SUPREME COURT
THIRD DIVISION

SAMUEL SAMARCA,
***Petitioner*,**

-versus-

G.R. No. 146118
October 8, 2003

ARC-MEN INDUSTRIES, INC.,
***Respondent*.**
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D E C I S I O N

SANDOVAL-GUTIERREZ, *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the 1997 Rules of Civil Procedure, as amended, seeking to nullify and set aside the Decision[1] dated May 22, 2000 and Resolution[2] dated November 8, 2000 of the Court of Appeals in CA-G.R. SP No. 54028, entitled "Arc-Men Industries, Inc. vs. National Labor Relations Commission (Fifth Division) and Samuel Samarca."

The undisputed facts of this case are as follows:

On March 8, 1981, Samuel Samarca (herein petitioner) was employed as a laborer by Arc-Men Industries, Inc. (herein respondent). Eventually, petitioner was assigned as a machine operator at

respondent's white plastic plant where he received P130.00 a day or in its loose bonding plant with a daily salary of P138.00.

On September 26, 1993, petitioner filed an application for an emergency leave of absence on account of his son's hospitalization for acute gastroenteritis. Upon his return for work on September 29, 1993, petitioner was immediately served with a notice of respondent's order suspending him for thirty (30) days effective September 30 to October 30, 1993 for alleged violation of company Rules and Regulations, particularly Rule No. 17[3] and Rule No. 25.[4]

Feeling aggrieved, petitioner filed with the Regional Arbitration Branch No. XI at Davao City a complaint for illegal suspension against respondent and its owner, Arcadio P. Mendoza, docketed as NLRC Case No. RAB-11-10-00828-93. During the pendency of this complaint or on October 30, 1993, petitioner's 30-day suspension ended. Consequently, respondent, in a letter dated November 5, 1993, directed petitioner to report for work immediately. However, he refused, prompting respondent, on November 11, 1993, to send him a Notice to Terminate, directing him to submit, within five (5) days, a written explanation why he should not be dismissed from the service for abandonment of work.

For his part, petitioner submitted to respondent a letter-reply explaining that because of the pendency of his complaint for illegal suspension with the Labor Arbiter, he could not report for work.

Respondent, finding that the petitioner failed to submit a sufficient written explanation, decided to terminate his services effective October 31, 1993 via a notice of termination dated November 23, 1993.

On November 24, 1993, petitioner filed an amended complaint for illegal dismissal.

On March 29, 1994, the Labor Arbiter rendered a Decision[5] declaring the dismissal of petitioner for cause and upholding its validity, thus:

> "WHEREFORE, in view of all the foregoing, judgment is hereby rendered DISMISSING the above-entitled case for lack of merit and declaring the dismissal of complainant as valid and for cause.
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> "Complainant is, however, entitled to his proportionate 13th month pay for 1993, subject to computation by respondent AMII.
>
> "SO ORDERED."

On appeal, the National Labor Relations Commission (NLRC), in a Resolution[6] dated August 21, 1995, reversed and set aside the Labor Arbiter's Decision, ordering respondent to reinstate petitioner to his former position without loss of seniority rights and to pay his backwages from the date of dismissal up to his actual reinstatement but limited to a maximum period of three (3) years. The NLRC held:

> "Now brought to focus is the instant complaint for illegal dismissal where respondents bear the burden of proving that it was for just cause. For in labor law determinations, the employer shoulders the burden of proof to show that the dismissal is valid and legal. (Manggagawa ng Komunikasyon ng Pilipinas vs. NLRC, 194 SCRA 573).
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> "We note that respondents, in their notice to terminate dated November 11, 1993, gave complainant five (5) days to show cause why he should not be terminated from employment on the ground of abandonment of work. (Records, Vol. 1, p. 39). In a reply thereto, complainant informed respondents he had filed a case of illegal suspension against them with the NLRC. Consequently, respondents served complainant a notice of termination dated November 23, 1994 notifying the latter that effective October 31, 1993 he was deemed to have abandoned his work and as of that date was considered terminated. Accordingly, on November 24, 1994, complainant amended his complaint from illegal suspension to illegal dismissal.
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> "Respondents' defense of abandonment must fail. It is belied by the fact that complainant had instituted the complaint for illegal

dismissal the day after he was dismissed. It would be illogical for him to leave his job and later on file said complaint.

"Clearly, there is no showing that complainant deliberately refused to continue his employment without a justifiable reason. Complainant initially instituted a complaint for illegal suspension wherein he prayed for backwages as he thought he was illegally suspended from work. We can not readily infer abandonment even if sometime during the pendency of the previous case he refused to heed the warning given by respondent while believing that he was suspended through no fault of his.

"Considering the circumstances of this case, We hold that complainant is entitled to reinstatement with backwages as it is clearly established that he did not abandon his work, in the absence of clear and deliberate intent to discontinue his employment without returning back. He was only compelled to leave the premises when he was ordered suspended and which suspension he had promptly questioned."

Respondent filed a motion for reconsideration but was denied with finality by the NLRC in a Resolution[7] dated April 19, 1996.

On May 13, 1996, respondent filed with this Court a Petition for *Certiorari*. In a Resolution dated June 23, 1999, this Court referred the petition for disposition to the Court of Appeals.

On May 22, 2000, the Court of Appeals rendered a Decision reversing the Resolutions of the NLRC and reinstating the Decision of the Labor Arbiter. In sustaining the validity and legality of petitioner's termination from employment, the Appellate Court made the following pronouncements:

"We agree with the petitioner and the OSG that the public respondent gravely abused its discretion when it ordered the reinstatement of the private respondent and the payment of backwages, for the following reasons:

"Firstly, there was just cause for terminating the employment of the private respondent under Article 282 of the Labor Code, which states that an employer may terminate an employment for serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with this work, as well as for causes analogous thereto.

"In the instant case, the private respondent failed to report to work after the expiration of his 30-day suspension. Even after the petitioner formally advised him to resume working five (5) days later, the private respondent still refused to go back to work. After the petitioner sent a Notice to Terminate to the private respondent on November 11, 1993, the latter wrote on the said notice that he has already questioned his alleged illegal suspension before the labor arbiter, and that the petitioner should report immediately to its company attorney about the second hearing.

x x x

"Secondly, the contention of the respondents that the private respondent cannot be deemed to have abandoned his work in light of his immediate filing of a case for illegal dismissal cannot be sustained. We are aware of such ruling of the Supreme Court that the filing of the complaint for illegal dismissal negates the charge of abandonment. However, we are of the view that such doctrine must be taken into consideration with the other factors present in each case.

x x x

"In contrast, in the case at bar, except for his amendment of his complaint for illegal suspension to illegal dismissal, the private respondent committed no other overt actions indicating his desire to return back to work. We hold that both elements constituting abandonment are present, considering the absence of the private respondent from his place of employment after the expiration of his suspension without any explanation or application for leave, and his subsequent refusal to go back to

> work. It should be emphasized that private respondent was given several opportunities by the petitioner to explain his continuing absences, but he did not. He did not give any reason for his absence when he was ordered to resume workings on November 5, 1993. He did not explain in writing why he should not be terminated for abandonment of work after having received a Notice to Terminate dated November 11, 1993. If he thought that his returning to work would jeopardize his case for illegal suspension, he could have informed the petitioner about such thinking, or he could have requested for an investigation regarding the charge of abandonment. But he did not. Moreover, a co-worker has reported that the private respondent expressed to him the latter's intention not to return to work anymore. Such consistent, overt acts are manifestations of a lack of interest to report back to work.
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> x x x"

On June 27, 2000, petitioner filed a Motion for Reconsideration but was denied in a Resolution dated November 8, 2000.

Hence, this petition for review on *certiorari*.

Petitioner contends that respondent failed to prove that he abandoned his work; and that the Court of Appeals and the Labor Arbiter erred in considering his alleged insubordination and/or willful disobedience as valid causes for his dismissal from the service inasmuch as respondent's reason for dismissing him is abandonment.

As an overture, clear and unmistakable is the rule that this Court is not a trier of facts.[8] Just as well entrenched is the doctrine that it is not the function of this Court to assess and evaluate the facts and the evidence all over again, our jurisdiction berg generally limited to reviewing errors of law that might have been committed by the appellate court. Nevertheless, since the factual findings of the Court of Appeals are at variance with those of the NLRC, we are compelled to review the records presented in both the Court of Appeals and the said labor tribunal.[9]

We agree with petitioner that respondent has failed to substantiate its claim that he abandoned his work and that, therefore, the termination of his services is an unlawful sanction.

Jurisprudence holds that for abandonment of work to exist, it is essential (1) that the employee must have failed to report for work or must have been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship manifested by some overt acts. Deliberate and unjustified refusal on the part of the employee to go back to his work post and resume his employment must be established. Absence must be accompanied by overt acts unerringly pointing to the fact that the employee simply does not want to work anymore. And the burden of proof to show that there was unjustified refusal to go back to work rests on the employer.[10]

We hold that the above twin essential requirements for abandonment to exist are not present in the case at bar.

Petitioner's absence is not without a justifiable reason. It must be recalled that upon receipt of the Notice to Terminate by reason of abandonment, petitioner sent respondent a letter explaining that he could not go back to work because of the pendency of his complaint for illegal suspension. And immediately after he was dismissed for "abandonment of work", he lost no time to amend his complaint to illegal dismissal. This alone negates any intention on his part to forsake his work. It is a settled doctrine that the filing of a complaint for illegal dismissal is inconsistent with the charge of abandonment, for an employee who takes steps to protest his dismissal cannot by logic be said to have abandoned his work.[11]

Moreover, we find no indication that petitioner has shown by some overt acts his intention to sever the employer-employee relationship. The affidavit of Sergio L. Moreno stating that petitioner expressed his intention not to report for work anymore is plain hearsay. We are aware of the schemes employed by employers to extract favorable statements from their employees entice them to testify in their favor for some financial considerations or promises.

Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts. To constitute abandonment, there must be clear proof of deliberate and unjustified intent to sever the employer-employee relationship. Clearly, the operative act is still the employee's ultimate act of putting an end to his employment.

Settled is the rule that mere absence or failure to report for work is not tantamount to abandonment of work. Even the failure to report for work after a notice to return to work has been served does not necessarily constitute abandonment nor does it bar reinstatement,[12] as correctly held by the NLRC.

Finally, as prudently observed by the NLRC, it was unlikely that petitioner had abandoned his job for no reason at all considering the hardship of the times. To reiterate, if petitioner had truly forsaken his job, he would not have bothered to file an amended complaint for illegal dismissal against respondent and prayed for reinstatement.

In sum, we find that petitioner did not abandon his job but was illegally dismissed by respondent. An employee who is unjustly dismissed from work is entitled to reinstatement without loss of seniority rights and other privileges as well as to his full backwages, inclusive of allowances, and to other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement.[13]

However, the circumstances obtaining in this case do not warrant the reinstatement of petitioner. Antagonism caused a severe strain in the relationship between him and respondent. A move equitable disposition would be an award of separation pay equivalent to one (1) month's pay for every year of service. (This is in addition to his full backwages, allowances and other benefits).

WHEREFORE, the Petition is **GRANTED**. The Decision dated May 22, 2000 and Resolution dated November 8, 2000 of the Court of Appeals are hereby **REVERSED** and **SET ASIDE**. The Resolution dated August 21, 1995 of the NLRC is **AFFIRMED** with **MODIFICATION** in the sense that respondent is hereby ordered to pay petitioner (1) his separation pay (in lieu of his reinstatement) equivalent to one month pay for every year of service; and (2) his full

backwages inclusive of allowances and other benefits or their monetary equivalent from his dismissal up to the time of his supposed actual reinstatement.

SO ORDERED.

Puno, Panganiban and Carpio Morales, *JJ.*, concur.
Corona, *J.*, is on leave.

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[1] Annex "R", Petition for Review, Rollo at 144-152.
[2] Annex "T", id. at 167.
[3] Making false, vicious and malicious utterances or statements, prejudicial to the company, its business, officers and employees.
[4] Failure or refusal to cooperate in any manner feasible with any superior or fellow employee in the performance of the latter's duty.
[5] Annex "J," Petition for Review, Rollo at 56-64.
[6] Annex "M," id. at 82-89.
[7] Annex "O," id. at 99-100.
[8] JMM Promotions and Management Inc. vs. CA, G.R. No. 139401, October 2, 2002.
[9] See Anflo Management and Investment Corp. vs. Rodolfo Bolanio, G.R. No. 141608, October 4, 2002.
[10] MSMG-UWP vs. Ramos, G.R. No. 113907, February 28, 2000, 326 SCRA 428.
[11] KAMS International, Inc. vs. NLRC, G.R. No. 128806, September 28, 1999, 315 SCRA 316.
[12] Philippine Industrial Security Agency Corp. vs. Virgilio Dapiton, G.R. No. 127421, December 8, 1999, 320 SCRA 124, citing Samahan ng mga Manggagawa sa Bandolino-LMLC vs. NLRC, 275 SCRA 633 (1997).
[13] Imelda B. Damasco vs. NLRC, G.R. Nos. 115755 & 116101, December 4, 2000, 346 SCRA 714.
