Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

CONCRETE SOLUTIONS, INC./PRIMARY STRUCTURES CORPORATION, represented by ANASTACIO G. ARDIENTE, JR.,	**G.R. No. 177812**
	Present:
Petitioners,	VELASCO, JR., *J., Chairperson,* PERALTA, ABAD, MENDOZA, and
- versus -	LEONEN, *JJ.*
	Promulgated:
ARTHUR CABUSAS, Respondent.	JUN 19 2013

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D E C I S I O N

PERALTA, *J.*:

Assailed in this petition for review on *certiorari* is the Decision[1] dated December 21, 2006 of the Court of Appeals, Cebu City, in CA-G.R. SP No. 00685, which affirmed the NLRC decision finding that respondent was illegally dismissed. Also assailed is the CA Resolution[2] dated April 24, 2007 denying petitioners' motion for reconsideration.

The antecedent facts of the case are as follows:

Respondent Arthur Cabusas (respondent) was hired by petitioner Primary Structures Corporation (PSC) as transit mixer driver for petitioner Concrete Solutions Inc. (CSI) – Batching Plant Project. The appointment

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[1] Penned by Associate Justice Pampio A. Abarintos, with Associate Justices Isaias P. Dicdican and Agustin S. Dizon, concurring; *rollo*, pp. 137-146.

[2] *Id.* at 148-149.

letter[3] dated June 27, 2000, which was signed by petitioner PSC's Human Resource Division Assistant with respondent's conformity, provided, among others: that respondent was hired for the period from June 28, 2000 until June 23, 2001; the status of his employment was that of a project employee and, as such, his employment was co-terminus with the completion of the project or any phase thereof; that upon completion of the particular project or phase, he was free to seek other employment of his choice; and, that within the duration of the work, petitioners shall have the right to terminate his employment without any liability on their part if his performance did not meet the company standards, or if he violated petitioners' rules and regulations.[4]

On February 16, 2001, a report reached petitioners that at around 5 o'clock in the afternoon of that day, respondent, as the driver of Transit Mixer 13, unloaded less than a cubic meter of concrete mix at Cabancalan, Mandaue City, more than two kilometers away from its project site located at Wireless, Mandaue City, instead of returning the excess concrete mix to the plant; and that respondent sold the excess concrete mix to the residents of the place where he unloaded the same.

On March 7, 2001, petitioners' Administrative Assistant, Carlo E. Gimena, submitted an Incident Report[5] where he stated that it is a company policy that washing/cleaning of drums must be done inside petitioners' plant to maximize the utilization of concrete residues for precast use; and nearly a cubic meter of concrete mix as excess would have been a substantial quantity for such purpose.

On March 8, 2001, petitioners' Manager, Anastacio G. Ardiente, Jr., required respondent to explain in writing[6] why he should not be meted with a disciplinary action for the alleged act of theft or dishonesty under the company's Code of Conduct and Discipline. In his explanation,[7] respondent stated that he threw away the concrete mix at Cabancalan, Mandaue City, instead of turning them over to the plant as he will wash the transit mixer at A.S. Fortuna, Mandaue City. Respondent was meted a three (3)-day suspension effective March 20, 2001 to March 22, 2001.[8]

On April 19, 2001, petitioners received an information that respondent allegedly took the company's plastic drum for personal gain. In his Incident Report[9] dated April 20, 2001, petitioners' Administrative Assistant Gimena reported that at 10:00 a.m. of April 19, 2001, respondent took an empty

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3 *Id.* at 178.
4 *Id.*
5 *Id.* at 179-A.
6 *Id.* at 179.
7 *Id.* at 180.
8 *Id.* at 181.
9 *Id.* at 186.

plastic drum and hid it in the Transit Mixer 13 he was driving on his way to deliver concrete mix to Ayala Heights; and that respondent even admitted the commission of such act which another transit mixer driver could attest to. Gimena recommended further investigation to include the security guards on duty at the time of the incident.[10] Respondent was asked to explain why no disciplinary action should be meted on him for such violation, and to attend the formal investigation on April 26, 2001.[11]

In his written explanation, respondent denied the accusation against him and claimed that he could not had driven the transit mixer out of the company's premises without passing through the guard house; hence, it was impossible to steal the plastic drum without the knowledge of the guard. He personally delivered his letter of explanation to the company, but was refused entry by the security guards. Respondent was placed under preventive suspension from April 20, 2001 to April 27, 2001 pending investigation of his case.[12]

The administrative investigation which was scheduled on April 26, 2001 was postponed to May 4, 2001 and respondent's preventive suspension was extended up to May 5, 2001. Respondent alleged that after the investigation on May 4, 2001, he and his counsel had asked for the result of the investigation and were waiting for such result.

While petitioners were deliberating on the violation committed by respondent, they went over the latter's 201 file and discovered that he appeared not to be registered with the Social Security System as the SSS number he submitted was that of another person in the name of Alex Cabusas.[13] Thus, petitioners needed clarifications from respondent, but the latter had been absent since May 6, 2001. On May 25, 2001, petitioners sent respondent a telegram,[14] to wit: "*You have been absent without official leave since May [6], 2001. Please notify CSI as soon as possible*."

On June 12, 2001, petitioners, thru Manager Ardiente, sent respondent a termination letter[15] reading as follows:

> Starting on May 6, 2001, you were absent from work without filing a Leave of Absence. A Notice of Abandonment was sent to you on May 25, 2001 via telegram. Likewise, you were required to report or notify the company as soon as possible. However, two weeks already elapsed from the time the notice was sent to you but you continued defying said request. Due to this, we are constrained to TERMINATE your services effective on the date you abandoned

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10 *Id.*
11 *Id*. at 185.
12 *Id*. at 184.
13 *Id.* at 194.
14 *Id.* at 688.
15 *Id*. at 196.

> your work with a strong belief that you are no longer interested to come back to your work anymore. [16]

Petitioners submitted to the Department of Labor and Employment an Establishment Termination Report[17] indicating that the project where respondent was assigned was already completed and also that respondent was terminated for being absent without leave (AWOL).

Earlier, however, on May 30, 2001, respondent had filed with Regional Arbitration Branch No. VII of Cebu City a Complaint[18] for unfair labor practice, illegal dismissal, non-payment of holiday pay, premium pay for holiday, rest day, night shift premium, separation pay and moral damages against petitioners. In his position paper,[19] respondent alleged among others: that it was not true that he went on AWOL. He alleged that when the administrative investigation on his alleged theft of company property was conducted and terminated on May 4, 2001, his counsel asked to be furnished a copy of the result of the investigation; that since then, they eagerly waited for such result, thus they were surprised to receive a telegram on May 26, 2001 where he was said to have been AWOL since May 5, 2001; that immediately upon receipt of the telegram, respondent went to petitioners' office, but he was refused entry for the reason that he was AWOL; that there was no valid cause for his dismissal and petitioners found the lame excuse of declaring him AWOL if only to create a semblance of justification for his unlawful termination; that he had previously tendered a follow-up letter for a copy of the resolution of the administrative investigation that was terminated on May 4, 2001, however, petitioners unceremoniously refused to receive a copy of the letter he personally delivered, thus his counsel was compelled to send the letter by way of registered mail on May 29, 2001;[20] that petitioners did not reply to his letter and did not even furnish his counsel with a copy of the suspension letter; that petitioners' imputation that he committed dishonest acts was founded on falsehood and fabrications as no evidence was presented during the so-called administrative hearing, except the self-serving and perjured statements of petitioners' employees who were merely cajoled into making unfounded stories. Respondent had prayed for his reinstatement, among others.

Petitioners, through counsel, submitted their position paper refuting respondent's allegations.

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16 *Id.*
17 *Id.* at 197.
18 *Id*. at 177-A.
19 *Id.* at 491-500.
20 Records, p. 41.

On September 26, 2001, the Labor Arbiter (LA) rendered his Decision,[21] the dispositive portion of which reads:

> WHEREFORE, the foregoing premises considered, judgment is hereby rendered DISMISSING this case for lack of merit. Respondents are, however, directed to pay complainant's proportionate 13th month pay in the amount of ₱1,603.33.
>
> SO ORDERED.[22]

The LA found that respondent was validly dismissed from his employment as he abandoned his job; that he failed to report for work despite the directive through a telegram for him to report back to work. The LA was not convinced of respondent's claim that immediately upon receipt of the telegram, he went to petitioners' office but he was refused entry for the alleged reason that he was AWOL since no evidence was presented to substantiate the same; and that his credibility was doubtful since he claimed that he was dismissed on May 4, 2001, however the records showed that he was being investigated for stealing plastic drums on that day; and that he furnished petitioners with an SSS number which did not belong to him.

As regards respondent's money claims, the LA ruled that since he had worked from January 2, 2001 to May 4, 2001, he was entitled to a proportionate amount of his 13th month pay equivalent to 4 months. However, his claim for salary differential due to underpayment was denied since based on the payroll, he was a paid a salary of ₱185.00 per day which was the prevailing minimum wage at the time his services were rendered.

Respondent filed an appeal with the National Labor Relations Commission (NLRC) to which petitioners filed their Comment thereto.

On January 12, 2005, the NLRC rendered its decision,[23] the decretal portion of which reads:

> **WHEREFORE**, premises considered, the decision of the Labor Arbiter dated 26 September 2001 is **MODIFIED**, to wit:
>
> 1. Ordering the respondents to reinstate the complainant and to pay his full backwages computed from 4 May 2001 up to the time of his actual reinstatement; and
> 2. Ordering respondents to pay complainant of his 13th month pay in the amount of ₱1,603.33 as awarded by the Labor Arbiter.

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21 *Rollo*, pp. 151-159; Per LA Jose G. Gutierrez.

22 *Id*. at 158-159.

23 *Id.* At 160-168; Penned by Commissioner Oscar S. Uy concurred in by Commissioners Gerardo C. Nograles and Aurelio D. Menzon.

SO ORDERED.[24]

In ruling that there was no abandonment, the NLRC found that respondent's absence was not without justifiable reason since petitioners did not sufficiently make known to respondent that he should report for work on May 6, 2001 because the alleged preventive suspension order was unwritten; that the telegram sent to respondent on May 26, 2001 did not direct him to report for work but merely stated "you have been absent without official leave since May 5, 2001, please notify CSI as soon as possible" and that even before respondent was dismissed for abandonment of work on June 12, 2001, he had already filed a complaint for illegal dismissal on May 30, 2001 which negated any intention on his part to forsake his work.

The NLRC also found that upon receipt of the telegram on May 26, 2001, respondent went to petitioners' office but he was refused entry for the alleged reason that he was AWOL which showed that he was constructively dismissed. However, it found no credence to petitioners' allegation that respondent was a project employee applying the principle that where from circumstances it is apparent that periods have been imposed to preclude acquisition of tenurial security by the employee, they should be disregarded for being contrary to public policy; and that the allegation that respondent was not registered with the SSS and the number he submitted to the company was that of Alex Cabusas has no bearing in this case and did not detract from the fact that he was illegally dismissed from employment.

Petitioners' motion for reconsideration was denied in a Resolution[25] dated March 10, 2005.

Petitioners filed with the CA a petition for *certiorari* under Rule 65 assailing the NLRC rulings for having been issued with grave abuse of discretion amounting to lack of jurisdiction. Respondent filed his comment thereto and petitioners filed their reply.

On December 21, 2006, the CA rendered its assailed decision affirming *in toto* the NLRC decision.

Petitioners' motion for reconsideration was denied in a Resolution dated April 24, 2007.

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24 *Id*. at 167-168.

25 *Id.* at 169-170.

The issue for resolution is whether respondent deliberately abandoned his work which is a just cause for his dismissal or whether he was illegally dismissed by petitioners.

It must be stressed that in petitions for review under Rule 45, only questions of law must be raised. Whether respondent abandoned his job or was illegally dismissed are questions of fact better left to quasi-judicial agencies to determine.[26] It is elementary rule that the Supreme Court is not a trier of facts and this doctrine applies with greater force in labor cases.[27] In exceptional cases, however, the Court may be urged to probe and resolve factual issues when the LA and the NLRC came up with conflicting positions.[28] Here, the findings of the Labor Arbiter, on one hand, and the NLRC and the Court of Appeals, on the other, are conflicting, thus we are constrained to determine the facts of the case.[29]

It is well settled that in termination cases, the burden of proof rests upon the employer to show that the dismissal was for a just and valid cause, and failure to discharge the same would mean that the dismissal is not justified and, therefore, illegal.[30] In this case, petitioners claim that respondent was validly dismissed as he abandoned his work as shown by the following circumstances, to wit: He did not go back to work on May 6, 2001, *i.e*, after his preventive suspension expired on May 5, 2001; he did not report to work despite receipt of the telegram on May 25, 2001 stating that "he was absent without official leave since May 5, 2001, and to notify CSI as soon as possible," but instead , through his lawyer, sent a letter asking for a copy of the result of the investigation; despite not being given the result of the investigation, respondent still did not bother to report back to work; and the complaint he filed with the LA did not pray for reinstatement.

To constitute abandonment, two elements must concur, to wit: (1) the failure to report for work or absence without valid or justifiable reason; and (2) a clear intention to sever the employer-employee relationship, with the second element as the more determinative factor and being manifested by some overt acts.[31] Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts.[32] To be a valid cause for dismissal for abandonment, there must be clear proof of deliberate and unjustified intent to sever the employer-employee relationship.[33] Clearly, the operative act is still the employee's ultimate act of putting an end to his employment.[34]

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26 *Mame v. Court of Appeals*, 549 Phil. 337, 346 (2007).

27 *RAndrada v. Agemar Manning Agency Inc.*, G.R. No. 194758, October 24, 2012.

28 *Id*.

29 *RBC Cable Master System v. Baluyot*, G.R. No. 172690, January 20, 2009, 576 SCRA 668, 677.

30 *Faeldonia v. Tong Yak Groceries*, G. R. No. 182499, October 2, 2009, 602 SCRA 677.

31 *Pure Blue Industries, Inc. v. NLRC*, 337 Phil. 710, 717 (1997), citing *Labor v. NLRC*, G.R. No. 110388, September 14, 1995, 248 SCRA 183 .

32 *Id*. at 718, citing *Cañete v. NLRC*, 320 Phil. 313 (1995) .

33 *Hodieng Concrete Products v. Emilia*, G.R. No. 149180, February 14, 2005, 451 SCRA 249.

34 *Id.*

We find that the elements of abandonment are lacking. The CA did not commit any reversible error in affirming the NLRC's decision that respondent was illegally dismissed for petitioners' failure to substantiate their claim that the former abandoned his work. The circumstances obtaining in this case do not indicate abandonment.

Respondent explained that his absence from work was due to the fact that he and his counsel had asked and were waiting for a copy of result of the investigation on his alleged act of theft or dishonesty conducted on May 4, 2001 but were not given at all. We find his absence from work not sufficient to establish that he already had intention of abandoning his job. Besides, settled is the rule that mere absence or failure to report for work is not tantamount to abandonment of work.[35] Even the failure to report for work after a notice to return to work has been served does not necessarily constitute abandonment. [36] In fact, when respondent received petitioners' telegram on May 25, 2001 stating that "he was absent without official leave since May 5, 2001, and to notify CSI as soon as possible", he went to petitioners premises but was refused entry for reason that he was AWOL. He also tried to give them a letter dated May 26, 2001 from his counsel requesting for a copy of the resolution of the investigation conducted on May 4, 2001 but petitioners refused to receive the same which prompted respondent's counsel to send the letter dated May 26, 2001 to petitioners by registered mail on May 29, 2001. The fact of petitioners' refusal to receive the letter was stated in that letter but they never refuted the same which in effect, negates petitioners' claim that respondent did not comply with the telegram sent to him.

There is no showing of respondent's intent to sever the employer-employee relationship. It is also notable that when respondent was refused entry to petitioners' premises and the letter of former's counsel was refused acceptance by the latter, there is already constructive dismissal which led respondent to seek recourse by filing an illegal dismissal case against petitioners on May 30, 2001. The proximity of respondent's filing of the complaint from the time he received the telegram and was refused entry to petitioners' premises showed that he had the least intention of abandoning his job. Well-settled that the filing by an employee of a complaint for illegal dismissal with a prayer for reinstatement is proof enough of his desire to return to work, thus, negating the employer's charge of abandonment.[37] As correctly held by the CA:

> Besides, respondent Cabusas immediately filed on 30 May 2001 a complaint for illegal dismissal. An employee who forthwith takes steps to protest his layoff cannot by any stretch of imagination be said to have

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35 *Samarca v. Arc-Men Industries, Inc.*, 459 Phil. 506, 516 (2003); *Aliten v. U Need Lumber and Hardware*, G.R. No. 168931, September 12, 2006, 501 SCRA 577.

36 *Id.*

37 *New Ever Marketing, Inc v. Court of Appeals*, G.R. No. 140555, July 14, 2005, 463 SCRA 284, 296.

> abandoned his work and the filing of the complaint is proof enough of his desire to return to work, thus negating any suggestion of abandonment. The Supreme Court pronounced in the case of *Judric Canning Corporation v. Inciong*, that "it would be illogical for the respondent to abandon his work and then immediately file an action seeking his reinstatement." Verily, Cabusas' act of contesting the legality of his dismissal ably supports his sincere intention to return to work, thus negating the stand of petitioner that he had abandoned his job.[38]

There is also no merit to petitioners' claim that respondent did not ask for reinstatement. While in his complaint filed with the LA, respondent failed to ask for reinstatement however, in his position paper, he specifically prayed for reinstatement.[39] which showed that he had no intention of abandoning his work.

Petitioners' claim that respondent's violations of company rules also warranted his termination on account of loss of trust and confidence deserves scant consideration since the latter's dismissal was not due to those alleged dishonest acts but due to abandonment. As the CA correctly held:

> x x x It bears stressing that petitioner CSI's letter of 12 June 2001 addressed to respondent Cabusas merely sought an explanation from the latter on his alleged absence without official leave, or in short, his alleged abandonment, and informed him that such absence compelled them to terminate him from his employment. Nothing is mentioned about dishonesty or any other misconduct on the part of respondent. If indeed respondent was guilty of both abandonment and dishonesty or misconduct, then petitioners should have put them down in black and white. Petitioners had already conducted an administrative investigation on such matter and nothing can prevent them from citing its also as basis of terminating Cabusas if they were really convinced that the latter committed such an infraction. Thus, it is illogical for us to touch on the matter of the alleged dishonest acts of respondent since it was not the basis stated in the notice of termination sent to Cabusas.[40]

The next question is whether the CA committed a reversible error in affirming the NLRC's award of respondent's reinstatement and backwages.

Petitioners contend that respondent was a project employee and the project to which he was hired was already completed, thus he could not be reinstated anymore.

Project employee is one whose employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the

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38 *Rollo*, p. 144.
39 *Id.* at 497.
40 *Id.* at 145.

work or services to be performed is seasonal in nature and the employment is for the duration of the season.[41] We held that the length of service of a project employee is not the controlling test of employment tenure but whether or not the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee.[42]

We rule that respondent is a project employee. His appointment letter showed that he was hired as transit mixer driver for the Concrete Solutions Inc. (CSI) – Batching Plant Project for the period from June 28, 2000 until June 23, 2001. The same letter provided that he was a project employee whose employment was co-terminus with the completion of the project or any phase thereof and upon completion of the particular project or phase, he was free to seek other employment of his choice. There is no evidence showing that respondent did not sign the conforme part of the appointment letter voluntarily. Hence, respondent was bound by the provisions in the appointment letter. Moreover, there is also no showing that the period fixed in the appointment letter was imposed to preclude acquisition of tenurial security by the employee and should be disregarded for being contrary to public policy as ruled by the NLRC since no evidence exists on the record to support such conclusion.

Considering that respondent was dismissed prior to the expiration of the duration of his employment and without a valid or just cause, his termination was therefore illegal. However, respondent could no longer be reinstated since the project he was assigned to was already completely finished. However, we find that he is entitled to the salary corresponding to the unexpired portion of his employment.[43] Respondent is entitled to the payment of his salary from the time he was not admitted back to work on May 26, 2001 up to June 23, 2001, the expiration of his employment contract.

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41 *D.M. Consunji, Inc. v. NLRC*, 401 Phil. 635, 639 (2000), citing Article 280 of the Labor Code which reads:

> Regular and Casual Employment. – The provisions of written agreement to the contrary notwithstanding and regardless of the oral agreement of the parties, an employment shall be deemed to be regular where the employee has been engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer, except where the employment has been fixed for a specific project or undertaking the completion or termination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season.
>
> An employment shall be deemed to be casual if it is not covered by the preceding paragraph: Provided, That, any employee who has rendered at least one year of service, whether such service is continuous or broken, shall be considered a regular employee with respect to the activity in which he is employed and his employment shall continue while such activity exists.

42 *Id*. at 641, citing See *Hilario Rada v. NLRC*, G.R. No. 96078, January 9, 1992, 205 SCRA 69.

43 *Id*. at 644.

Finally, petitioners cannot raise for the first time their claim that it was only petitioner PSC which was respondent's employer and that petitioners PSC and CSI are two different corporate entities. Notably, this issue had not been submitted for determination before the LA, NLRC or the CA but only now in this petition. The settled rule is that issues not raised or ventilated in the court *a quo* cannot be raised for the first time on appeal as to do so would be offensive to the basic rules of fair play and justice.[44]

WHEREFORE, the Decision dated December 21, 2006 and the Resolution dated April 24, 2007 of the Court of Appeals, Cebu City, in CA-G.R. SP No. 00685 are hereby **AFFIRMED** with **MODIFICATION** that the order for respondent's reinstatement is deleted and petitioners are **DIRECTED** to pay respondent his salary from May 26, 2001 up to June 23, 2001 only.

SO ORDERED.

DIOSDADO M. PERALTA
Associate Justice

WE CONCUR:

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson

ROBERTO A. ABAD
Associate Justice

JOSE CATRAL MENDOZA
Associate Justice

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

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[44] *R.P. Dinglasan Construction, Inc. v. Atienza*, G.R. No. 156104, June 29, 2004, 433 SCRA 263, 271. (2004).

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

PRESBITERO J. VELASCO, JR.
Associate Justice
Chairperson, Third Division

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice