

## NINTH DIVISION

[ CA-G.R. SP NO. 124890, November 12, 2014 ]

**TOP RATE CONSTRUCTION AND GENERAL SERVICES, INC.  
PETITIONER, VS. NATIONAL LABOR RELATIONS COMMISSION  
(2ND DIVISION) AND LOPE D. AZUCINAS, RESPONDENTS.**

### D E C I S I O N

**PERALTA, JR., E. B., J.:**

From an assessment of private respondent's constructive dismissal, the Petition for Certiorari under Rule 65 was utilized by petitioner now before Us intended to re-examine the Resolutions dated December 26, 2011<sup>[1]</sup> and March 14, 2012<sup>[2]</sup> of public respondent National Labor Relations Commission, which agreed with the Labor Arbiter's evaluation.<sup>[3]</sup>

Petitioner Top Rate Construction and General Services, Inc. (hereinafter referred to as petitioner) was an independent contractor primarily engaged in the business of providing janitorial, messengerial and other services to various clients.

On May 19, 2010, private respondent Lope D. Azucinas (hereinafter referred to as private respondent) was hired by petitioner as Maintenance Crew/Janitor.<sup>[4]</sup> His employment was coterminous with the renewal of the service of agreement<sup>[5]</sup> between Top Rate and BF Homes, which was from May 19, 2010 to May 18, 2011.

Unfortunately, on November 2, 2010, BF Homes wrote petitioner that on account of streamlining, it will return private respondent to petitioner on November 15, 2010, thusly:<sup>[6]</sup>

*"Gentlemen:*

*We are presently undertaking the streamlining of our operations. For this reason, we are turning over to you one of your employee (sic) assigned to us Mr. Lope Azucinas effective November 15, 2010.*

*Thank You.*

*Very truly yours,*

*(Sgd.)*

*ATTY. LERMA C. TANCHOCO  
4<sup>th</sup> AVP/OIC, GSD & HRMD"*

For lack of clients to which private respondent could immediately be reassigned, petitioner placed private respondent on floating status, effective November 16, 2010.

On January 11, 2011, private respondent filed a Complaint<sup>[7]</sup> against petitioner for illegal dismissal, payment of service incentive leave, 13<sup>th</sup> month pay, damages and attorney's fees.

On February 11, 2011, petitioner issued a Memo<sup>[8]</sup> to private respondent and reminded him of his floating status:

*"This is to reiterate our verbal communication to you last November 16, 2010 regarding your placement on floating status following the decision of BF Homes, Inc. to adopt cost cutting measures by reducing its agency contracted personnel.*

*Presently, there are no available positions in other clients of the company to which you can be assigned to. We shall inform you immediately once there is an opening for you to fill. Rest assured that your floating status will not exceed the six (6) month period allowed by law.*

*In case of change of contact numbers, you are reminded to keep our office updated so we can communicate with you without delay.*

*Please be guided accordingly."*

On May 31, 2011, Labor Arbiter Eduardo J. Carpio rendered a Decision<sup>[9]</sup> to the effect that private respondent was constructively dismissed and adjudged petitioner to pay private respondent separation pay in the amount of P147,056.00 plus P14,705.60 as attorney's fees, the dispositive portion of which reads:

***"WHEREFORE, premises considered, decision is hereby rendered ordering respondent Toprate Construction and General Service, Inc. to pay Lope Azucinas separation pay in the computed amount of Php147,056.00 plus Php14,705.60 as attorney's fees.***

*All other issues are dismissed for lack of merit.*

***SO ORDERED."***

On August 8, 2011, petitioner appealed<sup>[10]</sup> the Decision of the Labor Arbiter to the NLRC, docketed as LAC No. 09-002399-11.

On December 26, 2011, the NLRC issued the assailed Resolution,<sup>[11]</sup> which affirmed the Decision of the Labor Arbiter:

*"WHEREFORE, premises considered, in view of the foregoing, the Decision appealed from is hereby, **AFFIRMED in toto. The instant appeal is hereby DISMISSED** for lack of merit.*

*SO ORDERED."*<sup>[12]</sup>

Petitioner sought reconsideration of the NLRC Decision on January 19, 2012, but it was denied in the assailed Resolution<sup>[13]</sup> dated March 14, 2012.

Unfazed, petitioner filed a Petition for Certiorari<sup>[14]</sup> anchored on these ascriptions of grave abuse of discretion:

"...IN UPHOLDING THE LABOR ARBITER'S RULING OF RESPONDENT AZUCINAS AS A REGULAR EMPLOYEE AND IN THE PROCESS DISREGARDING RESPONDENT AZUCINAS'S STATUS AS A CONTRACTUAL EMPLOYEE WITH A FIXED PERIOD AND PETITIONER'S STATUS AS A LEGITIMATE INDEPENDENT JOB CONTRACTOR.

...IN UPHOLDING THE LABOR ARBITER'S AWARD TO RESPONDENT AZUCINAS OF HIS FULL SEPARATION PAY NOTWITHSTANDING THE PROVISIONS OF DEPT ORDER NO. 18, SERIES OF 2002 WHICH CATEGORICALLY PROVIDED FOR NON-PAYMENT OF SEPARATION PAY FOR TERMINATION DUE TO TERMINATION OF THE PRINCIPAL CONTRACT BETWEEN THE CLIENT AND THE INDEPENDENT JOB CONTRACTOR.

EVEN *GRANTING ARGUENDO* RESPONDENT AZUCINAS'S [sic] ENTITLEMENT TO SEPARATION PAY UNDER PAR 1, SEC. 10, OF DEPT ORDER NO. 18-02, SERIES OF 2002, STILL THE NLRC COMMITTED GRAVE ABUSE OF DISCRETION IN UPHOLDING THE LABOR ARBITER'S COMPUTATION OF SEPARATION PAY RECKONED FROM RESPONDENT AZUCINAS'S' [sic] DATE OF FIRST HIRE INSTEAD OF JUST AWARDED AT MOST ONE (1) MONTH SEPARATION PAY ON ACCOUNT OF THE ONE (1) YEAR FIXED TERM EMPLOYMENT CONTRACT EXECUTED BY RESPONDENT AZUCINAS."<sup>[15]</sup>

The bedrock of the Petition is whether private respondent was illegally dismissed from employment by petitioner.

Petitioner averred that private respondent was not terminated but merely placed on floating status due to absence of clients to which private respondent could be reassigned.

On the other hand, private respondent maintained that he was not placed on floating status but was terminated from the service. He stated that his position as maintenance crew was necessary and desirable in the usual business of petitioner. Moreover, he was employed for more than 15 years from October 18, 1996 until his dismissal on November 15, 2010.