Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

ELBA J. CABALLERO, Petitioner,	**G.R. No. 238859**
	Present:
-versus-	LEONEN, *Chairperson* LAZARO-JAVIER, LOPEZ, M., MARQUEZ, and KHO, JR., *JJ.*
VIKINGS COMMISSARY, AND/OR JACKSON GO, AND HARDWORKERS MANPOWER SERVICES, INC.,* AND/OR AIME BOLONGAITA,** Respondents.	**Promulgated:** OCT 19 2022

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DECISION

LEONEN, *J.*:

A certificate of registration issued by the Department of Labor and Employment is not conclusive proof of the status of the contractor as an independent contractor or the legitimacy of its operations. To determine whether the contractual relationship between the principal and contractor is one of permissible job contracting or the prohibited labor-only contracting, the totality of circumstances must be considered, and all features of the relationship evaluated according to the criteria set by law. An employee repeatedly and continuously hired for the same work under short-term contracts for at least one year is considered a regular employee of the principal.

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* Referred as Hardworker Manpower Services Inc. in some parts of the rollo.

** Referred as Aimee Bolongaita in some parts of the rollo.

This case arose from a Complaint for illegal dismissal and non-payment of overtime pay, 13th month pay, separation pay, and service charges, with claims for moral and exemplary damages and attorney's fees filed by Elba J. Caballero (Caballero) against the respondents.

In her Position Paper,[1] Caballero alleged that she applied for work at Vikings Commissary (Vikings), a luxury eat-all-you-can buffet restaurant,[2] and was interviewed by their Human Resources staff.[3]

She was informed that she would be hired as a packer starting January 15, 2015 with a basic daily salary rate of ₱466.00, plus ₱15.00 Emergency Cost of Living Allowance (ECOLA).[4] She alleged that she did not receive her payslip for the first month, i.e. from January 15 to February 15, 2015.[5]

Caballero claimed that she was told by Vikings' Human Resources Manager, Karen Angela Dy-Corduva (Dy-Corduva), that Vikings was not directly hiring workers and she would be coursed through Hardworkers Manpower Services, Inc. (Hardworkers) for the signing of her employment contract. [6]

Caballero formally signed a contract with Hardworkers, with an expiry date of April 15, 2015.[7] She was allegedly refused a copy of the contract upon request,[8] but Hardworkers issued her an identification card valid until March 2016.[9] She was also issued payslips[10] that indicated that she worked under Hardworkers Manpower division and under the Pacific Apex Food Venture Inc. department.[11]

On February 9, 2015, Caballero was trained as a dim sum maker at Vikings' Rockefeller Office. She was transferred to the kitchen by Chef Achung of Vikings while serving her three-month contract.[12]

After the expiration of her three-month contract, she was rehired by Vikings and signed another contract as a dim sum maker with Hardworkers for a period of five (5) months, from May to September 2015.[13]

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1 *Rollo*, pp. 120–153.
2 *Rollo*, p. 47.
3 Id.
4 Id.
5 Id.
6 Id. at 73.
7 Id.
8 Id. at 48.
9 Id. at 73.
10 Id. at 135–141.
11 Id. at 48.
12 Id. at 48 and 73.
13 Id. at 74.

After her contract expired in September 2015, Caballero signed another contract for a period of five (5) months, from October 2015 to February 2016;[14] and then another contract from March to July 2016.[15]

Caballero averred that her job as a dim sum maker was necessary to the business of Vikings.[16] Furthermore, Caballero alleged that Vikings imposed strict attendance for its employees and dictated the proper procedure in preserving and packing the dim sum. Vikings also recommended the dismissal of employees.[17]

Caballero claimed that on April 5, 2016, Vikings Executive Chef Sung Haw Law (Chef Law) informed her that he was terminating her services and that she should go home. However, she continued to work during that day.[18] Before noontime, Ms. Rhea Taburnal, a staff member at Vikings, approached her and said: "*Pinapasabi ni boss bakit hindi ka pa raw umuuwi eh tanggal ka na nga sa trabaho effective ngayon?! Hindi ka na raw nya gusto makita dito.*"[19] Caballero verbally requested an explanation for her dismissal without due process, but was not granted any.[20]

On April 7, 2016, Caballero inquired about the status of her employment at the Hardworkers office, but was told to wait for further advice and was not offered reassurance in finding another job.[21]

After two weeks without advice from Hardworkers, Caballero filed a labor case against Hardworkers and Vikings before the National Labor Relations Commission.[22]

In their Reply, Hardworkers and Aime Bolongaita (Bolongaita) countered that Hardworkers is a legitimate contractor as evidenced by its Certificate of Registration No. NCR-MFO-74911-0614-019.[23] They claimed that Caballero was their employee on a fixed-term/project basis,[24] and her latest assignment was with Vikings as a dim sum maker. Her contract of employment covered the period from March 27 to August 27, 2016.[25]

Hardworkers denied that Caballero was referred by Vikings. Instead, they averred that Caballero applied and agreed to become a fixed-term

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14 Id.
15 Id.
16 Id.
17 Id. at 48 and 74.
18 Id. at 74.
19 Id.
20 Id.
21 Id.
22 Id. at 75.
23 Id. at 161.
24 Id. at 50.
25 Id.

employee of Hardworkers, and she was assigned to work at Vikings after passing the assessment test.[26] Her fixed-term/project contract was renewed because of her good performance, and she was reassigned to Vikings since she preferred to work there than any of Hardworkers' clients.[27]

According to Hardworkers, on April 5, 2016, Caballero was reprimanded by Viking's Chef Law for lying to Dhonica M. Demegillo (Demegillo), kitchen secretary, that her co-worker Daisy Mae Mayordomo was absent, when in fact, the latter came to work.[28]

Vikings' representative, Catherine Ann Acebedo, then called Hardworkers' General Manager, Florencio Verdillo, asking for a replacement for Caballero.[29] In violation of company policies, Caballero allegedly no longer reported back to the Hardworkers office and instead filed a Complaint for illegal dismissal.[30]

From the records, it appears that Vikings neither filed a Position Paper[31] nor appeared in the mandatory conference[32] despite notice.

During the mandatory conference on May 24, 2016, Hardworkers paid Caballero her last salary and pro-rated 13th month pay in the amount of ₱5,621.00.[33]

On August 31, 2016, Labor Arbiter Vivian Magsino-Gonzalez (Labor Arbiter Magsino-Gonzalez) dismissed Caballero's Complaint, the dispositive portion of which reads:

> "WHEREFORE, foregoing considered, the complaint is DISMISSED for lack of merit."[34]

The Labor Arbiter Magsino-Gonzalez ruled that Caballero was hired by Hardworkers, not Vikings, on a per project basis or for a fixed period of employment. She further held that Caballero failed to substantiate her claims that she was illegally dismissed.[35] Instead, she did not report back to Hardworkers after an alleged incident with Vikings.[36] All the money claims were denied for lack of merit.

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26 Id. at 161–162.
27 Id. at 162.
28 Id. at 50.
29 Id.
30 Id.
31 Id at 186.
32 Id at 118–119.
33 Id at 179.
34 Id at 181.
35 Id. at 179–180.
36 Id. at 180.

Caballero appealed from the adverse ruling. The First Division of the National Labor Relations Commission issued a Decision[37] on December 27, 2016 affirming with modification the decision of the Labor Arbiter:

> "WHEREFORE, the decision of Labor Arbiter Vivian Magsino-Gonzalez dated 31 August 2016 is hereby **MODIFIED** by ordering respondent Hardworkers Manpower Services, Inc. to pay complainant her separation pay amounting to Php 12,766.00 which is equivalent to one (1) month salary for every year of service."[38]

The Commission gave credence to the Certificate of Registration issued by the Department of Labor and Employment in favor of Hardworkers, as Caballero failed to present any evidence to prove her claim that Hardworkers is a labor-only contractor.[39] The Commission further held that Caballero's repeated hiring under short-term contracts was illegal, and thus, Caballero is deemed a regular employee of Hardworkers.[40] Nonetheless, the Commission found no substantial evidence to prove the alleged illegal dismissal of Caballero.[41] However, the Commission awarded separation pay in lieu of reinstatement considering Caballero's prayer and her manifestation before the Labor Arbiter that she no longer wanted to work for Hardworkers.[42]

Caballero filed a Motion for Reconsideration[43], which was denied for lack of merit in a Resolution promulgated on February 10, 2017.

On November 28, 2017, the Court of Appeals promulgated the assailed Decision[44] finding that the National Labor Relations Commission committed no grave abuse of discretion.[45] The Court of Appeals, however, deleted the award of separation pay for being inconsistent with the finding of no illegal dismissal.[46] The claims for overtime pay, moral and exemplary damages were denied for lack of factual and legal basis.[47] The Decision disposed as follows:

> "WHEREFORE, the petition is **DISMISSED** for lack of merit, with **MODIFICATION** deleting the award of separation pay in the amount of Php12,766.00"[48]

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37 Id. at 207–217; The NLRC Decision was penned by Commissioner Romeo L. Go, and concurred in by Presiding Commissioner Gerardo C. Nograles and Commissioner Gina F. Cenit-Escoto.

38 Id at 216.

39 Id. at 213.

40 Id. at 213–214.

41 Id. at 215.

42 Id. at 216.

43 Id. at 238–246.

44 Id at 72–83. The November 28, 2017 Decision was penned by Associate Justice Marlene Gonzales-Sison and concurred in by Associate Justices Socorro B. Inting and Rafael Antonio M. Santos of the Fifteenth Division, Court of Appeals, Manila.

45 Id. at 82.

46 Id. at 81.

47 Id. at 82.

48 Id.

Caballero sought reconsideration, but the Court of Appeals denied the motion in its Resolution[49] dated March 27, 2018.

Hence, Caballero filed this Petition.[50] On July 10, 2018, Hardworkers and Bolongaita filed their Comment/Opposition.[51]

In the Court's August 7, 2019 Resolution,[52] Vikings and/or Jackson Go were directed to show cause why they should not be held in contempt for failure to file their comment despite receipt of notice; and to file their comment to the Petition. Subsequently, upon Vikings and/or Jackson Go's continued failure to file their comment, they were fined in the amount of ₱1,000,[53] increased to ₱6,000,[54] and ₱10,000.[55]

On May 23, 2022, Vikings paid the fine of ₱10,000 and submitted a Compliance stating that it "waives the right to file Comment."[56]

This Court resolves the following issues:

First, whether or not petitioner Elba J. Caballero is a regular employee of Hardworkers, and not Vikings;

Second, whether or not petitioner Elba J. Caballero was illegally dismissed; and

Third, whether or not petitioner Elba J. Caballero is entitled to backwages, attorney's fees, and other monetary claims.

The Petition is granted.

I

The Court's review in labor cases is confined to the determination of whether the Court of Appeals correctly resolved the presence or absence of grave abuse of discretion on the part of the National Labor Relations

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49 Id. at 85–86.
50 Id. at 45–69; The Petition was posted on June 18, 2018, within the 30-day extended period sought by Petitioner, which was granted in the Court's Resolution dated June 20, 2018.
51 Id at 260–272.
52 Id at 302–303.
53 Id at 304–305.
54 Id at 311–312.
55 Id at 314–315.
56 Id at 318–319.

Commission in rendering its decision.[57] The review is generally limited to questions of law unless the petitioner successfully shows the presence of exceptions[58] justifying a factual review,[59] as in this case.

Grave abuse of discretion is judgment exercised in an arbitrary, capricious, or despotic manner. It must be so patent and gross as to amount to an "evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law."[60]

In *E. Ganzon Inc. v. Ando, Jr.*,[61] the National Labor Relations Commission may be found to have committed grave abuse of discretion –

> . . . when its findings and conclusions reached are not supported by substantial evidence or are in total disregard of evidence material to or even decisive of the controversy; when it is necessary to prevent a substantial wrong or to do substantial justice; when the findings of the [National Labor Relations Commission] contradict those of the [Labor Arbiter]; and when necessary to arrive at a just decision of the case.[62]

Here, the rulings of the National Labor Relations Commission and of the Labor Arbiter have been made with such disregard of relevant and undisputed facts, amounting to an evasion of their positive duty to render judgment only after a meticulous consideration of the circumstances of a case. As such, the Court of Appeals erred for sustaining the labor tribunals.

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57 *Philippine National Bank v. Gregorio*, 818 Phil. 321, 335 (2017) [Per J. Jardeleza, First Division]; *Protective Maximum Security Agency, Inc. v. Fuentes*, 753 Phil. 482, 503 (2015) [Per J. Leonen, Second Division]; *Rio v. Colegio de Sta. Rosa-Makati*, 740 Phil. 574, 580 (2014) [Per J. Perez, Second Division].

58 The exceptional circumstances where the Court may conduct a factual review are:
1. When the findings are grounded entirely on speculations, surmises or conjectures;
2. when the inference made is manifestly mistaken, absurd or impossible;
3. when there is 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 in making its findings, the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee;
7. when the findings of the Court of Appeals are contrary to that of the trial court;
8. when the findings 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 respondent;
10. when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and
11. when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion. *Reyes v. Global Beer Below Zero, Inc.*, 819 Phil. 483 (2017) [Per J. Peralta, Second Division].

59 *Manila Cordage Company-Employees Labor Union-Organized Labor Union in Line Industries and Agriculture v. Manila Cordage Co.*, G.R. Nos. 242495-96, September 16, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67006> [Per J. Leonen, Third Division].

60 *Rio v. Colegio de Sta. Rosa-Makati*, 740 Phil. 574, 581 (2014) [Per J. Perez, Second Division].

61 806 Phil 58 (2017) [Per J. Peralta, Second Division].

62 *E. Ganzon, Inc. v. Ando, Jr.*, 806 Phil 58, 65 (2017) [Per J. Peralta, Second Division].

II

Petitioner takes exception to the ruling of the Court of Appeals that Hardworkers is a legitimate job contractor.[63] Petitioner asserts that notwithstanding its Certificate of Registration, Hardworkers must still satisfy the criteria set by law for independent contractorship.[64] She points out that respondent had no substantial capitalization and merely supplies labor to its principal.[65] Her work as a dim sum maker is directly necessary and related to the business of Vikings.[66] Moreover, Vikings prescribes the manner and method of her work, and provided the tools and equipment used in performing her task.[67] Taking all these circumstances together, petitioner contends that Hardworkers is engaged in labor-only contracting, and Vikings is considered her direct employer.[68]

Hardworkers contends that it is not a labor-only contractor as it has substantial capital as proven by its Certificate of Registration issued by the Department of Labor and Employment stating that it has complied with all the requirements of Department Order No. 1, Series of 2011.[69] Petitioner failed to present evidence to rebut the disputable presumption that Hardworkers is an independent contractor.[70] Hardworkers adds that it is not required to have both substantial capital and investment in form of tools. Also, Vikings no longer required Hardworkers to bring its own kitchen equipment.[71] Moreover, petitioner's work is not necessary and desirable in the business of Vikings as the latter can continue with its business even without a dim sum maker.[72]

Further, Hardworkers denies that petitioner was referred by Vikings' Dy-Corduva and claims that she voluntarily applied with Hardworkers and was assigned at Vikings after passing the assessment test.[73] Petitioner voluntarily signed every fixed-term/project employment contract with Hardworkers and was reassigned to Vikings upon her request.[74] Hardworkers paid petitioner's wages, and Vikings neither exercises control nor does it have the power to dismiss or discipline petitioner.[75]

Petitioner's contentions are tenable.

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63 *Rollo*, p. 54.
64 Id.
65 Id. at 55.
66 Id. at 56.
67 Id at 31.
68 Id at 31–32.
69 Id at 287–288.
70 Id at 288.
71 Id.
72 Id. at 289.
73 Id at 285.
74 Id.
75 Id. at 286.

Permissible job contracting "refers to an arrangement whereby a principal agrees to put out or farm out with a contractor or subcontractor the performance or completion of a specific job, work or service within a definite or predetermined period, regardless of whether such job, work or service is to be performed or completed within or outside the premises of the principal."[76]

A person is considered engaged in legitimate job contracting if the following conditions concur:

> (a) The contractor carries on a distinct and independent business and partakes the contract work on his account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of his work except as to the results thereof;
>
> (b) The contractor has substantial capital or investment; and
>
> (c) The agreement between the principal and contractor or subcontractor assures the contractual employees' entitlement to all labor and occupational safety and health standards, free exercise of the right to self-organization, security of tenure, and social and welfare benefits.[77]

On the other hand, Article 106 of the Labor Code defines labor-only contracting as follows:

> ARTICLE 106. Contractor or subcontractor. —
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> . . . .
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> **There is "labor-only" contracting where the person supplying workers to an employer does not have substantial capital or investment in the form of tools, equipment, machineries, work premises, among others, and the workers recruited and placed by such person are performing activities which are directly related to the principal business of such employer.**[78] (Emphasis supplied)

The Department of Labor and Employment's Department Order No. 18-A, series of 2011 echoes the provision of the Labor Code:

> SECTION 6. *Prohibition against labor-only contracting.* — Labor-only contracting is hereby declared prohibited. For this purpose, labor-only contracting shall refer to an arrangement where:
>
> (a) The contractor or subcontractor does not have substantial capital or investments in the form of tools, equipment, machineries, work premises, among others, and the employees recruited and placed are performing activities which are usually necessary or desirable to the

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76 DOLE Department Order No. 18-A (2011).

77 *San Miguel Foods, Inc. v. Rivera,* 824 Phil. 961, 973 (2018) [Per J. Velasco, Jr., Third Division].

78 LABOR CODE, art. 106, par. 4.

> operation of the company, or directly related to the main business of the principal . . .; or
>
> (ii) the contractor does not exercise the right to control over the performance of the work of the employee.[79]

Thus, permissible job contracting involves the contracting out of work, job or service, while labor-only contracting involves the contracting out of labor.

Department Order No. 18-A, series of 2011 requires all contractors and subcontractors to register in their respective Department of Labor and Employment Regional Offices for regulation and monitoring. "Failure to register shall give rise to the presumption that the contractor is engaged in labor-only contracting."[80]

In *Manila Cordage Company-Employees Labor Union-Organized Labor Union in Line Industries and Agriculture v. Manila Cordage Co.*,[81] it was held that a certificate of registration issued by the Department of Labor and Employment is not conclusive evidence of the contractor's status as an independent contractor.[82] It merely creates a disputable presumption of legitimacy of its operations.[83]

To determine whether the contractor was engaged by the principal as a legitimate job contractor or a labor-only contractor, "the totality of the facts and the surrounding circumstances of the case are to be considered."[84] All the features of the relationship are assessed.[85] The burden lies with the contractor or the principal to prove that there is legitimate job contracting.[86]

Here, we find that Hardworkers was engaged in labor-only contracting.

First, while it had a paid-up capital of ₱3,000,000.00,[87] Hardworkers did not present any other proof showing its equipment, assets, and tools for

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79 DOLE Department Order No. 18-A (2011), sec. 6.

80 DOLE Department Order No. 18-A (2011), sec. 14.

81 G.R. Nos. 242495-96, September 16, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67006> [Per J. Leonen, Third Division].

82 Id.

83 *Barretto v. Amber Golden Pot Restaurant*, G.R. No. 254596-97, November 24, 2021, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68041> [Per J. Carandang, Third Division].

84 *Polyfoam-RGC International Corporation v. Concepcion*, 687 Phil. 137, 148 (2012) [Per J. Peralta, Third Division].

85 *Ortiz v. Forever Richsons Trading Corp.*, G.R. No. 238289, January 20, 2021, < https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67497> [Per J. M.V. Lopez, Second Division].

86 *Manila Cordage Company-Employees Labor Union-Organized Labor Union in Line Industries and Agriculture v. Manila Cordage Co.*, G.R. Nos. 242495-96, September 16, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/67006> [Per J. Leonen, Third Division]; *Alilin v. Petron Corp.*,735 Phil. 509, 524 (2014) [Per J. Del Castillo, Second Division].

87 The Certificate of Approval of Increase of Capital Stock and its attachments show that Hardworkers had original paid up capital of P500,000 which was increased to P3,000,000.

the conduct of its business. Petitioner herself worked on the premises of Vikings, using equipment provided and owned by Vikings; and performed activities according to the instructions of Vikings, first as a packer and then as a dim sum maker.

Second, there was no proof of what particular job, work, or service Hardworkers was supposed to perform for Vikings. The service agreement between Hardworkers and Vikings was not submitted in evidence. On the other hand, the employment contract[88] between Hardworkers and petitioner shows that petitioner was appointed as dim sum maker at Vikings, which implies that Hardworkers merely recruits for and supplies Vikings with specific types of employees. In fact, Hardworkers contends that it assigns workers to Vikings after having passed the assessment made by Vikings.[89] At this point, it must be emphasized that petitioner's contention that it was Vikings who initially interviewed and hired her, and it was Vikings' Human Resources Manager Dy-Corduva who told her to approach Hardworkers to process her employment, remains uncontroverted. Notably, Vikings did not file any position paper before the labor tribunals and even waived the filing of its comment before this Court.

Third, petitioner is also correct in her contention that her job as a dim sum maker is directly related to Vikings' food business. Indeed, petitioner's continuous rehiring at Vikings for more than a year indicates the necessity or desirability of that activity to the business of the employer.[90]

Fourth, Hardworkers failed to show that it, and not Vikings, established petitioner's working procedure and methods and supervised her work. There was no evidence that Hardworkers exercised control over petitioner or her work.

Under the employment contract, petitioner was required to abide by the policies, rules, and regulations of Vikings. It was also undisputed that petitioner was initially hired as a packer,[91] and that it was Vikings' decision to move her to a different department and train her to be a dim sum maker.

Finally, with regard to the power of dismissal, it is undisputed that Vikings had the power to dismiss the petitioner. Both parties in their respective pleadings admit that Vikings recommends the dismissal of employees.[92] Without such recommendation from Vikings, Hardworkers would not have dismissed petitioner.

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88 *Rollo*, p. 154.
89 Id at 261.
90 See *Quintanar v. Coca-Cola Bottlers, Philippines, Inc.*, 788 Phil. 385, 403 (2016) [Per J. Mendoza, En Banc].
91 *Rollo*, p. 20.
92 Id. at 21.

The totality of circumstances leads us to conclude that notwithstanding Hardworkers' registration as an independent contractor, it has engaged in prohibited labor-only contracting with Vikings.

Consequently, Vikings, as the principal, is deemed the employer of the petitioner pursuant to Sections 5 and 27 of Department Order No. 18-A, series of 2011, which state:

> **Section 5. Trilateral relationship in contracting arrangements; Solidary liability**. . .
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> . . . .
>
> However, the principal shall be deemed the direct employer of the contractor's employee in cases where there is a finding by competent authority of labor-only contracting, or commission of prohibited activities as provided in Section 7, or a violation of either Sections 8 or 9 hereof.
>
> **Section 27. Effects of labor-only contracting and/or violation of Sections 7, 8 or 9 of the Rules**. — A finding by competent authority of labor-only contracting shall render the principal jointly and severally liable with the contractor to the latter's employees, in the same manner and extent that the principal is liable to employees directly hired by him/her, as provided in Article 106 of the Labor Code, as amended.
>
> A finding of commission of any of the prohibited activities in Section 7, or violation of either Sections 8 or 9 hereof, shall render the principal the direct employer of the employees of the contractor or subcontractor, pursuant to Article 109 of the Labor Code, as amended.[93]

In *Petron v. Caberte, et al.*:[94]

> A finding that a contractor is a 'labor-only' contractor is equivalent to declaring that there is an employer-employee relationship between the principal and the employees of the supposed contactor, and the 'labor-only' contractor is considered as a mere agent of the principal, the real employer.[95]

III

Hardworkers interchangeably characterizes petitioner's employment as project or fixed period employment, citing the employment contract that she signed. However, these two types of employment are not the same.

> . . . While the former requires a *project* as restrictively defined

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93 DOLE Department Order No. 18-A (2011), sec. 5 and 27.
94 759 Phil. 353 (2015) [Per J. Del Castillo, Second Division].
95 Id. at 371.

> above, the duration of a fixed-term employment agreed upon by the parties may be any *day certain*, which is understood to be "that which must necessarily come although it may not be known when." The decisive determinant in fixed-term employment is not the activity that the employee is called upon to perform but the day certain agreed upon by the parties for the commencement and termination of the employment relationship.[96]

In *GMA Network, Inc. v. Pabriga,*[97] the Court extensively discussed project employees:

> On the other hand, the activities of project employees **may or may not** be usually necessary or desirable in the usual business or trade of the employer, as we have discussed in *ALU-TUCP v. National Labor Relations Commission* and recently reiterated in *Leyte Geothermal Power Progressive Employees Union-ALU-TUCP v. Philippine National Oil Company-Energy Development Corporation.* In said cases, we clarified the term "project" in the test for determining whether an employee is a regular or project employee:
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> > . . . [A]s is evident from the provisions of Article 280 of the Labor Code, quoted earlier, **the principal test for determining whether particular employees are properly characterized as "project employees" as distinguished from "regular employees," is *whether or not the "project employees" were assigned to carry out a "specific project or undertaking," the duration (and scope) of which were specified at the time the employees were engaged for that project.***
> >
> > In the realm of business and industry, we note that **"project" could refer to one or the other of at least two (2) distinguishable types of activities. Firstly, a project could refer to a particular job or undertaking that is *within the regular or usual business* of the employer company, *but which is distinct and separate, and identifiable as such*, from the other undertakings of the company**. Such job or undertaking begins and ends at determined or determinable times. The typical example of this first type of project is a particular construction job or project of a construction company. A construction company ordinarily carries out two or more [distinct] identifiable construction projects: *e.g.*, a twenty-five-storey hotel in Makati; a residential condominium building in Baguio City; and a domestic air terminal in Iloilo City. Employees who are hired for the carrying out of one of these separate projects, the scope and duration of which has been determined and made known to the employees at the time of employment, are properly treated as "project employees," and their services may be lawfully terminated at completion of the project.

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96 *GMA Network, Inc. v. Pabriga,* 722 Phil. 161, 177–178 (2013) [Per J. Leonardo-De Castro, First Division].

97 722 Phil. 161 (2013) [Per J. Leonardo-De Castro, First Division].

> **The term "project" could also refer to, secondly, a particular job or undertaking that is *not within the regular business of the corporation.*** Such a job or undertaking must also be identifiably separate and distinct from the ordinary or regular business operations of the employer. The job or undertaking also begins and ends at determined or determinable times. . . (Emphases supplied, citation omitted)
>
> Thus, in order to safeguard the rights of workers against the arbitrary use of the word "project" to prevent employees from attaining the status of regular employees, employers claiming that their workers are project employees should not only prove *that the duration and scope of the employment was specified at the time they were engaged,* but also *that there was indeed a project.* As discussed above, the project could either be (1) a particular job or undertaking that is within the regular or usual business of the employer company, but which is distinct and separate, and identifiable as such, from the other undertakings of the company; or (2) a particular job or undertaking that is not within the regular business of the corporation. As it was with regard to the distinction between a regular and casual employee, the purpose of this requirement is to delineate whether or not the employer is in constant need of the services of the specified employee. If the particular job or undertaking is within the regular or usual business of the employer company *and* it is not identifiably distinct or separate from the other undertakings of the company, there is clearly a constant necessity for the performance of the task in question, and therefore said job or undertaking should not be considered a project.[98]

From the foregoing, it is not enough that the employee was informed upon hiring of the duration and scope of the project. There must be a project that could either be: (1) a particular job within the regular or usual business of the employer, but which is distinct and separate, and identifiable as such, from the other undertakings of the company; or (2) a particular job not within the regular business of the company.

In this case, petitioner was repeatedly hired as dim sum maker. She performed activities which are: (1) within the regular or usual business of Vikings, as a luxury buffet restaurant; and (2) not identifiably distinct and separate from Vikings' other undertakings.

The constant necessity or desirability of petitioner's task is manifested by the established fact that petitioner has repeatedly renewed a five-month contract for Vikings, through Hardworkers. She signed a contract on January 2015 (for three months), April 2015 (for five months), September 2015 (for five months), and February 2016 (for six months). Parenthetically, she has been continuously working for Vikings for more than a year already, i.e. from January 2015 until her dismissal in April 2016. Hence, petitioner cannot be considered a project employee.

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98 Id. at 170-173.

On the other hand, the existence of a contract indicating a fixed term does not preclude regular employment. In *GMA Network, Inc. v. Pabriga,*[99] the Court, cognizant of the employer's use of this type of contract to circumvent tenurial rights, emphasized certain conditions laid down in *Brent School, Inc. v. Zamora*[100] for its validity:

> We thus laid down indications or criteria under which "term employment" cannot be said to be in circumvention of the law on security of tenure, namely:
>
> 1) The fixed period of employment was knowingly and voluntarily agreed upon by the parties without any force, duress, or improper pressure being brought to bear upon the employee and absent any other circumstances vitiating his consent; or
>
> 2) It satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms with no moral dominance exercised by the former or the latter.
>
> These indications, which must be read together, make the *Brent* doctrine applicable only in a few special cases wherein the employer and employee are on more or less in equal footing in entering into the contract. The reason for this is evident: when a prospective employee, on account of special skills or market forces, is in a position to make demands upon the prospective employer, such prospective employee needs less protection than the ordinary worker. Lesser limitations on the parties' freedom of contract are thus required for the protection of the employee.[101] (Citation omitted)

Thus, in *Pure Foods Corp. v. NLRC,*[102] the Court found that neither of the above criteria had been satisfied considering the inequality between the employer and employees:

> [I]t could not be supposed that private respondents and all other so-called "casual" workers of [the petitioner] KNOWINGLY and VOLUNTARILY agreed to the 5-month employment contract. Cannery workers are never on equal terms with their employers. Almost always, they agree to any terms of an employment contract just to get employed considering that it is difficult to find work given their ordinary qualifications. Their freedom to contract is empty and hollow because theirs is the freedom to starve if they refuse to work as casual or contractual workers. Indeed, to the unemployed, security of tenure has no value. It could not then be said that petitioner and private respondents "dealt with each other on more or less equal terms with no moral dominance whatever being exercised by the former over the latter.[103]

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99 722 Phil. 161 (2013) [Per J. Leonardo-De Castro, First Division].
100 260 Phil. 747 (1990) [Per J. Narvasa, En Banc].
101 *GMA Network, Inc. v. Pabriga,* 722 Phil. 161, 178 (2013) [Per J. Leonardo-De Castro, First Division].
102 347 Phil 434 (1997) [Per J. Davide, Jr., First Division].
103 Id. at 444.

In this case, petitioner, as dim sum maker, cannot be considered to be in equal footing as Hardworkers in the negotiation of their employment contract. Petitioner herself claimed that she was compelled to proceed to Hardworkers since it was the only way for her to be hired. Considering her need for a job, petitioner cannot be in a position to make demands on Hardworkers. "There is no genuine freedom to contract when a fixed-term employment is used as a vehicle to exploit the economic disadvantage of workers,"[104] like petitioner.

In *Lynvil Fishing Enterprises, Inc. v. Ariola,*[105] the circumstances that the employees were doing tasks necessary to the employer's fishing business and were repeatedly hired after the end of a trip were held to be indicative of a clear intention to go around the employees' security of tenure.

Similarly, the continued renewal of petitioner's contract is a clear manifestation that Hardworkers sought to circumvent petitioner's tenurial rights by claiming that she was only engaged for a fixed term.

In sum, we hold that petitioner is a regular employee entitled to security of tenure, and may be terminated only for just or authorized causes.

IV

On the issue of illegal dismissal, petitioner contends that on August 5, 2016, she was fired verbally by Chef Law. This was confirmed, when on the same day before noon, a staff member allegedly told her *"Pinapasabi ni Boss, bakit hindi ka pa raw umuuwi eh tanggal ka na sa trabaho effective ngayon?! Hindi ka na raw nya gusto makita dito."*[106] She cites *ANFLO v. Bolanio*[107] where this Court held the words "you're fired" as clear, unequivocal and categorical enough to create an impression of termination of service.

On the other hand, Hardworkers asserts that contrary to petitioner's allegation, she was not dismissed by Chef Law, but merely reprimanded for lying that her co-worker was absent.[108] After this incident, she no longer reported to Hardworkers, in violation of the company's rules. Hence, she could not be given another posting.[109] Petitioner's acts allegedly constitute abandonment, as she voluntarily severed her employment with Hardworkers.

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104 *Claret School of Quezon City v. Sinday*, G.R. No. 226358, October 9, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65825> [Per J. Leonen, Third Division].

105 680 Phil. 696 (2012) [Per J. Perez, Second Division].

106 *Rollo*, p. 33.

107 *ANFLO Management & Investment Corp. v. Bolanio*, 439 Phil. 309, 316 (2002) [Per J. Corona, Third Division].

108 *Rollo*, pp. 265–266.

109 Id at 266.

Consequently, she is not entitled to any backwages, separation pay, or any form of damages and attorney's fees.[110]

We find for petitioner.

Here, the circumstances of petitioner's dismissal from service remain uncontroverted as Vikings did not file any position paper or comment before this Court disputing petitioner's allegations.

Chef Law's remark that she should go home as he is already terminating her, followed by a statement from Rhea Taburnal of Vikings "*bakit hindi ka pa daw umuuwi eh tanggal ka na nga sa trabaho effective ngayon?*" constitutes an effective dismissal of petitioner from service. The words were clear and unequivocal, sufficient to create an impression in the mind of petitioner that her services were being terminated. They are far from being merely a "reprimand," as Hardworkers claims. In fact, Vikings immediately asked for petitioner's replacement, to which Hardworkers obliged. These show that petitioner can no longer return to her work at Vikings.

Demex Rattancraft, Inc. v. Leron[111] discusses that valid termination "requires an initial notice to the employee, stating the specific grounds or causes for dismissal and directing the submission of a written explanation answering the charges." Once the employee has an opportunity to answer, the employer must give another notice informing the employee of the findings and reason/s for termination. Further, the burden is on the employer to prove that the termination was for a just or authorized cause.

In this case, petitioner was deprived not only of due notice, but also of an explanation and opportunity to answer even as she tried to inquire with Hardworkers on why her services were terminated.[112] There was also no proof that petitioner was directed by Hardworkers to report for work, if Hardworkers' claims were true that she was to be given another posting.

Hardworkers' theory of abandonment is unbelievable.

"Abandonment is a matter of intention and cannot lightly be inferred or legally presumed from certain equivocal acts."[113] In *Protective Maximum Security Agency, Inc. v. Fuentes*,[114] this Court held:

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110 Id at 267.
111 *Demex Rattancraft, Inc. v. Leron*, 820 Phil. 693, 704–705 (2017) [Per J. Leonen, Second Division].
112 *Rollo*, p. 92.
113 *Tegimenta Chemical Phils. v. Oco*, 705 Phil 57, 67 (2013) [Per J. Sereno, First Division].
114 753 Phil. 482, 503 [Per J. Leonen, Second Division].

> Abandonment is the deliberate and unjustified 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. The intent to discontinue the employment must be shown by clear proof that it was deliberate and unjustified.[115]

Two days after Chef Law fired her, or on April 7, 2016, the very same day that Hardworkers sent an employee to replace her,[116] petitioner inquired about the status of her employment. Hardworkers did not give her an explanation and merely told her to wait.

With neither the notice to explain nor notice of dismissal or a return-to-work order issued to her, petitioner immediately sought the assistance of the Commission through the Single Entry Approach (SENA) on April 8, 2016.[117] Evidently, her actions do not constitute abandonment, and instead, revealed her intention to protect her job.

Fernandez v. Newfield Staff Solutions, Inc.[118] states that "[e]mployees who take steps to protest their dismissal cannot logically be said to have abandoned their work" and that abandonment is totally inconsistent with the immediate filing of a complaint for illegal dismissal.

In this case, we find that petitioner did not abandon her work, but was illegally dismissed.

V

Petitioner, having been illegally dismissed, is entitled to reinstatement and full backwages from the time of the dismissal up to the time of her actual reinstatement.[119] However, where reinstatement is no longer feasible because of strained relations, separation pay equivalent to one month pay for every year of service is granted.[120] "Separation pay in lieu of reinstatement may likewise be awarded if the employee decides not to be reinstated."[121]

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115 *Protective Maximum Security Agency, Inc. v. Fuentes*, 753 Phil. 482, 507 (2015) [Per J. Leonen, Second Division], citing *Agabon v. NLRC*, 485 Phil. 248, 278 (2004) [Per J. Ynares-Santiago, En Banc].

116 *Rollo*, p. 157.

117 Id at 180.

118 *Fernandez v. Newfield Staff Solutions*, 713 Phil. 707, 718 (2013) [Per J. Villarama, First Division].

119 LABOR CODE, art. 279.

120 *Golden Ace Builders v. Talde*, 634 Phil. 364, 370 (2010) [Per J. Carpio Morales, First Division].

121 *Velasco v. National Labor Relations Commission*, 525 Phil. 749, 761 (2006) [Per J. Tinga, Third Division].

Here, petitioner had opted not to be reinstated for the best interest of both parties. Hence, separation pay in lieu of reinstatement shall be awarded in the amount of ₱12,766.00, as computed by the National Labor Relations Commission. Petitioner is also awarded backwages from April 5, 2016 up to the finality of this Decision.

As for moral and exemplary damages, jurisprudence dictates that moral damages are granted "when the dismissal of an employee is attended by bad faith or fraud or constitutes an act oppressive to labor, or is done in a manner contrary to good morals, good customs or public policy."[122] On the other hand, exemplary damages are recoverable when "the dismissal was done in a wanton, oppressive, or malevolent manner."[123]

In *Aliviado v. Procter & Gamble Phils., Inc.*,[124] moral damages was granted because "the sudden and peremptory barring of the employees from work, and from admission to the work place, after just a one-day verbal notice, *and* for no valid cause" was considered oppressive to labor and in utter disregard of the employees' right to due process.

In *Monsanto Philippines, Inc. v. NLRC,*[125] the Court held that the transfer of the employees from the employer to the labor-only contractor for the purpose of ending their regular status constitutes oppression to labor, and violates the principles of good morals, good customs, and public policy.

Also, in *Daguinod v. Southgate Foods, Inc.,*[126] the employer and labor-only contractor were found to have acted in bad faith in: (1) creating a subterfuge of legitimate labor contracting to avoid the regularization of employee; and (2) haphazardly accusing the employee of theft without sufficient proof which resulted in his incarceration for three days.

In this case, Vikings' arbitrary and capricious act of dismissing petitioner, without due process, was done in bad faith and in a manner oppressive to labor. This was even facilitated through a labor-only contracting scheme, which effectively deprived petitioner of her tenurial

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122 *Monsanto Philippines, Inc. v. National Labor Relations Commission,* G.R. Nos. 230609-10, August 27, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66518> [Per J. Reyes, Jr., First Division]; *Daguinod v. Southgate Foods, Inc.,* G.R. No. 227795, February 20, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65255> [Per J. Caguioa, Second Division]; *Aliviado v. Procter & Gamble Phils., Inc.,* 628 Phil. 469, 492-493 (2010) [Per J. Del Castillo, Second Division].

123 Id.

124 *Aliviado v. Procter & Gamble Phils., Inc.,* 628 Phil. 469, 493 (2010) [Per J. Del Castillo, Second Division].

125 *Monsanto Philippines, Inc. v. National Labor Relations Commission,* G.R. Nos. 230609-10, August 27, 2020, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66518> [Per J. Reyes, Jr., First Division].

126 *Daguinod v. Southgate Foods, Inc.,* G.R. No. 227795, February 20, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65255> [Per J. Caguioa, Second Division].

rights. The contractual arrangement of Vikings/Hardworkers with petitioner specifically violates Department Order No. 18-A, series of 2011 which prohibits "repeated hiring of employees under an employment contract of short duration . . ., which circumvents the Labor Code provisions on security of tenure."[127] This is against the policy enshrined in the Constitution "to afford full protection to labor . . . and promote full employment and equality of employment opportunities for all."[128] Hence, an award of moral damages and exemplary damages is called for. Under the circumstances, an award of ₱10,000.00 for each is reasonable.

Petitioner is likewise entitled to attorney's fees. In *Tangga-an v. Philippine Transmarine Carriers Inc., et al.*:[129]

> In this case, it is already settled that petitioner's employment was illegally terminated. As a result, his wages as well as allowances were withheld without valid and legal basis. Otherwise stated, he was not paid his lawful wages without any valid justification. Consequently, he was impelled to litigate to protect his interests. Thus, pursuant to the above ruling, he is entitled to receive attorney's fees. . .[130]

Pursuant to Article 109 of the Labor Code,[131] Vikings and Hardworkers should both be held jointly and severally liable to petitioner for the monetary awards granted to the latter.

FOR THESE REASONS, the Petition is **GRANTED**. The November 28, 2017 Decision and March 27, 2018 Resolution of the Court of Appeals in CA-G.R. SP. No. 150470 are **REVERSED** and **SET ASIDE**.

Respondents are ordered to pay petitioner the following:

(1) Backwages computed from April 5, 2016 up to the finality of this decision;

(2) Separation pay of ₱12,766.00[132] as determined by the National Labor Relations Commission;

(3) Moral damages of ₱10,000.00;

(4) Exemplary damages of ₱10,000.00; and

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127 DOLE Department Order No. 18-A (2011), sec. 7(A)(7).
128 CONST., art. XIII, sec. 3.
129 706 Phil. 339 (2013) [Per J. Del Castillo, Second Division].
130 Id. at 354.
131 ARTICLE 109. *Solidary Liability.* — The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers.
132 *Rollo*, p. 216.

(5) 10% Attorney's fees based on the total judgment award.

The total monetary award shall bear legal interest of 6% per annum from finality of this Decision until full payment.[133]

SO ORDERED.

MARVIC M.V.F. LEONEN
Senior Associate Justice

WE CONCUR:

AMY C. LAZARO-JAVIER
Associate Justice

MARIO V. LOPEZ
Associate Justice

JHOSEP Y. LOPEZ
Associate Justice

ANTONIO T. KHO, JR.
Associate Justice

133 *Nacar v. Gallery Frames*, 716 Phil. 267, 280–281 (2013) [Per J. Peralta, En Banc].

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.

MARVIC M.V.F. LEONEN
Senior Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ALEXANDER G. GESMUNDO
Chief Justice