EN BANC

G.R. No. 228357 – C.P. REYES HOSPITAL/ANGELINE M. REYES, Petitioner, **v. GERALDINE M. BARBOSA,** Respondent.

Promulgated:

April 16, 2024

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CONCURRING OPINION

GESMUNDO, ***C.J.:***

This case involves an illegal dismissal complaint filed by a probationary employee.

Geraldine M. Barbosa (Barbosa) was hired at the C.P. Reyes Hospital (Hospital) as Training Supervisor, for which she signed a six-month probationary employment contract for the period from September 4, 2013 to March 4, 2014. On November 27, 2013, she received a notice directing her to explain why no disciplinary action should be taken against her for being absent for three days without official leave of absence. She explained that she notified her supervisor on duty with regard to her November 4, 2013 absence, while she submitted a medical certificate and the required leave forms for her November 7 and 8 absences. On November 29, 2013, she received a letter formally terminating her probationary employment due to her failure to meet the reasonable standards set by the Hospital. The effective date of the termination of her employment was on December 30, 2013.[1]

The Labor Arbiter declared that Barbosa was illegally dismissed, but the National Labor Relations Commission (NLRC) reversed such ruling and stated that the Labor Arbiter considered only the numerical grades given to Barbosa, and not the feedback and comments from her evaluators. The Court of Appeals (CA), in turn, reversed the NLRC's finding and reinstated the Labor Arbiter's ruling with modifications as to the monetary awards. Hence, this Rule 45 Petition.[2]

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[1] *Ponencia*, pp. 3, 20.

[2] *Rollo*, pp. 10–37.

The *ponencia* denies the petition. It affirms the CA's ruling that the NLRC gravely abused its discretion when it held that the Hospital validly terminated Barbosa's employment.

Preliminarily, Barbosa's employment was clearly probationary in nature,[3] and thus, she can only be dismissed on the grounds of just or authorized cause, or failure to meet regularization standards made known to the employee at the time of engagement.

The *ponencia* rejects the Hospital's contention that Barbosa failed to meet the regularization standards. Barbosa's probationary contract indicated that she needed to maintain an average passing score equivalent to 80% as the reasonable standard for her continued employment. Records show that Barbosa's average scores in the two months of evaluation were 81.68% for the first month and 82.59% for the second month. The *ponencia* observes that the Nursing Director's feedback was executed only as an afterthought, or after Barbosa was already terminated. Moreover, the *ponencia* finds that the claim of Barbosa's absenteeism is not supported by the records. The *ponencia* finds that only one absence was unexplained for which no notice to explain was issued to Barbosa. Thus, there was no valid ground for the termination of Barbosa's employment.

Anent the monetary awards, the *ponencia* declares that Barbosa is entitled to separation pay in lieu of reinstatement, and to full backwages to be computed from the time that compensation was withheld (i.e., January 1, 2014) until the finality of the Decision. Resolving the jurisprudential conflict on the reckoning period for the award of backwages, the *ponencia* declares that illegally dismissed probationary employees are entitled to backwages until their "actual reinstatement" or if reinstatement is no longer viable, until the "finality of the decision," viz.:

> In the face of this jurisprudential conflict, the Court deems it necessary to state explicitly that illegally dismissed probationary employees, like regular employees, **are entitled to backwages up to their actual reinstatement**. In case reinstatement is proven to be infeasible due to strained relations between the employer and the employee, **backwages shall be computed from the time compensation was withheld up to the finality of the decision.**[4] (Emphasis in the original)

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3 *Ponencia*, pp. 6–8.

4 *Id.* at 19.

The *ponencia* explains that this ruling is in keeping with the constitutional and statutory guarantees in favor of labor. Indeed, probationary and regular employees alike enjoy the constitutional right to security of tenure.

I concur in the *ponencia.*

Barbosa's probationary employment was illegally terminated and her backwages should be computed until the finality of the Decision in the instant case. I write to underscore two points: *first*, the management's prerogative to terminate probationary employment is circumscribed by the constitutional right to security of tenure of probationary employees; and *second*, the computation of backwages until the finality of the decision is based on the existing regulatory framework governing probationary employment such that Congress is not precluded from revisiting said framework.

Constitutional right to security of tenure as applied to probationary employees; the management's exercise of its power to terminate employment must be anchored on a valid cause

The provisions on probationary employment balances the employers' prerogative to hire and the employees' right to security of tenure. The Court elucidated on this score, thus:

> On the one hand, employment on probationary status affords management the chance to fully scrutinize the true worth of hired personnel before the full force of the security of tenure guarantee of the Constitution comes into play. Based on the standards set at the start of the probationary period, management is given the widest opportunity during the probationary period to reject hirees who fail to meet *its own adopted but reasonable standards.*[5] (Emphasis in the original)

Employers are "at liberty to choose who will be hired and who will be denied employment."[6] Case law instructs that employers have the exclusive "prerogative to hire someone for the position, either on a permanent status right from the start or place him first on probation."[7] Should employers opt to first place an employee under probationary employment, they may set the

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5 *See Mercado v. AMA Computer College–Parañaque City, Inc.*, 632 Phil. 228, 253 (2010) [Per J. Brion, Second Division].

6 *Moral v. Momentum Properties Management Corporation*, 848 Phil. 620, 639 (2019) [Per J. Carpio, Second Division].

7 *Philippine National Oil Company–Energy Development Corporation v. Buenviaje*, 788 Phil. 508, 526 (2016) [Per J. Jardeleza, Third Division].

period within which the employee may be "placed on trial"[8] during which the employee's conduct may be observed before hiring the latter on a permanent basis. The nature of probationary employment is further explained, thus:

> The essence of a probationary period of employment lies primordially in the purpose or objective of both the employer and the employee during such period. While the employer observes the fitness, propriety, and efficiency of a probationary employee, in order to ascertain whether or not such person is qualified for regularization, the latter seeks to prove to the former that he or she has the qualifications and proficiency to meet the reasonable standards for permanent employment.[9]

Nevertheless, it must be emphasized that an employee's "right to security of tenure immediately attaches at the time of hiring," regardless of whether the employer decides to place the employee immediately on a permanent status, or under probation first.[10] Notably, even a probationary employee enjoys some form of security of tenure, although it is not on the same plane as that of a permanent employee. A probationary employee may be dismissed for just or authorized cause, and as an additional ground of dismissal, due to failure to qualify as a regular employee in accordance with the reasonable standards of the employer which were made known to [them] at the time of engagement.[11] Article 296 of the Labor Code states:

> 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)

Generally, the probationary period of employment is limited to six months. The exception to this general rule is when the parties to an employment contract agree otherwise, such as when the same is established by company policy or when the same is required by the nature of work to be performed by the employee.[12]

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8 *Skyway O & M Corporation v. Reinante*, 860 Phil. 668, 674 (2019) [Per J. Inting, Third Division].

9 *Moral v. Momentum Properties Management Corporation*, 848 Phil. 620, 634 (2019) [Per J. Carpio, Second Division].

10 *Philippine National Oil Company–Energy Development Corporation v. Buenviaje*, 788 Phil. 508, 526 (2016) [Per J. Jardeleza, Third Division].

11 *Id.* at 526–527.

12 *Umali v. Hobbywing Solutions, Inc.*, 828 Phil. 320, 334 (2018) [Per J. Reyes, J. Jr., Second Division], *citing Buiser v. Leogardo, Jr.*, 216 Phil. 144 (1984) [Per. J. Guerrero, Second Division].

In this case, Barbosa was hired on a probationary basis. The *ponencia* explains that Barbosa's employment contract clearly shows that the six-month probationary period and the reasonable standards for her regularization have been communicated to her at the start of her employment, viz.:

> As a standard Hospital procedure, we present you with these terms and conditions of your employment, for your information and conformity:
>
> 1. ***PROBATIONARY PERIOD*** – your employment shall commence on a probationary status, beginning as of **September 4, 2013** for a period of Six (6) months thereafter, and subject to regularization review at the end of the Six (6) months or on or before **March 4, 2014.** x x x[13]
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> . . . .
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> 7. ***TRAINING AND EVALUATION*** – you are required to maintain a satisfactory performance based on performance evaluation. You should get or maintain an average of *a passing score equivalent to 80% (Satisfactory)*. Failure to meet the reasonable standard set by this Hospital may warrant the penalty of termination of your employment.[14] (Emphasis supplied)

Barbosa's six-month probationary period started on September 4, 2013, but within a short period of three months, she was apprised that her employment would be terminated on the alleged ground that she failed to meet the reasonable standards set by her employer. In particular, the Hospital cited the "negative performance feedback received" by it "due to attitude including [Barbosa's] attendance records."[15]

In *Dusit Hotel Nikko v. Gatbonton*,[16] the Court enumerated the requisites to validly terminate a probationary employment on the ground of failure to meet the employer's reasonable standards: (1) this power must be exercised in accordance with the specific requirements of the contract; (2) *the dissatisfaction on the part of the employer must be real and in good faith*, not feigned so as to circumvent the contract or the law; and (3) there must be no unlawful discrimination in the dismissal.[17]

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13 *Ponencia*, p. 7. (Emphasis in the original)

14 *Id.* at 9. (Emphasis in the original)

15 *See ponencia*, p. 3.

16 523 Phil. 338 (2006) [Per J. Quisumbing, Third Division]; *see also Tamson's Enterprises, Inc. v. Court of Appeals*, 676 Phil. 384, 400 (2011) [Per J. Mendoza, Third Division].

17 *Dusit Hotel Nikko v. Gatbonton, id.* at 344, *as cited in Cambil v. Kabalikat Para sa Maunlad na Buhay, Inc.*, G.R. No. 245938, April 5, 2022 [Per J. Inting, First Division] at 12. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website. (Emphasis supplied)

In the present case, the *ponencia* masterfully discussed how it reached the conclusion that the Hospital's dissatisfaction with Barbosa's work is not genuine.[18] It underscored the fact that the negative performance evaluation was contained in a letter that was issued in December 2013, which came *after* the letter dismissing Barbosa from employment which was received on November 29, 2013. More importantly, Barbosa received satisfactory marks that met the 80% threshold required in her employment contract. The *ponencia* explains:

> [T]he evaluators each gave her a passing grade, except for one, who gave Barbosa a grade of 79.76%. **At any rate, for purposes of regularization, an *average score* of at least 80% is required by C.P. Reyes Hospital, which she obtained.**[19] (Emphasis in the original)

Hence, there was an objective basis to conclude that Barbosa had complied with the reasonable standard for her regularization as contained in her employment contract, which was to "get or maintain an average of a passing score equivalent to 80%."[20]

The scenario would have been different if Barbosa obtained a score below 80%. In *Cambil v. Kabalikat Para sa Maunlad na Buhay, Inc.*,[21] the probationary employee obtained an overall rating of 67.50%. Hence, the employer was able to show that the dismissal was "not arbitrary, fanciful, or whimsical" and that its dissatisfaction with the probationary employee was "real and in good faith."[22] In *Jaso v. Metrobank & Trust Co.*,[23] the probationary employee was informed that she needed to achieve an overall performance rating of at least 3.0 to become a regular employee, but she obtained a failing mark of 2.21. In these cases, considering the employee's poor performance, the employer cannot be compelled to keep the former in its employ. Indeed, an employer is not precluded from terminating the probationary employment if there is evident showing that its standards were not attained during the trial period.

In termination cases, the burden of proving valid cause for dismissing an employee, rests on the employer.[24] Here, the Hospital was unable to

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18 *See ponencia*, p. 12.
19 *Id.* at 13.
20 *Id.* at 9.
21 G.R. No. 245938, April 5, 2022 [Per J. Inting, First Division].
22 *Id.* at 16. This pinpoint citation refers to the copy of the Decision uploaded to the Supreme Court website.
23 G.R. No. 235794, May 12, 2021 [Per J. Inting, Third Division].
24 *Tamson's Enterprises, Inc. v. Court of Appeals*, 676 Phil. 384, 400 (2011) [Per J. Mendoza, Third Division].

discharge said burden, especially in view of the satisfactory rating received by Barbosa.

It is my view that this ruling does not necessarily take away the prerogative of the employer to choose its employees, particularly, the probationary employees. The Court is simply stating that an employer's prerogative cannot be exercised capriciously, whimsically, and arbitrarily as it will violate the right to security of tenure, even in a limited capacity, of probationary employees. Again, before an employer can dismiss a probationary employee for failing to meet the standards provided in the employment contract, the dissatisfaction on the part of the employer must be real and in good faith. Otherwise, it will not be considered as a valid ground for termination of the probationary employment. Hence, the *ponencia* correctly held that Barbosa was illegally dismissed.

The computation of backwages until the finality of the decision is based on the existing regulatory framework governing probationary employment; Congress is not precluded from revisiting such framework

An illegally dismissed employee is entitled to the twin reliefs of full backwages and reinstatement. This is based on Article 294 of the Labor Code viz.:

> Article 294. [279] *Security of Tenure.*—. . . 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.[25] (Emphasis supplied)

When reinstatement is no longer feasible, jurisprudence provides that separation pay shall be granted in lieu of reinstatement.[26] Thus, the illegally dismissed employee is granted *backwages* and *separation pay*. These monetary awards also apply to probationary employees who have been illegally dismissed. In this case, Barbosa was correctly found to be entitled to both backwages and separation pay, in light of the strained relations between the parties.

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[25] LABOR CODE, art. 294 (as renumbered in 2015).

[26] *Philippine National Oil Company–Energy Development Corporation v. Buenviaje*, 788 Phil. 508, 540 (2016) [Per J. Jardeleza, Third Division].

The two reliefs of backwages and separation pay are distinct from each other. Backwages represent "compensation that should have been earned but were not collected because of the unjust dismissal" while separation pay is the amount received by an employee at the time of severance from employment, and designed to provide such employee with the means or "wherewithal" while "looking for another employment."[27] Separation pay is "a proper substitute for reinstatement."[28] The basis of computation also differs: for separation pay, it is "usually the length of the employee's past service," while for backwages, it is "the actual period when the employee was unlawfully prevented from working."[29]

In computing the award of backwages, the *ponencia* notes the conflicting reckoning periods in computing backwages for illegally dismissed probationary employees. On one hand, there are cases where backwages are awarded up to the finality of the decision, similar to those for regular employees. On the other hand, there are cases where backwages are awarded only up to the end of the probationary period,[30] which is the end of the six-month probationary period.

In this case, the *ponencia* states that the first set of cases should govern – the reckoning periods in computing backwages for illegally dismissed probationary employees should be up to the finality of the decision, similar to those for regular employees.

I agree in the *ponencia* that the first set of cases should be followed. Hence, backwages for illegally dismissed probationary employees must be computed until the finality of the decision.

It must be emphasized that the computation of the backwages until the finality of the decision is consistent with the mandate under Article 294 of the Labor Code that "full backwages" shall be computed from the time the "compensation was withheld" from the employee up to the time of "actual reinstatement," and the jurisprudential pronouncement that if reinstatement is no longer feasible, it would be up to the finality of the decision. This reckoning period applies to regular and probationary employees alike.

Elementary is the rule in statutory construction that: where the law does not distinguish, the courts should not distinguish. At present, there is no statute or administrative issuance which sets a different reckoning period for

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27 *Genuino Agro-Industrial Development Corporation v. Romano*, 863 Phil. 360, 380 (2019) [Per J. Reyes, J. Jr., Second Division].

28 *Id.*

29 *Id.*

30 *See ponencia*, pp. 17–19.

computing backwages in favor of probationary employees. Thus, the Court shall adopt the same reckoning period.

Construing the prevailing statutory provisions governing probationary employees, the *ponencia* correctly holds that backwages should be computed up to actual reinstatement or finality of the decision. I expound below.

Article 296 of the Labor Code states that a probationary employee who is "*allowed to work after*" a probationary period shall be considered a *regular* employee. In the present case, Barbosa, a probationary employee, was found to have been illegally dismissed from work. Had she not been illegally dismissed, she would have continued with performing her tasks and therefore "*allowed to work*" after the probationary period. She would have become a *regular* employee, and earned compensation as such. Therefore, she is entitled to backwages similar to an illegally dismissed regular employee. This interpretation is more consistent with the State's policy in favor of labor.

Besides, to construe "allowed to work" as purely within the control of the employer would mean that an employer can remove an employee during the probationary period arbitrarily or without any valid ground, and, in consequence, the employer would only need to pay backwages for a short duration (i.e., up to the end of the probationary period). The statutorily mandated transition from probationary to regular employee when the reasonable standards are achieved would be rendered futile. This would effectively circumvent the security of tenure protection given to probationary employees.

To underscore, while the employer is given discretion on whether to retain or remove a probationary employee upon the expiration of the probationary period, this discretion is not absolute and ultimate. There must still be a valid cause for termination of the probationary employment. Without such cause, the probationary employee would stay employed and would continue to earn from the employment.

The short period of actual service of Barbosa at the Hospital is relevant for the computation not of the backwages, but of separation pay. To recall, separation pay is computed based on the length of the employee's past service. Hence, in this case, considering that her actual service to the Hospital was for six months only, Barbosa is awarded separation pay equivalent only to one month pay.

Viewed from another perspective, it may be argued that it would be unfair to grant backwages to a probationary employee beyond the probationary period. It is the employer who should decide whether an employee should pass the probationary period of six months. To award backwages beyond the six-month period would imply that the courts and tribunals are the ones that exercise discretion to confer full employment status to a probationary employee.

However, this alternative perspective is more apparent than real. Again, while the employer has the discretion to determine who among its probationary employees would become regular employees, this discretion must be exercised in good faith, and not in an arbitrary fashion. *If the employer exercises this discretion whimsically, then it is as if the probationary employee was never genuinely terminated within the six-month probationary period.* Jurisprudence dictates that when a probationary employee is not terminated within the six-month period, such person becomes a regular employee.[31] Hence, since the probationary employee becomes a regular employee, then the backwages that must be awarded in their favor should be the same as that of a regular employee. Accordingly, for those probationary employees who were arbitrarily dismissed by their employers within the six-month period, it is not inequitable to award them backwages in the same manner as regular employees.

This notwithstanding, it is my humble opinion that Congress is not precluded from enacting a law that would set a different reckoning period for the payment of backwages in favor of illegally dismissed probationary employees. To reiterate, the existing legal framework governing probationary employees supports the *ponencia*'s conclusion that full backwages must be awarded to such illegally dismissed employee. Currently, there is no statutory basis to anchor the computation of backwages only up to the end of the probationary period. The wisdom on whether to shorten the base period for computing backwages of probationary employees is a matter within the province of the Legislature.[32] While it can be the subject of a future enactment, the duty of the Court now is to interpret and apply the current law.

ACCORDINGLY, I vote to **DENY** the Petition and **AFFIRM** the ruling of the Court of Appeals that respondent Geraldine M. Barbosa was illegally dismissed with **MODIFICATION** on the monetary awards.

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31 *Servidad v. National Labor Relations Commission*, 364 Phil. 518, 526 (1999) [Per J. Purisima, Third Division], which states that an employee allowed to work beyond the probationary period is deemed a regular employee.

32 See *Rasonable v. National Labor Relations Commission*, 324 Phil. 191, 197–199 (1996) [Per J. Puno, Second Division] on the development of the legal framework on the computation of backwages for illegally dismissed employees. *See also Mercury Drug Co. v. Court of Industrial Relations*, 155 Phil. 636 (1974) [Per J. Makasiar, *En Banc*] which simplified the computation of backwages to three years without further qualification or deduction. This rule was changed by the LABOR CODE.

Let a copy of the Decision in this case be furnished to the House of Representatives and the Senate of the Philippines as reference for a possible review of the regulatory framework governing illegally dismissed probationary employees, particularly on the proper computation of their backwages.

ALEXANDER G. GESMUNDO
Chief Justice