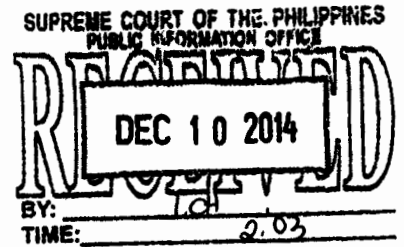




Republic of the Philippines
Supreme Court
Manila
THIRD DIVISION



NOTICE

Sirs/Mesdames:

Please take notice that the Court, Third Division, issued a Resolution dated November 17, 2014, which reads as follows:

“G.R. No. 211102 (BDO Unibank, Inc. vs. Arnold R. Echevarri). – For review is the Decision¹ dated May 30, 2013 and Resolution² dated January 20, 2014 of the Court of Appeals (CA) in CA-G.R. SP No. 119382. The CA set aside the Decision³ dated October 15, 2010 of the National Labor Relations Commission (NLRC) in NLRC-NCR Case No. 05-07519-09 which declared that respondent Arnold R. Echevarri (Echevarri) was dismissed for just cause by petitioner BDO Unibank, Inc. (BDO).

Antecedents

Echevarri was initially employed by BDO on November 2, 2005. He then held the position of Specialist I for BDO’s Property Management Division with a monthly salary of ₱35,000.00. In recognition of his performance, his monthly compensation was subsequently increased to ₱38,400.00 on March 1, 2007.

In January of 2008, Echevarri was assigned at BDO’s Car Depot in Baesa, Quezon City. On March 1, 2008, his position was reclassified as Junior Assistant Manager I and his salary was increased to ₱42,200.00 monthly. On September 29, 2008, he became a Real Estate Administrator covering the areas of Cavite and Batangas.

On October 14, 2008, Echevarri went to BDO’s Car Depot in Baesa. He pulled out a car battery from a foreclosed Toyota Innova and swapped it with the battery of his own car. He returned the pulled out battery on October 30, 2008.

¹ Penned by Associate Justice Francisco P. Acosta, with Associate Justices Fernanda Lampas Peralta and Angelita A. Gacutan, concurring; *rollo*, pp. 26-35.

² Id. at 37-38.

³ Id. at 239-251.

On November 3, 2008, Echevarri received a notice asking him to explain about the battery-swapping incident. On the same day, he submitted his reply⁴ admitting the act of borrowing the car battery and offering his apologies. He explained that on October 14, 2008, his car broke down due to a discharged battery while he was dropping off his kids in school. He called BDO's Car Depot in Baesa to request for help in restarting his car's engine and to inform the officers-in-charge that he was on his way to borrow a battery as he cannot then afford to buy a new one. He was able to purchase his own battery on October 23, 2008. However, it was only on October 30, 2008 that he got the chance to return the battery which he borrowed because he got busy with his new assignment inspecting properties in Cavite and Batangas.

Subsequently, Echevarri received from BDO's Cases Review Committee a Memorandum⁵ dated February 18, 2009, directing him to file a written explanation on why he should not be terminated for (a) serious misconduct and willful breach of trust, as provided for in the Labor Code, and (b) violating Section 3⁶ of BDO's Code of Conduct.

On February 26, 2009, Echevarri reiterated that he had no deliberate intent to misappropriate the car battery. He merely borrowed the battery with the knowledge of other bank personnel and the guard on duty.⁷

On April 29, 2009, BDO's Senior Vice President/Human Resource Management Head Perla F. Toledo (Toledo) issued a Decision Memo⁸ terminating Echevarri from employment on the grounds of serious misconduct and willful breach of trust as provided for in the Labor Code, and violation of Section 3 of BDO's Code of Conduct. Echevarri's Appeal⁹ dated May 12, 2009, was denied.

On May 19, 2009, Echevarri filed with the NLRC a complaint against BDO and Toledo for illegal dismissal, non-payment of salary and 13th month pay, moral and exemplary damages, and attorney's fees with prayer for reinstatement and full backwages.

On February 15, 2010, the Labor Arbiter rendered a Decision,¹⁰ the dispositive portion of which reads:

⁴ Id. at 100.

⁵ Id. at 39-40, 101-102.

⁶ Items (a) to (j) were enumerated. Items (h) 2.3.1 and 2.3.4 read as follows:

"Stealing, misappropriating, embezzling, damaging, destroying, substituting Bank funds or property;" and

"Unauthorized removing from bank premises, concealing or deliberately misplacing Bank property;"

⁷ *Rollo*, p. 103.

⁸ Id. at 104.

⁹ Id. at 105-106.

¹⁰ Issued by Labor Arbiter Thelma M. Concepcion; id. at 150-158.

WHEREFORE, on the basis of the foregoing premises, the instant complaint is deemed impressed with merit. Respondents are accordingly ordered to reinstate the complainant within ten (10) days upon receipt of this Decision and held liable to pay his full backwages and other benefits reckoned from the time of its withholding up to actual reinstatement; to his unpaid wages and 13th month pay, the computation of which is shown below:

1)	Backwages:		
	Basic Wage:		
	05/09 - 02/15/10 = 9.0 mos.		
	₱42,200 x 9.0 =	₱379,800.00	
	13 th Month Pay:		
	₱379,800.00/12 =	<u>31,650.00</u>	₱411,450.00
2)	Proportionate 13 th Month Pay:		
	01/01/09 - 04/30/09 = 4.0 mos.		
	₱42,200.00 x 4 / 12 =		<u>14,066.66</u>
	GRAND TOTAL		₱425,516.66

All other claims are ordered dismissed for lack of merit.

SO ORDERED.¹¹

On October 15, 2010, the NLRC's Fourth Division granted the appeal filed by BDO.¹² The decretal portion of the NLRC decision states:

WHEREFORE, premises considered, the Memorandum of Appeal filed by the respondents [BDO and Toledo] is partly **GRANTED**, in that, the termination of [Echevarri] from service is declared legal and that the order of reinstatement and payment of backwages is set aside.

The award for complainant's proportionate 13th month pay is affirmed.

SO ORDERED.¹³

On May 30, 2013, the CA found merit in Echevarri's Petition for *Certiorari*¹⁴ and ordered the following:

WHEREFORE, premises considered, the instant Petition is hereby **GRANTED** with modification. The Decision of the NLRC dated 15 October 2010 is hereby **ANNULLED** and **SET ASIDE**. The Decision dated 15 February 2010 of the Labor Arbiter is hereby **REINSTATED** and **MODIFIED** providing for [Echevarri's] suspension from the service for a period of **one (1) month without pay**; hence, [Echevarri] is entitled to reinstatement, backwages and benefits computed from the date of dismissal until his reinstatement and from the total amount due [to him], an amount equivalent to **one (1) month salary** should be deducted.

¹¹ Id. at 157.
¹² Id. at 239-251.
¹³ Id. at 250.
¹⁴ Id. at 270-305.

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SO ORDERED.¹⁵

The CA ratiocinated that:

The issue raised by [Echevarri] is to determine if his job designation as a property administrator is a managerial position and if so, whether dismissal is the proper penalty for a one-time violation of BDO's Code of Conduct.

x x x x

To qualify as a managerial employee, there must be a clear showing of the exercise of managerial attributes under Article 212(m) of the Labor Code. **The mere fact that an employee is designated as a manager does not ipso facto render him/her as such.** The designation should be reconciled with the actual job description that determines the nature of employment.

x x x x

x x x BDO failed to present [Echevarri's] duties and responsibilities as a real estate administrator negating its empty allegation that [the latter] is indeed a managerial employee.

As real estate administrator, [Echevarri] alleged that his job is to conduct inspection on real properties foreclosed or repossessed in favor of BDO. The same was never denied by [BDO].

Article 212(k) of the Labor Code defines a managerial employee as "*one who is vested with powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees, or to effectively recommend such managerial actions.*" The same article provides that all employees not falling within said definition are considered rank-and-file employees. Under Policy Instructions No. 8 which was issued by the then Secretary of Labor and which took effect on April 23, 1976, managerial employees are those (1) who have the power to lay down management policies; (2) who have the power to hire, fire, demote, promote, etc.; and (3) who have the power to recommend effectively (1) and (2).

None of the aforesaid factors was alleged nor substantiated by [BDO]. [Echevarri] therefore cannot be presumed as a managerial employee by merely relying on his job designation as real estate administrator.

The next issue is whether the act of "unauthorized pull-out of car battery/ies" constitute[s] serious misconduct which is a valid ground for [Echevarri's] termination of employment.

x x x x

Article 282 of the Labor Code mentions "*serious misconduct*" as a cause for cessation of employment.

¹⁵ Id. at 34.

92.

Misconduct has been defined as improper or wrong conduct. It is 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 of judgment. The misconduct to be serious must be of such grave and aggravated character and not merely trivial and unimportant. Such misconduct, however serious, must nevertheless be in connection with the employee's work to constitute just cause for his separation. Thus, for misconduct or improper behavior to be a just cause for dismissal, (a) it must be serious; (b) must relate to the performance of the employee's duties; and (c) must show that the employee has become unfit to continue working for the employer. Indeed, an employer may not be compelled to continue to employ such person whose continuance in the service would be patently inimical to his employer's interest.

We agree with the Decision of the [LA] which provides:

"Finding the incident in question: (a) not serious in character as it does not amount to appropriating of company property for himself in light of the battery's return; (b) the action complained of does not pertain [to] or in relation to his function; (c) the said incident is his first infraction and under company rules, the same only merits the penalty of suspension negating the claim for his unfitness for continued employment.

x x x Even assuming that the pullout is considered an infraction, such offense does not warrant his dismissal (x x x). Suspension would have sufficed.

The imposition of such supreme penalty of dismissal would certainly be very harsh and disproportionate to the infraction committed by [Echevarri], especially considering that it was [his] first offense after having faithfully rendered three (3) long years of satisfactory service. The several promotions received by [Echevarri] show how well he has served the company. While an employer has its own interests to protect and, pursuant thereto, it may terminate an employee for a just cause, such prerogative to dismiss or lay off an employee must not be abusively exercised. Such power should be tempered with compassion and understanding. The employer should bear in mind that, in the execution of said prerogative, what is at stake is not only the employee's position but his livelihood as well. This ruling is only in keeping with the constitutional mandate for the State to afford full protection to labor[,] such that, when conflicting interests of labor and capital are to be weighed on the scales of social justice, the heavier influence of the latter should be counterbalanced by the sympathy and compassion the law must accord the underprivileged worker.

However, We agree that there was an infraction/breach of duty which warrant[s] a sanction. In this case, We find that a penalty of one (1) month suspension without pay is more appropriate.¹⁶ (Citations omitted and emphasis ours)

¹⁶

Id. at 30-33.

The CA denied BDO's motion for reconsideration.¹⁷

Issues

BDO is before this Court raising the issues of whether or not:

(a) Echevarri's failure to attach a certificate against forum shopping in the petition he filed with the CA should have prompted the appellate court to dismiss the action;

(b) the CA erred in not finding that Echevarri was occupying a managerial position endowed with trust and confidence; and

(c) Echevarri was illegally dismissed.¹⁸

BDO argues that the offense committed by Echevarri was serious in character and was related to his duties as a Property Administrator. His act was tantamount to theft of company property and was committed in betrayal of the bank's trust and confidence in him. The battery-swapping incident cannot be taken lightly lest a precedent for dishonesty be established. BDO also claims that it was not Echevarri but his counsel who executed the certification of non-forum shopping filed with the CA.

In Echevarri's Comment¹⁹ to the instant petition, he contends that BDO merely relies on nothing more but the nomenclature of his position to argue that he was a managerial employee. Echevarri likewise avers that he swapped the car batteries while caught up in a predicament beyond his control, but he was not motivated by any wrongful intent. Echevarri also points out that a Special Power of Attorney was executed in favor of his counsel, who thus became authorized to sign the certification of non-forum shopping filed with the CA.

Ruling of the Court

The petition lacks merit.

Echevarri points out that his counsel, in executing the certification of non-forum shopping, was armed with a Special Power of Attorney annexed to the petition filed with the CA. Under the foregoing circumstances, the Court finds that there was sufficient compliance with the rules despite the absence of a certificate of non-forum shopping personally executed by Echevarri.

¹⁷ Id. at 37-38.

¹⁸ Id. at 8-9.


¹⁹ Id. at 385-392.

Further, the two substantial issues raised are factual in nature calling for a re-calibration of the evidence presented in the proceedings below. Factual issues are not the proper subjects of an action filed under Rule 45 of the Rules of Court.²⁰

Besides, even if the Court were to exercise leniency and consider the substantial merits of the case, the Court finds that evidence and jurisprudence support the CA's disquisition. BDO did not amply prove that Echevarri's position is indeed managerial in nature. Moreover, while Echevarri had indeed committed an infraction, the penalty meted out by BDO was too harsh and disproportionate to the offense. The records and a reading of Section 3 of the Code of Conduct cited by BDO likewise do not clearly show that the acts enumerated therein are punishable by dismissal from service. Echevarri's performance as an employee was conspicuously more than satisfactory. In a span of 28 months from the time he was initially employed, his salary had an aggregate increase of ₱7,000.00 monthly. Prior to the battery-swapping incident, he had proven his competence, loyalty and honesty.²¹

IN VIEW OF THE FOREGOING, the instant petition is **DENIED**. The Decision dated May 30, 2013 and Resolution dated January 20, 2014 of the Court of Appeals in CA-G.R. SP No. 119382 are **AFFIRMED**." (Mendoza, J., designated Member per Raffle dated November 12, 2014 vice Peralta, J.)

Very truly yours,


WILFREDO V. LAPITAN
Division Clerk of Court *11/17/14*

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²⁰ *Mercado v. AMA Computer College-Parañaque City, Inc.*, G.R. No. 183572, April 13, 2010, 618 SCRA 218, 232-233.

²¹ Please see Echevarri's Appeal dated May 12, 2009 enumerating the instances when he risked his life and limb for the bank, and when he had opportunities to commit pilferage but had not done so, *rollo*, pp. 105-106.

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(NLRC-LAC Case No. 04-000795-10)

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