REPUBLIC OF THE PHILIPPINES
SUPREME COURT
Manila

SECOND DIVISION

NOTICE

Sirs/Mesdames:

Please take notice that the Court, Second Division, issued a Resolution dated **30 March 2022** *which reads as follows*:

"G.R. 255499 (Benedict Q. Magalong *vs.* Expedition Construction Corporation.) — This is a Petition for Review on *Certiorari*[1] assailing the Decision[2] dated 22 September 2020 and Resolution[3] dated 20 January 2021 of the Court of Appeals (CA) in CA-G.R. SP No. 162679.

After a careful review of the instant Petition and its annexes, as well as the assailed Decision and Resolution of the CA, the Court resolves to **DENY** the Petition for lack of merit.

While petitioner Benedict Q. Magalong (petitioner) claims that the issues involve mixed questions of fact and law, a careful reading of the issues raised clearly shows that these are factual in nature.

Generally, the Court does not entertain questions of fact in a petition for review under Rule 45. However, this Court has acknowledged that this rule is subject to exceptions. These exceptions are summarized in *Miano v. Manila Electric Co.*,[4] to wit: (1) when the conclusion is a finding grounded entirely on speculation, surmises, or conjectures; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) where there is a grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of fact are conflicting; (6) when the CA, in making its findings, went beyond the issues of the case and the same is contrary to the admissions of both appellant and appellee; (7) the findings of the CA are contrary to those of the trial court; (8) when the

---

1 *Rollo*, pp. 20-38.

2 Id. at 67-79; penned by Associate Justice Franchito N. Diamante and concurred in by Associate Justices Germano Francisco D. Legaspi and Carlito B. Calpatura of the Twelfth (12th) Division, Court of Appeals, Manila.

3 Id. at 81-82; penned by Associate Justice Franchito N. Diamante and concurred in by Associate Justices Germano Francisco D. Legaspi and Carlito B. Calpatura of the Former Twelfth (12th) Division, Court of Appeals, Manila.

4 800 Phil. 118 (2016).

7/13

findings of fact are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondents; and (10) the findings of fact of the CA is premised on the supposed absence of evidence and is contradicted by the evidence on record.[5]

In this case, petitioner points to the CA's misapprehension of facts. Specifically, petitioner theorizes that the reduction of his trips equates to a diminution of his regular pay; hence, he was constructively dismissed. A reduction on the number of trips may result to a diminution of pay, and thus amount to constructive dismissal. However, the Court cannot make the same conclusion in this case. There is hardly any evidence to support petitioner's claim that having less trips resulted in the reduction of his take-home pay.

He failed to show the amount of his previous pay or the frequency of his trips in a week prior to the accident. All the Court has is petitioner's bare assertions that he earned ₱620.00 per trip, that his rounds depended on the number of trip tickets issued to him, and that he was given fewer trips after the incident.[6]

This Court also notes that there is doubt as to the reason he cited for the diminution of his pay. Petitioner claims that he was given less trips after he refused to sign the acknowledgement of liability given by Nelia Curia (Nelia). Aside from the fact that this statement was not verified by Nelia herself, the records show that Nelia had resigned from respondent Expedition Construction Corporation (ECC) even before the incident took place.[7]

In constructive dismissal cases, the employer has the burden of proving that its conduct and action, or the transfer of an employee, are for valid and legitimate grounds such as genuine business necessity. However, it is likewise true that in constructive dismissal cases, the employee has the burden to first prove the fact of dismissal by substantial evidence. Only when the dismissal has been established will the burden shift to the employer to prove that the dismissal was for just and/or authorized cause. The logic is simple: if there is no dismissal, there can be no question as to its legality or illegality.[8]

In this case, there is no evidence to support petitioner's claim of

---

5 Id. at 123.
6 *Rollo*, p. 214.
7 Id.
8 *Italkarat 18, Inc. v. Gerasmio*, G.R. No. 221411, 28 September 2020.

dismissal, not even constructively. Similarly, ECC's claim that petitioner abandoned his work has no leg to stand on. The mere absence of an employee is not sufficient to constitute abandonment.[9] The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified.[10]

In *Agabon v. National Labor Relations Commission*,[11] this Court explained that abandonment is the deliberate refusal of an employee to resume his employment. It is a form of neglect of duty, hence, a just cause for termination of employment by the employer. For a valid finding of 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 employee has no more intention to work.[12]

Abandonment is a defense available against an employee who alleges a dismissal. Thus, for the employer "to successfully invoke abandonment, whether as a ground for dismissing an employee or as a defense, the employer bears the burden in proving the employee's unjustified refusal to resume his employment." The burden, of course, proceeds from the general rule that places the burden on the employer to prove the validity of the dismissal.[13] In this case, petitioner's institution of the complaint belies any intention to abandon his employment.

Instead, this is clearly a situation where the petitioner was neither dismissed from employment, nor did he abandon his work. The general course of action in such a case is to direct the employee to return to work and order the employer to accept the employee. However, in the recent case of *Gososo v. Leyte Lumber Yard and Hardware Inc., (Gososo)*,[14] the Court ruled that when an employee was neither found to have been dismissed nor to have abandoned, separation pay in lieu of reinstatement may be awarded if there be strained relations between the parties or a considerable length of time has passed from the filing of the complaint and the decision of the case. Here, the petitioner alleged, and the labor tribunals found, that the parties now suffer from strained relations. Thus, the award of separation pay in lieu of reinstatement is justified.

---

9 See *Garden of Memories Park and Life Plan, Inc. v. NLRC*, 681 Phil. 299, 313-314 (2012).
10 Id. at 313.
11 485 Phil. 248 (2004).
12 Id. at 278.
13 *Nightowl Watchman & Security Agency, Inc. v. Lumahan*, 771 Phil. 391, 407 (2015).
14 G.R. No. 205257, 13 January 2021.

Notably, however, the CA only awarded one-half month pay for every year of service. This has no legal basis. In *Gososo*, the Court awarded separation pay at the rate of one month salary for every of service up to the time the petitioner stopped working. The full monetary award is subject to legal interest at the rate of six percent (6%) *per annum* from the date of finality of this Resolution until fully paid.[15]

WHEREFORE, the Petition is **DENIED**. The assailed Decision dated 22 September 2020 and Resolution dated 20 January 2021 of the Court of Appeals in CA-G.R. SP No. 162679 are hereby **AFFIRMED with MODIFICATION,** such that the award for separation pay shall be computed at the rate of one (1) month salary for every year of service up to the time petitioner Benedict Q. Magalong stopped working. The total monetary award shall earn legal interest at the rate of six percent (6%) *per annum* from date of finality of this Resolution until fully paid.

The case is **REMANDED** to the Labor Arbiter for computation of the exact amount due to petitioner Benedict Q. Magalong on the basis of this Resolution.

SO ORDERED."

By authority of the Court:

TERESITA AQUINO TUAZON
Division Clerk of Court

By:

MA. CONSOLACION GAMINDE-CRUZADA
Deputy Division Clerk of Court
14 JUL 2022

[15] *Nacar v. Gallery Frames*, 716 Phil. 267, 282 (2013).

*PUBLIC ATTORNEY'S OFFICE (reg)
Special & Appealed Cases Service
Department of Justice
5th Floor, PAO-DOJ Agencies Building
NIA Road corner East Avenue
Diliman, 1104 Quezon City

*BENEDICT Q. MAGALONG (reg)
Petitioner
Ph. 3, Lower Empire, Lupang Pangako
Brgy. Payatas, Quezon City

*MORALES RISOS-VIDAL & DAROY-MORES (reg)
Counsel for Respondent
4th Floor, Goldloop Tower A
J.M. Escriva Dr., Ortigas Center
1605 Pasig City

NATIONAL LABOR RELATIONS COMMISSION (reg)
PPSTA Building, Banawe Street cor. Quezon Avenue
1100 Quezon City
(NLRC-NCR-Case No. 04-007254-18;
NLRC LAC No. 02-00080-19 [4])

JUDGMENT DIVISION (x)
Supreme Court, Manila

PUBLIC INFORMATION OFFICE (x)
LIBRARY SERVICES (x)
[For uploading pursuant to A.M. No. 12-7-SC]

OFFICE OF THE CHIEF ATTORNEY (x)
OFFICE OF THE REPORTER (x)
PHILIPPINE JUDICIAL ACADEMY (x)
Supreme Court, Manila

COURT OF APPEALS (x)
Ma. Orosa Street
Ermita, 1000 Manila
CA-G.R. SP No. 162679

*with a copy of the CA Decision dated September 22, 2020
Please notify the Court of any change in your address.
GR255499. 3/30/2022(7)URES