EN BANC

G.R. No. 228357 — C.P. REYES HOSPITAL/ANGELINE REYES, Petitioners, **v. GERALDINE BARBOSA,** Respondent.

Promulgated:

April 16, 2024

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CONCURRING AND DISSENTING OPINION

CAGUIOA, *J.*:

I concur in the *ponencia* insofar as it affirms the illegality of respondent's dismissal. However, I dissent as to the computation of her backwages and the abandonment of the rule in *Robinsons Galleria/Robinsons Supermarket Corporation v. Ranchez*[1] (*Robinsons*).

In *Robinsons*, the Court computed the backwages awarded to an illegally dismissed probationary employee from the time of her illegal dismissal until the end of her probationary employment. According to the Court in *Robinsons*, the lapse of the probationary employment without the employee's regularization effectively severed the employment relationship.[2]

The *ponencia* abandons this rule and reverts to the prior rule enunciated in *Lopez v. Javier*[3] (*Lopez*) which computes the payment of backwages of an illegally dismissed probationary employee up to actual reinstatement or finality of judgment.[4] The *ponencia* holds that *Lopez* is more in keeping with the constitutional and statutory guarantees in favor of labor since neither the Constitution nor the Labor Code distinguish between regular and probationary employees in guaranteeing the right to security of tenure.[5] Moreover, the *ponencia* holds that the lapse of the probationary period without a valid termination *ipso facto* renders the employment regular.[6]

With due respect, I disagree and submit that the rule in *Robinsons* is the more correct view as it is consistent with law.

The award of backwages is tied to the employee's right to security of tenure, which guarantees that employees can only be dismissed for just or

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1 655 Phil. 133 (2011) [Per J. Nachura, Second Division].
2 *Id.* at 139.
3 322 Phil. 70 (1996) [Per J. Romero, Second Division].
4 *Ponencia*, p. 19.
5 *Id.* at 20.
6 *Id.*

authorized causes and after they have been afforded due process of law.[7] In case an employee is unjustly terminated from work, he or she shall be entitled to backwages in accordance with Article 294 of the Labor Code:

> ARTICLE 294. [279] *Security of Tenure*. — **In cases of regular employment**, the employer shall not terminate the services of an employee except for a just cause or when authorized by this Title. An employee who is unjustly dismissed from work shall be entitled to reinstatement without loss of seniority rights and other privileges and to his full **backwages**, inclusive of allowances, and to his other benefits or their monetary equivalent **computed from the time his compensation was withheld from him up to the time of his actual reinstatement**. (Emphasis supplied)

While Article 294 only speaks of regular employees, it is settled that probationary employees also enjoy security of tenure albeit limited.[8] It is limited in the sense that, aside from just and authorized causes, probationary employees may also be dismissed due to failure to qualify in accordance with the standards of the employer made known to the employee at the time of engagement.[9] However, a probationary employee's right to security of tenure ends upon the expiration of the probationary period.[10] Despite these distinctions, the Court recognizes that illegally dismissed probationary employees are also entitled to backwages.

The payment of backwages allows the employee to recover from the employer that which he or she has lost by way of wages because of his or her dismissal.[11] Hence, backwages is computed from the time of the dismissal or when the salaries were withheld until the employee's actual reinstatement. Where reinstatement is no longer possible, backwages is computed until the finality of judgment because it is at this point that the employment relationship is deemed terminated.[12]

In *Robinsons*, however, the Court clarified that probationary employment relationship is terminated, not by the finality of judgment, but by the expiration of the probationary period — when the probationary period lapses during the pendency of the illegal dismissal case.

In disagreement, the *ponencia* holds that the lapse of the probationary period without a valid termination *ipso facto* renders the employment

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7 *See Reyes v. RP Guardians Security Agency, Inc.*, 708 Phil. 598 (2013) [Per J. Mendoza, Third Division].

8 *See Philippine National Oil Co.-Energy Development Corp. v. Buenviaje*, 788 Phil. 508 (2016) [Per J. Jardeleza, Third Division].

9 *Id.* at 536.

10 *Biboso v. Victorias Milling*, 166 Phil. 717, 722–723 (1977) [Per J. Fernando, Second Division]; *See also Alcira v. NLRC*, 475 Phil. 455, 464 (2004) [Per J. Corona, Third Division]; *Manlimos v. NLRC*, 312 Phil. 178, 192 (1995) [Per J. Davide, Jr., First Division]; and *Cathay Pacific Airways, Ltd. v. Marin*, 533 Phil. 111, 126 (2006) [Per J. Callejo, Sr., First Division].

11 *Verdadero v. Barney Autolines Group of Companies Transport, Inc.*, 693 Phil. 646, 659 (2012) [Per J. Mendoza, Third Division]

12 *Masagana Farm Supply, Inc. v. Tompong*, G.R. No. 266925, June 14, 2023 [Notice, First Division].

regular.[13] Consequently, the general rule applies, and such employee becomes entitled to backwages until actual reinstatement or finality of judgment, which may be beyond the probationary period.

This interpretation is not consistent with, overlooks, and unwarrantedly impacts the characterization of probationary employment under Article 296 of the Labor Code:

> ARTICLE 296. [281] *Probationary Employment.* — **Probationary employment shall not exceed six (6) months from the date the employee started working,** unless it is covered by an apprenticeship agreement stipulating a longer period. The services of an employee who has been engaged on a probationary basis may be terminated for a just cause or when he fails to qualify as a regular employee in accordance with reasonable standards made known by the employer to the employee at the time of his engagement. **An employee who is allowed to work after a probationary period shall be considered a regular employee.** (Emphasis supplied)

The last sentence of Article 296 provides that "[a]n employee who is **allowed to work** after a probationary period shall be considered a regular employee." Regularization therefore for a probationary employee does not envision the mere lapse of the probationary period — rather, it recognizes the rendition of actual service beyond and despite the lapse of the probationary period. **By allowing the employee to work after the probationary period, the employer is deemed to have been satisfied with the employee's performance, and the employee is therefore deemed to be a regular employee.**

Article 296 works in this manner: the reasonable standards to qualify as a regular employee are made known to the probationary employee at the time of engagement. The probationary period is for the purpose of determining whether the employee is able to qualify as a regular employee. Before the end of the probationary period, the employer will provide the employee with the results of the former's evaluation and inform the latter if he or she qualified as regular employee. The last sentence of Article 296 envisions the situation where the employer does not provide the employee with the results of the evaluation but nonetheless allows the employee to work beyond the probationary period. In this situation, the law steps in and considers the employee as already a regular employee.

The application of the last sentence of Article 296 is akin to that of estoppel. The employer, who allows a probationary employee to work beyond the probationary period, is deemed ***by law*** to have bestowed on the employee that status of a regular employee. From the point of view of the employee, it can be said that the employee is made to believe that he or she has passed the standards of regularization, as he or she was allowed to work

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[13] *Ponencia*, p. 20.

beyond the probationary period. In effect, the employer's actions provide the basis for the employee's regularization.

I emphasize that this phrase — "allowed to work" — does not give the employer unbridled discretion to remove a probationary employee with or without any valid grounds, and consequently, pay less backwages. It does not provide basis for the employer to "disallow" an employee from working, in violation of the employee's security of tenure. This phrase should always be read in conjunction with the probationary employee's right to security of tenure which, as explained above, proscribes capricious and unjustified termination of probationary employment. At the risk of repetition, being "allowed to work" under Article 296 means that the employee has qualified to become a regular employee.[14]

Regrettably, the *ponencia* oversimplifies the requirement under the last sentence of Article of 296 and makes a broad statement that a probationary employee who was allowed to work refers to a one who was "not validly dismissed prior to the expiration of the probationary period."[15] The *ponencia* then concludes that the change in status of employment, from probationary to regular, happens *ipso facto,* by operation of law, and without need of any act on the part of the employer or employee.[16]

I simply cannot subscribe to the *ponencia*'s interpretation as it clearly deviates from the true meaning of Article 296 and amounts to an introduction of another mode of regularization that is not sanctioned by law, i.e., regularization by mere expiration of the probationary period or passage of time.

Interestingly, despite concluding that the expiration of the probationary period during the pendency of the case will result in regularization, the *ponencia* nonetheless refrains from explicitly declaring respondent a regular employee of petitioner. It appears that respondent is considered a regular employee, but not in the true sense of the term; rather, only for purposes of computation of her backwages (i.e., she will not be entitled to the statutory compensation and emoluments accorded by law to regular employees). As a result, the Court has practically extended her probationary employment — which began in September 2013 — for more than a decade, in clear contravention of the six (6)-month limit under Article 296.

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[14] Thus, it is not to correct to posit, as the Chief Justice does in his Concurring Opinion, that to construe "allowed to work" as purely within the control of the employer would mean that the employer can remove a probationary employee with or without any valid ground, and consequently only pay backwages for a short duration. This would effectively circumvent their right to security of tenure. Again, being "allowed to work" does not give the employer unbridled discretion to dismiss probationary employees; what it means is that the employee has earned the tacit of the employer.

[15] *Ponencia*, p. 22–23.

[16] *Id.* at 23.

It is also unreasonable to presume that respondent would have become a regular employee had she not been illegally dismissed. This proposition assumes that respondent would have performed to the satisfaction of petitioner for the remainder of her probationary period and would then have been allowed to continue working as a regular employee. Unlike in regular employment, there can be no reasonable expectation of continued employment beyond the probationary period for probationary employees.

After all, the decision to regularize employees is a management prerogative. A probationary employee is one who is placed on a "trial period" during which the employee seeks to prove to the employer that he or she has the qualifications to meet the reasonable standards for permanent or regular employment, while the employer observes the fitness and efficiency of the employee to ascertain whether he or she is qualified for permanent or regular employment.[17] This exercise — the determination of a probationary employee's fitness for regular employment — is a management prerogative. Jurisprudence provides that the employer has the right or is at liberty to choose as to who will be hired and who will be declined.[18] It is within the exercise of this right to select employees that the employer may set or fix a probationary period within which the latter may test and observe the conduct of the former before hiring them permanently. Thus, the Court cannot assume that the probationary employee would have been regularized upon the mere lapse of the probationary period.

Let us consider a scenario where an illegally dismissed probationary employee is ordered to be reinstated (and not just given backwages) because the probationary period has not yet expired. In such case, the probationary employee would be reinstated to the same probationary position with the same compensation and emoluments. **For the remainder of the probationary period, the employee's performance would again be subject to the same reasonable standards for regularization.** Hence, once reinstated, there is no assurance that the employee will, in the end, qualify for regularization. The proposition above discounts these nuances.[19]

Without actually qualifying for regularization, a probationary employee cannot claim to have a right to earn wages beyond the probationary period. There is, therefore, no reason to extend the computation of backwages beyond the probationary period because the rationale behind the award of backwages is to allow an employee to recoup the salaries and benefits which said employee should have **earned** had he or she not been illegally dismissed. It bears stressing that a probationary employee's right to

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17 *International Catholic Migration Commission v. NLRC*, 251 Phil. 560, 567 (1989) [Per J. Fernan, Third Division].

18 *Manlimos v. NLRC*, *supra* note 10, at 192.

19 Thus, it would be inaccurate to assume, as suggested by the Chief Justice in his Concurring Opinion, that had respondent been "allowed to work" after the probationary period, she would have become a regular employee and, therefore, entitled to backwages similar to an illegally regular employee. Again, this proposition presumes that the respondent would have performed to the satisfaction of her employer for the remainder of the probationary period.

security of tenure ends upon the expiration of the probationary period. Unless the employer deems him or her qualified for regularization, the probationary employee's right to continued employment also ends.

Thus, I cannot support the *ponencia's* conclusion, lifted from the Court's pronouncement in *Philippine Manpower Services, Inc. v. NLRC*,[20] (*Philippine Manpower*), that absent valid grounds to terminate a probationary employee, he or she becomes entitled to continued employment even beyond the probationary period. This statement disregards the requirement for regularization discussed above, which — I stress anew — is the only basis for continued employment beyond the probationary period.

Moreover, a full reading of *Philippine Manpower* in fact validates the conclusion that illegally dismissed probationary employees are entitled to backwages only until the end of the probationary period. *Philippine Manpower* involves an illegally dismissed probationary overseas worker. Overseas employment is contractual in nature. Republic Act (R.A.) No. 10022, or the "Migrant Workers and Overseas Filipinos Act of 1995," as amended, provides for the payment of salaries equivalent to the unexpired portion of the contract to illegally dismissed overseas workers, including those with probationary status. It is in this context that the Court in this case held that:

> Since as established in the case at bar, petitioners were unable to prove either ground as a basis for terminating Pangan's employment, no reason exists to sever the employment relationship between Adawliah and Pangan. Otherwise stated, absent the grounds for termination of a probationary employee, he is entitled to continued employment even beyond the probationary period. **Accordingly, had not Pangan been compelled to return to the Philippines, he could have demanded enforcement of the employment contract.**[21] (Emphasis supplied)

Evidently, this case supports the conclusion that an illegally dismissed employee is entitled to salaries corresponding only to the period where there is reasonable expectancy of continued employment, i.e., until the end of the term of a contract or end of the term of a probationary employment.

I recognize that the different views on the computation of backwages stem partly from the fact that there is no statute specifically providing the reckoning periods for the computation of backwages of probationary and regular employees. Be that as it may, the foregoing discussion demonstrates that the law affords a clear distinction between probationary and regular employment, and the Court should have taken these into consideration in the treatment of employees backwages. To emphasize, the Labor Code — particularly Articles 294 in relation to Article 296 — provides legal mooring for the interpretation that the backwages of an illegally dismissed

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[20] 296 Phil. 596 (1993) [Per J. Romero, Third Division].
[21] *Id.* at 606–607.

probationary employee should be computed only until actual reinstatement or the end of the probationary period. The *ponencia*, however, has blurred these distinctions for reasons other than those clearly found in law, i.e., to prevent an employer from evading financial repercussions stemming from the employment relationship.

Indeed, a question on the possible financial exposure of employers may be raised: particularly, that a maximum possible exposure of six months' worth of backwages will not deter employers from arbitrarily dismissing probationary employees to prevent them from attaining regular employment.

Deterrence of deplorable practices is, however, not a function of backwages but of damages.

I am aware of the Court's declaration in *Equitable Banking Corp. v. Sadac*[22] (*Equitable*) that "payment of full backwages is the price or penalty that the employer must pay for having illegally dismissed an employee." This statement, however, should not be taken at face value and should be contextualized. The Court in *Equitable* made this statement in relation to the abandonment of the *Mercury Drug Rule* which provides that compensation earned by illegally dismissed employees elsewhere should be deducted from their backwages. It was held that payment of **"full backwages"** (i.e., without deducting the salaries earned from other employment during the pendency of the illegal dismissal case) — not the payment of **backwages *per se*** — was no longer seen as amounting to unjust enrichment on the part of the employee but the "price or penalty the employer has to pay." As held by the Court in *Bustamante v. NLRC*,[23] the case cited in *Equitable*, *viz.:*

> . . . The rationale for such ruling was that, the earnings derived elsewhere by the dismissed employee while litigating the legality of his dismissal, should be deducted from the full amount of backwages which the law grants him upon reinstatement, so as not to unduly or unjustly enrich the employee at the expense of the employer.
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> The Court deems it appropriate, however, to reconsider such earlier ruling on the computation of backwages as enunciated in said *Pines City Educational Center* case, by now holding that conformably with the evident legislative intent as expressed in Rep. Act No. 6715, above-quoted, backwages to be awarded to an illegally dismissed employee, should not, as a general rule, be diminished or reduced by the earnings derived by him elsewhere during the period of his illegal dismissal. The underlying reason for this ruling is that the employee, while litigating the legality (illegality) of his dismissal, must still earn a living to support himself and family, while full backwages have to be paid by the employer as part of the price or penalty he has to pay for illegally dismissing his employee. The clear legislative intent of the amendment in Rep. Act No. 6715 is to give more benefits to workers than

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22 523 Phil. 781 (2006) [Per J, Chico-Nazario, First Division].
23 332 Phil. 833 (1996) [Per J. Padilla, *En Banc*].

> was previously given them under the *Mercury Drug rule* or the "deduction of earnings elsewhere" rule. Thus, a closer adherence to the legislative policy behind Rep. Act No. 6715 points to "full backwages" as meaning exactly that, *i.e.,* without deducting from backwages the earnings derived elsewhere by the concerned employee during the period of his illegal dismissal. In other words, the provision calling for "full backwages" to illegally dismissed employees is clear, plain and free from ambiguity and, therefore, must be applied without attempted or strained interpretation. *Index animi sermo est.*[24]

Relevantly, in *Albay Electric Cooperative, Inc. v. ALECO Labor Employees Organization*,[25] the Court had the occasion to rule that backwages were not awarded to penalize the employer but to enforce the obligation to pay the employees their salaries and benefits, *viz.*:

> In consideration of the foregoing, the award of backwages is proper — not as a penalty for non-compliance with the Assumption Order as argued by ALEO — but as satisfaction of ALECO's obligation towards the employees covered by the Assumption Order. On said date, the obligation of the employer to re-admit the striking employees and/or ***pay*** them their respective salaries and benefits arose. However, there is no proof that the affected employees were in fact paid by ALECO their corresponding salaries and benefits. Because of ALECO's failure to perform this obligation, and to give the affected employees what has become due to them as of January 10, 2014, backwages should be awarded.
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> In illegal dismissal cases, backwages refer to the employee's supposed earnings had he/she not been illegally dismissed. As applied in this case, backwages correspond to the amount ought to have been received by the affected employees if only they had been reinstated following the Assumption Order. This shall similarly include not only the employee's basic salary but also the regular allowances being received, such as the emergency living allowances and the 13th month pay mandated by the law, as well as those granted under a CBA, if any.[26]

To emphasize, therefore, if the objective is to penalize the employer for illegally dismissing an employee, the Court should impose damages.

In labor cases, *moral damages* are awarded when the employer acted in bad faith or fraudulently, in a manner oppressive to labor, or in a manner contrary to morals, good customs, or public policy.[27] They are awarded as compensation for actual injury suffered and not as a penalty.[28]

Meanwhile, *exemplary damages* are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages.[29] They may be awarded if the dismissal was

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24 *Id.* at 842–843.
25 883 Phil. 517 (2020) [Per J. Caguioa, First Division].
26 *Id.* at 530.
27 *Beltran v. AMA Computer College-Biñan*, 851 Phil. 134, 151 (2019) [Per J. Caguioa, Second Division].
28 *Magsaysay Maritime Corporation v. Chin, Jr.*, 731 Phil. 608, 614 (2014) [Per J. Abad, Third Division].
29 *Beltran v. AMA Computer College-Biñan*, *supra* note 25, at 151.

effected in a wanton, oppressive or malevolent manner.[30] Exemplary damages are "intended to serve as a deterrent to serious wrong doings, and as a vindication of undue sufferings and wanton invasion of the rights of an injured or a punishment for those guilty of outrageous conduct."[31] They are "a negative incentive to curb socially deleterious actions."[32] In labor cases, exemplary damages are necessary to deter future employers from committing the same acts.[33]

Thus, if the Court's objective is to penalize respondent's employer and to discourage other employers from engaging in the practice of terminating probationary employment to prevent regularization, it would be more appropriate to award exemplary damages instead of extending the accrual period of backwages in contravention of the Labor Code.

In this case, however, there is no finding that petitioner dismissed respondent in bad faith or in a wanton, oppressive or malevolent manner. Furthermore, respondent did not appeal the Court of Appeals' ruling which did not award any damages. For these reasons, the imposition of moral and exemplary damages would not be proper in this case.

In conclusion, I submit that the characterization of probationary employment under Article 296 of the Labor Code does not support regularization by mere lapse of the probationary period; it requires the rendition of actual service beyond the probationary period. Thus, contrary to the *ponencia*'s conclusion and consistent with the ruling in *Robinsons,* the lapse of the probationary period during the pendency of the illegal dismissal case should operate to terminate the employment relationship. Consequently, the backwages to which the illegally dismissed probationary employee is entitled to shall only accrue until the end of the probationary period.

I recognize the practice of unscrupulous employers who use the limited security of tenure of probationary employees to skirt their obligations under the law. I maintain, however, that deterrence of unlawful practices is not the purpose of backwages but of damages — specifically, exemplary damages. Thus, the Court should instead impose stiffer exemplary damages as penalty and deterrent when proper. A survey of illegal dismissal cases decided in 2023 and 2022 shows that the Court had awarded exemplary damages ranging from PHP 10,000.00 to PHP 100,000.00.[34] While there is

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30 *Agabon v. National Labor Relations Commission*, 485 Phil. 248, 367 (2004) [Per. J. Santiago, *En Banc*].

31 *People v. Dalisay*, 620 Phil. 831, 844 (2009) [Per J. Nachura, Third Division].

32 *Magsaysay Maritime Corporation v. Chin, Jr.*, *supra* note 26, at 614.

33 *Aldovino, et al. v. Gold and Green Manpower Management and Development Services, Inc.*, 854 Phil. 100, 119 (2019) [Per J. Leonen, Third Division].

34 *See Vestina Security Services, Inc. v. Villanueva*, G.R. No. 256704, March 29, 2023 [Notice, Second Division]; *Causeway Seafood Restaurant Corp. v. Camacho*, G.R. No. 250048 , February 1, 2023 [Notice, First Division]; *Añonuevo v. CBK Power Company, Ltd.*, G.R. No. 235534, January 23, 2023 [Per J. Singh, Third Division], *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68736; *Caballero v. Vikings Commissary,* G.R. No. 238859, October 19, 2022 [Per J. Leonen, Second Division], *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68775;

no clear metric in determining the proper amounts to be imposed as damages, the Court should consider whether the amount is commensurate to the fraudulent act committed by the employer and sufficient to send a message to other employers that the commission of similar acts will not be taken lightly by the Court.

I underscore the importance of empathizing with the rights of workers and prioritizing the protection of labor rights. Championing the cause of labor, however, must be done within the clear parameters of law and with equal regard to the rights of the employers.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

Adstratworld Holdings, Inc. v. Magallones, G.R. No. 233679, July 6, 2022 [Per J. Inting, Third Division], *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68434; *Agapito v. Aeroplus Multi-Services, Inc.*, G.R. No. 248304, April 20, 2022 [Per J. Lazaro-Javier, Third Division], *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68342; *Inter-Asia Development Bank v. Pereña*, G.R. No. 213627, April 5, 2022 [Notice, First Division]; and *Traveloka Philippines, Inc. v. Ceballos, Jr.*, G.R. No. 254697, February 14, 2022 [Per J. Perlas-Bernabe, Second Division], *available at* https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/68289.