sufficient evidence showing a valid ground for complainant's [Rio] dismissal.

From the entirety of the circumstances from the time NCH asked complainant what respondent company wanted as "freebies" to its pull out of the welding machine, it is clear that complainant tried to pass off the welding machine as his personal property.

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It was only after complainant was asked to explain why he should not be disciplined for his actions did he make a complete turn around and now claimed that the welding machine was owned by respondent company. He also denied having asserted ownership of the welding machine xxx.

xxx

Complainant is not a mere rank-and-file employee. He is the head of the maintenance department and is thus highly reposed with trust and confidence. xxx. He is thus, also considered a supervisory employee.

xxx [A]s regards a managerial employee, the mere existence of a basis for believing that such employee had breached the trust of his employer would suffice for his dismissal. Hence, in the case of managerial employees, proof beyond reasonable doubt is not required, it being sufficient that there is some basis for such loss of confidence.<sup>[11]</sup>

On appeal, the National Labor Relations Commission (NLRC) affirmed the decision of the Labor Arbiter.<sup>[12]</sup> Kenn moved for reconsideration,<sup>[13]</sup> but was denied.<sup>[14]</sup> The NLRC held:

We find appellant [Rio] to have been validly terminated from employment based on serious misconduct and willful breach of trust.

Serious Misconduct:

xxx [A]ppellant's act in suppressing the information from appellee company [NMFPI] that several "freebies", including the welding machine model 200, were delivered by NCH and attempting to bring said welding machine outside company premises, thru his staff Ledisma, without the

necessary gate pass is indeed a serious malfeasance which was committed in relation to the performance of his duties as employee. Such misdemeanor is manifestly intentional and renders appellant unfit to continue working with appellee company.

#### Loss of Trust and Confidence:

Appellant is undeniably a managerial employee entrusted with confidence on delicate matters, such as the custody, handling, or care and protection of the employer's property. xxx. In the instance case, appellee Norwegian has sufficient basis to lose its trust and confidence on appellant for having claimed not once but twice that subject two welding machines were his personal property. Such claim was made with the purpose of evasion when he was asked by Quirante for the delivery receipt of the welding machine 300 and by Lozano for the delivery of the welding machine model 200. Had the matter involving the proper documentation of said welding machines not brought to the fore, the said equipment could have been easily appropriated by appellant for his personal use. Appellant could not feign inadvertence or work lapses because he is a lettered employee, being a mechanical engineer by profession, and had been in the employ of appellees for more than five (5) years.

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The termination from employment of appellant being valid and justified, his claim for separation pay as well as moral and exemplary damages plus attorney's fees must consequently be denied. Appellant's claim for provident share is likewise denied because appellant failed to substantiate its existence.<sup>[15]</sup>

Hence, this Petition for Certiorari.<sup>[16]</sup> Rio contends that the NLRC acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction, when:

#### I

XXX THEY RULED THAT THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO PROCEDURAL DUE PROCESS WHEN HE WAS TERMINATED FROM SERVICE.

#### II.

XXX THEY RULED THAT THE PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO SUBSTANTIVE DUE PROCESS WHEN HE WAS TERMINATED FROM SERVICE.

#### III.

XXX THEY APPRECIATED THE LONG DISTANCE CALLS TO JUSTIFY THE TERMINATION OF THE PETITIONER FROM SERVICE.

#### IV.

XXX THEY RULED THAT THE PETITIONER WAS NOT ILLEGALLY TERMINATED FROM SERVICE.

V.

XXX THEY FAILED TO AWARD PETITIONER FULL BACKWAGES, COMPANY SHARE OF THE PROVIDENT FUND, SEPARATION PAY, MORAL AND EXEMPLARY DAMAGES AND ATTORNEY'S FEES.

VI.

XXX THEY FAILED TO DECLARE THAT INDIVIDUAL PRIVATE RESPONDENTS ARE SOLIDARILY LIABLE WITH PRIVATE RESPONDENT COMPANY.

Rio alleges that he was not afforded due process and that there is no valid ground to terminate his employment.

The petition lacks merit.

It is established that a valid dismissal of an employee requires the observance of substantive and procedural due processes. Procedural due process mandates that the employee be given a notice of the charge, an ample opportunity to be heard, and a notice of termination.<sup>[17]</sup> This process was complied in the present case. The Notice to Explain<sup>[18]</sup> dated October 3, 2011 informed Rio of the charges against him. The notice contained not only a statement of the charges of malfeasance or misfeasance but also the effect on Rio's employment, which is termination, if the charges are proven to be true.<sup>[19]</sup> As such, Rio has been afforded the opportunity to avail of all defenses and exhaust all remedies to refute the allegations against him.<sup>[20]</sup> After the determination of cause to terminate employment, the employer must give a written notice to the employee concerned indicating that all circumstances involving the charge against him have been considered and the grounds established as justification of the severance of employment.<sup>[21]</sup> This, NMFPI also complied with when it served the Notice of Termination dated November 4, 2011.<sup>[22]</sup>

On the other hand, substantive due process requires that the dismissal must be pursuant to a just or authorized cause under the Labor Code.<sup>[23]</sup> Article 282 of the Labor Code<sup>[24]</sup> enumerates the causes for which an employer may terminate employment. The grounds include serious misconduct and willful breach of trust.

Misconduct is defined as the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error in judgment.<sup>[25]</sup> For serious misconduct to justify dismissal, it must be serious, related to the performance of the employee's duties and show that the employee has become unfit to continue working for the employer.<sup>[26]</sup> Here, NMFPI's Employee Handbook classifies as a Class-E Offense, theft or stealing and unlawful possession of property which are punishable with dismissal even on the first offense.<sup>[27]</sup> As aptly observed by the Labor Arbiter and the NLRC, Rio violated company rules when he suppressed information that several "freebies" were delivered by NCH<sup>[28]</sup> and when he "*tried to pass off the welding machine as his personal property.*"<sup>[29]</sup> Indeed, Rio committed a serious violation of