Awards and Reliefs of Illegally Dismissed Employees: What the Law States and What Jurisprudence Grants

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I. INTRODUCTION

A. Background of the Study

The Labor Code of the Philippines[1] is one of the most important laws in the Philippines, effectively affecting as it does millions of workers composing the backbone of our society. Since its effectivity in 1974,[2] thousands of cases have been filed involving the issue of legality and validity of termination of employment as well as the proper reliefs and remedies that should be awarded to illegally dismissed employees.

1. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE] Presidential Decree No. 442 (1974).

2. The Labor Code was promulgated on 1 May 1974 and took effect on 1 November 1974 — six months after its promulgation. *See* LABOR CODE, art. II.

Through the years, the Labor Code has been the subject of numerous significant amendments, and one of its provisions remains deficient in addressing the issue of what an illegally dismissed employee is entitled to receive by way of relief or remedy as a consequence of such illegality of dismissal. This provision, despite being lately amended in 1989,[3] is Article 293 [279][4] which states —

> Article 293 [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.[5]

In Article 293 [279], there are two remedies which are made readily available to illegally dismissed employees. They are:

(a) Reinstatement without loss of seniority rights and other privileges; and

(b) Payment of full backwages, inclusive of allowances, other benefits, or their monetary equivalent.[6]

Aside from this Article, no other provision in the Labor Code affords reliefs and remedies to illegally dismissed employees.

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3. An Act to Extend Protection to Labor, Strengthen the Constitutional Rights of Workers to Self-Organization, Collective Bargaining and Peaceful Concerted Activities, Foster Industrial Peace and Harmony, Promote the Preferential Use of Voluntary Modes of Settling Labor Disputes, and Reorganize the National Labor Relations Commission, Amending for these Purposes Certain Provisions of Presidential Decree No. 442, as Amended, Otherwise Known as the Labor Code of the Philippines, Appropriating Funds therefore and for other Purposes, Republic Act No. 6715 (1989).

4. This Provision has been renumbered pursuant to Republic Act (R.A.) No. 10151. The provisions of the Labor Code cited in this Note will be following the renumbering pursuant to R.A. No. 10151. *See* An Act Allowing the Employment of Night Workers Thereby Repealing Articles 130 and 131 of Presidential Decree Number Four Hundred Forty-Two, as Amended, Otherwise Known as the Labor Code of the Philippines, Republic Act No. 10151, § 5 (2010).

5. R.A. No. 6715, § 34.

6. *Id.*

In normal circumstances, the court gives judgment and awards based on the law. However, there are cases where the court gives awards without any basis in law. Rather, the basis is simply jurisprudence.

One such case is when certain reliefs are granted to illegally dismissed employees who can no longer be reinstated because, for instance, of the existence of strained relations between him and his employer, or for whatever other cause the Supreme Court (Court) considers as enough justification to prevent reinstatement. The proper remedies or reliefs to which such employees are entitled are nowhere to be found in Article 293 [279] or in the Labor Code.

Given the lack of basis in the law regarding situations similar to what was mentioned, the Court then gives arbitrary awards to the illegally dismissed employees based on what it deems proper and equitable, most of the time citing certain provisions under the Labor Code that are not pointedly applicable to the case at hand.

There are instances when the courts would only analogously apply provisions of the law, which they deem slightly similar, in order to provide the basis for the grant of certain reliefs. This would then result in differing remedies and reliefs given to employees found in substantially similar situations.

Another example of the arbitrary awarding of reliefs is the imposition of legal interest on monetary awards, separation pay, and backwages. There are a number of cases wherein the Court imposes legal interest on the awards, while not giving at all in countless others.[7] This occurs even if the illegally dismissed employees in different cases are in exactly similar situations.

These are not the only instances wherein the Court gives arbitrary awards. Other illustrations include the grant of financial assistance to legally

7. *See generally* Secretary of Labor and Employment v. Panay Veteran's Security and Investigation Agency, Inc., 563 SCRA 112, 123 (2008); Malig-on v. Equitable General Services, Inc., 622 SCRA 326, 333 (2010); C. Alcantara & Sons, Inc. v. Court of Appeals, 631 SCRA 486, 503-04 (2010); Equitable Banking Corporation v. Sadac, 490 SCRA 380, 422-23 (2006); Sy v. Court of Appeals, 398 SCRA 301, 313 (2003); Austria v. National Labor Relations Commission, 310 SCRA 293, 303 (1999); Magos v. National Labor Relations Commission, 300 SCRA 484, 493 (1998); Dela Cruz v. National Labor Relations Commission, 299 SCRA 1, 15 (1998) [hereinafter *1998 Dela Cruz*]; Dela Cruz v. National Labor Relations Commission, 268 SCRA 458, 471-72 (1997) [hereinafter *1997 Dela Cruz*]; & Yu v. National Labor Relations Commission, 224 SCRA 75, 85-86 (1993).

and validly dismissed employees,[8] award of indemnity in the form of nominal damages in case of dismissal for just or authorized cause but without procedural due process,[9] award of moral and exemplary damages and attorney's fees,[10] and reliefs made available to illegally dismissed fixed-period employees.[11]

The fact that different remedies are given to similarly situated and circumstanced employees is patently unfair, extremely prejudicial, and evidently a case of discrimination.

To this day, no new amendatory legislation is in sight that would finally arrest this inequity and arbitrariness, and address this issue of proper reliefs or remedies that should, by law, be made available to illegally dismissed employees. While it is true that currently, there are numerous proposals in the Congress to promote and protect security of tenure, a review of the previous and pending measures[12] indicates that not one of them seeks to

8. *See, e.g.*, Reno Foods v. Nagkakaisang Lakas ng Manggagawa (NLM)-Katipunan, 615 SCRA 240, 250 (2010); Yrasuegui v. Philippine Airlines, Inc., 569 SCRA 467, 502 (2008); Philippine Airlines, Inc. v. National Labor Relations Commission, 634 SCRA 18, 47 (2010) [hereinafter *2010 Philippine Airlines*]; Malabago v. National Labor Relations Commission, 501 SCRA 659, 669 (2006); & Artificio v. National Labor Relations Commission, 625 SCRA 435, 446-47 (2010).

9. *See, e.g.*, Jaka Food Processing Corporation v. Pacot, 454 SCRA 119, 127-28 (2005) & Agabon v. National Labor Relations Commission, 442 SCRA 573, 620 (2004).

10. *See, e.g.*, Norkis Trading Co., Inc. v. Gnilo, 544 SCRA 279, 296-97 (2008); Price v. Innodata Phils., Inc., 567 SCRA 269, 290 (2008); San Miguel Corporation v. Aballa, 461 SCRA 392, 433 (2005); & Viernes v. National Labor Relations Commission, 400 SCRA 557, 569 (2003).

11. *See generally* Philippine-Singapore Transport Services, Inc. v. NLRC, 277 SCRA 506, 514 (1997) & Orlando Farms Growers Association v. NLRC, 299 SCRA 364, 372 (1998).

12. Some of the pending bills in Congress are:

    (a) An Act Strengthening the Security of Tenure of Workers in the Private Sector, Amending for the Purpose Articles 259 [248], 293 [279], 294 [280], 295 [281] and 302 [288], and Introducing New Articles 106, 106-A, 106-B, 106-C, 106-D, 106-E, 280-A AND 280-B to Presidential Decree No. 442, As Amended, Otherwise Known as the Labor Code of the Philippines, H.B. No. 4853, 15th Cong;

    (b) An Act Strengthening the Security of Tenure of Workers in the Private Sector, Amending for the Purpose Articles 259 [248], 293 [279], 294 [280], 295 [281] and 302 [288], and Introducing New Articles 106, 106-A, 106-B, 106-C, 106-D, 106-E, 280-A and 280-B

address this particular problem and worse, not one of them has identified this significant deficiency and deplorable inadequacy in Article 293 [279].

This Note enumerates and discusses the differing reliefs and remedies given by the Court in basically similar situations experienced by similarly circumstanced illegally dismissed employees without any basis in law.

By identifying these clear loopholes in the law, this Note will — firstly, prove that the grant of the arbitrary reliefs and remedies, though without bad faith on the part of the Court, results in the violation of the right of the illegally dismissed employees to their security of tenure; and secondly, that a curative amendatory legislation is extremely and urgently necessary to ensure better reliefs and remedies for them. It will then conclude that the awarding of arbitrary reliefs and remedies to illegally dismissed employees is violative of the employees' right to security of tenure. Due to this continuous instability in the awarding of reliefs that have no basis in the law, amendatory legislation to the Labor Code, particularly in its Article 293 [279], should urgently be passed by the Legislature.

II. SECURITY OF TENURE

A. Constitutional Bases

The concept of security of tenure is deeply rooted in the Constitution. Section 18, Article II[13] of the 1987 Constitution declares it a state policy not

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To Presidential Decree No. 442, As Amended, Otherwise Known as the Labor Code of the Philippines, H.B. No 1451, 15th Cong;

(c) An Act Strengthening Security of Tenure Amending for That Purpose Certain Provisions of Presidential Decree No. 442, As Amended, Otherwise Known as the Labor Code of the Philippines, H.B. No 892, 15th Cong;

(d) Security of Tenure Act of 2010, H.B. No. 3402, 15th Cong;

(e) An Act Rationalizing the Security of Tenure of Employees in the Private Sector, Strengthening their Rights, Prohibiting Contracting-Out of Work, and for Other Purposes, S.B. No 171, 15th Cong;

(f) An Act Strengthening Constitutional Security of Tenure, H.B. No 999, 13th Cong; and

(g) An Act Strengthening the Constitutional Security of Tenure, Amending for the Purpose the Labor Code of the Philippines and for Other Purposes S.B. No. 2622 introduced in the 15th Cong;

13. Article II of the 1987 Constitution is entitled "Declaration of Principles and State Policies." PHIL. CONST. art. II.

only to affirm labor as a primary social economic force but to protect the rights of workers and promote their welfare.[14]

More to the point, Section 3, Article XIII[15] of the same Constitution expressly guarantees the entitlement and right of workers to security of tenure.[16]

B. Legal Bases

To breathe life to this constitutional tenet, the Labor Code expressly declares as a basic policy in its Article 3 that the State shall assure the right of workers to security of tenure.[17]

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14. This Section provides that "[t]he State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare." PHIL. CONST. art. II, § 18.

15. Article XIII of the 1987 Constitution is entitled "Social Justice and Human Rights." PHIL. CONST. art. XIII.

16. This Section provides that

> [t]he State shall afford full protection to labor, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.
>
> It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to *security of tenure*, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.
>
> The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.
>
> The State shall regulate the relations between workers and employers, recognizing the right of labor to its just share in the fruits of production and the right of enterprises to reasonable returns to investments, and to expansion and growth.

PHIL. CONST. art. XIII, § 3 (emphasis supplied).

17. Article 3 of the Labor Code states —

> Article 3. Declaration of Basic Policy. — The State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race[,] or creed[,] and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, *security of tenure*, and just and humane conditions of work.

LABOR CODE, art. 3 (emphasis supplied).

In the same vein, Article 293 [279][18] seeks to protect and promote security of tenure by expressly prohibiting employers from terminating the services of an employee except for a just or authorized cause; and in the event that the termination is proven to be illegal and unjust, the same Article affords to the affected employee reliefs such as reinstatement without loss of his seniority rights and other privileges and payment to him of full backwages, inclusive of allowances, and of 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.[19]

C. Concept of Security of Tenure

The constitutional and legal provisions afore-cited are undoubtedly meant to ensure that security of tenure will not remain an empty concept, but become a living and vibrant legal proposition — adequate and concrete enough to be the touchstone and hallmark that would provide the most effective relief and succor to workers who are faced with the dim prospect of losing their jobs — in most cases their only "property" as this term is understood within the concept of the Constitution.

That employment constitutes a property right within the context of the due process clause[20] of the Constitution is well-settled in our jurisdiction.[21] Thus, when a person has no property, their job may possibly be their only possession or means of livelihood and those of their dependents. When a person loses their job, their dependents suffer as well. The worker should,

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18. Article 293 [279] of the Labor Code provides —

> Article 293 [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.

Id.

19. *Id.*

20. This Section provides that "[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." PHIL. CONST. art.III, § 1.

21. *See* Manila Electric Company v. Lim, 632 SCRA 195, 203 (2010) & Sagales v. Rustan's Commercial Corporation, 572 SCRA 89, 100 (2008).

therefore, be protected and insulated against any arbitrary deprivation of his or her job.[22]

Indeed, this policy of the State of guaranteeing "the right of every worker to security of tenure is an act of social justice."[23] As such, security of tenure cannot just "be denied on mere speculation of any similar or unclear nebulous basis."[24]

Resultantly, any scheme which would preclude the acquisition of tenurial security should be struck down and condemned as contrary to public policy, public morals, good customs, or public order. As pronounced by the Court, "no member of the workforce of this country should be allowed to be taken advantage of by the employer."[25]

D. Applicability of the Concept of Security of Tenure to All Kinds of Employees

If one were to read the literal provision of Article 293 [279], it would seem at first blush that the doctrine of security of tenure in the Labor Code is solely applicable to regular employees. This is so because its opening phrase states that "[*i*]*n 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."[26]

In fact, to the uninitiated, this is the impression conveyed by such phrase. The fact, however, is that the concept of security of tenure, both under the context of the Constitution and the Labor Code, is applicable to all forms of employment, and not just to regular employment.

For instance, probationary employees also enjoy security of tenure by virtue of the express provision of Article 295 [281] of the Labor Code, thus —

> Article 295 [281]. Probationary Employment — Probationary employment shall not exceed six 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*

22. *See* Philips Semiconductors (Phils.), Inc. v. Fadriquela, 427 SCRA 408, 421 (2004) & Philippine Geothermal, Inc. v. NLRC, 189 SCRA 211, 216 (1990).

23. *Sagales*, 572 SCRA at 100.

24. *Id.*

25. *See* Servidad v. National Labor Relations Commission, 305 SCRA 49, 51 (1999).

26. LABOR CODE, art. 293 (emphasis supplied).

> *employee at the time of his engagement.* An employee who is allowed to work after a probationary period shall be considered a regular employee.[27]

The proscription embodied in the law against terminating a probationary employee except "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"[28] acknowledges in no uncertain terms that he enjoys security of tenure. Of course, this tenurial security applies only during the period of probationary employment and not beyond it, unless the probationary employee successfully hurdles the probation, in which case, he becomes a regular employee and, consequently, his right to security of tenure continues all throughout his regular employment.

Besides the requirement that a just or authorized cause should exist before a probationary employee may be validly terminated, it is likewise required that he be afforded procedural due process.[29] He, therefore, cannot be terminated during the probationary period without observing the procedural due process requirement of the law.[30]

The same principle of security of tenure applicable to probationary employees also applies, with equal force and effect, to other forms of employment under Article 294 [280] of the Labor Code such as project, seasonal, and casual employment, as well as fixed-term employment which, per jurisprudence,[31] is not provided for in the Labor Code.

Hence, all these kinds of non-regular employment enjoy security of tenure and require that, during the effectivity of the contracts of employment, the project,[32] seasonal,[33] casual,[34] or fixed-term[35] employees

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27. *Id.* art. 296 (emphasis supplied).

28. *Id.*

29. Department of Labor and Employment, Omnibus Rules Implementing the Labor Code, Presidential Decree No. 422, Book V, Rule XIV, § 1 (1975).

30. LABOR CODE, art. 292 (b). *See* Philippine Daily Inquirer, Inc. v. Magtibay, Jr., 528 SCRA 355, 364 (2007) & Cebu Marine Beach Resort v. National Labor Relations Commission, 414 SCRA 173, 177 (2003).

31. *See* Brent School, Inc. v. Zamora, 181 SCRA 702, 709 & 711-12 (1990).

32. *See, e.g.*, Filipinas Pre-Fabricated Building Systems (Filsystems), Inc. v. Puente, 453 SCRA 820, 826-31 (2005).

33. *See, e.g.*, Hacienda Fatima v. National Federation of Sugarcane Workers-Food and General Trade, 396 SCRA 518, 524-27 (2003) & Bacolod-Murcia Milling Co., Inc. v. NLRC, 204 SCRA 155, 158 (1991).

34. *See, e.g.*, Kimberly-Clark (Phils.), Inc. v. Secretary of Labor, 538 SCRA 353, 360-61 (2007).

cannot be terminated sans any just or authorized cause and without affording them procedural due process; otherwise, their right to security of tenure would be violated.[36] But after the lapse of the period of their engagement as such, there is no more security of tenure to speak of. Thus, they can be terminated upon expiration of the period of their engagement without the need to comply with the due process requirement of the law.[37]

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35. *See, e.g.*, Medenilla v. Philippine Veterans Bank, 328 SCRA 1, 5-10(2000) & Anderson v. National Labor Relations Commission, 252 SCRA 116, 118-126 (1996).

36. Omnibus Rules Implementing the Labor Code, Book V, Rule XIV, § 1.

37. In case of project employment, if the termination is brought about by the completion of the project or any phase thereof, no prior notice of termination is required to comply with due process as this is not required according to Section 2, Rule I, Book VI and of the Implementing Rules of the Labor Code, as amended by Article III, Department Order No. 10, Series of 1997. In fact, it is provided under Section 2 (III), Rule XXIII, Book V of the same Rules that "[i]f the termination is brought about by the completion of the contract or phase thereof, no prior notice is required." D.M. Consunji, Inc. v. Gobres, 627 SCRA 145, 158 (2010) (citing Cioco Jr., v. CE Construction Corporation, 437 SCRA 648, 653 (2004) (emphasis supplied)).

    In case of seasonal employment, its termination happens upon the end of the season for which the seasonal employees have been hired without need to formally terminate them. The nature of their relationship with the employer is such that during off-season, they are temporarily laid off but they are re-employed during the season or when their services may be needed. They are not, strictly speaking, separated from the service but are merely considered as on leave of absence without pay until they are re-employed. Their employment relationship is never severed but only suspended. As such, they can be considered as being in the regular employment of the employer. *Bacolod-Murcia Milling Co.*, 204 SCRA at 158-59 & Abasolo v. National Labor Relations Commission, 346 SCRA 293, 305 (2000).

    In case of casual employment, a casual employee who has not rendered at least one year of service, is not a regular employee or does not become one. Therefore, he may be legally dismissed before the lapse of the one-year period. Capule v. National Labor Relations Commission, 191 SCRA 374, 377 (1990).

    In case of fixed-term employment, it ends upon the expiration of the fixed term mutually agreed upon by the parties without need to comply with the requisite of procedural due process normally required in just or authorized cause termination. An employment contract for a definite period terminates by its own term at the end of the mutually agreed period fixed by the parties. New Sunrise Metal Construction v. Pia, 527 SCRA 259, 265 (2007); Pangilinan v. General Milling Corporation, 434 SCRA 159, 168-72 (2004); & Blancaflor v. NLRC, 218 SCRA 366, 374-76 (1993).

With the exception of corporate officers,[38] managerial employees are also covered by security of tenure. Hence, the mere fact that one is a managerial employee does not give the employer unbridled discretion to remove him from his job. His being "a managerial employee does not by itself exclude him from the protection of the constitutional guarantee of security of tenure."[39]

Thus, managerial employees cannot be terminated without just cause, although there are certain causes valid for terminating managerial employees other than those applicable to rank-and-file employees. General managers, department managers, and the like, "whose powers and functions are central to the effective operation of the company[,] may be terminated for [loss of trust] and confidence"[40] — a ground which may be invoked against a managerial employee but generally not against a rank-and-file employee.[41] Dismissal of rank-and-file employees based on this ground requires a higher proof of involvement in the events in question.[42] Generally, "employers are allowed a wider latitude of discretion in terminating the employment of managerial personnel or those who, while not of similar rank, perform functions which by their nature, require the employer's trust and confidence."[43]

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38. Corporate officers, appointed or elected, are not covered by the doctrine of security of tenure. This is so because under Presidential Decree 902-A, "corporate officers" are "those officers of a corporation who are given that character either by the Corporation Code or by the corporation's by-laws." Specifically mentioned as corporate officers under Section 25 of the Corporation Code, are the president, secretary and treasurer and such other officers as may be provided for in the by-laws. Hence, not being employees, their dismissal is not covered by the Labor Code but by the Corporation Code. Consequently, the jurisdiction over cases filed by corporate officers for illegal dismissal belongs to the Regional Trial Court and not with the Labor Arbiter nor with the Securities and Exchange Commission (SEC), by virtue of the amendatory provision of Section 5 of R.A. No. 8799. The Securities Regulation Code [SECURITIES REGULATION CODE], Republic Act No. 8799, § 5 (2000).

39. *See* LBC Domestic Franchise Co. v. Florido, 530 SCRA 607, 619 (2007); Maglutac v. Fujitsu Computer Products Corporation of the Philippines v. Court of Appeals, 454 SCRA 737, 766 (2005); & National Labor Relations Commission, 189 SCRA 767, 778 (1990).

40. Yap v. Inciong, 186 SCRA 664, 670 (1990).

41. *Id.* at 670-71.

42. Velez v. Shangri-La's EDSA Plaza Hotel, 504 SCRA 13, 26 (2006).

43. Coca-Cola Bottlers Philippines, Inc. v. National Labor Relations Commission, 172 SCRA 751, 757 (1989). *See also* Mendoza v. National Labor Relations Commission, 310 SCRA 846, 863 (1999).

At the other end of the spectrum, even domestic workers or *kasambahays* enjoy security of tenure during the effectivity of their fixed-term employment. According to Section 32 of the newest law, R.A. No. 10361, otherwise known as Domestic Workers Act or *Batas Kasambahay*,[44] the employer cannot terminate their contract of employment before the expiration of the term unless there is a just and valid ground.[45] The law in fact states that "[n]either the domestic worker nor the employer may terminate the contract *before the expiration of the term* except for grounds provided for in Sections 33 and 34 of this Act."[46]

It is clear, therefore, that while the employment of domestic workers, being on a fixed-term basis, ceases upon its expiration, they cannot be terminated during its effectivity because they enjoy security of tenure during that period.

1. Recommended Amendatory Provision to Reflect Applicability of the Concept of Security of Tenure to All Kinds of Employees

In light of the foregoing discussion, there is a need to amend Article 293 [279] in order for it to reflect the fact that security of tenure is applicable to all kinds of employees, irrespective of rank, pay, status, position, or designation. Though it can be said that it is common knowledge that all types of employees are entitled to security of tenure, this is only true with people who have a background in law. If not expressly mentioned in the law, employees other than those who are considered regular employees would interpret such provision as applicable only to regular employees thus prompting them to no longer try to fight for their right to their position. The current state of the provision provides the possibility for different rulings to emanate where types of employment other than regular employment can readily be terminated in violation of the security of tenure.

Thus the proposed amendatory provision shall read as follows —

> Article 293 [279]. Security of Tenure — (a) All employees, regardless of rank, position, status, pay, or designation, shall enjoy security of tenure at all stages of employment. No employee shall be terminated without full observance of both substantive and procedural due process mandated under the Labor Code.

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44. An Act Instituting Policies for the Protection and Welfare of Domestic Workers [Domestic Worker's Act or Batas Kasambahay], Republic Act No. 10361 (2013).

45. *Id.* § 32.

46. *Id.* (emphasis supplied).

E. Statutory Due Process in the Labor Code, Confusingly Covered Separately Under Article 293 [279] for Substantive Due Process and Article 291 (b) [277 (b)] for Procedural Due Process

Although Article 293 [279] speaks of security of tenure, however, it covers only the substantive and not the procedural aspect of due process, which is provided for in another article of the Labor Code, particularly paragraph (b) of Article 291 [277] thereof.[47]

This separate presentation of the twin due process requisites brings about a lot of confusion in the application of the law because while Article 293 [279] is covered by Book Six of the Labor Code on "Post Employment" (Termination of Employment),[48] Article 291 (b) [277 (b)] is part of Book V[49] of the same Code on "Labor Relations."

Worse, this very important provision of the Labor Code, dealing as it does with procedural due process, has been bafflingly relegated as paragraph (b) of Article 291 [277] — one among eight unrelated paragraphs of the "Miscellaneous Provisions"[50] to the fifth book of the Labor Code on Labor Relations. As to how this could have been relevant to "Labor Relations," and not to "Post Employment," is perplexing, to say the least.

That procedural due process should have been included in Article 293 [279] alongside its twin — the substantive aspect thereof — is only logical. However, to date, no curative legislation has been enacted to treat this infirmity in the law.

The separation between the two provisions has already resulted in confusion on how procedural due process should be applied.[51] This has given rise to the constantly changing rulings on procedural due process as will be seen in the cases of *Wenphil Corporation v. NLRC*,[52] *Serrano v. National Labor Relations Commission*,[53] *Agabon v. National Labor Relations*

47. *See* LABOR CODE, art. 293.

48. *Id.*

49. *Id.* art.291 (b).

50. *Id.* art. 291.

51. *See generally* Wenphil Corporation v. NLRC, 170 SCRA 69 (1989); Serrano v. National Labor Relations Commission, 323 SCRA 445 (2000); Agabon v. National Labor Relations Commission, 442 SCRA 573 (2004); & Jaka Food Processing Corporation v. Pacot, 454 SCRA 119 (2005).

52. Wenphil Corporation v. NLRC, 170 SCRA 69 (1989).

53. *Serrano*, 323 SCRA.

Commission,[54] and *Jaka Food Processing Corporation v. Pacot*.[55] The implications of these cases will be discussed in detail later on in this Chapter.

1. Recommended Amendatory Provision to Merge Both Substantive and Procedural Due Process in One and the Same Provision of Article 293 [279]

In view of the discussion above, this Note thus suggests an amendment to Article 293 [279] making reference in one and the same provision to both the substantive and procedural due process provided in the Labor Code.

Consequently, the procedural due process described in paragraph (b) of Article 291 [277] should be deleted therefrom and included in Article 293 [279]. However, instead of replicating *in toto* the following provision of paragraph (b) of Article 291 [277], thus —

> (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause and without prejudice to the requirement of notice under Article 297 [283] of this Code, the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative, if he so desires, in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer. The Secretary of the Department of Labor and Employment may suspend the effects of the termination pending resolution of the dispute in the event of a *prima facie* finding by the appropriate official of the Department of Labor and Employment before whom such dispute is pending that the termination may cause a serious labor dispute or is in implementation of a mass lay-off.[56]

It shall be proposed that procedural due process in just cause termination be re-stated along the line of the pronouncement of the Supreme Court in the 2007 case of *King of Kings Transport, Inc. v. Mamac*,[57] which enumerated three aspects of procedural process, namely the first written notice, a required

54. *Agabon*, 442 SCRA.

55. *Jaka Food Processing Corporation*, 454 SCRA.

56. LABOR CODE, art. 291, ¶ 2.

57. King of Kings Transport, Inc. v. Mamac, 526 SCRA 116 (2007).

hearing or conference, and finally a second written notice.[58] Consequently, the proposed amendatory provision to Article 293 [279] reflecting the merger of both substantive and procedural due process therein as well as the principle enunciated in said case of *King of Kings*, shall read as follows:

> Article 293 [279] Security of Tenure —
>
> (a) All employees, regardless of rank, status, pay or designation, shall enjoy security of tenure at all stages of employment. No employee shall be terminated without full observance of both substantive and procedural due process mandated under the Labor Code.
>
> (b) Substantive due process shall refer to any of the just or authorized causes as defined in this Code, employment contract or company rules and regulations.
>
> (c) Procedural due process in just cause termination shall refer to the following steps:
>
> (1) First Written Notice — Service of first written notice to the employee containing the specific causes or grounds for termination against him and a directive for him to submit his written explanation within five calendar days from receipt thereof. The notice shall contain a detailed narration of the facts and circumstances of the charge/s and specifically mention which provisions of law employment contract or company rules and regulations have been violated.
>
> (2) Hearing — Conduct of a hearing or conference after serving the first notice wherein the employee shall be given the opportunity to: (a) explain and clarify his defenses to the charge/s against him; (b) present evidence in support of his defenses; and (c) rebut the evidence presented against him by the management. During the hearing or conference, the employee shall be given the chance to defend himself personally, with the assistance of a representative or counsel of his choice. Moreover, the parties may use this conference or hearing as an opportunity to come to an amicable settlement.
>
> (3) Second Written Notice — After determining that termination of employment is justified, the employer shall serve the employee a written notice of termination indicating that: (a) all circumstances involving the charge/s against the employee have been considered; and (b) grounds have been established to justify the severance of his employment.

And as far as procedural due process in authorized cause termination is concerned, the one provided under Article 297 [283] of the Labor Code shall be proposed to be adopted as substantial basis. It shall thus be re-stated as follows —

58. *Id.* at 124.

> (d) Procedural due process in authorized cause termination shall consist in the simultaneous service of separate notices to the concerned workers and to the Department of Labor and Employment at least one month before the intended date thereof.

F. Constantly Changing Rulings on Procedural Due Process

One source of continuing legal mix-up as far as the procedural due process requirement is concerned involves the issue of what the proper basis for its invocation should be.

Over the years, the Court, on several occasions, has changed the rules on the application of procedural due process. This not only leads to confusion but also to the deprivation of the right to security of tenure of employees as herein below exposed and expounded.

1. Former Rule: Dismissal Without Due Process Violates the Due Process Clause of the Constitution

For decades, it has been the consistent ruling of the Court that in cases where an employee is dismissed without affording him procedural due process, it is considered violative of the constitutional due process clause found in Section 1, Article III of the 1987 Constitution which provides that "[n]o person shall be deprived of life, liberty, or property without due process of law nor shall any person be denied the equal protection of the laws."[59]

This is so because ever since the concept of due process was applied to termination cases, employment has been treated as a "property" right within the meaning and context of this constitutional protection.[60] It is "his means of livelihood, [and] he cannot be deprived of his labor or work without due process of law."[61] Hence, the employee is entitled to due process not because of the Labor Code but because of the Constitution.[62]

Under the regime of this rule, it was consistently held that an employee cannot be dismissed from employment without according to him the

59. PHIL. CONST. art. III, § 1.

60. *Sagales*, 572 SCRA at 100.

61. *Id. See* Offshore Industries, Inc. v. NLRC (Fifth Division), 177 SCRA 50, 57 (1989). *See also Philippine-Singapore Transport Services*, 277 SCR at 513-14.

62. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY 101 (1996 ed.). *See also Serrano*, 323 SCRA at 531-46 (J. Panganiban, separate opinion) & Wallem Maritime Services, Inc. v. NLRC, 263 SCRA 174, 182 (1996).

constitutional right to due process whether he is a rank-and-file or a managerial employee. Otherwise, the dismissal will be declared illegal.[63]

Consequent to this rule, once an employee is dismissed, a determination is made whether there was compliance with substantive due process consisting of the existence of just or authorized cause and whether he was afforded procedural due process. The outcome of this determination or evaluation may be summed up as follows:

(1) Just or Authorized Cause + Procedural Due Process = Legal Dismissal.

(2) No Just or Authorized Cause + Procedural Due Process = Illegal Dismissal.

(3) No Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.

(4) Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.[64]

The fourth situation above is the most critical because this has been the subject of the changing rules starting with the 8 February 1989 decision in *Wenphil*, the 27 January 2000 ruling in *Serrano*, four years later, the 17 November 2004 decision in the case of *Agabon,* and still a few months thereafter, the 28 March 2005 ruling in the case of *Jaka.*

What makes this fourth situation precarious and critical, as would be extensively discussed below, is that on the basis of the finding alone that no procedural due process was afforded the dismissed employee, the dismissal will be declared illegal even if the substantive aspect of due process, that is, that there was just or authorized cause, was fully proved and established by evidence.

This rule was understandable since what is violated when procedural due process is not afforded to the dismissed employee is the due process clause of the Constitution (otherwise called "constitutional due process")[65] and not simply the due process provision of the Labor Code (also known as "statutory due process").[66]

Without a doubt, under the regime of this rule, the employee's tenurial security is better protected. In this situation, mere non-compliance with the procedural due process requirement which, in most cases, is treated by

63. Midas Touch Food Corp. v. NLRC, 259 SCRA 652, 658 (1996).

64. *Agabon*, 442 SCRA at 657 (J. Panganiban, separate dissenting opinion).

65. PHIL. CONST. art. III, § 1.

66. LABOR CODE, art. 293.

employers as unnecessary, insignificant, and cumbersome, will result in the reinstatement of the dismissed employee, "without loss of his 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."[67] Resultantly, employers are very careful not to transgress the procedural due process rule; otherwise, the dismissal will be declared illegal with the attendant adverse consequences found in Article 293 [279] of the Labor Code.

2. Re-Examination of the Application of the Procedural Due Process Rule

The changes in the application of the procedural due process rule through the years shall be examined in this Section. More specifically, the following changes in the doctrines will be discussed:

(1) The *Wenphil* Rule — Dismissal for Cause but Without Due Process Merits an Award of Indemnity Instead of Reinstatement and Backwages;

(2) The *Serrano* Rule — No Categorical Pronouncement on the Shift from Constitutional to Statutory Due Process as Basis; Dismissal for Cause but Without Due Process Makes Dismissal not Illegal but Ineffectual Thereby Meriting the Award of Full Backwages but not Reinstatement;

(3) The *Agabon* Rule — Categorical Declaration on the Shift from Constitutional to Statutory Due Process as Basis; Dismissal for Cause but Without Due Process Makes Dismissal not Illegal nor Ineffectual but Valid and Legal; Employee is Entitled to Indemnity in the Form of Nominal Damages but Not to Reinstatement nor Backwages;

(4) The *Jaka* Rule — Stiffer Indemnity for Lack of Due Process in Authorized Cause Termination.

i. The Wenphil Rule — Dismissal for Cause but Without Due Process Merits an Award of Indemnity Instead of Reinstatement and Backwages

Due to the extremely adverse outcome of dismissing employees without procedural due process, which would result in their reinstatement and payment of backwages even if there was just or authorized cause in support of their dismissal, the Supreme Court has expressly suggested a policy "re-examination" of the procedural due process rule in several cases.

67. *Id.*

Most noteworthy among the earlier cases where such policy "re-examination" was expressly suggested by the High Court is the 1989 *Wenphil* case. Here, private respondent employee figured in an altercation with a co-employee.[68] The day after the incident took place, both employees were at first suspended in the morning; and in the afternoon of the same day, they were dismissed without due process.[69] An official notice of termination was served to private respondent only four days thereafter.[70] Before the Supreme Court,

> [p]etitioner employer insists[ed] that private respondent was afforded due process[,] but he refused to avail of his right to the same; that when the matter was brought to the labor arbiter, he was able to submit his position papers although the hearing could not proceed due to the non-appearance of his counsel; and that the private respondent is guilty of serious misconduct in threatening or coercing a co-employee which is a ground for dismissal under Article 297 [[282]] of the Labor Code.[71]

Because of this, it was ruled that "the failure of petitioner to give private respondent the benefit of a hearing before he was dismissed constitutes a violation of his constitutional right to due process of law and equal protection of the laws."[72] Thus —

> The failure of petitioner to give private respondent the benefit of a hearing before he was dismissed constitutes an infringement of his constitutional right to due process of law and equal protection of the laws. The standards of due process in judicial as well as administrative proceedings have long been established. In its bare minimum, due process of law simply means giving notice and opportunity to be heard before judgment is rendered.[73]

However, despite the afore-stated finding, it was held that the private respondent did not deserve to be reinstated and be paid backwages, hence —

> By the same token, the conclusion of the public respondent NLRC on appeal that private respondent was not afforded due process before he was dismissed is binding on this Court. Indeed, it is well taken and supported by the records. *However, it cannot justify a ruling that private respondent should be reinstated with* [*backwages*] *as the public respondent NLRC so decreed. Although belatedly, private respondent was afforded due process before the labor arbiter wherein*

68. *Wenphil*, 170 SCRA at 71.

69. *Id.*

70. *Id.* at 71-72.

71. *Id.* at 74.

72. *Id.* 74-75.

73. *Id.*

> *the just cause of his dismissal had been established. With such finding, it would be arbitrary and unfair to order his reinstatement with* [*back wages*].[74]

Since this was not the prevailing norm at that time, the Supreme Court recommended a policy "re-examination" of this rule on dismissal without compliance with the procedural due process.[75] Therefore,

> [t]he Court [held] that the policy of ordering the reinstatement to the service of an employee without loss of seniority and the payment of his wages during the period of his separation until his actual reinstatement but not exceeding three years without qualification or deduction, when it appears he was not afforded due process, although his dismissal was found to be for just and authorized cause in an appropriate proceeding in the Ministry of Labor and Employment, *should be re-examined*. It will be highly prejudicial to the interests of the employer to impose on him the services of an employee who has been shown to be guilty of the charges that warranted his dismissal from employment. Indeed, it will demoralize the rank and file if the undeserving, if not undesirable, remains in the service.[76]

The *Wenphil* case was decided in 1989. This suggested policy "re-examination" and award of indemnity were expressly reiterated in the 1991 case of *Pacific Mills, Inc. v. Alonzo*[77] and in the 1994 case of *Alhambra Industries, Inc. v. NLRC*.[78] However, it was only actually "re-examined" in the 2000 case of *Serrano*.

By reason of this pronouncement, a new rule was likewise enunciated in *Wenphil*, labelled as the *Wenphil* Rule, or otherwise known as the "Belated Due Process" Rule.[79] Thereunder, the employee declared illegally dismissed because of lack of due process is no longer entitled to reinstatement and full backwages but simply to an indemnity.[80]

Based on the same criteria as mentioned before, consequent to the application of this *Wenphil* Rule, once an employee is dismissed, a determination should be made whether there was observance of substantive due process referring to the existence of just or authorized cause and

74. *Wenphil*, 170 SCRA at 75 (emphasis supplied).

75. *Id.*

76. *Id.* at 75-76 (emphasis supplied).

77. *See generally* Pacific Mills, Inc. v. Alonzo, 199 SCRA 617 (1991).

78. *See generally* Alhambra Industries, Inc. v. NLRC, 238 SCRA 232 (1994).

79. *Agabon*, 442 SCRA at 610.

80. *Id.* at 610-11.

whether he was given procedural due process.[81] The following summation may thus be made:

(1) Just or Authorized Cause + Procedural Due Process = Legal Dismissal.

(2) No Just or Authorized Cause + Procedural Due Process = Illegal Dismissal.

(3) No Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.

(4) Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.[82]

Although under the fourth situation — which is the most crucial — the dismissal is declared illegal, the consequence is merely the payment of indemnity and not reinstatement with full backwages.[83]

The amount of the indemnity, however, varies from case to case. A survey of cases decided under the regime of the *Wenphil* Rule indicates that ₱1,000.00 was not the threshold amount as awarded in *Wenphil* and other cases.[84] There are some other cases where the amount awarded was

81. *Serrano*, 323 SCRA at 526 (J. Vitug, separate concurring and dissenting opinion).

82. *Id.*

83. *Agabon*, 442 SCRA at 610.

84. *See, e.g.*, Biantan v. NLRC (Fourth Division, Cebu City), 287 SCRA 645, 651 (1998); Manuel v. N. C. Construction Supply, 282 SCRA 326, 332-36 (1997); Philippine Rabbit Bus Lines, Inc. v. NLRC, 279 SCRA 106, 116 (1997); Camua v. National Labor Relations Commission, 279 SCRA 45, 51 (1997); & ABS-CBN Employees Union v. NLRC, 276 SCRA 123, 127-28 & 132 (1997).

₱2,000.00,[85] ₱3,000.00,[86] ₱5,000.00,[87] ₱7,000.00,[88] and the highest which was ₱10,000.00.[89]

It is thus clear from the above disquisition that even with the express grant of the twin reliefs of reinstatement and full backwages under Article 293 [279] of the Labor Code, the Court has not awarded them simply because of the failure of the employer to give due process to the dismissed employee — considered a gross violation of the due process clause of the Constitution.

That this shift in the rule is remarkably adverse to the exercise of the right to security of tenure of dismissed employees is clearly evident, especially considering that Article 293 [279] remains unchanged by any legislative amendment that could have justified the shift in its interpretation.

What is clearly seen from the afore-cited numerous cases, where despite the express provision of Article 293 [279] granting these reliefs, indemnity was awarded in lieu of reinstatement and backwages, is the exercise of extraordinary, unlimited discretion by the Supreme Court in changing the rule as it deems fit and necessary.

It must be noted that in almost all illegal dismissal cases decided before *Wenphil* and even during the regime of the doctrine enunciated thereunder, it has been the consistent ruling that every time an employee is dismissed without giving him procedural due process, what is violated is the due process clause[90] in the Constitution and surprisingly, not the due process provision found in the Labor Code, which has been belatedly referred to as "statutory due process" to distinguish it from the said "constitutional due process."

85. *See, e.g.*, Bondoc v. National Labor Relations Commission, 276 SCRA 288, 300 (1997); Bontia v. National Labor Relations Commission, 255 SCRA 167, 177 (1996); & Sebuguero v. National Labor Relations Commission, 248 SCRA 532, 548 (1995).

86. *See, e.g.*, Mabaylan v. NLRC, 203 SCRA 570, 575 (1991).

87. *See, e.g.*, Tan v. National Labor Relations Commission, 299 SCRA 169, 187 (1998); Equitable Banking Corporation v. NLRC, 273 SCRA 352, 383 (1997); Magnolia Dairy Products Corp. v. NLRC, 252 SCRA 483, 492-93 (1996); & Falguera v. Linsangan, 251 SCRA 364, 377 (1995).

88. *See, e.g.*, Del Val v. National Labor Relations Commission, 296 SCRA 283, 290 (1998).

89. *See, e.g.*, *Alhambra Industries*, 238 SCRA at 239-40 & Reta v. National Labor Relations Commission, 232 SCRA 613, 618 (1994).

90. PHIL. CONST. art. III, § 1.

Said paragraph (b) of Article 291 [277] has been, all this time, part and parcel of the Labor Code and yet, sparingly was it mentioned in illegal dismissal cases where the procedural due process requirement was violated.

This disregard of paragraph (b) of Article 291 [277], however, was suddenly noticed in the 2000 case of *Serrano*.

ii. The Serrano Rule — No Categorical Pronouncement on the Shift from Constitutional to Statutory Due Process as Basis; Dismissal for Cause but Without Due Process Makes Dismissal not Illegal but Ineffectual Thereby Meriting the Award of Full Backwages but not Reinstatement

The landmark *en banc* ruling in the 27 January 2000 case of *Serrano* has dramatically changed the policy on the effect of lack of procedural due process in illegal dismissal cases.

In *Serrano*,

> [p]etitioner was hired by private respondent[,] Isetann Department Store[,] as a security checker to apprehend shoplifters and prevent pilferage of merchandise. Initially hired on [4 October 1984] on [a] contractual basis, petitioner eventually became a regular employee on [4 April 1985]. In 1988, he became [the] head of the Security Checkers Section of private respondent. Sometime in 1991, as a cost-cutting measure, private respondent decided to phase out its entire security section and engage the services of an independent security agency.[91]

Petitioner was given a notice of termination on 11 October 1991 to take effect on the same day.[92] Private respondent, however, did not notify the Department of Labor and Employment (DOLE) nor did it observe the procedural due process required in authorized cause termination by serving separate notices to the employee to be terminated due to redundancy and to the DOLE at least one month prior to its effectivity.[93] As a consequence of his termination, petitioner filed an illegal dismissal case.[94]

One of the issues raised before the Court was whether his dismissal was illegal in light of the failure of the private respondent to comply with the procedural due process requirement.[95] If declared illegal, the next question would be the proper relief to which petitioner may be entitled.

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91. *Serrano*, 323 SCRA at 456.

92. *Id.*

93. *Id.* at 456.

94. *Id.*

95. *Id.* at 459.

The *en banc Serrano* ruling is multi-faceted. It reflects the result of the policy "re-examination" suggested by the Court as early as the 1989 *Wenphil* case and subsequent cases.[96] This fact was admitted in *Serrano* in this wise —

> Need for Re-examining the *Wenphil* Doctrine
>
> Today, we once again consider the question of appropriate sanctions for violations of the notice requirement in light of our experience during the last decade or so with the *Wenphil* doctrine. The number of cases involving dismissals without the requisite notice to the employee, although effected for just or authorized causes, suggests that the imposition of fine for violation of the notice requirement has not been effective in deterring violations of the notice requirement. Justice [Artemio V.] Panganiban finds the monetary sanctions 'too insignificant, too niggardly, and sometimes even too late.' On the other hand, Justice [Reynato S.] Puno says there has in effect been fostered a policy of 'dismiss now, pay later' which moneyed employers find more convenient to comply with than the requirement to serve a 30-day written notice (in the case of termination of employment for an authorized cause under Arts. 283-284 or to give notice and hearing (in the case of dismissals for just causes under Art. 282).
>
> For this reason, they regard any dismissal or layoff without the requisite notice to be null and void even though there are just or authorized causes for such dismissal or layoff. Consequently, in their view, the employee concerned should be reinstated and paid backwages.[97]

As a result of this "re-examination," a new doctrine was born in *Serrano* which declared dismissal for a just or authorized cause but without procedural due process not as "illegal" but simply "ineffectual."[98] The Court ratiocinated in this manner —

> Validity of Petitioner's Layoff not Affected by Lack of Notice
>
> We agree with our esteemed colleagues, Justices Puno and Panganiban, that we should rethink the sanction of fine for an employer's disregard of the notice requirement. We do not agree, however, that disregard of this requirement by an employer renders the dismissal or termination of employment null and void. Such a stance is actually a reversion to the discredited pre-*Wenphil* rule of ordering an employee to be reinstated and paid backwages when it is shown that he has not been given notice and hearing although his dismissal or layoff is later found to be for a just or authorized cause. Such rule was abandoned in *Wenphil* because it is really unjust to require an employer to keep in his service one who is guilty, for example, of an attempt on the life of the employer or the latter's family, or when the employer is precisely retrenching in order to prevent losses.

96. *Id.* at 465-66.

97. *Serrano*, 323 SCRA at 465-66.

98. *Id.* at 504 (J. Puno, dissenting opinion).

...

> Lack of Notice Only Makes Termination Ineffectual
>
> Not all notice requirements are requirements of due process. Some are simply part of a procedure to be followed before a right granted to a party can be exercised. Others are simply an application of the Justinian precept, embodied in the Civil Code, to act with justice, give everyone his due, and observe honesty and good faith toward one's fellowmen. Such is the notice requirement in [Articles] 282-283. The consequence of the failure either of the employer or the employee to live up to this precept is to make him liable in damages, not to render his act (dismissal or resignation, as the case may be) void. The measure of damages is the amount of wages the employee should have received were it not for the termination of his employment without prior notice. If warranted, nominal and moral damages may also be awarded.
>
> We hold, therefore, that, with respect to [Article] 283 of the Labor Code, the employer's failure to comply with the notice requirement does not constitute a denial of due process but a mere failure to observe a procedure for the termination of employment which makes the termination of employment merely ineffectual. It is similar to the failure to observe the provisions of [Article] 1592, in relation to [Article] 1191, of the Civil Code in rescinding a contract for the sale of immovable property. Under these provisions, while the power of a party to rescind a contract is implied in reciprocal obligations, nonetheless, in cases involving the sale of immovable property, the vendor cannot exercise this power even though the vendee defaults in the payment of the price, except by bringing an action in court or giving notice of rescission by means of a notarial demand. Consequently, a notice of rescission given in the letter of an attorney has no legal effect, and the vendee can make payment even after the due date since no valid notice of rescission has been given.[99]

Indeed, under the Labor Code, only the absence of a just cause for the termination of employment can make the dismissal of an employee illegal. This is clear from Article 293 [279] which provides —

> *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.
>
> Thus, only if the termination of employment is not for any of the causes provided by law is it illegal and, therefore, the employee should be

99. *Id.* at 466 & 471-72.

> reinstated and paid backwages. To contend, as Justices Puno and Panganiban do, that even if the termination is for a just or authorized cause the employee concerned should be reinstated and paid backwages would be to amend [Article 293 [279]] by adding another ground for considering a dismissal illegal. What is more, it would ignore the fact that under [Article 300 [286]], if it is the employee who fails to give a written notice to the employer that he is leaving the service of the latter, at least one month in advance, his failure to comply with the legal requirement does not result in making his resignation void but only in making him liable for damages.[100]

In asserting this newly-minted doctrine of "ineffectual" dismissal, the Court has placed emphasis on the injustice that the previous pre-*Wenphil* rulings have wrought against the interest of the employer, thus —

> [Unjust Results of Considering Dismissals/Layoffs Without Prior Notice As Illegal]
>
> ...
>
> The refusal to look beyond the validity of the initial action taken by the employer to terminate employment either for an authorized or just cause can result in an injustice to the employer. For not giving notice and hearing before dismissing an employee, who is otherwise guilty of, say, theft, or even of an attempt against the life of the employer, an employer will be forced to keep in his employ such guilty employee. This is unjust.
>
> It is true the Constitution regards labor as 'a primary social economic force.' But so does it declare that it 'recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investment.' The Constitution bids the State to 'afford full protection to labor.' 'But it is equally true that 'the law, in protecting the rights of the laborer, authorizes neither oppression nor self-destruction of the employer.' And it is oppression to compel the employer to continue in employment one who is guilty or to force the employer to remain in operation when it is not economically in his interest to do so.
>
> In sum, we hold that if in proceedings for reinstatement under [Article 298. [283]], it is shown that the termination of employment was due to an authorized cause, then the employee concerned should not be ordered reinstated even though there is failure to comply with the 30-day notice requirement. Instead, he must be granted separation pay in accordance with [Article 298 [283]].
>
> ...
>
> On the other hand, with respect to dismissals for cause under [Article 297 [282]] if it is shown that the employee was dismissed for any of the just causes mentioned in said [Article 297 [282]], then, in accordance with that article, he should not be reinstated. However, he must be paid backwages

100. *Id.* at 473.

> from the time his employment was terminated until it is determined that the termination of employment is for a just cause because the failure to hear him before he is dismissed renders the termination of his employment without legal effect.[101]

Using the same criteria as cited before, as a result of the application of this "ineffectual" dismissal rule, once an employee is dismissed, a determination should be made whether there was compliance with substantive due process consisting of the existence of just or authorized cause, and whether he was afforded procedural due process. The following conclusion may thus be made:

(1) Just or Authorized Cause + Procedural Due Process = Legal Dismissal.

(2) No Just or Authorized Cause + Procedural Due Process = Illegal Dismissal.

(3) No Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.

(4) Just or Authorized Cause + No Procedural Due Process = Ineffectual Dismissal.

Again, the fourth situation above is the one affected by the application of this rule. Hence, the consequence of the declaration that the dismissal was "ineffectual" is not the grant of reinstatement to the dismissed employee, but the payment of full backwages to him computed from the time of the ineffectual dismissal until the finality of the decision.[102]

That the application of this doctrine squarely contravenes the mandate under Article 293 [279] of the Labor Code is crystal clear. Wanting any basis in law, the application of this "ineffectual" dismissal doctrine certainly prejudices the right of the workers to security of tenure — the relief of reinstatement having been completely removed from among the remedies available to him as a consequence of his employer's violation of the procedural due process requirement.[103]

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101. *Id.* at 474-76 (citing Citing Manila Trading and Supply Co. v. Zulueta, 69 Phil. 485, 487 (1940); Villanueva v. NLRC (Second Division), 295 SCRA 326, 333 (1998); DI Security and General Services, Inc. v. NLRC, 264 SCRA 458, 466 (1996); Flores v. National Labor Relations Commission, 256 SCRA 735, 744 (1996); San Miguel Corporation v. Ubaldo, 218 SCRA 293, 301 (1993); & Colgate Palmolive Philippines, Inc. v. Ople, 163 SCRA 323, 331 (1988)).

102. *Serrano*, 323 SCRA at 466-67.

103. *Id.* at 467.

The afore-quoted ratiocinations made by the Court in support of the doctrine of "ineffectual" dismissal, although not based on Article 293 [279] of the Labor Code nor on any other provision of the Labor Code, are all justified on the basis of the finding that the Constitutional due process clause is not the provision violated in case of dismissal without observance of due process.

Surprisingly, however, after making this pronouncement, the Court did not categorically cite in *Serrano* what the legal basis of procedural due process should be. No reference was made to paragraph (b) of Article 291 [277] of the Labor Code as the "new" proper basis of procedural due process in termination cases.

iii. The Agabon Rule — Categorical Declaration on the Shift from Constitutional to Statutory Due Process as Basis; Dismissal for Cause but Without Due Process Makes Dismissal not Illegal nor Ineffectual but Valid and Legal; Employee is Entitled to Indemnity in the Form of Nominal Damages but not to Reinstatement nor Backwages

It was only in the 2004 *en banc* decision in *Agabon*, promulgated four years after *Serrano*, where the Court made the categorical and definitive declaration that instead of the due process clause of the 1987 Constitution, it is paragraph (b) of Article 292 [277] of the Labor Code that should be the touchstone upon which procedural due process should be based.[104]

In *Agabon*, private respondent, Riviera Home Improvements, Inc., "[was] engaged in the business of selling and installing ornamental and construction materials. It employed petitioners Virgilio Agabon and Jenny Agabon as gypsum board and cornice installers on [2 January 1992] until [23 February 1999], when they were dismissed for abandonment of work."[105] After due proceedings, the High Court pronounced that the termination of the Agabons was for a just and valid cause.[106] However, it was determined and established that the proper procedures for their dismissal were not observed.[107]

In this case, the Court retold the evolution of the application of the procedural due process rule, starting from the pre- and post-*Wenphil* doctrines until *Serrano*, in this wise —

> Prior to 1989, the rule was that a dismissal or termination is illegal if the employee was not given any notice. In the 1989 case of *Wenphil*, [ ] we

104. *Agabon*, 442 SCRA at 613-20.

105. *Id.* at 602.

106. *Id.* at 620.

107. *Id.* at 613-14.

reversed this long-standing rule and held that the dismissed employee, although not given any notice and hearing, was not entitled to reinstatement and backwages because the dismissal was for grave misconduct and insubordination, a just ground for termination under Article 282 [297]. The employee had a violent temper and caused trouble during office hours, defying superiors who tried to pacify him. We concluded that reinstating the employee and awarding backwages 'may encourage him to do even worse and will render a mockery of the rules of discipline that employees are required to observe.' We further held that —

'Under the circumstances, the dismissal of the private respondent for just cause should be maintained. He has no right to return to his former employment.

However, the petitioner must nevertheless be held to account for failure to extend to private respondent his right to an investigation before causing his dismissal. The rule is explicit as above discussed. The dismissal of an employee must be *for just or authorized cause and* [*with*] *due process*. Petitioner committed an infraction of the second requirement. Thus, it must be imposed a sanction for its failure to give a formal notice and conduct an investigation as required by law before dismissing petitioner from employment. Considering the circumstances of this case[,] petitioner must indemnify the private respondent the amount of ₱1,000.00. The measure of this award depends on the facts of each case and the gravity of the omission committed by the employer.'

The rule thus evolved [—] where the employer had a valid reason to dismiss an employee but did not follow the due process requirement, the dismissal may be upheld but the employer will be penalized to pay an indemnity to the employee. This became known as the *Wenphil* or Belated Due Process Rule.

On [27 January 2000], in *Serrano*, the rule on the extent of the sanction was changed. We held that the violation by the employer of the notice requirement in termination for just or authorized causes was not a denial of due process that will nullify the termination. However, the dismissal is ineffectual and the employer must pay full backwages from the time of termination until it is judicially declared that the dismissal was for a just or authorized cause.

The rationale for the re-examination of the *Wenphil* doctrine in *Serrano* was the significant number of cases involving dismissals without requisite notices. We concluded that the imposition of penalty by way of damages for violation of the notice requirement was not serving as a deterrent. Hence, we now required payment of full backwages from the time of dismissal until the time the Court finds the dismissal was for a just or authorized cause.

Serrano was confronting the practice of employers to 'dismiss now and pay later' by imposing full backwages.

We believe, however, that the ruling in *Serrano* did not consider the full meaning of Article 279 of the Labor Code[.]

...

> This means that the termination is illegal only if it is not for any of the justified or authorized causes provided by law. Payment of backwages and other benefits, including reinstatement, is justified only if the employee was unjustly dismissed.
>
> The fact that the *Serrano* ruling can cause unfairness and injustice which elicited strong dissent has prompted us to revisit the doctrine.[108]

After the above discussion, the Court continued with the ratiocination on why the due process clause of the Constitution is not the proper basis for the invocation and application of the due process requirement in termination cases.[109]

Unlike in *Serrano*, this time it was categorically pronounced that paragraph (b) of Article 292 [277] is the proper legal basis thereof.[110] Thus, it distinguished constitutional due process from statutory due process —

> To be sure, the [d]ue [p]rocess [c]lause in Article III, Section 1 of the Constitution embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our entire history. Due process is that which comports with the deepest notions of what is fair and right and just. It is a constitutional restraint on the legislative as well as on the executive and judicial powers of the government provided by the Bill of Rights.
>
> Due process under the Labor Code, like *Constitutional due process*, has two aspects [—] substantive, i.e., the valid and authorized causes of employment termination under the Labor Code; and procedural, i.e., the manner of dismissal. Procedural due process requirements for dismissal are found in the Implementing Rules of [the Labor Code]. Breaches of these *due process* requirements violate the Labor Code. Therefore *statutory due process* should be differentiated from failure to comply with *constitutional due process*.
>
> *Constitutional due process* protects the individual from the government and assures him of his rights in criminal, civil[,] or administrative proceedings; while *statutory due process* found in the Labor Code and Implementing Rules protects employees from being unjustly terminated without just cause after notice and hearing.[111]

Enunciating a new rule, now known as the prevailing *Agabon* doctrine, the Court reverted to the *Wenphil* rule and abandoned *Serrano*, thus —

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108. *Id.* at 609-11 (citing *Wenphil*, 170 SCRA at 76-77).

109. *Id.* at 612-13.

110. *Agabon*, 442 SCRA at 609.

111. *Id.* at 611-12 (emphasis supplied).

> After carefully analyzing the consequences of the divergent doctrines in the law on employment termination, we believe that in cases involving dismissals for cause but without observance of the twin requirements of notice and hearing, the better rule is to abandon the *Serrano* doctrine and to follow *Wenphil* by holding that the dismissal was for just cause but imposing sanctions on the employer. Such sanctions, however, must be stiffer than that imposed in *Wenphil*. By doing so, this Court would be able to achieve a fair result by dispensing justice not just to employees, but to employers as well.
>
> The unfairness of declaring illegal or ineffectual dismissals for valid or authorized causes but not complying with statutory due process may have far-reaching consequences.
>
> This would encourage frivolous suits, where even the most notorious violators of company policy are rewarded by invoking due process. This also creates absurd situations where there is a just or authorized cause for dismissal[,] but a procedural infirmity invalidates the termination. Let us take for example a case where the employee is caught stealing or threatens the lives of his co-employees or has become a criminal, who has fled and cannot be found, or where serious business losses demand that operations be ceased in less than a month. Invalidating the dismissal would not serve public interest. It could also discourage investments that can generate employment in the local economy.
>
> ...
>
> An employee who is clearly guilty of conduct violative of Article 282 should not be protected by the [s]ocial [j]ustice [c]lause of the Constitution. Social justice, as the term suggests, should be used only to correct an injustice. As the eminent Justice Jose P. Laurel observed, social justice must be founded on the *recognition of the necessity of interdependence among diverse units of a society and of the protection that should be equally and evenly extended to all groups as a combined force in our social and economic life*, consistent with the fundamental and paramount objective of the state of promoting the health, comfort, and quiet of all persons, and of bringing about 'the greatest good to the greatest number.'
>
> This is not to say that the Court was wrong when it ruled the way it did in *Wenphil*, *Serrano*[,] and related cases. Social justice is not based on rigid formulas set in stone. It has to allow for changing times and circumstances.[112]

Based on the criteria enunciated in the instant prevailing *Agabon* doctrine, once an employee is dismissed for a just cause, a determination should be made whether there was compliance with *substantive* due process consisting of the existence of just cause and whether he was afforded

112. *Id.* at 613-15 (emphasis supplied).

procedural due process. The four situational standards previously cited in this Note may thus be re-stated as follows:

(1) Just or Authorized Cause + Procedural Due Process = Legal Dismissal.

(2) No Just or Authorized Cause + Procedural Due Process = Illegal Dismissal.

(3) No Just or Authorized Cause + No Procedural Due Process = Illegal Dismissal.

(4) Just or Authorized Cause + No Procedural Due Process = Legal Dismissal[113]

It bears to stress that the *Agabon* doctrine applies only to just cause termination. If the termination is based on an authorized cause, the prevailing rule is the doctrine enunciated in the 28 March 2005 case of *Jaka*.[114]

Clearly then, the dismissal as stated in the fourth situation above will be declared to be legal and valid. Necessarily, the usual reliefs of reinstatement plus full backwages granted to illegally dismissed employees will not be awarded. However, having reverted to the *Wenphil* doctrine, an indemnity in the form of nominal damages will be imposed on the employer for violating the statutory (not constitutional) due process, the amount of which was fixed at ₱30,000.00,[115] thus —

> Where the dismissal is for a just cause, as in the instant case, the lack of statutory due process should not nullify the dismissal, or render it illegal, or ineffectual. However, the employer should indemnify the employee for the violation of his statutory rights, as ruled in *Reta v. National Labor Relations Commission*. The indemnity to be imposed should be stiffer to discourage the abhorrent practice of 'dismiss now, pay later,' which we sought to deter in the *Serrano* ruling. The sanction should be in the nature of indemnification or penalty and should depend on the facts of each case, taking into special consideration the gravity of the due process violation of the employer.[116]

113. *Id.*

114. *Jaka*, 454 SCRA at 124-26.

115. *Agabon*, 442 SCRA at 620.

116. *Id.* at 616 (citing Reta v. National Labor Relations Commission. 232 SCRA 613, 618.).

Although the threshold amount was fixed at ₱30,000.00 in this case of *Agabon* and a lot of subsequent cases,[117] the amount of indemnity, however, varies in some subsequent cases. Thus, in the 2010 case of *Hilton Heavy Equipment Corporation v. Dy*,[118] the amount of indemnity awarded was ₱120,000.00;[119] and in other cases, ₱20,000.00,[120] ₱10,000.00,[121] ₱5,500.00,[122] and ₱2,000.00.[123]

iv. The Jaka Rule — Stiffer Indemnity for Lack of Due Process in Authorized Cause Termination.

About four months after the *Agabon* decision was promulgated on 14 November 2004, the Court issued its ruling in the 2005 *Jaka* case, where it

117. *See, e.g.*, Sang-an v. Equator Knights Detective and Security Agency, Inc., 690 SCRA 534, 545 (2013); Aliling v. Feliciano, 671 SCRA 186, 221 (2012); Spic N' Span Services Corporation v. Paje, 629 SCRA 261, 275 (2010); Phimco Industries, Inc. v. Phimco Industries Labor Association (PILA), 628 SCRA 119, 155 (2010); & Formantes v. Duncan Pharmaceuticals Phils., Inc., 607 SCRA 268, 287 (2009).

118. Hilton Heavy Equipment Corporation v. Dy, 611 SCRA 329 (2010).

119. In the case of *Hilton*, the total amount of indemnity awarded was ₱120,000.00. However, in the dispositive portion of the decision, it was qualified as follows —

> WHEREFORE, we GRANT the petition. We AFFIRM with MODIFICATION the Decision of the Court of Appeals promulgated on 30 May 2003 in CA-G.R. SP No. 72454 as well as the Resolution promulgated on 6 August 2004. The amount of ₱120,000 previously given by petitioners Hilton Heavy Equipment Corporation and Peter Lim to respondent Ananias P. Dy constitutes the award of nominal damages. Although the amount of ₱120,000 exceeds the ₱30,000 normally given in similar cases, the excess paid by Hilton Heavy Equipment Corporation and Peter Lim may be retained by Ananias P. Dy as voluntary and discretionary gratuity.

Id. at 339.

120. *See, e.g.*, Intertranz Container Lines, Inc. v. Bautista, 625 SCRA 75, 96-97 (2010); Galaxie Steel Workers Union [GSWU-NAFLU-KMU] v. National Labor Relations Commission, 504 SCRA 692, 703 (2006); TPI Philippines Cement Corporation v. Cajucom VII, 483 SCRA 494, 506 (2006); & Lavador v. "J" Marketing Corp., 461 SCRA 497, 592 (2005).

121. *See, e.g.*, PCL Shipping Philippines, Inc. v. National Labor Relations Commission, 464 SCRA 314, 323 (2005); Industrial Timber Corporation v. Ababon, 485 SCRA 652, 657 (2006); & Television and Production Exponents, Inc. v. Servana, 542 SCRA 578, 592 (2008).

122. *See, e.g.*, Clarion Printing House, Inc. v. NLRC, 461 SCRA 272, 297 (2005).

123. *See, e.g.*, Cabatulan v. Buat, 451 SCRA 234, 247-48 (2005).

distinguished the legal effects of lack of due process in termination for a just cause (abandonment of work in the case of *Agabon*) and for authorized cause (retrenchment in this case).[124]

The employees in this case were terminated due to valid retrenchment, but the employer failed to observe the due process requirement under Article 297 [283] of the Labor Code mandating the separate service of a written notice upon the employees to be terminated and the Department of Labor and Employment (DOLE), at least one month before the intended date of effectivity of the termination.[125]

Thus, it was held that in case of authorized cause termination where there is a violation of procedural due process, a "stiffer" indemnity of ₱50,000.00 should be awarded, as distinguished from the *Agabon* case where the penalty was set at ₱30,000.00 —

> The difference between *Agabon* and the instant case is that in the former, the dismissal was based on a just cause under Article 295 [282] of the Labor Code while in the present case, respondents were dismissed due to retrenchment, which is one of the authorized causes under Article 297 [283] of the same Code.
>
> ...
>
> A dismissal for an authorized cause under Article 297 [283] does not necessarily imply delinquency or culpability on the part of the employee. Instead, the dismissal process is initiated by the employer's exercise of his management prerogative, i.e., when the employer opts to install labor saving devices, when he decides to cease business operations or when, as in this case, he undertakes to implement a retrenchment program.
>
> The clear-cut distinction between a dismissal for just cause under Article 295 [282] and a dismissal for authorized cause under Article 297 [283] is further reinforced by the fact that in the first, payment of separation pay, as a rule, is not required, while in the second, the law requires payment of separation pay.
>
> For these reasons, there ought to be a difference in treatment when the ground for dismissal is one of the just causes under Article 295 [282], and when based on one of the authorized causes under Article 297 [283].
>
> Accordingly, it is wise to hold that: (1) if the dismissal is based on a just cause under [Article 295 [282]] but the employer failed to comply with the notice requirement, the sanction to be imposed upon him should be *tempered* because the dismissal process was, in effect, initiated by an act imputable to the employee; and (2) if the dismissal is based on an authorized cause under [Article 297 [283]] but the employer failed to

124. *Jaka*, 454 SCRA at 124-26.

125. *Id.* at 120-21.

> comply with the notice requirement, the sanction should be *stiffer* because the dismissal process was initiated by the employer's exercise of his management prerogative.[126]

In other words, the rationale behind the doctrinal ruling in *Agabon* applies; the only difference is in the fixing of a stiffer penalty which has been pegged at ₱50,000.00.[127]

This amount has been awarded in a number of cases.[128] However, for some justifiable reasons, it was reduced to ₱40,000.00[129]and ₱10,000.00[130] in other cases.

As in the case of the *Agabon* rule, it is clear from the application of the *Jaka* doctrine that the security of tenure of employees dismissed due to authorized causes has been enormously emasculated and extremely weakened. Compared to the pre-*Wenphil* rule of reinstating employees dismissed for just or authorized cause without procedural due process plus payment of backwages, the current *Agabon* and *Jaka* rules openly disregard the mandate literally expressed in the provision of Article 293 [279].

Indeed, if this were the intention of the lawmakers, this should have been remedied by reflecting what the Court now is foisting as its interpretation of the otherwise clear Provision of Article 293 [279]. Until that time, the Court should have followed the legal command enunciated therein — to reinstate employees and to pay them full backwages upon the finding of non-compliance by the employer of either or both the substantive and procedural aspects of due process. The time-honored legal maxim of *dura lex sed lex* (the law is harsh but it is the law) should have been applied in all illegal dismissal cases since the legal mandate in Article 293 [279] is to protect the tenurial security of the employees, favorable as it is to their welfare and well-being.

III. REINSTATEMENT AS A REMEDY

A. Preliminary Statement on the Only Remedies Mentioned in Article 293 [279]

Under Article 293 [279] of the Labor Code, there are only two (2) basic remedies expressly mentioned therein, to wit: (a) reinstatement without loss

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126. *Id.* at 124-26 (emphasis supplied).

127. *Id.* at 127-28.

128. *See, e.g.*, *San Miguel*, 461 SCRA at 434; DAP Corporation v. Court of Appeals, 477 SCRA 792, 800 (2005) & Smart Communications, Inc. v. Astorga, 542 SCRA 434, 453-54 (2008).

129. *See, e.g.*, Business Services of the Future Today, Inc. v. CA, 480 SCRA 571 (2006).

130. *See, e.g.*, *Industrial Timber Corporation*, 485 SCRA at 657-58.

of seniority rights and other privileges; and (b) award of full backwages, inclusive of allowances and other benefits or their monetary equivalent.[131]

Being the only provision in the law which concretizes and breathes life to the concept of security of tenure, it is startling to note that only these two remedies are expressly provided thereunder. This very limited grant of remedies is clearly the reason behind the continuing judicial legislation being made by the Court to supplement or otherwise expand what is provided thereunder.

Notably, as the composition of the Court changes with the retirement of its old members and appointment of new ones, among other possible reasons, so does the interpretation and construction of Article 293 [279] often seen and encountered. Perhaps, this explains in part the constant changes in rules and doctrines involving Article 293 [279] — one of the least amended provisions in the Labor Code and yet, the subject of changing tides in most doctrinal rulings. What is most disheartening, however, is the fact that these constant changes adversely affect the very heart and soul of the provision which it sought to protect and promote — security of tenure.

This Chapter and the next ones will expound on the said remedies as well as the ramifying pronouncements made by the Court thereon in a multitude of cases, with emphasis on the deficiencies and inadequacies in the reliefs provided in this provision under consideration which do not promote and protect security of tenure.

B. Five Kinds of Reinstatement Under the Labor Code

The reinstatement mentioned in Article 293 [279] of the Labor Code is not the only kind of reinstatement found in this law. As of this writing, there are at least five kinds of reinstatement provided therein, to wit:

(a) Reinstatement by reason of final judgment under Article 293 [279];[132]

(b) Reinstatement pending appeal under Article 229 [223];[133]

(c) Reinstatement pursuant to a return-to-work order under Article 277 (g) [263 (g)];[134]

(d) Reinstatement consequent to suspension of the effects of termination under Article 291 (b) [277 (b)];[135] and

131. LABOR CODE, art. 293.

132. *Id.*

133. *Id.* art. 279.

134. *Id.* art. 277 (g).

(e) Reinstatement after lapse of six months of bona-fide suspension of operation under Article 300 [286].[136]

The last of these — reinstatement after six months — has been the source of much contention, as will be seen in the succeeding Section.

1. Reinstatement After Lapse of Six Months of Bona-fide Suspension of Operation Under Article 300 [286]

Reinstatement under Article 300 [286] happens after the resumption of operation by the employer who, in good faith, suspended its operation for a period not exceeding six months. It likewise contemplates the reinstatement of employees after rendering military or civic duty. It reads —

> Article 300 [286]. *When Employment Not Deemed Terminated.* — The bona-fide suspension of the operation of a business or undertaking for a period not exceeding six months, or the fulfillment by the employee of a military or civic duty shall not terminate employment. In all such cases, the employer shall reinstate the employee to his former position without loss of seniority rights if he indicates his desire to resume his work not later than one month from the resumption of operations of his employer or from his relief from the military or civic duty.[137]

This provision has not been frequently used by management in ensuring that its employees are not terminated outright once its operations suffer extreme business losses or financial reverses. Oftentimes, the employer, who suffers business losses or financial reverses immediately effects an out-and-out termination of its employees based on the authorized causes mentioned in Article 297 [283], when it could have preserved their employment by first resorting to this remedy of suspension of operation for a period of six months. Within this six-month period, the employer no doubt has the golden opportunity to re-assess its financial condition and re-evaluate its options without getting bogged down and stalled by any continuing obligation to pay salaries and benefits to its workers. The reason is that once the suspension is proven to be "bona-fide" or in good faith, the employer, during the six-month suspension, is not legally bound to pay its workers their salaries and benefits. Conversely, on the part of the workers, they are not likewise duty-bound to render work for their employer. It is only after the lapse of the six-month bona-fide suspension period that the employer is required to make the final decision, that is, to either resume its operation or close or cease it for good. Should it resume its operation because in its view, it is viable again to continue with its business, then its only obligation is to

135. *Id.* art. 291 (b).

136. *Id.* art. 300.

137. LABOR CODE, art. 300.

notify its employees to return to their respective work assignments, without any obligation to pay them their salaries and benefits for the entire duration of the five-month period of suspension.

Contrarily, should the employer decide to no longer resume its operation, then per the 1995 case of *Sebuguero v. National Labor Relations Corporation*,[138] its obligation is to declare that its employees are terminated on the ground of closure or cessation of business operation due to extreme business losses and financial reverses. However, the legal basis for such termination is no longer Article 300 [286] but Article 297 [283] of the Labor Code where it is provided that —

> Article 297 [283]. *Closure of Establishment and Reduction of Personnel.* — The employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses[,] or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the workers and the Ministry of Labor and Employment at least one month before the intended date thereof. In case of termination due to the installation of labor-saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one month pay or to at least one month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and *in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one month pay or at least one-half month pay for every year of service, whichever is higher. A fraction of at least six months shall be considered one whole year.*[139]

In other words, resorting first to this scheme of six-month bona-fide suspension of operation prior to termination on the ground of the authorized cause of closure or cessation of business operation would ensure that the security of tenure of the employees is adequately protected and promoted. But the absence of any legal requirement mandating resort to such relief would necessarily result in the outright termination of employees.

While it may be conceded that jurisprudence imposes certain pre-requisites that should be fully complied with prior to terminating employees based on any of the authorized grounds in Article 297 [283], such as the requirement that resort to cost-cutting measures or other ways and means short of termination be adopted first, nowhere is it provided that the employer should first suspend its operation for a maximum period of six months before it could terminate its employees due to an authorized cause.

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138. Sebuguero v. National Labor Relations Corporation, 248 SCRA 532 (1995).

139. LABOR CODE, art. 297 (emphasis supplied).

This probably is the bright side of this provision. However, at the other end of the spectrum, there is greater danger to an employee's security of tenure if this principle is applied in a different light and manner where the employer is not at all under a distressed state of extreme business losses or financial reverses and yet is allowed to place the same employee under a scheme where he does not receive any salary or benefit for the entire six-month period simply because his employer cannot find any new assignment for him.

Illustrative of this dangerous side of Article 300 [286] is the introduction by the Court of a new doctrine called "off-detail" or "floating" status which it applied preliminarily to cases of security guards[140] and, later, to those involving other occupations such as those of merchandisers,[141] janitors,[142] and the like. Under this doctrine, Article 300 [286] is used as a basis thereof not because it is on all fours with this situation, but only because it is supposedly analogous.

The Court itself has acknowledged in a number of cases that its use of Article 300 [286] as basis for the invocation of this doctrine is only "by analogy" because there is no existing law which squarely and appropriately covers this new doctrine.[143] This "by analogy" acknowledgment has recently been stated again in the 2013 case of *Leopard Security and Investigation Agency v. Quitoy*,[144] where it was pronounced, thus —

> *Applying Article 300 [286] of the Labor Code of the Philippines by analogy*, this Court has repeatedly recognized that security guards may be temporarily sidelined by their security agency as their assignments primarily depend on the contracts entered into by the latter with third parties. Temporary 'off-detail' or 'floating status' is the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one. It takes place when, as here, the security agency's clients decide not to renew their contracts with the agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster. For as long as such temporary inactivity does not continue for a period

140. *See* Superstar Security Agency, Inc. v. NLRC, 184 SCRA 74, 77 (1990).

141. *See* JPL Marketing Promotions v. Court of Appeals, 463 SCRA 136, 140 (2005).

142. *See Malig-on*, 622 SCRA at 331.

143. *See generally* Mobile Protective & Detective Agency v. Ompad, 458 SCRA 308 (2005); Philippine Industrial Security Agency Corporation v. Dapiton, 320 SCRA 124 (1999); & Sentinel Security Agency, Inc. v. NLRC, 295 SCRA 123 (1998).

144. Leopard Security and Investigation Agency v. Quitoy, 691 SCRA 440 (2013).

> exceeding six months, it has been ruled that placing an employee on temporary 'off-detail' or 'floating status' is not equivalent to dismissal.[145]

Indeed, while it is true that Article 300 [286] applies only when there is a bona-fide suspension of the employer's operation of a business or undertaking for a period not exceeding six months, the same period is now used as basis when employees are temporarily laid off due to certain perceived "justifiable" causes.

In such a case, there is likewise no termination of employment but only a temporary displacement of employees, albeit the displacement should not exceed six months. The paramount consideration should be the dire exigency of the business of the employer that compels it to put some of its employees temporarily out of work.[146]

More often, this principle is applied in cases involving security services where, as a consequence of the termination or non-renewal of the security contract with a client, the security agency is left saddled with security guards without any available work assignments as the available posts under its existing contracts are less than the number of guards in its roster.

This also happens in instances where contracts for security services stipulate that the client may request the security agency for the replacement of the guards assigned to it even arbitrarily or whimsically for utter want of any cause at all. The replaced security guard is oftentimes left with no assignment. Using Article 300 [286] by sheer analogy, the concept of temporary "off-detail" or "floating status" was introduced and has now become a well-entrenched doctrine being followed in a catena of cases.

Temporary "off-detail" or "floating status," as applied to security guards,

> is the period of time when security guards are in between assignments or when they are made to wait after being relieved from a previous post until they are transferred to a new one. It takes place when the security agency's clients decide not to renew their security services contracts with the agency, resulting in a situation where the available posts under its existing contracts are less than the number of guards in its roster. It also happens in instances where contracts for security services stipulate that the client may request the agency for the replacement of the guards assigned to it even for want of cause, such that the replaced security guard may be placed on temporary 'off-detail' or 'floating' status if there are no available posts under the agency's existing contracts.
>
> During such time, the security guard does not receive any salary or any financial assistance provided by law. It does not constitute a dismissal, as the

145. *Id.* at 449 (emphasis supplied).

146. *Id.*

> assignments primarily depend on the contracts entered into by the security agencies with third parties, so long as such status does not continue beyond a reasonable time which has been fixed at no more than six months. When such 'floating' status lasts for more than six months, the employee may be considered to have been constructively dismissed.[147]

Conversely, therefore, for as long as such temporary inactivity does not continue for a period exceeding six months, placing an employee on temporary "off-detail" or "floating status" is not equivalent to dismissal.[148]

Undoubtedly, this principle of "off-detail" or "floating" status, if viewed from the standpoint of its possible effect on security of tenure, is an oppressive rule that totally obliterates this constitutionally and legally protected right. Placing a security guard under this status would mean that he has to survive for six months on his own without any assurance being provided by the same provision of law that he, as well as the members of his family who are dependent on him for support, would ever make it.

Can he sue his employer for illegal dismissal prior to the lapse of the five-month period?

This question was answered in the negative in the 2002 case of *Soliman Security Services, Inc. v. Court of Appeals*.[149] The facts of the case are as follows —

> Respondent Eduardo Valenzuela, a security guard, was a regular employee of petitioner Soliman Security Services assigned at the BPI-Family Bank, Pasay City. On 9 March 1995, he received a memorandum from petitioners relieving him from his post at the bank, said to be upon the latter's request, and requiring him to report to the security agency for reassignment. The following month, or on 7 April 1995, respondent filed a complaint for illegal dismissal on the ground that his services were terminated without a valid cause and that, during his tenure at the bank, he was not paid his overtime pay, 13th-month pay and premium pay for services rendered during holidays and rest days. He averred that after receiving the memorandum of 9 March 1995, he kept on reporting to the office of petitioners for reassignment but, except for a brief stint in another post lasting for no more than a week, he was put on a 'floating' status.
>
> Petitioners, [for their part,] contended that the relief of respondent from his post, made upon the request of their client, was merely temporary and that respondent had been offered a new post but the latter refused to accept it.

147. Salvaloza v. National Labor Relations Commission, 636 SCRA 184, 197-98 (2010).

148. *Leopard Security*, 691 SCRA at 449; *Superstar Security Agency*, 184 SCRA at 77; & Veterans Security Agency, Inc. v. Gonzalvo, Jr., 478 SCRA 298, 308 (2005).

149. Soliman Security Services, Inc. v. Court of Appeals, 384 SCRA 514 (2002).

> Petitioners argued that respondent's floating status for barely 29 days did not constitute constructive dismissal.
>
> ...
>
> The only issue on the merits of the case is whether or not private respondent should be deemed constructively dismissed by petitioner for having been placed on 'floating status,' i.e., with no reassignment, for a period of 29 days.[150]

Ruling that private respondent was not constructively dismissed, the Court explained —

> The question posed is not new. In the case of [*Superstar Security Agency*], this Court, addressing a similar issue, has said [—]
>
> ...
>
> The charge of illegal dismissal was prematurely filed. The records show that a month after Hermosa was placed on a temporary 'off-detail,' she readily filed a complaint against the petitioners on the presumption that her services were already terminated. Temporary 'off-detail' is not equivalent to dismissal. In security parlance, it means waiting to be posted. It is a recognized fact that security guards employed in a security agency may be temporarily sidelined as their assignments primarily depend on the contracts entered into by the agency with third parties However, it must be emphasized that such temporary inactivity should continue only for six months. Otherwise, the security agency concerned could be liable for constructive dismissal.
>
> Constructive dismissal exists when an act of clear discrimination, insensibility or disdain, on the part of an employer has become so unbearable as to leave an employee with no choice but to forego continued employment. The temporary 'off-detail' of respondent Valenzuela is not such a case.[151]

It is clear from *Soliman* that even in such simple cases where the security guard was requested to be removed from the assigned post by the principal-client of the security agency with or without cause, all that the security agency will do is to comply with the principal-client's request and place the security guard concerned under "off-detail" or "floating" status. Having placed him under such status, the employer security agency, even if it is not suffering from any losses or financial reverses or such other justifications that would indicate bona-fide or good faith suspension of its operations, is now clothed with the legal authority to completely disregard, during the entire six months that the employee is under "off-detail" or "floating" status, its part in the contract of employment it entered into with the security guard, that is,

150. *Id.* at 514-15 & 518.

151. *Id.* at 518-19.

to provide him continuous, uninterrupted work being a regular employee and to pay his salary and benefits during all the time that he is under employment.

By invoking Article 300 [286] as basis for such doctrine, the Court, with due deference, has failed to consider the highly absurd result of its application. For how could the security guard and his family ever be expected to survive the six-month long period of being under "off-detail" or "floating" status?

The Court sadly did not extend its dissertation to this unfortunate outcome after its declaration in *Soliman* that it was premature for a security guard to file an illegal dismissal case prior to the lapse of the six-month "off-detail" or "floating" period.[152] The Court did not even make any suggestion as to how this bizarre and incongruous consequence could be avoided.

Understandably, the Court could not have gone beyond its declaration that the cause of action of the security guard in *Soliman* was premature after the lapse of only 29 days of the six-month permissible period simply because Article 300 [286], the legal anchor for the invocation of this doctrine of "off-detail" or "floating" status could not have been, in the first place, the proper basis therefore. In fact, there is no existing provision in the Labor Code nor in our statute books that could be cited as the appropriate basis of this doctrine. An indication that the Court has conceded this fact is its continuing stress in almost all its major decisions involving this doctrine that Article 300 [286] is being used as basis therefore only "by analogy."

Indeed, such open admission of the lack of any provision that may well be the basis for the invocation of this doctrine only exposes all the more the necessity to enact a law that would squarely address this inadequacy in the law which results in the deprivation of lowly security guards and other similarly circumstanced workers of their right to security of tenure.

i. Recommended Amendatory Provision to Reflect the Rule on "Off-Detail" or "Floating" Status doctrine in Article 293 [279]

This Note has taken the view that the stop-gap doctrine of "off-detail" or "floating" status does not, at its present state, promote security of tenure. However, in light of the view of the Court that this doctrine is valid and just, deference thereto may be made with the caveat that the same be reflected in Article 293 [279] to make its invocation statutorily-based and no longer through the simple expedience of "by analogy." In so doing, all the proper safeguards to ensure that it will be implemented in a just and fair manner should be reflected in the amendatory law. This can only be

152. *Id.* at 518.

achieved if the following features are embodied in the amendatory law itself, to wit:

(a) The period within which an employee may be placed under "off-detail" or "floating" status should be reduced from six months to a much reasonable period of three months;

(b) After the lapse of the said period, the employee should be reinstated to his former position or substantially equivalent position and shall be entitled to the payment of full backwages, inclusive of regular allowances and other benefits or their monetary equivalent for the entire three-month period; and

(c) In case the employee is not so reinstated after the lapse of the said period, he shall be paid separation pay in the equivalent amount of one month salary for every year of service, a fraction of at least six months shall be considered as one whole year, in addition to full backwages, inclusive of regular allowances and other benefits or their monetary equivalent.

The suggested amendatory provision shall thus read as follows —

> In appropriate cases involving lack of work assignment, an employee may be placed on temporary 'off-detail' or 'floating' status for a period not exceeding three months: *Provided*, That after the lapse thereof, he shall be reinstated to his former position or substantially equivalent position and shall be entitled to the payment of full backwages, inclusive of regular allowances and other benefits or their monetary equivalent for the entire three-month period, and: *Provided further*, That in case he is not so reinstated after the lapse of the said period, he shall be paid separation pay in the equivalent amount of one month pay or one month pay for every year of service, whichever is higher, a fraction of at least six months shall be considered one [ ]whole year, in addition to full backwages, inclusive of regular allowances and other benefits or their monetary equivalent.

C. Four Kinds of Reinstatement Not Found in the Labor Code

There are four kinds of reinstatement that are not found nor based on any provision of the Labor Code, to wit:

(a) Reinstatement After Period of Preventive Suspension;

(b) Reinstatement Consequent to Constructive Dismissal or Involuntary/Forced Resignation;

(c) Reinstatement Due to Termination for Non-Existent Cause; and

(d) Reinstatement Due to a Finding that there has been no Termination to Speak of.

The last three and the issues which attend them are discussed below.

1. Reinstatement Consequent to Constructive Dismissal or Involuntary or Forced Resignation

Constructive dismissal and involuntary or forced resignation, in their strict technical sense, are not similar to illegal dismissal. In the former, the employer does not actually effect the dismissal of the employee by serving notice of termination or any similar document to the employee; while in the latter, the employer actually attempts to comply with the substantive and procedural due process required under the law although found to be short or wanting later on after due proceedings.

The test in the former is

> whether a reasonable person in the employee's position would have felt compelled to give up his position under the circumstances. It is an act amounting to dismissal but made to appear as if it were not. In fact, the employee who is constructively dismissed may be allowed to keep on coming to work. Constructive dismissal is, therefore, a dismissal in disguise. The law recognizes and resolves this situation in favor of the employees in order to protect their rights and interests from the coercive acts of the employer.[153]

The fact that an employee continues to report for work does not suggest that constructive dismissal has not occurred; nor does it operate as a waiver.

When should constructive dismissal then be reckoned in a situation where the employee has been demoted or constructively dismissed and yet continues to report for work?

Should the act of the employee in continuously reporting for work be considered as an acknowledgment on his part that there was a demotion or constructive dismissal that occurred?

Should it not be deemed a waiver of the cause of action for demotion or constructive dismissal?

These questions were answered in the 2013 case of *The Orchard Golf and Country Club v. Francisco*.[154] Amelia R. Francisco, the respondent, worked as the Club Accountant of petitioner, and in that capacity, she headed the Club's General Accounting Division and the four divisions under it.[155] Because of alleged violations, she was suspended, later made to take a forced leave of absence, and ultimately transferred to Cost Controller/Accountant, a

153. Dimagan v. Dacworks United, Incorporated, 661 SCRA 438, 446 (2011) (emphasis omitted).

154. The Orchard Golf and Country Club v. Francisco, 693 SCRA 497 (2013).

155. *Id.* at 501.

lower ranked position.[156] In its defense against the charge of constructive dismissal lodged by respondent, petitioner asserted that respondent's transfer to the Cost Accounting Section was done in good faith and that the transfer did not prejudice her.[157] Petitioner claimed that it did not commit any act which forced respondent to quit; she continued to be employed by the Club, and in fact continues to report for work.[158]

In sustaining the similar rulings of the NLRC and the Court of Appeals that respondent was constructively dismissed, the Court had this to say regarding the act of respondent in continuing to report for work despite her demotion which amounted to constructive dismissal —

> The fact that Francisco continued to report for work does not necessarily suggest that constructive dismissal has not occurred, nor does it operate as a waiver. Constructive dismissal occurs not when the employee ceases to report for work, but when the unwarranted acts of the employer are committed to the end that the employee's continued employment shall become so intolerable. In these difficult times, an employee may be left with no choice but to continue with his employment despite abuses committed against him by the employer, and even during the pendency of a labor dispute between them. This should not be taken against the employee. Instead, we must share the burden of his plight, ever aware of the precept that necessitous men are not free men.[159]

The common characteristic of both involuntary or forced resignation and constructive dismissal is the act of "quitting" from employment by the employee because of the attendant just causes, acts, facts, or circumstances which render the continued employment impossible, unreasonable, or unlikely.[160]

Technically speaking, constructive dismissal is a form of involuntary or forced resignation resorted to under any of the following three circumstances:

(1) When continued employment is rendered impossible, unreasonable, or unlikely;

(2) When there is a demotion in rank and/or a diminution in pay; or

(3) When a "clear discrimination, insensibility[,] or disdain by an employer becomes unbearable [to] the employee that it could

156. *Id.* at 502–03.

157. *Id.* at 513.

158. *Id.*

159. *Id.* at 519.

160. *See Mobile Protective and Detective Agency*, 458 SCRA at 321.

> foreclose any choice by him except to forego his continued employment."[161]

Having described constructive dismissal as being different from illegal dismissal, is it possible that an employee, in one and the same case, may be declared as having been constructively dismissed and at the same time legally dismissed?

The 2009 case of *Formantes v. Duncan Pharmaceuticals Phils., Inc.*,[162] answers this question in the affirmative. The petitioner employee in this case was held to have been constructively dismissed but at the same time, was declared to have been legally dismissed.[163]

Petitioner, while still employed with the respondent, was compelled to resign and forced to go on leave.[164] After being confronted with the complaint for sexual abuse lodged by a subordinate female employee and before being required to explain his side, petitioner, the Acting District Manager of respondent for the Ilocos District, was no longer allowed to participate in the activities of respondent company.[165] His salary was no longer remitted to him.[166] His subordinates were directed not to report to him and the company directed one of its district managers to take over his position and do his functions without prior notice to him.[167] He was required to explain his side on the issue of sexual abuse as well as the charge of insubordination only after these things had already been done to him.[168]

In holding that he was at that point already constructively dismissed, the Court observed that these discriminatory acts were calculated to make petitioner feel that he is no longer welcome nor needed in respondent company — short of sending him an actual notice of termination.[169] However, despite this finding, the Court declared that his dismissal was valid and legal. Thus, the Court held it impractical and unjust to reinstate him as there was a just cause for his dismissal from the service consisting of his sexual abuse of a subordinate female employee which, although not cited in

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161. Gan v. Galderma Philippines, Inc., 688 SCRA 666, 694-95 (2013); Morales v. Harbour Centre Port Terminal, Inc., 664 SCRA 110, 117-18 (2012); & Unicorn Safety Glass, Inc. v. Basarte, 444 SCRA 287, 294-95 (2004).

162. Formantes v. Duncan Pharmaceuticals, Phils., Inc., 607 SCRA 268 (2009).

163. *Id.* at 285-87.

164. *Id.* at 286.

165. *Id.* at 274.

166. *Id.*

167. *Id.* at 286.

168. *Formantes*, 607 SCRA at 247-75.

169. *Id.*

the notice of termination served on him when he was terminated, was duly proved during the trial of the case before the labor arbiter.[170]

It bears noting that in this case, petitioner was terminated not on the ground of sexual abuse but due to insubordination for his failure to report to the office, failure to submit reports, and failure to file written explanations despite repeated instructions and notices.[171]

Further, while the dismissal was adjudged as valid, it was found that there was non-compliance with the twin procedural requirements of notice and hearing for a lawful dismissal.[172] It was established by evidence that the barrage of letters sent to petitioner, starting from a letter dated 22 April 1994 until his termination on 19 May 1994, was belatedly made and apparently done in an effort to show that petitioner was accorded the notices required by law in dismissing an employee.[173] As observed by the Labor Arbiter in her decision, petitioner was already constructively dismissed prior to these letters.[174] Since the dismissal, although for a valid cause, was done in violation of due process of law, the employee was granted an indemnity in the form of nominal damages of ₱30,000.00.[175]

Not being similar to illegal dismissal, which is what is contemplated under Article 293 [279] of the Labor Code, the primordial question that needs to be addressed is what is the proper relief or remedy to be granted to the constructively dismissed employee or to the employee who involuntarily resigned or is forced to resign?

Obviously, the constructively dismissed employee should be entitled to the reliefs embodied in Article 293 [279], such as reinstatement plus full backwages, not to mention moral and exemplary damages if warranted. And if reinstatement be no longer possible or feasible in view of the existence of certain justifying circumstances, the employee should be granted separation pay in lieu of reinstatement in the amount equivalent to one month salary for every year of service, as ruled in the 1997 case of *Pulp and Paper, Inc. v. NLRC*.[176]

This notwithstanding the absence of any provision in the Labor Code applicable on all fours to this kind of situation since what is contemplated

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170. *Id.* at 286-87.

171. *Id.* at 275 & 277.

172. *Id.* at 286.

173. *Id.*

174. *Formantes*, 607 SCRA at 286.

175. *Id.* at 286-87.

176. Pulp and Paper, Inc. v. NLRC, 279 SCRA 408, 420 (1997).

under this provision is the traditional norm of the employer dismissing its employee not through "disguise" but on purpose, by making it clear that it is dismissing its employee. This must be the case if only to fully subserve the right to security of tenure of the concerned employee.

i. Recommended Amendatory Provision on the Inclusion of Constructive Dismissal and Involuntary or Forced Resignation in Article 293 [279]

This Note will thus propose that constructive dismissal as well as involuntary, forced resignation be included in Article 293 [279], as amended.

Such proposed amendatory law shall contain a paragraph that will expressly mention constructive dismissal or involuntary or forced resignation to read as follows — "(h) An employee who is illegally or *constructively dismissed or involuntarily forced to resign* from work shall be entitled to the following reliefs."

2. Reinstatement Due to Termination for Non-Existent Cause

The traditional ground of "termination without cause" should be distinguished from "termination for non-existent cause" as these two terms are not similar to each other.

On one hand, in cases involving "termination without cause," the employer intends to dismiss its employee for no cause whatsoever; hence, the dismissal should be deemed illegal.

On the other hand, in "termination for non-existent cause," the employer does not intend to terminate its employee but because of certain circumstances, the dismissal is effected nonetheless for a specific cause which turned out to be non-existent, as a result of which, the dismissal is deemed illegal and the employee should be entitled to reinstatement as a matter of right.

There are many cases involving this unique situation. For example, an employee was terminated by reason of his alleged involvement in pilferage of company-owned property but after due proceedings, was later absolved from any culpability by the court. Under this situation, the cause for his dismissal may be said to be non-existent or false; hence, he should be ordered reinstated. Indeed, it would be unjust and unreasonable for the employer to dismiss the employee after the latter had been proved innocent of the cause for which he was dismissed.[177]

A very concrete example of this kind of dismissal is the 2005 case of *Standard Electric Manufacturing Corporation v. Standard Electric Employees Union-*

177. Pepito v. Secretary of Labor, 96 SCRA 454, 459.

NAFLU-KMU.[178] Respondent Rogelio Javier was dismissed by the petitioner effective 5 February 1995 for: (a) being AWOL from 31 July 1995 up to 30 January 1995; and (b) committing rape.[179] However, on demurrer to evidence, respondent Javier was acquitted of the charge.[180] Because of this acquittal, the cause of Javier's dismissal from his employment may be said to be non-existent.[181] Thus, his

> absence from [9 August 1995] cannot be deemed as an abandonment of his work. Abandonment is a matter of intention and cannot lightly be inferred or legally presumed from certain equivocal acts. Mere absence or failure to report for work, even after notice to return, is not tantamount to abandonment.
>
> Moreover, his acquittal for rape makes it more compelling to review the illegality of his dismissal. The trial court dismissed the case for 'insufficiency of evidence,' and such ruling is tantamount to an acquittal of the crime charged and proof that his arrest and detention were without factual and legal bases in the first place.
>
> The [petitioner-employer] acted with precipitate haste in terminating his employment on [30 January 1995], on the ground that he had raped the complainant therein. Respondent Javier had yet to be tried for the said charge. In fine, the petitioner prejudged him and pre-empted the ruling of the Regional Trial Court. The petitioner had, in effect, adjudged him guilty without due process of law. While it may be true that after the preliminary investigation of the complaint, probable cause for rape was found[,] and respondent Javier had to be detained, this cannot be made as legal basis for the immediate termination of his employment.[182]

In the 1985 case of *Pedroso v. Castro*,[183] petitioners were arrested and detained by the military authorities by virtue of a Presidential Commitment Order allegedly for the commission of Conspiracy to Commit Rebellion under Article 135 of the Revised Penal Code.[184] Consequently, their employer hired substitute workers to avoid disruption of work and business

178. Standard Electric Manufacturing Corporation v. Standard Electric Employees Union-NAFLU-KMU, 468 SCRA 316 (2005).

179. *Id.* at 319.

180. *Id.* at 323.

181. *Id.*

182. *Id.* at 327.

183. Pedroso v. Castro, 141 SCRA 252 (1986).

184. *Id.* at 253.

operations.[185] They were released when the charges against them were not proven.[186]

After incarceration, they reported back to work, but were refused admission by their employer.[187] The labor arbiter and the NLRC sustained the validity of their dismissal.[188] Nevertheless, the Court held that the dismissed employees should be reinstated to their former positions since their separation from employment was founded on a false or non-existent cause, hence, illegal.[189]

In the 2007 case of *Asian Terminals, Inc. v. NLRC*,[190] the same issue involving termination of an employee who was arrested and detained for reasons not related to his work was again raised.[191] In accordance with the rulings in *Pedroso* and *Standard Electric*, it was held that "[a]bsences incurred by an employee who is prevented from reporting for work due to his detention to answer some criminal charge is excusable if his detention is baseless, in that the criminal charge against him is not at all supported by sufficient evidence."[192]

Similarly, in this case,

> respondent [ ] was prevented from reporting for work by reason of his detention. That his detention turned out to be without basis as the criminal charge upon which said detention was ordered was later dismissed for lack of evidence, made the absences he incurred as a consequence thereof not only involuntary but also excusable. It was certainly not the intention of respondent to absent himself, or his fault that he was detained on an erroneous charge. In no way may the absences he incurred under such circumstances be likened to abandonment. The Court of Appeals, therefore, correctly held that the dismissal of respondent was illegal, for the absences he incurred by reason of his unwarranted detention did not amount to abandonment.[193]

185. *Id.* at 254.

186. *Id.*

187. *Id.*

188. *Id.* at 254-55.

189. *Pedroso*, 141 SCRA at 255 & 257.

190. Asian Terminals, Inc. v. National Labor Relations Commission, 541 SCRA 105 (2007).

191. *Id.* at 108.

192. *Id.* at 112-13.

193. *Id.* at 114.

Having described and illustrated the cases indicating termination for non-existent cause, the issue is what relief or remedy should the dismissed employee be entitled to?

Again, it must be reiterated that this situation is unique since the employer here does not intend to terminate the employee.

Should the employee be reinstated and the employer made to pay full backwages?

The better rule is to reinstate the employee but without payment of backwages as the employer here may be said to have acted in good faith. Reinstatement alone in this case would suffice to fully subserve the ends of justice and promote security of tenure. However, because no law exists in the statute books that would create the standards upon which the validity of dismissals of this nature may be based, there is a need to introduce an amendment to Article 293 [279] to reflect the appropriate governing rule thereon.

i. Recommended Amendatory Provision on the Reliefs Available to Employees Dismissed for Non-Existent Cause

In view of the foregoing discussion, the following amendatory provision to Article 293 [279] is suggested to reflect the reliefs to which an employee dismissed for non-existent cause is entitled —

> An employee who has been dismissed for *non-existent cause* or in good faith or that the dismissal was too harsh a penalty or that there was no proof of dismissal, shall be reinstated to his former position or to a substantially equivalent position but with limited or without backwages, at the discretion of the court.

3. Reinstatement Due to a Finding that there has been no Termination to Speak of

Another unique situation which no provision in the Labor Code squarely covers involves cases where the employee files an illegal dismissal case against his employer but there is no evidence that he was dismissed.

The rule that in cases of illegal dismissal, the employer bears the burden of proving that the termination was for a just or authorized cause requires that evidence be presented therein that should establish a *prima facie* case that the employee was really dismissed from employment.[194] However, before the employer "must bear the burden of proving that the dismissal was legal, the [employee] must first establish by substantial evidence the fact of his

194. Ledesma, Jr. v. NLRC, 537 SCRA 358, 370 (2007).

dismissal from service. Logically, if there is no dismissal to speak of, then there can be no question as to the legality or illegality thereof."[195]

In *Arc-Men Food Industries Inc. v. NLRC*,[196] it was pronounced that the substantial evidence proffered by the employer that it had not, in the first place, terminated the employee should not simply be ignored on the pretext that the employee would not have filed the complaint for illegal dismissal if he had not really been dismissed.[197] The Court ruled that "[t]his is clearly [ ] *non sequitur* reasoning that can never validly take the place of the evidence of both the employer and the employee."[198]

Since there is no proof of dismissal in cases of this nature, what should then be the appropriate reliefs that should be made available to the employee?

The most equitable relief that should be accorded to the employee is best exemplified in the 1997 case of *Capili v. National Labor Relations Commission*.[199] It was held here that separation pay cannot be awarded to the employees who were not dismissed by the employer.[200] The Court said that the "common denominator of the instances where payment of separation pay is warranted is that the employee was dismissed by the employer."[201] In cases where there was no dismissal at all, separation pay should not be awarded.[202] The employee should instead be ordered reinstated — not by way of a relief arising from illegal dismissal but as a means of declaring or affirming that the employee may return to work because he was not dismissed in the first place, and he should be happy that his employer is accepting him back.[203]

Neither should backwages be paid to the employee. Thus, in the 1999 case of *Asia Fancy Plywood Corporation v. NLRC*,[204] where the employees' conclusion that they were dismissed or that they were prevented from returning to work was unsubstantiated by evidence, it was ruled that the

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195. *Id.*

196. Arc-Men Food Industries, Inc. v. NLRC, 272 SCRA 366 (1997).

197. *Id.* at 372.

198. *Id.*

199. Capili v. National Labor Relations Commission, 270 SCRA 488 (1997).

200. *Id.* at 495.

201. *Id.*

202. *Id.*

203. *Id.*

204. Asia Fancy Plywood Corporation v. National Labor Relations Commission, 301 SCRA 189 (1999).

employees should simply be ordered to report for work, and for the employer to accept them to their former or substantially equivalent positions without backwages.[205] The employer in this case has, in fact, expressed its willingness to accept them back to their former positions.[206] Resultantly, no backwages should be awarded since the same is proper only if employees are unjustly or illegally dismissed.[207]

Reinstatement without backwages was also ordered in the cases of *Leopard Security* and *Security and Credit Investigation, Inc. v. NLRC*,[208] where the Court found that petitioner did not dismiss respondents (security guards) and that the latter did not abandon their employment.[209]

In *Leonardo v. National Labor Relations Commission*,[210] the Court also ordered the reinstatement sans backwages of the employee (Aurelio Fuerte) who was declared neither to have abandoned his job nor was he constructively dismissed.[211] As pointed out by the Court, in a case where the employee's failure to work was occasioned neither by his abandonment nor by a termination, the burden of economic loss is not rightfully shifted to the employer. Each party must bear his own loss.[212]

In *Ambee Food Services, Inc. v. Court of Appeals*,[213] private respondent, Myrthle B. Marzan, was allowed to return to work under the same terms and conditions but without backwages because of the finding that Marzan was not terminated from employment.[214] She was merely suspended pending her administrative investigation.[215] In fact, there was no written or verbal communication to prove the alleged dismissal.[216] The employer actually awaited Marzan's decision to report back to work under the same terms and conditions of employment.[217]

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205. *Id.* at 190-91.

206. *Id.*

207. *Id.* at 191.

208. Security and Credit Investigation, Inc. v. National Labor Relations Commission, 350 SCRA 357 (2001).

209. *Id.* at 361.

210. Leonardo v. National Labor Relations Commission, 333 SCRA 589 (2000).

211. *Id.* at 600.

212. *Id.*

213. Ambee Food Services, Inc. v. Court of Appeals, 556 SCRA 59 (2008).

214. *Id.* at 72.

215. *Id.*

216. *Id.* at 68-69.

217. *Id.* at 69.

But notwithstanding the rulings in the above cases, separation pay was still granted in the 2009 case of *Industrial & Transport Equipment, Inc. v. Tugade*.[218] The respondents in this case, after their 10-day suspension, did not report back to work and instead filed an illegal dismissal case.[219] The Court ruled that

> the complaint for illegal dismissal was premature since even after the expiration of their suspension period, they refused, despite due notice, to report to work. In fact, in their Memorandum of Appeal, respondents admitted having received petitioners' return-to-work memorandum which, however, became futile because they hastily filed the complaint for illegal dismissal.
>
> [Consequently], since there was no dismissal to speak of, there is no basis to award any backwages to respondents. Under Article 293 [279] of the Labor Code, an employee is entitled to reinstatement and backwages only if he was illegally dismissed.
>
> The decision of the Labor Arbiter was, therefore, sustained, finding that respondents abandoned their positions by failing to return to work despite management directives to do so, and awarding separation pay of ₱55,580 each to respondents.[220]

i. Recommended Amendatory Provision on the Reliefs Available to Employees Who Filed Illegal Dismissal Cases Without Any Evidence of Dismissal

In light of the variance in the decisions of the Court in the afore-cited cases and to pre-empt possible continuation of the confusion in similar situations, there is a need to enshrine this principle in the Labor Code. In this way, the security of tenure of affected employees will be assured. Thus, an amendatory provision to Article 293 [279] is proposed to reflect this situation as well as the proper relief that should be granted to the employee.

The amendatory provision dwelling on dismissal where there is no evidence of dismissal shall read as follows —

> An employee who has been dismissed for non-existent cause or in good faith or that the dismissal was too harsh a penalty or that *there was no proof of dismissal*, shall be reinstated to his former position or to a substantially equivalent position but with limited or without backwages, at the discretion of the court.

D. Separation Pay in Lieu of Reinstatement, An Alternative Remedy not Found in the Labor Code

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218. Industrial & Transport Equipment, Inc. v. Tugade, 576 SCRA 101 (2009).

219. *Id.* at 103.

220. *Id.* at 106.

Reinstatement remains the primordial remedy in cases where the dismissal of an employee is declared illegal. This is expressly provided under Article 293 [279] of the Labor Code. However, there is this remedy of *separation pay in lieu of reinstatement* which is not found in Article 293 [279] or in any other provision of the same Code which has been treated as a better alternative to reinstatement in certain cases.

The first question may thus be posed — What is the legal basis for this award of separation pay in lieu of reinstatement?

While Article 293 [279], as earlier pointed out, does not expressly provide for this remedy, it is obvious, however, that this Article is the basis for the application thereof, as acknowledged in the 2010 case of *Session Delights Ice Cream and Fast Foods v. CA*,[221] thus —

> *By jurisprudence derived from this provision* (Article 293 [279]), separation pay may be awarded to an illegally dismissed employee in lieu of reinstatement. Recourse to the payment of separation pay is made when continued employment is no longer possible, in cases where the dismissed employee's position is no longer available, or the continued relationship between the employer and the employee is no longer viable due to the strained relations between them, or when the dismissed employee opted not to be reinstated, or payment of separation benefits will be for the best interest of the parties involved.[222]

The 1997 case of *Capili v. Nattional Labor Relations Commission*,[223] has been very definitive in declaring that it is Article 293 [279] itself which is the basis for such award, thus —

> The legal basis for the award of separation pay is clearly provided by [Article 293 [279]] of the Labor Code which states that the remedy for illegal dismissal is reinstatement without loss of seniority rights plus backwages computed from the time compensation was withheld up to reinstatement. However, there may be instances where the relations between the employer and the employee have been so severely strained that it is no longer advisable to be reinstated. In such events, the employer will instead be ordered to pay separation pay.[224]

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221. Session Delights Ice Cream and Fast Foods v. Court of Appeals, 612 SCRA 10 (2010).

222. *Id.* at 25.

223. Capili v. National Labor Relations Commission, 270 SCRA 488 (1997).

224. *Id.* at 494 (citing Kingsize Manufacturing Corporation v. NLRC, 238 SCRA 349 (1994)).

But in a number of cases, it was declared that it is a recourse based on equity.[225]

A survey of decisions granting this alternative remedy to reinstatement indicates that the justifications cited in support thereof vary from case-to-case. Based on jurisprudence, the following may be cited:

(a) When there are strained relations between the employer and the employee;[226]

(b) When the lapse of time between termination and reinstatement is considerable;[227]

(c) When the employer's establishment where the employee is to be reinstated has closed or ceased operations;[228]

(d) When reinstatement is no longer possible, practicable, and in the best interest of the employer and the employee;[229]

(e) Where the employer has been declared insolvent by the court;[230]

(f) When, by reason of compassionate justice, long years of service, or lack of bad records in the past, an employee is granted by the court separation pay in accordance with his entitlement under the law, under the CBA, company rules, or practice, whichever is higher, although there was a finding of legality of dismissal;[231]

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225. *See, e.g.*, Bolinao Security and Investigation Service, Inc. v. Toston, 421 SCRA 406, 414 (2004); Philtread Tire & Rubber Corporation v. Vicente, 441 SCRA 574, 582 (2004); & Philippine Rabbit Bus Lines, Inc. v. NLRC, 306 SCRA 151, 155 (1999).

226. *See, e.g.*, Bordomeo v. Court of Appeals, 691 SCRA 269, 291 (2013); Aliling v. Feliciano, 671 SCRA 186, 213, (2012); & Velasco v. National Labor Relations Commission, 492 SCRA 686, 699 (2006).

227. *See, e.g.*, Sari-Sari Group of Companies, Inc. v. Piglas Kamao (Sari-Sari Chapter), 561 SCRA 569, 592 (2008) & National Bookstore, Inc. v. Court of Appeals, 378 SCRA 194, 203(2002).

228. Omnibus Rules Implementing the Labor Code, Book VI, Rule I, § 4 (b). Code. *See, e.g.*, Pizza Inn/Consolidated Food Corporation v. NLRC, 162 SCRA 773, 779 (1988).

229. *See, e.g.*, Blue Sky Trading Company, Inc. v. Bias, 667 SCRA 727, 749 (2012) & AFI International Trading Corporation (Zamboanga Buying Station) v. Lorenzo, 535 SCRA 347, 355 (2007).

230. *See, e.g.*, Electruck Asia, Inc. v. Meris, 435 SCRA 310 (2004).

231. *See, e.g.*, Firestone Tire and Rubber Co. of the Philippines v. Lariosa, 148 SCRA 187 (1987).

(g) When reinstatement is rendered moot and academic due to supervening events (e.g., fire);[232]

(h) Where it is the decision of the employee to no longer be reinstated as when he does not pray for reinstatement in his complaint or position paper or he prays therein for separation pay instead of reinstatement;[233]

(i) When the illegally dismissed employees are beyond retirement age and their reinstatement would unjustly prejudice their employer;[234]

(j) When there is a take-over of the business of the employer by another company and there is no agreement regarding assumption of liability by the acquiring company;[235]

(k) Where the position of the dismissed employee is no longer available at the time of reinstatement;[236] and

(l) When the general sales agency contract between the employer and its client has been terminated, and reinstatement is no longer feasible.[237]

The second query that may be posed is whether the option of choosing separation pay in lieu of reinstatement may be exercised by the employer.

This was answered in the negative in the 2007 case of *Johnson & Johnson (Phils.), Inc. v. Johnson Office & Sales Union–FFW*.[238] The dispositive portion of the 14 December 2001 Resolution of the NLRC reflected the phrase "*or in the alternative,* [*private respondents are entitled*] *to payment of separation pay.*"[239] The petitioners interpreted this to mean that they have the option to choose between reinstatement and payment of separation pay.[240] The Court,

232. *See, e.g.*, Bagong Bayan Corporation v. Ople, G.R. No. 73334, Dec. 8, 1986.

233. *See, e.g.*, Abacan, Jr. v. Northwestern University, Inc., 455 SCRA 136, 172-73 (2005).

234. *See, e.g.*, Bustamante v. National Labor Relations Commission, 265 SCRA 61, 71 (1996).

235. *See, e.g.*, Callanta v. Carnation Philippines, Inc., 145 SCRA 268, 281 (1986).

236. Omnibus Rules Implementing the Labor Code, Rule I, Book VI, Rule I, § 4 (b).

237. *See, e.g.*, Asia Pacific Chartering (Phils.), Inc. v. Farolan, 393 SCRA 454, 469 (2002).

238. Johnson & Johnson (Phils.), Inc. v. Johnson Office & Sales Union-Federation of Free Workers (FFW), 526 SCRA 672 (2007).

239. *Id.* at 680 (emphasis supplied).

240. *Id.*

however, pronounced that such phrase in the dispositive portion does not mean that petitioners were granted the option to pay the separation pay *in lieu* of reinstating respondents.[241] The Court held that "[m]ore than anything else, the statement was in the nature of an affirmation of the state of the law rather than an adjudication of a right in favor of petitioners."[242] Thus, they ruled that

> the NLRC properly exercised its authority to resolve the controversy when it issued the Resolution dated 18 June 2004, where it categorically ordered the reinstatement of respondents to their former positions, in consonance with its earlier ruling. The NLRC upheld the continuing primacy of reinstatement as the available relief and made short shrift of petitioners' avowal that separation pay should be awarded in lieu of reinstatement.[243]

However, the same question was answered in the affirmative in the 2008 case of *National Union of Workers in the Hotel, Restaurant and Allied Industries [NUWHRAIN-APL-IUF] Dusit Hotel Nikko Chapter v. The Hon. Court of Appeals*.[244] Here, 61 ordinary union members were ordered reinstated because of the failure of the employer to adduce sufficient evidence to prove that they participated in the commission of illegal acts in the course of the strike.[245] However, the Court took cognizance of the possibility that the hotel might have already hired regular replacements for the said 61 employees.[246] Thus, the hotel was given the option to pay separation pay in lieu of reinstatement computed at one month pay for every year of service, a fraction of six months being considered one year of service.[247]

The third question is whether separation pay in lieu of reinstatement may be granted even if there is no finding of illegal dismissal.

The answer to this is likewise in the negative since reinstatement, being the primary remedy to which separation pay is the alternative, may only be granted where the dismissal is declared to be illegal. Thus, in the 2009 case of *Macasero v. Southern Industrial Gases Philippines*,[248] the labor arbiter, the NLRC, and the Court of Appeals were one in declaring that there was no

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241. *Id.* at 680.

242. *Id.*

243. *Id.* at 679.

244. National Union of Workers in the Hotel Restaurant and Allied Industries (NUWHRAIN-APL-IUF) Dusit Hotel Nikko Chapter v. Court of Appeals, 570 SCRA 598 (2008).

245. *Id.* at 618–21.

246. *Id.*

247. *Id.* at 621.

248. Macasero v. Southern Industrial Gases Philippines, 577 SCRA 500, 507 (2009).

evidence to indicate that petitioner's employment was terminated or that it was illegal.[249] Notwithstanding this holding, however, separation pay in lieu of reinstatement was awarded.[250] The Court reversed said rulings, to wit —

> The Court finds incongruous the crediting by the labor tribunals and the appellate court of respondents' claim that petitioner must prove the fact of his dismissal with particularity and at the same time accept respondents' above-said unsubstantiated claim that business slump prevented it from giving petitioner escorting assignment.
>
> While both labor tribunals and the appellate court held that petitioner failed to prove the fact of his dismissal, they oddly ordered the award of separation pay in lieu of reinstatement in light of respondent company's 'firm stance that [herein petitioner] was not its employee [vis-à-vis] the unflinching assertion of [herein petitioner] that he was which do[es] not create a fertile ground for reinstatement.' It goes without saying that the award of separation pay is inconsistent with a finding that there was no illegal dismissal, for under Article 293 [279] of the Labor Code and as held in a catena of cases, an employee who is dismissed without just cause and without due process is entitled to backwages and reinstatement or payment of separation pay in lieu thereof.[251]

Given that separation pay in lieu of reinstatement is not found in the Labor Code nor in any other law, the fourth question of significance is what should the amount of the separation pay be, and how should it be computed?

The amount of separation pay not being provided in the law, resort to doctrinal rulings is in order. The prevailing jurisprudential principle on this matter mentions the following components thereof:

(a) The amount equivalent to at least one month salary or to one month salary for every year of service, whichever is higher, a fraction of at least six months being considered as one whole year;[252] and

(b) Allowances that the employee has been receiving on a regular basis.[253]

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249. *Id.* at 503.

250. *Id.* at 508.

251. *Id.* at 506.

252. *See generally* Omnibus Rules Implementing the Labor Code, Book VI, Rule I, § 4, ¶ b. *See also* St. Luke's Medical Center, Inc. v. Notario, 634 SCRA 67, 80 (2010) & Agricultural and Industrial Supplies Corp. v. Siazar, 629 SCRA 332, 340 (2010).

253. *See* Planters Products, Inc. v. NLRC, 169 SCRA 328, 340 (1989).

Ordinarily, however, the Court only grants the payment of the amount mentioned in letter (a) and does not include the allowances mentioned in letter (b).

However, there have been decisions where allowances were included in the computation. Examples include the cases of *Santos v. National Labor Relations Commission*,[254] where the transportation and emergency living allowances regularly received by the illegally dismissed employee were included in the computation of the separation pay[255] and *Millares v. National Labor Relations Commission*,[256] where it was held that allowances that are regularly received by the employee should be included in the computation of the separation pay.[257]

The rationale for the inclusion of regular allowances is not difficult to discern since it is the obligation of the employer to pay an illegally dismissed employee the whole amount of his salary plus all other benefits, bonuses, and general increases to which he would have been normally entitled had he not been dismissed or had he not stopped working.[258]

It bears stressing, however, that the foregoing reckoning of the amount of separation pay in lieu of reinstatement has not been consistently and uniformly implemented by the Court. Separation pay in lieu of reinstatement in a lesser amount than the "one month salary or one month salary for every year of service, whichever is higher," has been awarded in a number of cases.

For instance, separation pay of one-half month salary per year of service has been awarded in cases where the dismissals were declared legal, but because of the existence of some peculiar circumstances it considers justifying such as long years of service of the dismissed employee or that the employee has not objected thereto, this lesser amount was awarded as a form of equitable relief.[259]

Magos v. National Labor Relations Commission,[260] explained that "[t]he propriety of such grant of a lesser amount of separation pay has already been settled in a long line of cases[.]"[261]

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254. Santos v. National Labor Relations Commission, 154 SCRA 166 (1987).

255. *Id.* at 173.

256. Millares v. National Labor Relations Commission, 305 SCRA 500 (1999).

257. *Id.* at 506 & 511.

258. *Id.* at 511-12.

259. *See* Waterous Drug Corporation v. NLRC, 280 SCRA 735 (1997).

260. Magos v. National Labor Relations Commission, 300 SCRA 484 (1998).

261. *Id.* at 493.

Surprisingly, there have been cases where separation pay in lieu of reinstatement of one-half month pay per year of service was declared not valid — under the theory that it is not in accord with the doctrine of paying "one month salary or one month salary for every year of service, whichever is higher."[262]

Citing *Gaco v. National Labor Relations Commission*,[263] the Court, in the 2005 case of *P. J. Lhuillier, Inc. v. NLRC*,[264] modified the ruling of the NLRC which awarded only one-half month pay for every year of service to an illegally dismissed employee in order to conform to the said doctrine.[265]

Based on the foregoing discussion, the remedy of separation pay in lieu of reinstatement has obviously not been implemented in a consistent manner. This is understandable because it is based merely on judicial *dicta* and not on law from which such *dicta* could have been uniformly based.

The matter of regular allowances alone not being considered as part of the separation pay in recent decisions indicates too well the instability of this rule on separation pay in lieu of reinstatement.

The matter of granting such separation pay in a lesser amount likewise does not promote any protective mantle upon the interest of labor. An amendatory law to Article 293 [279], therefore, must be enacted enshrining this separation pay in lieu of reinstatement principle as a fundamental relief or remedy available to employees whose reinstatement, expressly provided thereunder, can no longer be granted. Additionally, the amount of such separation pay, that is, one month pay per year of service, a fraction of six months shall be considered one whole year should be fixed in said article.

1. Recommended Amendatory Provision on Separation Pay in Lieu of Reinstatement

As thus presented in the amendatory provision to Article 293 [279], the following shall be the statement of the proposed provision —

> (h) An employee who is illegally or constructively dismissed or involuntarily forced to resign from work shall be entitled to the following reliefs:

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262. *See generally* Rutaquio v. National Labor Relations Commission, 317 SCRA 1 (1999); Reformist Union of R.B. Liner, Inc. v. NLRC, 266 SCRA 713 (1997); & Sealand Service, Inc. v. NLRC, 190 SCRA 347 (1990).

263. Gaco v. National Labor Relations Commission, 230 SCRA 260 (1994).

264. P.J. Lhuillier, Inc. v. National Labor Relations Commission, 457 SCRA 784 (2005).

265. *Id.* at 799.

...

2. If actual reinstatement be legally impossible or impracticable due to strained relations or other valid grounds, separation pay in lieu thereof shall be granted in the equivalent amount of one month pay or one month pay for every year of service, whichever is higher, a fraction of at least six months shall be considered one whole year.

IV. AWARD OF BACKWAGES AND OTHER MONETARY BENEFITS AS A REMEDY UNDER ARTICLE 293 [279] OF THE LABOR CODE

A. Preliminary Statement

The only monetary awards to which an illegally dismissed employee is entitled under Article 293 [279] of the Labor Code involve the payment of "full backwages, inclusive of allowances, and other benefits or their monetary equivalent computed from the time his compensation was withheld from him up to the time of his actual reinstatement."[266]

More concretely, these monetary awards may be divided into two as follows:

(a) Award of full backwages, inclusive of allowances; and

(b) Award of other benefits or their monetary equivalent.

Other than the foregoing, Article 293 [279] does not contain any qualifying or catch-all clause which may be cited as proper basis upon which other forms of monetary awards may be granted.

Yet, there have been many other forms of awards that are monetary in nature that the Court has granted in a catena of cases such as:

(a) Award of financial assistance;

(b) Award of indemnity in the form of nominal damages in case of dismissal for just or authorized cause but without procedural due process;

(c) Award of moral and exemplary damages;

(d) Award of attorney's fees; and

(e) Imposition of legal interest on monetary awards, separation pay and backwages.

266. Philippine Journalists, Inc. v. Mosqueda, 428 SCRA 369, 376 (2004) & Rodriguez, Jr. v. National Labor Relations Commission, 393 SCRA 511, 517 (2002).

These are, however, treated in the next Chapter entitled "Other Monetary Remedies not Found in the Labor Code" for purposes of orderly discussion and presentation.

But in the concluding part of the instant Chapter, the inadequacy of Article 293 [279] in reckoning and computing full backwages, allowances, and other benefits or their monetary equivalent will be exposed and discussed in the hope that appropriate legislative amendments may be introduced to this particular provision in order to better promote and protect not only the security of tenure of illegally dismissed employees, but also to better subserve the ends of justice, equity, and fair play.

B. The Award of Full Backwages, Inclusive of Allowances, and Other Benefits

Backwages, as a remedy, represent compensation that should have been earned by the employee but were lost because of the unjust or illegal dismissal.[267] It is a form of

> reparation for the illegal dismissal of an employee based on earnings which he could have obtained either by virtue of a lawful decree or order, as in the case of a wage increase under a wage order; or by rightful expectation, as in the case of one's salary or wage. The outstanding feature of backwages is the degree of assuredness to an employee that he would have had them as earnings had he not been illegally terminated from his employment.[268]

The employer is required to pay backwages as part of the price or penalty he has to pay for illegally dismissing his employee.[269]

1. Historical Perspective

Historically, the Court has constantly changed the rules on the reckoning and computation of backwages notwithstanding the clear provision thereon in Article 293 [279].

The first of such rules was the pre-Labor Code *Mercury Drug* Rule,[270] which prescribes that in case the illegal dismissal of an employee has lasted for many years, the backwages should be computed based on the fixed period of three years "without further qualifications or deductions."[271] This

267. *See generally* Philippine Long Distance Telephone Company v. NLRC, 303 SCRA 9, 18-19 (1999); Torillo v. Leogardo, Jr., 197 SCRA 471, 477-81 (1991) & Philippine Airlines, Inc. v. NLRC, 180 SCRA 555, 565 (1989).

268. Paguio v. Philippine Long Distance, Co., Inc., 393 SCRA 379, 386-87 (2002).

269. *Philippine Industrial Security Agency Corporation*, 320 SCRA at 138.

270. *See* Mercury Drug Co., Inc. v. Court of First Industrial Relations, 56 SCRA 694 (1974).

271. *Id.* at 710.

meant that there was no need to take into account whatever the employee might have earned during such period and deduct the same from the backwages recovered.[272] The justification for limiting the period to three years only is to eliminate delay in the disposition of cases.[273]

The advent of the Labor Code in 1974 saw the enshrining of the rule on backwages in Article 293 [279]. Under this provision, the grant of backwages to an illegally dismissed *regular* employee should be computed from the time of his illegal dismissal when the compensation was withheld from him up to the time of his reinstatement.[274] However, despite this express mandate under the Labor Code, the Court continued to apply the *Mercury Drug* Rule.[275]

In 1989, the Labor Code was amended by R.A. No. 5715. One of its provisions so amended is Article 293 [279] which now provides in clear terms that the backwages should be computed in "full," inclusive of allowances, and other benefits or their monetary equivalent from the time the compensation was withheld from the illegally dismissed employee up to his actual reinstatement.[276] This is the avowed legislative intent behind the amendatory provision of R.A. No. 5715 — to grant the backwages without any diminution or reduction. Employees were thus given more benefits on grounds of equity than they were allowed under the *Mercury Drug* Rule. It effectively prevented the undue delay and complication of reinstatement proceedings, and thus gave more teeth to the constitutional mandate of affording full protection to labor and guaranteeing their right to security of tenure.

However, despite the very clear provision of Article 293 [279], as amended by R.A. No. 5715, the Court followed the so-called *Ferrer* Doctrine,[277] which subjected the "full" backwages to deduction for any

272. *See* Highway Copra Traders v. NLRC-Cagayan de Oro, 293 SCRA 350 (1998) & Mariners Polytechnic School v. Leogardo, Jr., 171 SCRA 597 (1989).

273. D. M. Consunji, Inc. v. Pucan, 159 SCRA 107 (1988).

274. LABOR CODE, art. 293.

275. *See, e.g.*, Danao Development Corporation v. NLRC, 81 SCRA 487 (1978); Associated Anglo-American Tobacco Corporation v. Lazaro, 125 SCRA 463 (1983); & Philippine National Oil Company-Energy Development Corporation v. Leogardo, 175 SCRA 26 (1989).

276. LABOR CODE, art. 293.

277. *See* Ferrer v. National Labor Relations Commission, 224 SCRA 410, 423 (1993). *See also* Pines City Educational Center v. NLRC, 227 SCRA 655 (1993).

amount which the employee may have earned elsewhere during the period of his illegal termination.[278]

The cumbersome requirement of computing the full backwages and presenting proof of income earned elsewhere by the illegally dismissed employee after his termination and before actual reinstatement needs to be complied with in the execution proceedings before the labor arbiter in accordance with and as required by the Rules of Procedure of the NLRC. The *Ferrer* Doctrine, in actuality, adopted the rule applied *prior* to the *Mercury Drug* Rule.[279]

It was only in 1995, or close to seven years after the effectivity of R.A. No. 5715 on 21 March 1989, that the Court dramatically changed the rule on the reckoning and computation of backwages by way of its ruling in the case of *Bustamante v. National Labor Relations Commission*.[280]

The *Bustamante* Rule mandated thereunder that "full backwages" should mean

> exactly that, i.e., without deducting from backwages the earnings derived elsewhere by the illegally dismissed employee during the pendency of his illegal dismissal [case]. 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.[281]

This Rule certainly adheres closer to the legislative intent and policy behind R.A. No. 5715 — which is to give more benefits to workers than what was previously given to them under the *Mercury Drug* Rule or the *Ferrer* Rule.

The *Bustamante* Rule is the prevailing doctrine. Thus, from the time of its promulgation until today, full backwages are reckoned and computed based thereon. And for this purpose, it is now well-settled that any cause of action arising after 21 March 1989 — the date of effectivity of R.A. No. 5715, is covered by the *Bustamante* Rule.[282]

2. Components of Backwages, Inclusion of Allowances and Other Benefits

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278. *Ferrer*, 224 SCRA at 423.

279. *See Highway Copra Traders*, 293 SCRA 350.

280. Bustamante v. National Labor Relations Commission, 265 SCRA 61 (1996).

281. *Id.* at 71 (emphasis supplied).

282. *See generally Highway Copra Traders*, 293 SCRA at 356-57; Salafranca v. Philamlife (Pamplona) Village Homeowners Association, Inc., 300 SCRA 469, 481-82 (1998); & Ala Mode Garments, Inc. v. NLRC, 268 SCRA 497, 508 (1997).

In accordance with judicial precedents,[283] the amount of backwages should be computed on the basis of the wage rate level at the time of the illegal dismissal, and not in accordance with the latest, current wage level of the employee's position.[284]

Additionally, regular allowances paid to the illegally dismissed employee should be added to the amount mentioned above. The rule on inclusion of regular allowances and benefits is well settled. The only requisite to make these allowances and benefits part of backwages is that they should have been regularly paid to, and received by, the employee during the time of his employment prior to his illegal dismissal.[285]

According to jurisprudence, backwages include the following regular allowances and benefits:

(a) Holiday pay, vacation and sick leaves, and service incentive leaves;[286]

(b) Gasoline, car, and representation allowances;[287]

(c) Emergency living allowances and 13th month pay mandated under the law;[288]

(d) Transportation and emergency allowances;[289]

(e) Share in the service charges;[290]

(f) Fringe benefits or their monetary equivalent; and[291]

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283. *See generally* Evangelista v. National Labor Relations Commission, 249 SCRA 194 (1995) & Paramount Vinyl Products Corp. v. NLRC, 190 SCRA 525 (1990).

284. *See* General Baptist Bible Colleges v. NLRC, 219 SCRA 549, 557-60 (1993) & *Philippine Long Distance Telephone Company*, 303 SCRA at 18.

285. *Paramount Vinyl Products Corp.*, 190 SCRA at 537 & *Evangelista*, 249 SCRA at 196.

286. *See, e.g.*, St. Louise College of Tuguegarao v. NLRC, 177 SCRA 151, 156-57 (1989) & Fernandez v. National Labor Relations Commission, 285 SCRA 149, 179 (1998).

287. *See, e.g.*, Consolidated Rural Bank (Cagayan Valley), Inc. v. NLRC, 301 SCRA 223, 234-36 (1999).

288. *See, e.g.*, Espejo v. National Labor Relations Commission, 255 SCRA 430, 436-37 (1996) & *General Baptist Bible Colleges*, 219 SCRA at 560.

289. *See, e.g.*, *Santos*, 154 SCRA at 175 & Soriano v. National Labor Relations Commission, 155 SCRA 124, 132 (1987).

290. *See, e.g.*, Maranaw Hotels & Resort Corporation v. NLRC, 303 SCRA 540, 545 (1999).

(g) Any other regular allowances and benefits or their monetary equivalent.[292]

It must be emphasized that Article 293 [279] failed to append the descriptive word "regular" to describe the allowances and other benefits properly to be included in the computation of backwages. It is only on the basis of jurisprudence that this qualification is made the basis for their inclusion.

i. Recommended Amendatory Provision on Inclusion of Regular Allowances and Other Benefits

The amendatory law to Article 293 [279] being proposed in this Note will necessarily reflect this qualifying, descriptive term of "regularity" in relation to said allowances and benefits so that there would be no more mistaking on the propriety of their inclusion as part of backwages.

Thus, the provision on full backwages, regular allowances, and other benefits in said article shall be amended and accordingly re-stated as follows —

> (h) An employee who is illegally or constructively dismissed or involuntarily forced to resign from work shall be entitled to the following reliefs:
>
> ...
>
> 3. Full backwages, inclusive of *regular* allowances and other benefits or their monetary equivalent, reckoned and computed from the time of his illegal or constructive dismissal or involuntary or forced resignation when his compensation was withheld from him up to the time of his actual reinstatement: *Provided*, That if actual reinstatement be not legally possible, the same shall be computed up to the finality of the decision or up to the time when his actual reinstatement was rendered impossible or impracticable.

C. Confusing Variations in the Application of the Rule on Awarding of Backwages Together with Reinstatement

Based on jurisprudence, the Court has granted, alongside an order of reinstatement, either:

(a) Reinstatement with full backwages;

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291. *See, e.g.*, Acesite Corporation v. National Labor Relations Commission, 449 SCRA 360, 379 (2005).

292. *See, e.g.*, Blue Dairy Corporation v. National Labor Relations Commission, 314 SCRA 401, 412 (1999).

(b) Reinstatement without backwages; or

(c) Reinstatement with limited backwages.

1. Reinstatement with Full Backwages.

Under Article 293 [279], it is clearly provided that reinstatement carries with it the award of backwages. This is clear from a cursory reading of this provision where the conjunction "and" is used to connect these two reliefs, thus —

> 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.[293]

And yet, it has been held that the merger of these twin reliefs is simply the general rule. For it has been pronounced that the inappropriateness or non-availability of one does not carry with it the inappropriateness or non-availability of the other; "[t]he award of one is not a condition precedent to [the] award of [the other. Thus, b]ackwages may be ordered without [requiring] reinstatement; conversely, reinstatement may be ordered without payment of backwages."[294]

Undoubtedly, "[b]oth reliefs are rights granted by substantive law[.]"[295] They have dissimilar purposes. The purpose of reinstatement is to restore the employee who was unjustly dismissed to the position from which he was removed, i.e., to his *status quo ante* dismissal. The grant of backwages is meant to allow the same employee to recover from the employer his lost wages as a result of the dismissal. Both remedies would make whole the dismissed employee who can then look forward to continued employment. Thus, "these two remedies give meaning and substance to the constitutional right of labor to security of tenure."[296]

2. Reinstatement without Backwages

Having underscored the legal propriety of having these two kindred remedies harmonized and granted alongside each other, there is a need to

293. LABOR CODE, art. 293 (emphasis supplied).

294. De Guzman v. National Labor Relations Commission, 312 SCRA 266, 274 (1999). *See also* Medina v. Consolidated Broadcasting System (CBS)-DZWX, 222 SCRA 707, 712-15 (1993).

295. St. Michael's Institute v. Santos, 371 SCRA 383, 394-95 (2001).

296. *Santos*, 154 SCRA at 171-72.

discuss the circumstances that would justify the award of one without the other.

In accordance with established jurisprudence, the following circumstances were cited to justify the grant of reinstatement but without backwages:

(a) The dismissal was made in good faith;

(b) The dismissal was too harsh a penalty; or

(c) There is no proof that the employee was dismissed.

i. The Dismissal was made in Good Faith

In cases where the dismissal is found to have been effected by the employer in good faith, the Court normally orders the reinstatement of the employee without awarding any backwages. A number of decisions to this effect may be cited.

For instance, the good faith of the employer in the 2013 case of *Pepsi-Cola Philippines, Inc. v. Molon*,[297] was the reason for the grant of reinstatement but sans backwages.[298] In this case, Saunder Santiago Remandaban III was reinstated.[299] He got himself involved in a strike case which the DOLE Secretary has certified to the NLRC for compulsory arbitration.[300] A return-to-work order was issued as a result of such certification.[301] However, he "failed to report for work within [24] hours from receipt of the said order. Because of this, he was served with a notice of loss of employment status (dated [30 July 1999]).[302] He challenged the said notice and contended that his absence "was justified because he had to consult a physician regarding the persistent and excruciating pain of the inner side of his right foot."[303]

The Court, in justifying its order of reinstatement without backwages, pronounced —

> As may be gathered from the [11 September 2002] NLRC Decision, while Remandaban was remiss in properly informing Pepsi of his intended absence, the NLRC ruled that the penalty of dismissal would have been

297. Pepsi-Cola Products Philippines, Inc. v. Molon, 691 SCRA 113 (2013).

298. *Id.* at 137-38.

299. *Id.* at 138.

300. *Id.* at 119.

301. *Id.*

302. *Id.*

303. *Pepsi-Cola Products Philippines, Inc.*, 691 SCRA at 119.

> too harsh for his infractions considering that his failure to report to work was clearly prompted by a medical emergency and not by any intention to defy the [27 July 1999] return-to-work order. On the other hand, Pepsi's good faith is supported by the NLRC's finding that 'the return-to-work-order of the Secretary was taken lightly by Remandaban.' In this regard, considering Remandaban's ostensible dereliction of the said order, Pepsi could not be blamed for sending him a notice of termination and eventually proceeding to dismiss him. At any rate, it must be noted that while Pepsi impleaded Remandaban as party to the case, it failed to challenge the NLRC ruling ordering his reinstatement to his former position without backwages. As such, the foregoing issue is now settled with finality.
>
> All told, the NLRC's directive to reinstate Remandaban without backwages is upheld.[304]

This kind of ruling has been made as early as the advent of the Labor Code in 1974. By way of illustration, in the 1975 case of *San Miguel Corporation v. Secretary of Labor*,[305] the employee was dismissed after he was caught buying from his co-workers medicines that were given *gratis* to them by the employer company, and re-selling said medicines, in subversion of the employer's efforts to give medical benefits to its workers.[306] It was likewise established that the employee's dismissal was too drastic a punishment in light of his voluntary confession that he committed trafficking of company-supplied medicines out of necessity, as well as his promise not to repeat the same mistake.[307] The Court ordered the employee's reinstatement but without backwages in consideration of the employer's good faith in dismissing him.[308]

In the 1982 case of *Itogon-Suyoc Mines, Inc. v. National Labor Relations Commission*,[309] the employee was found guilty of breach of trust for stealing ore with high gold content.[310] However, his dismissal was considered drastic and unwarranted considering that he had rendered 23 years of service without previous derogatory record, and he was prematurely suspended during the pendency of the case.[311] Consequently, he was ordered reinstated

304. *Id.* at 137-38.

305. San Miguel Corporation v. Secretary of Labor, 64 SCRA 56 (1975).

306. *Id.* at 57-58.

307. *Id.* at 62.

308. *Id.* at 62-63.

309. Itogon-Suyoc Mines, Inc. v. NLRC, 117 SCRA 523, 529 (1982).

310. *Id.* at 530.

311. *Id.* at 528-29.

but without granting him any backwages.[312] The Court pronounced that "[t]he ends of social and compassionate justice would, therefore, be served if private respondent is reinstated but without backwages in view of petitioner's good faith."[313]

In the 1983 case of *Cruz v. Minister of Labor and Employment*,[314] the Court has given premium to the good faith of the employer, thus —

> The Court is convinced that petitioner's guilt was substantially established. Nevertheless, we agree with respondent Minister's order of reinstating petitioner without backwages instead of *dismissal which maybe too drastic. Denial of backwages would sufficiently penalize her for her infractions.* The bank officials acted in good faith. They should be exempt from the burden of paying backwages. *The good faith of the employer, when clear under the circumstances, may preclude or diminish recovery of backwages.* Only employees discriminately dismissed are entitled to backpay.[315]

In the 1989 case of *Manila Electric Co. v. NLRC*,[316] the employee was found responsible for the irregularities in the installation of electrical connections to a residence, for which reason, his services were terminated by the petitioner's company.[317] The Court, however, affirmed the findings of the NLRC and the labor arbiter that the employee should not have been dismissed considering his 20 years of service to the employer without any previous derogatory record, and his being awarded in the past, two commendations for honesty.[318] It was thus ruled that the employee's reinstatement is proper, without backwages, bearing in mind the employer's good faith in terminating his services.[319]

ii. The Dismissal was too Harsh a Penalty

The dismissal of the employee has been considered as too harsh a penalty in a number of cases — leading to the award of reinstatement but without backwages.

312. *Id.* at 529.

313. *Id.*

314. Cruz v. Minister of Labor and Employment, 120 SCRA 15, 20 (1983).

315. *Id.* (emphasis supplied).

316. Manila Electric Co. v. NLRC, 175 SCRA 277 (1989).

317. *Id.* at 279.

318. *Id.* at 280-84.

319. *Id.* at 283.

One of these cases is *Pepsi-Cola Distributors of the Philippines, Inc. v. National Labor Relations Commission*,[320] where the employee filed a leave of absence for one day after he suffered stomach ache.[321] Upon the advice of his doctor, he took a 25 day break without prior leave.[322] When he reported back for work, he was told that he had been dismissed for being absent without leave.[323] It was held that while he was at fault, the employee could not be dismissed.[324] He was ordered reinstated, but he was denied backwages.[325]

In *Yupangco Cotton Mills, Inc. v. NLRC*,[326] where, after finding that the employee was illegally dismissed but at the same time guilty of misconduct, the Court ruled that there was no grave abuse of discretion on the part of the NLRC when it meted the penalty of suspension only without backwages.[327]

In *Associated Labor Unions-TUCP v. NLRC*,[328] the Court ordered reinstatement with no backwages because the penalty of dismissal imposed on the employee for committing theft of company property was reduced to suspension due to mitigating circumstances.[329] The Court justified that the entire period when the employee was out of a job because of his dismissal should already be considered as the period of his suspension; hence, he should no longer be entitled to backwages for the same period.[330]

iii. There is No Proof that the Employee was Dismissed

Please see discussion on this topic, as viewed from the standpoint of reinstatement, in Chapter Three, entitled "Reinstatement Due to a Finding That There Has Been No Termination to Speak of."

3. Reinstatement with Limited Backwages

320. Pepsi Cola Distributors of the Philippines, Inc. v. National Labor Relations Commission, 247 SCRA 386 (1995).

321. *Id.* at 394.

322. *Id.*

323. *Id.* at 395.

324. *Id.* at 397.

325. *Id.*

326. Yupangco Cotton Mills, Inc. v. NLRC, G.R. 94156 (1990).

327. *De Guzman*, 312 SCRA at 275 (citing *Yupangco*, G.R. 94156).

328. Associated Labor Unions–TUCP v. NLRC, 302 SCRA 708 (1999).

329. *Id.* at 717.

330. *Id.*

In addition to the aforementioned jurisprudence, there have been cases where the Court has awarded limited backwages alongside the grant of reinstatement. This underscores further the real necessity of amending Article 293 [279] to reflect the circumstances that would justify this award of limited backwages.

The following cases ordering the award of limited backwages together with reinstatement may thus be cited.

In the 1992 case of *Dolores v. NLRC*,[331] the employee was terminated for her continuous absence without permission.[332] Although it was found that the employee was indeed guilty of breach of trust and violation of company rules, the Court still pronounced that the employee's dismissal was illegal on the basis of its finding that it was too severe a penalty considering that she had served the company for 21 years, it was her first offense, and her leave to study the French language would ultimately benefit the employer who no longer had to spend for translation services.[333] Even so, other than ordering the employee's reinstatement, the said employee was awarded backwages limited to a period of two years, given that the employer acted without malice or bad faith in terminating the employee's services.[334]

In another 1992 case, *San Miguel Corporation v. Javate, Jr.*,[335] the Court affirmed the uniform findings and conclusions of the Labor Arbiter, the NLRC, and the Court of Appeals that the employee was illegally dismissed because he was still fit to resume his work.[336] However, the employer's liability was mitigated by its evident good faith in terminating the employee's services based on the terms of its Health, Welfare, and Retirement Plan.[337] Hence, the employee was ordered reinstated to his former position without loss of seniority and other privileges appertaining to him prior to his dismissal, but the award of backwages was limited to only one year considering the mitigating circumstance of good faith attributed to the employer.[338]

In the 2004 case of *Procter and Gamble Philippines v. Bondesto*,[339] the Court, while affirming the illegality of the dismissal of the employee, did not

331. Dolores v. NLRC, 205 SCRA 348 (1992).

332. *Id.* at 351.

333. *Id.* at 355.

334. *Id.* at 356.

335. San Miguel Corporation v. Javate, Jr., 205 SCRA 469 (1992).

336. *Id.* at 474-77.

337. *Id.* at 476.

338. *Id.* at 477.

339. Procter and Gamble Philippines v. Bondesto, 425 SCRA 1 (2004).

grant full backwages.[340] It agreed with the findings of the NLRC and the Court of Appeals that in view of the employee's absences which were not wholly justified, he should be entitled to backwages limited to one year only.[341]

The full backwages originally awarded in the 2008 case of *Victory Liner, Inc. v. Race*,[342] was reduced and limited to only five years because of the good faith of the employer.[343] While petitioner's argument that respondent had already abandoned his job in 1994 was not upheld, the Court conceded that petitioner, given the particular circumstances of this case, had sufficient basis to reasonably and in good faith deem respondent resigned by 1998.[344]

The decisions rendered in all the foregoing situations and cases no doubt prove that despite the clear language and tenor of Article 293 [279] on the grant of "full" backwages as an accompanying relief to reinstatement, the Court has considered a lot of factors that result in no backwages being awarded or in limited award thereof. This should not be the case at all considering that the provision under consideration — Article 293 [279] — is meant to promote and protect the principle of security of tenure and, therefore, should expressly reflect any qualification or variance in the implementation of the otherwise clear mandate expressed therein that is, the payment of "full" backwages.

4. Recommended Amendatory Provision Covering Cases where the Relief is Reinstatement with Limited or Without Backwages

In order to make such award of reinstatement with limited or without backwages valid and beyond question, Article 293 [279] should reflect this as one of its provisions to be made specifically applicable to situations where such would be deemed appropriate in accordance with and pursuant to the prevailing rulings of the Court in a long line of cases. In this manner, any further ambiguity or doubt involving these issues will be fully addressed and resolved.

Therefore, the following amendatory provision to Article 293 [279] is proposed —

> An employee who has been dismissed for non-existent cause or *in good faith* or when it appears that *dismissal was too harsh a penalty* or that *there was no proof of dismissal*, shall be reinstated to his former position or to a

340. *Id.* at 11.

341. *Id.*

342. Victory Liner, Inc. v. Race, 573 SCRA 212 (2008).

343. *Id.* at 218–23.

344. *Id.* at 221–23.

substantially equivalent position but with limited or without backwages, at the discretion of the court.

D. Inadequacy of Article 293 [279] in Reckoning and Computing Full Backwages, Regular Allowances, Other Benefits or their Monetary Equivalent

To reiterate, Article 293 [279] clearly states that an illegally dismissed employee is entitled, among other remedies, "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.*"[345]

Thus, it is evident that this article prescribes the manner by which such full backwages, allowances, and other benefits should be computed — that is, from the time the employee was dismissed, when his compensation was withheld from him, up to the time of actual reinstatement.[346]

Not all reinstatement, however, is in the nature of *actual* reinstatement. Evident from a cursory reading of Article 293 [279] is that it does not at all address the issue of how backwages should be reckoned and computed when actual reinstatement is not granted, and in lieu thereof, separation pay is awarded.

The reasons for not granting actual reinstatement vary from case to case. It could be because of strained relations or other causes which render reinstatement impossible, impracticable, or not feasible, in which case, what is granted is separation pay instead of reinstatement.

In cases of this nature, what the Court prescribes is that the backwages should be computed from the time of the employee's dismissal, which marks the withholding of the compensation from him, until the finality of the decision.[347] Obviously, such computation of the backwages cannot be reckoned until his actual reinstatement — the only remedy prescribed in Article 293 [279] — because this is not the proper award to be granted under the circumstances. The justification for this manner of reckoning backwages is that along with the finality of the decision, the issue of the illegality of the dismissal is also finally laid to rest.[348]

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345. LABOR CODE, art. 293 (emphasis supplied).

346. The Coca-Cola Export Corporation v. Gacayan, 638 SCRA 377, 401 (2010) & Buenviaje v. Court of Appeals, 391 SCRA 440, 446 & 452 (2002).

347. *Gaco*, 230 SCRA at 268.

348. *Agricultural and Industrial Supplies Corporation*, 629 SCRA 332, 340-41; General Milling Corporation v. Casio, 615 SCRA 13, 37-38 (2010); & RBC Cable Master System v. Baluyot, 576 SCRA 668, 678-79. (2009)

While the above situation may have been considered as the exception to the otherwise clear provision of Article 293 [279], there are cases where the Court prescribes a completely different form of reckoning for backwages when reinstatement is not granted, and in its stead, separation pay is awarded.

For instance, a variation in the reckoning of backwages in strained relations cases was reflected in the 2013 case of *Bordomeo v. Court of Appeals*.[349] While in some cases of strained relations, backwages are computed until finality of the decision, in this case, however, a different reckoning period was used. Based on the premise that the computation of separation pay and backwages due to illegally dismissed employees should not go beyond the date when they were deemed to have been actually separated from their employment, or beyond the date when their reinstatement was rendered impossible due to strained relations and "[t]hat the basis for computing backwages is usually the length of the employee's service while that for separation pay is the actual period when the employee was unlawfully prevented from working[,]"[350] accordingly, insofar as the backwages are concerned, the same was ordered computed from the time he was unjustly dismissed until his reinstatement was rendered impossible due to strained relations without fault on his part.[351] This covers the period from February 1999, when he was illegally dismissed, until 30 June 2005, the day he was deemed to have been actually separated (his reinstatement having been rendered impossible due to strained relations) from petitioner company.[352] This holding only shows that the reckoning of backwages in strained relations cases also varies.

Another example is the 1999 case of *Association of Independent Unions in the Philippines v. NLRC*.[353] In this case, the full backwages granted to the illegally dismissed employee were ordered to be computed not until the finality of the decision but until full payment of their separation pay, because of the continued non-compliance by the employer of the award of separation pay.[354] This is obviously a departure from the norm discussed above.

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349. Bordomeo v. Court of Appeals, 691 SCRA 269 (2013).

350. *Id.* at 291.

351. *Id.* at 292.

352. *Id.*

353. Association of Independent Unions in the Philippines v. NLRC, 305 SCRA 219 (1999).

354. *Id.* at 235.

Still in another 2010 case, *Malig-on v. Equitable General Services, Inc.*,[355] the Court completely deviated from the foregoing norm in the computation of full backwages.[356] In this case, petitioner Elsa Malig-on, a janitress, was deemed constructively dismissed on 15 August 2002 — the expiration date of her six-month "floating" status.[357] Consequently, it may be said that Malig-on was entitled to reinstatement from the time she was constructively dismissed until the NLRC ordered her immediate reinstatement in February 2005 — a period of two years and six months.[358] Because of this and on the basis of the principle that "[b]ackwages represent compensation that should have been earned but were not collected because of the unjust dismissal[,]"[359] Malig-on was declared entitled to backwages (inclusive of allowances, other benefits or their monetary equivalent) but only for said period of two years and six months.[360] In addition, since the circumstances already ruled out actual reinstatement, she was declared entitled to separation pay at the rate of one month salary for every year of service reckoned from 1996, when she began her employment until 2005, when she was deemed to have been actually separated from work — a period of nine years. Both amounts, the backwages and the separation pay, to bear an interest of six percent per annum until fully paid.[361]

Another deviation in the reckoning of backwages is when the illegally dismissed employee has reached the optional retirement age of 60 years[362] or the compulsory retirement age of 65.[363] Necessarily, the backwages should only cover the time when the employee was illegally dismissed up to the time when he reached 60 or 65 years, as the case may be.

In a situation where, during the pendency of the illegal dismissal case, a valid retrenchment program was implemented by the employer, and the illegally dismissed employee is one of the affected employees whose retrenchment was declared valid, as in the 2004 case of *Mitsubishi Motors*

355. *See* Malig-on v. Equitable General Services, Inc., 622 SCRA 326 (2010).

356. *Id.* at 332-33.

357. *Id.* at 331.

358. *Id.* at 332.

359. *Id.*

360. *Id.* at 333.

361. *Malig-on*, 622 SCRA at 333.

362. Under Article 301 [287], 60 years is the optional retirement age. LABOR CODE, art. 301. *See Espejo*, 255 SCRA at 435.

363. Under Article 301 [287], 65 years is the compulsory retirement age. *Id. See, e.g.*, Jaculbe v. Silliman University, 518 SCRA 445, 452 (2007); Intercontinental Broadcasting Corporation v. Benedicto, 495 SCRA 561, 569-70 (2006); & *St. Michael's Institute*, 371 SCRA at 390.

Philippines Corporation v. Chrysler Philippines Labor Union,[364] the illegally dismissed employee should no longer be ordered reinstated because of the occurrence of the supervening event of retrenchment.[365] His backwages should be computed only up to the date of effectivity of the retrenchment.[366] It was thus held in this case that "[c]onsidering that the notices of retrenchment were mailed on [25 February 1998] and made effective one month therefrom, respondent employee should be paid full backwages from the date of his illegal dismissal up to [25 March 1998]."[367]

In case the dismissed employee is not completely faultless, the 2008 case of *Salas v. Aboitiz One, Inc.*[368] instructs that the award of backwages should be reckoned only from the promulgation date of the NLRC decision and not from the date of his illegal dismissal.[369] Although the negligence of petitioner was not sufficient to justify his termination from employment, in view of the stringent condition imposed by the Labor Code for the termination of employment due to gross and habitual neglect, it cannot be condoned, much less tolerated.[370]

Another area where backwages are not reckoned in accordance with the procedure prescribed in Article 293 [279] is in the termination of fixed-period employment. Obviously, the general rule enunciated in this article that the illegally dismissed employee should be entitled to reinstatement with full backwages up to the time of his actual reinstatement cannot be applied to this situation. This rule obviously applies only in case the employment is not for a definite period. In case the employment contract is for a definite period, what is appropriate is only the payment of the employee's salaries corresponding to the unexpired portion of the employment contract.[371]

In cases where the illegally dismissed employee dies during the pendency of the case, backwages should be computed from the time of the dismissal only up to the time of death. This was what happened in the 2005 case of *Maxi Security and Detective Agency v. National Labor Relations Commission*,[372]

364. Mitsubishi Motors Philippines Corporation v. Chrysler Philippines Labor Union, 433 SCRA 206 (2004).

365. *Id.* at 222–24.

366. *Id.* at 223–24.

367. *Id.*

368. Salas v. Aboitiz One, Inc., 556 SCRA 374 (2008).

369. *Id.* at 391.

370. *Id. See also Philippine Long Distance Telephone Company*, 303 SCRA at 18.

371. *Philippine-Singapore Transport Services*, 277 SCRA at 514.

372. Maxi Security and Detective Agency v. National Labor Relations Commission, 478 SCRA 376 (2005).

where the employee died during the pendency of the case in which his dismissal for abandonment was declared illegal.[373] It was held that he was entitled to payment of full backwages from 5 December 1997 up to the time of his death on 7 April 1999 which rendered his reinstatement impossible.[374]

1. Recommended Amendatory Provision on the Proper Reckoning and Computation of Full Backwages, Regular Allowances, Other Benefits or their Monetary Equivalent

As shown by the foregoing variations in the reckoning and computation of backwages which Article 293 [279] does not cover, there is clearly a need to amend this article to reflect these substantive variations. In this way, the right to security of tenure is protected, and the stability in the application of labor law principles is ensured.

For this purpose, the following is the proposed amendatory provision on this point —

> (h) An employee who is illegally or constructively dismissed or involuntarily forced to resign from work shall be entitled to the following reliefs:
>
> ...
>
> 3. Full backwages, inclusive of regular allowances and other benefits or their monetary equivalent, reckoned and computed from the time of his illegal or constructive dismissal or involuntary or forced resignation when his compensation was withheld from him up to the time of his actual reinstatement: *Provided*, That if actual reinstatement be not legally possible, the same shall be computed up to the finality of the decision or up to the time when his actual reinstatement was rendered impossible or impracticable.

V. OTHER MONETARY REMEDIES NOT FOUND IN THE LABOR CODE

A. Preliminary Statement

Pursuant to and in accordance with jurisprudence, the following reliefs have been awarded in illegal dismissal cases, but they do not find any legal anchor in Article 293 [279] or in any other provision of the Labor Code:

(a) Award of financial assistance;

(b) Award of damages and attorney's fees; and

373. *Id.* at 381.

374. *Id.* at 385-87.

(c) Imposition of legal interest on monetary awards, separation pay and backwages.

B. Award of Financial Assistance

Financial assistance has no legal basis in the Labor Code or in any other labor law. A reading of Article 293 [279], in relation to Article 297 [282] of the Labor Code, indicates too clearly that an employee who is dismissed for cause after appropriate proceedings in compliance with the due process requirement is not entitled to an award of any separation pay as and by way of financial assistance. And yet, it has been awarded by the Court in cases where the dismissal was found to be valid and legal. The Court has awarded this as a measure of social justice under certain exceptional circumstances and as an equitable concession,[375] such as long years of service,[376] because of the Court's concern and compassion for the working class,[377] or where the infraction is not so reprehensible nor unscrupulous as to warrant complete disregard of the fact that the same was a first offense.[378]

The fact that there is no law which allows the grant of separation pay as a form of financial assistance is the root cause of the lack of uniformity and constancy in the Court's rulings on this matter.

1. The Various Doctrines on Financial Assistance.

A copious review of the development in the grant of financial assistance traces its origin to the 1988 case of *Philippine Long Distance Company Co. v. NLRC*,[379] (*PLDT*) where it was proclaimed, thus —

> We hold that henceforth separation pay shall be allowed as a measure of social justice only in those instances where the employee is validly dismissed for causes other than serious misconduct or those reflecting on his moral character. Where the reason for the valid dismissal is, for example, habitual intoxication or an offense involving moral turpitude, like theft or illicit sexual relations with a fellow worker, the employer may not be required to give the dismissed employee separation pay, or financial assistance, or whatever other name it is called, on the ground of social justice.

375. Piñero v. National Labor Relations Commission, 437 SCRA 112, 120 (2004); Aparente, Sr. v. National Labor Relations Commission, 331 SCRA 82, 93 (2000); & Salavarria v. Letran College, 296 SCRA 184, 192-93 (1998).

376. *See generally* Pharmacia and Upjohn, Inc. v. Albayda, Jr., 628 SCRA 544 (2010).

377. *See generally* Villaruel v. Yeo Han Guan, 650 SCRA 64 (2011).

378. *See generally Aparente, Sr.*, 331 SCRA 82.

379. Philippine Long Distance Telephone Co. v. NLRC, 164 SCRA 671 (1988).

> A contrary rule would, as the petitioner correctly argues, have the effect, of rewarding rather than punishing the erring employee for his offense. And we do not agree that the punishment is his dismissal only and that the separation pay has nothing to do with the wrong he has committed. Of course it has. Indeed, if the employee who steals from the company is granted separation pay even as he is validly dismissed, it is not unlikely that he will commit a similar offense in his next employment because he thinks he can expect a like leniency if he is again found out. This kind of misplaced compassion is not going to do labor in general any good as it will encourage the infiltration of its ranks by those who do not deserve the protection and concern of the Constitution.
>
> The policy of social justice is not intended to countenance wrongdoing simply because it is committed by the underprivileged. At best it may mitigate the penalty but it certainly will not condone the offense. Compassion for the poor is an imperative of every humane society but only when the recipient is not a rascal claiming an undeserved privilege. Social justice cannot be permitted to be refuge of scoundrels any more than can equity be an impediment to the punishment of the guilty. Those who invoke social justice may do so only if their hands are clean and their motives blameless and not simply because they happen to be poor. This great policy of our Constitution is not meant for the protection of those who have proved they are not worthy of it, like the workers who have tainted the cause of labor with the blemishes of their own character.[380]

In 2002, the Court had the occasion to expound definitively on the doctrine laid down in the said *PLDT* case when it pronounced in *San Miguel Corporation v. Lao*,[381]

> that where the cause for the termination of employment cannot be considered as one of mere inefficiency or incompetence, but rather an act that constitutes an utter disregard for the interest of the employer or a palpable breach of trust reposed in the employee, the grant of separation benefits is hardly justifiable.[382]

Consequently, financial assistance in the form of separation pay may be exceptionally awarded as a measure of social justice only when the dismissal does not fall under any of the following circumstances:

(a) The dismissal was for serious misconduct;[383] or

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380. *Id.* at 682-83.

381. San Miguel Corporation v. Lao, 384 SCRA 504 (2002).

382. *Id.* at 512.

383. "Serious misconduct" is the first ground for dismissal under Article 296 [282]. It is

> defined as improper or wrong conduct. It is a transgression of some established and definite rule of action, a forbidden act, a dereliction of

(b) The dismissal reflected on the employee's moral character or moral turpitude.[384]

The *PLDT* and *San Miguel* rulings have been modified substantially by the so-called *Toyota* doctrine laid down in the 2007 case of *Toyota Motor Phils. Corp. Workers Association (TMPCWA) v. National Labor Relations Commission*.[385] This new doctrine expanded the coverage of the wrongful acts where financial assistance should not be awarded.[386] Hence, no financial assistance in the form of separation pay should be awarded not only on the ground of serious misconduct, but also on the other grounds mentioned in Article 297 [282] of the Labor Code such as willful disobedience, gross and habitual neglect of duty, fraud or willful breach of trust, and commission of a crime against the employer or his family.[387]

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duty, willful in character, and implies wrongful intent and not mere error of judgment. To be serious within the meaning and intendment of the law, the misconduct must be of such grave and aggravated character and not merely trivial or unimportant. However serious such misconduct, it must, nevertheless, be in connection with the employee's work to constitute just cause for his separation. The act complained of must be related to the performance of the employee's duties such as would show him to be unfit to continue working for the employer.

2010 Philippine Airlines, 634 SCRA at 41 & Lagrosas v. Bristol-Myers Squibb (Phil.), Inc./Mead Johnson Phil., 565 SCRA 90, 99 (2008).

384. "Moral turpitude" is defined as "everything which is done contrary to justice, modesty, or good morals; an act of baseness, vileness[,] or depravity in the private and social duties which a man owes his fellowmen, or to society in general, contrary to justice, honesty, modesty, or good morals." Soriano v. Dizon, 480 SCRA 1, 9 (2006).

385. Toyota Motor Phils, Corp. Workers Association (TMPCWA) v. National Labor Relations Commission, 537 SCRA 171 (2007).

386. *Id.* at 222-29.

387. This Article provides —

> Article 296 [282]. *Termination by employer* — An employer may terminate an employment for any of the following causes:
>
> (a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;
>
> (b) Gross and habitual neglect by the employee of his duties;
>
> (c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;

This *Toyota* ruling has been consistently observed in subsequent cases such as:

(a) The 2010 case of *Bank of the Philippine Islands v. National Labor Relations Commission (First Division)*,[388] where the validity of respondent Ma. Rosario N. Arambulo's dismissal for cause on the ground of loss of trust and confidence was upheld by both the NLRC and the Court of Appeals, but separation pay was still awarded based on the *PLDT* doctrine.[389] It was found that respondent had approved withdrawals which were later proven to be forged.[390] The Court, however, denied the award of separation pay, citing that the applicable doctrine is not that of *PLDT* but that of *Toyota*, as reiterated in the earlier 2010 case of *Reno Foods v. NLM*,[391] where it was maintained that —

> labor adjudicatory officials and the Court of Appeals must demur the award of separation pay based on social justice when an employee's dismissal is based on serious misconduct or willful disobedience; gross and habitual neglect of duty; fraud or willful breach of trust; or commission of a crime against the person of the employer or his immediate family — grounds under Article 297 [282] of the Labor Code that sanction dismissals of employees.[392]

Further, it was held that the case of *Aromin v. National Labor Relations Commission*,[393] was on all fours with the instant case.[394] In *Aromin*, petitioner "was the assistant vice-president of BPI when he was validly dismissed for loss of trust and confidence. [Citing its] pronouncement in *Toyota*, the Court disallowed the payment of separation pay on the ground that Aromin was

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(d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representatives; and

(e) Other causes analogous to the foregoing.

LABOR CODE, art. 296 [282].

388. Bank of the Philippine Islands v. National Labor Relations Commission (First Division), 621 SCRA 283 (2010).

389. *Id.* at 289-92.

390. *Id.* at 286.

391. Reno Foods v. Nagkakaisang Lakas ng Manggagawa (NLM)-Katipunan, 615 SCRA 240, 250 (2010).

392. *Id.* at 251.

393. Aromin v. National Labor Relations Commission, 553 SCRA 273 (2008).

394. *Reno Foods*, 615 SCRA at 294.

found guilty of willful betrayal of trust, a serious offense akin to dishonesty."[395]

(b) The *Toyota* doctrine was cited as basis in justifying the deletion of the award of separation pay in the 2010 case of *Equitable PCI Bank v. Dompor*.[396] In this case,

> [t]he [l]abor [a]rbiter's basis for the award of separation pay was respondent's length of service and the fact that petitioner sustained no losses. However, it was established that the infractions committed by the respondent constituted serious misconduct or willful disobedience resulting to loss of trust and confidence. Clearly[,] therefore, even based on equity and social justice, respondent does not deserve the award of separation pay.[397]

(c) The 2008 case of *Central Philippines Bandag Retreaders, Inc. v. Diasnes*[398] involved gross and habitual neglect of duties due to respondent's repeated and continuous absences without prior leave and frequent tardiness.[399] In this case, the Court, in no uncertain terms, decreed that

> labor adjudicatory officials and the [Court of Appeals] must demur the award of separation pay based on social justice when an employee's dismissal is based on serious misconduct or willful disobedience; gross and habitual neglect of duty; fraud or willful breach of trust; or commission of a crime against the person of the employer or his immediate family — grounds under Article [297 (282)] that sanction dismissal of employees. They must be most judicious and circumspect in awarding separation pay or financial assistance as the constitutional policy to provide full protection to labor is not meant to be an instrument to oppress the employers. The court's commitment to the cause of labor should not embarrass it from sustaining the employers when they are right. In fine, courts should be more cautious in awarding financial assistance to the undeserving and those who are unworthy of the liberality of the law.[400]

(d) The holding in the said case of *Central Philippines Bandag Retreaders, Inc.* was cited as the basis for denying the claim of petitioner for separation pay in the 2009 case of *Quiambao v.*

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395. *Id.*

396. Equitable PCI Bank v. Dompor, 637 SCRA 698 (2010).

397. *Id.* at 716.

398. Central Philippines Bandag Retreaders, Inc. v. Diasnes, 558 SCRA 194 (2008).

399. *Id.* at 199.

400. *Id.* at 207.

Manila Electric Company,[401] which also involved gross and habitual neglect of duties due to petitioner's habitual absences and tardiness.[402]

It bears noting that even before the advent of the *Toyota* doctrine, the Court has already asserted the rule in a number of cases, that if the ground cited for the dismissal falls under any of those mentioned in Article 297 [282], financial assistance should not be awarded. Some of these cases are as follows:

(a) In the 2002 case of *San Miguel Corporation v. Lao*,[403] the Court set aside the Court of Appeals' grant of retirement benefits or separation pay to an employee who was dismissed for willful breach of trust and confidence by causing the delivery of raw materials which are needed for its glass production plant to its competitor.[404]

(b) In the 2004 case of *Gabuay v. Oversea Paper Supply, Inc.*,[405] the petitioners were neither legally nor illegally dismissed.[406] However, they were found to have abandoned their jobs as "[t]hey failed to return to work despite the [employer's] directive requiring them to do so."[407] Consequently, the Court ruled that there was "no room for the award of financial assistance in the form of separation pay. To sustain the claim for separation pay under the circumstances [ ] established would be to reward the petitioners for abandoning their work."[408]

(c) In another 2004 case, *Gustilo v. Wyeth Philippines, Inc.*,[409] the Court held that no exceptional circumstances exist to warrant the grant of financial assistance to an employee who repeatedly violated the company's disciplinary rules and regulations and whose employment was thus terminated for gross and habitual neglect of his duties.[410]

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401. Quiambao v. Manila Electric Company, 608 SCRA 511 (2009).

402. *Id.* at 515-20.

403. San Miguel Corporation v. Lao, 384 SCRA 504 (2002).

404. *Id.* at 513.

405. Gabuay v. Oversea Paper Supply, Inc., 436 SCRA 514 (2004).

406. *Id.* at 520.

407. *Id.*

408. *Id.*

409. Gustilo v. Wyeth Philippines, Inc., 440 SCRA 67 (2004).

410. *Id.* at 77-78.

(d) In the 2005 case of *House of Sara Lee v. Rey*,[411] the Court ordered the deletion of the award of separation pay to a branch supervisor who regularly, without authorization, extended the payment deadlines of the company's sales agents.[412] Since the cause for the supervisor's dismissal involved her integrity which can be considered as breach of trust, she was declared not worthy of compassion as to deserve separation pay based on her length of service.[413]

(e) In another 2005 case, *Ha Yuan Restaurant v. National Labor Relations Commission*,[414] the Court likewise ordered the deletion of the award of separation pay to an employee who, without any provocation, hit her co-worker's face, causing injuries which resulted in a series of fights and scuffles between them.[415] Her act was viewed as serious misconduct which should not warrant the award of separation pay.[416]

As far as analogous causes under paragraph (e) of Article 297 [282] are concerned, *Toyota* has made a distinction. It declared that in these cases,

> the NLRC or the courts may opt to grant separation pay anchored on social justice in consideration of such factors as the length of service of the employee, the amount involved in the case, whether the act is the first offense, the quality of the performance of the employee[,] and the like; using the guideposts enunciated in *PLDT* on the propriety of the award of separation pay.[417]

The 2008 case of *Yrasuegui v. Philippine Airlines, Inc.*[418] best illustrates the principle that if the ground invoked is an analogous cause, the valid dismissal of the employee may still merit the award of separation pay in the form of financial assistance.[419] In this case, the Court deemed valid the dismissal grounded on the analogous cause of obesity of the petitioner, who was an international flight attendant of respondent airlines.[420] Despite this ruling, the

411. House of Sara Lee v. Rey, 500 SCRA 419 (2006).

412. *Id.* at 443.

413. *Id.*

414. Ha Yuan Restaurant v. National Labor Relations Commission, 480 SCRA 328 (2006).

415. *Id.* at 331-32.

416. *Id.* at 332.

417. *Toyota Motors*, 537 SCRA at 223.

418. Yrasuegui v. Philippine Airlines, Inc., 569 SCRA 467 (2008).

419. *Id.* at 502.

420. *Id.* at 488.

Court, as an act of social justice and for reason of equity, awarded him separation pay equivalent to one-half month's pay for every year of service, including his regular allowances.[421] The Court observed that his dismissal brought about by his failure to meet the weight standards of his employer was not for serious misconduct, and it did not reflect his moral character.[422]

However, it must be pointed out that despite the 2007 *Toyota* doctrine, the 2008 case of *Bristol Myers Squibb [Phils.], Inc. v. Baban* was decided differently.[423] In *Baban*, the Court still heeded respondent's plea for mercy and separation pay despite ruling that respondent's dismissal based on loss of trust and confidence was valid.[424] The Court awarded separation pay at the rate of one month salary for every year of service as an equitable relief in consideration of his past services rendered and because the cause of his dismissal did not constitute serious misconduct or those that negatively reflected on his moral character.[425] Respondent was a district manager of Bristol Myers who had stapled a thank you note from his father, who lost in his vice-mayoralty bid in Zamboanga City, on the "Mamacare" milk product samples for distribution to petitioner's clients.[426]

Despite the otherwise sound policy enunciated in the *Toyota* doctrine, it was further modified in the 2010 case of *Philippine Airlines, Inc. v. National Labor Relations Commission*.[427] It was enunciated that while the *Toyota* doctrine "clarified that the grant of separation pay may still be precluded even if the ground for the employee's dismissal is not serious misconduct under [paragraph (a) of Article 297 [282]], but other just causes under the same article and/or other authorized causes provided for under the Labor Code[,]"[428] *Toyota* still recognized the social justice exception prescribed in *PLDT*.[429]

Therefore, under the current jurisprudential framework,

> the grant of separation pay as a matter of equity to a validly dismissed employee is not contingent on whether the ground for dismissal is expressly provided under Article 297 [282] (a), but whether the ground relied upon is

421. *Id.* at 502.

422. *Id.*

423. Bristol Myers Squibb (Phils.), Inc. v. Baban, 574 SCRA 198 (2008).

424. *Id.* at 209.

425. *Id.*

426. *Id.* at 201.

427. *2010 Philippine Airlines*, 634 SCRA at 18.

428. *Id.* at 39-40.

429. *Id.*

> *akin* to serious misconduct or involves willful or wrongful intent on the part of the employee.[430]

Resultantly, according to the Court, there is a need to examine in every case if the special circumstances described in *PLDT* are present to determine whether the validly dismissed employee is entitled to separation pay.[431]

In *Philippine Airlines*, the Court found uncontroverted special circumstances that justified the grant of separation pay to private respondent on equitable considerations.[432] The Court held that

> the transgressions imputed to private respondent have never been firmly established as deliberate and willful acts clearly directed at making petitioner lose millions of pesos. At the very most, they can only be characterized as unintentional, albeit major, lapses in professional judgment. Likewise, the same cannot be described as morally reprehensible actions. Thus, private respondent may be granted separation pay on the ground of equity which is defined as 'justice outside law, being ethical rather than jural and belonging to the sphere of morals than of law. It is grounded on the precepts of conscience and not on any sanction of positive law, for equity finds no room for application where there is law.'[433]

2. Lack of Consistent Rule on the Amount of Financial Assistance

Since financial assistance is not based nor founded on any law but simply on jurisprudence, its amount has not been fixed by the Court. It varies from case to case. Its determination wholly depends on the sound judgment of the Court.

A survey of cases involving the award of financial assistance indicates the varying amounts thereof.

By way of illustration, the amount of financial assistance was pegged at one month's salary for every year of service in the following cases:

(a) The 1998 case of *Salavarria v. Letran College*,[434] where petitioner teacher who had previously been meted with a two week suspension for the same offense of illegally soliciting contributions from students, was granted financial assistance in the amount of one month salary for every year of service on the

430. *Id.* at 41 (emphasis supplied).

431. *Id.*

432. *Id.* at 44.

433. *2010 Philippine Airlines*, 634 SCRA at 42.

434. Salavarria v. Letran College, 296 SCRA 184 (1998).

basis of the finding that she never took custody of the illegally solicited funds.[435]

(b) The 2010 case of *Artificio v. National Labor Relations Commission*,[436] where the Court held that petitioner Jose P. Artificio should be given some equitable relief in the form of separation pay, computed at the rate of one month pay for every year of service reckoned from the start of his employment with the respondents in 1986 until 2002, the date of his severance from employment.[437] This was in view of the fact that Artificio, a security guard, had been working with the respondent security agency for a period of 16 years and without any previous derogatory record.[438]

(c) In the 1989 case of *Cruz v. Medina*,[439] the Court, despite finding that the dismissal was legal, awarded to petitioner separation pay, equivalent to one month salary for every year of service, for reasons of social and compassionate justice, and for having spent the best years (18 years) of his life in the service of the employer and having worked beyond reproach as a dean and teacher.[440]

In the following cases, the amount of financial assistance was pegged at one-half month's pay for every year of service:

(a) The 2000 case of *Aparente, Sr. v. National Labor Relations Commission*,[441] where despite petitioner's blatant disobedience of company rules, the Court granted one-half month's pay for every year of service to the employee based on equity.[442]

(b) The 2004 case of *Piñero v. National Labor Relations Commission*,[443] where petitioner, who was dismissed as a result of an illegal strike, was granted one-half month's pay for the 29 years of his service.[444] His infraction was deemed not so reprehensible or

435. *Id.* at 192-93.

436. Artificio v. National Labor Relations Commission, 625 SCRA 435 (2010).

437. *Id.* at 446-47.

438. *Id.*

439. Cruz v. Medina, 177 SCRA 565 (1989).

440. *Id.* at 572-73.

441. Aparente, Sr. v. National Labor Relations Commission, 331 SCRA 82 (2000).

442. *Id.* at 93.

443. Piñero v. National Labor Relations Commission, 437 SCRA 112 (2004).

444. *Id.* at 120.

unscrupulous as to warrant complete disregard of his long years of service with no derogatory record.[445]

(c) The 2008 case of *Yrasuegui*, where, as an act of social justice and for reasons of equity, the amount of separation pay of one-half month's pay for every year of service plus regular allowances were awarded to petitioner.[446]

(d) The 2010 case of *Pharmacia and Upjohn, Inc. v. Albayda, Jr.*,[447] where, despite respondent's valid dismissal for insubordination, he was awarded separation pay by way of financial assistance, equivalent to one-half month's pay for every year of service, as an equitable relief because of his long years of service and due to the fact that it was his first offense.[448]

(e) The 2010 case of *Philippine Airlines*, wherein the circumstances of private respondent in this case are more or less identical to *Yrasuegui*, in the sense that her dismissal was neither for serious misconduct nor for an offense involving moral turpitude.[449] Further, her employment with petitioner spanned more than two decades unblemished with any derogatory record prior to the infractions at issue in the case at bar.[450] Based on equitable grounds, the same amount of separation pay of one-half month salary for every year of service awarded in *Yrasuegui* was granted to private respondent in this case.[451]

(f) The 2010 case of *C. Alcantara & Sons, Inc. v. Court of Appeals*,[452] wherein financial assistance was granted to the union members who participated in the illegal strike by reason of their long years of service and lack of past infractions.[453] The financial assistance was in the form of separation pay equivalent to one-half month salary for every year of service to the company up to the date of

445. *Id.* at 119.

446. *Yrasuegui*, 569 SCRA at 502.

447. Pharmacia and Upjohn, Inc. v. Albayda, Jr., 628 SCRA 544 (2010).

448. *Id.* at 573.

449. *2010 Philippine Airlines*, 634 SCRA at 46.

450. *Id.* at 47.

451. *Id.*

452. *C. Alcantara & Sons, Inc.*, 631 SCRA.

453. *Id.* at 503.

> their termination, with interest of 12% per annum reckoned from the time the decision became final and executory.[454]

In the following cases, the amount of financial assistance was reduced or otherwise fixed at a certain amount not equivalent to one-month or one-half (1/2) month's pay for every year of service:

(a) The 1992 case of *Manggagawang Komunikasyonsa Pilipinas v. NLRC*,[455] where the separation pay previously awarded by the NLRC in the amount equal to one-half month salary for every year of service, or a total of ₱33,000.00, was reduced by the Court to ₱10,000.00 as financial assistance.[456]

(b) The 1997 case of *Philippine Scout Veterans Security and Investigation Agency v. National Labor Relations Commission*,[457] where the employer denied the claim for retirement of the employee but offered instead financial assistance in the amount of ₱10,000.00.[458] The Court upheld the denial of the retirement benefits but affirmed the validity of the employer's offer and directed the payment thereof to the employee.[459]

(c) The 2005 case of *Eastern Shipping Lines, Inc. v. Sedan*,[460] where, after ruling that respondent employee was not entitled to retirement benefits, the Court affirmed the award to him of financial assistance in the amount of ₱200,000.00 for the sake of "social and compassionate justice[,]"[461] in light of the following special circumstances —

> that private respondent joined the company when he was a young man of 25 years and stayed on until he was 48 years old; that he had given to the company the best years of his youth, working on board a ship for almost 24 years; that in those years, there was not a single report of any transgression by him of any of the company rules and regulations; that he applied for optional retirement under the company's non-contributory plan when his daughter died and for his own health reasons; and that it would appear that he had served the company well,

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454. *Id.*

455. Manggagawang Komunikasyon sa Pilipinas v. NLRC, 206 SCRA 109 (1992).

456. *Id.* at 117.

457. Philippine Scout Veterans Security and Investigation Agency v. National Labor Relations Commission, 271 SCRA 209 (1997).

458. *Id.* at 215.

459. *Id.*

460. Eastern Shipping Lines, Inc. v. Sedan, 486 SCRA 565 (2006).

461. *Id.* at 575.

> since even the company said that the reason it refused his application for optional retirement was that it still needed his services; that he denies receiving the telegram asking him to report back to work; but that considering his age and health, he preferred to stay home rather than risk further working in a ship at sea.[462]

3. Recommended Amendatory Provision to Article 293 [279] on Financial Assistance

The foregoing illustrative cases whose rulings vary only underscore the extreme need to enshrine in the Labor Code the doctrine of financial assistance.

To reiterate, because of the lack of any provision in the Labor Code on the grant of financial assistance to deserving employees whose dismissal was declared valid and legal, there has been constantly changing doctrinal rulings not only on the proper grounds or justifications to be cited in support of the grant thereof, but on the all-too important issue of the determination of the correct or proper amount to be granted therefore.

Since the standards for which financial assistance has been, through the years, jurisprudentially determined and granted, incorporating them in the Labor Code, particularly under its Article 293 [279], would better protect the security of tenure of the affected employees. Under a stable and consistent policy on financial assistance duly enunciated in the very provision of the Labor Code, uniformity and consistency in rulings will be attained.

Consequently, the following amendatory provision shall be proposed —

> In case there are justifying circumstances, an employee whose dismissal has been found to be valid and legal may be granted *separation pay in the form of financial assistance* in the equivalent amount of one month pay or one-half month pay for every year of service, whichever is higher, a fraction of at least six months shall be considered one whole year; *Provided*, that the ground for his dismissal is not one of the just causes enumerated in Article 297 [282] of this Code.

C. Award of Damages and Attorney's Fees in Labor Cases

Immemorially, damages and attorney's fees have been awarded in illegal dismissal cases but the paramount question remains — Is there any provision in the Labor Code which provides for the grant of such damages as actual or compensatory, moral, exemplary, and nominal damages as well as attorney's fees to illegally dismissed employees?

462. *Id.*

The answer to this question is a resounding no. The legal bases therefore are found in the Civil Code but not in the Labor Code.

Article 293 [279] is supposed to embody a provision on the award of damages and attorney's fees to illegally dismissed employees. Unfortunately, this article is wanting on these very important reliefs.

Based on the huge body of labor law jurisprudence, it is only proper that Article 293 [279] should embody a provision on damages reflecting well-settled rulings on damages and attorney's fees as applied specifically to illegal dismissal cases.

The Civil Code classifies damages as follows:

(a) Actual or compensatory;

(b) Moral;

(c) Nominal;

(d) Temperate or moderate;

(e) Liquidated; or

(f) Exemplary or corrective.[463]

A survey of illegal dismissal cases at least for the past 20 years indicates that moral, exemplary, and nominal damages have often been granted. In a few cases, actual or compensatory damages have likewise been awarded. Temperate and liquidated damages have so far not been granted.

1. Actual and Compensatory Damages

As defined in law, "actual or compensatory damages," except as provided by law or by stipulation, are considered adequate compensation for pecuniary loss suffered by a person as he may duly prove.[464]

In at least two of the labor cases surveyed, the Court has awarded actual or compensatory damages, to wit:

(a) In the 2007 case of *Santiago v. CF Sharp Crew Management, Inc.*,[465] respondent manning agency reneged on its obligation to deploy petitioner seafarer overseas after a POEA-approved employment contract was signed.[466] Despite the absence of any

463. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 2197 (1950).

464. *Id.* art. 2199.

465. Santiago v. CF Sharp Crew Management, Inc., 527 SCRA 165 (2007).

466. *Id.* at 176.

employer-employee relationship between petitioner and respondent agency, it was held that petitioner is entitled to actual damages as such failure of respondent agency to deploy him abroad constitutes breach of contract which gave rise to the cause of action of petitioner.[467]

(b) The 1989 case of *Globe Mackay Cable and Radio Corp. v. Court of Appeals*,[468]where the employee was not only arbitrarily dismissed but was charged with six criminal cases all of which were dismissed.[469] Because of this, the Court held that the employee is entitled not only to moral damages and attorney's fees but also to actual damages.[470]

It bears emphasis that even if reflected in the Labor Code, the same standard of proof in civil cases, insofar as the evidence to prove actual or compensatory damages are concerned, should be required in labor cases. Thus, for damages to be recovered, the best evidence obtainable by the injured party must be presented.[471] Actual or compensatory damages cannot be presumed but must be duly proved, and so proved with a reasonable degree of certainty.[472] A court cannot rely on speculation, conjecture, or guesswork as to the fact and amount of damages but must depend upon competent proof that they have been suffered and on evidence of the actual amount thereof.[473] The Court has held that "[i]f the proof is flimsy and insubstantial, no damages [should] be awarded."[474]

2. Moral Damages

Moral damages have always been awarded in illegal dismissal cases for as long as the evidence presented warrants it. Its award finds its legal anchor on Article 2220 of the Civil Code.[475]

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467. *Id.* at 176-80.

468. Globe Mackay Cable and Radio Corp. v. Court of Appeals, 176 SCRA 778 (1989).

469. *Id.* at 789.

470. *Id.* at 791.

471. PNOC Shipping and Transport Corporation v. Court of Appeals, 297 SCRA 402, 408 (1998).

472. *Id.*

473. *Id.*

474. National Federation of Labor v. NLRC, 283 SCRA 275, 290 (1997).

475. Article 2220 of the Civil Code provides that "[w]illful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to

While Article 2219[476] of the Civil Code comprehensively enumerates the cases or circumstances under which moral damages may be recovered, the Court, as applied to illegal dismissal cases, has pronounced that moral damages may be awarded to compensate an illegally dismissed employee for diverse injuries such as "physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injur[ies]."[477] Moral damages, although incapable of pecuniary computation, may be recovered if they are the proximate result of the employer's unreasonable dismissal of the employee or wrongful act or omission.[478]

There must be evidence to show that the dismissal of an employee had been carried out arbitrarily, capriciously, and maliciously, with personal ill-will and bad faith in order to justify the award of moral damages.[479]

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breaches of contract where the defendant acted fraudulently or in bad faith." CIVIL CODE, art. 2220. *See also* Cruz v. National Labor Relations Commission, 324 SCRA 770, 784 (2000).

476. This Article provides —

> Article 2219. Moral damages may be recovered in the following and analogous cases:
>
> (a) A criminal offense resulting in physical injuries;
>
> (b) Quasi-delicts causing physical injuries;
>
> (c) Seduction, abduction, rape, or other lascivious acts;
>
> (d) Adultery or concubinage;
>
> (e) Illegal or arbitrary detention or arrest;
>
> (f) Illegal search;
>
> (g) Libel, slander or any other form of defamation;
>
> (h) Malicious prosecution;
>
> (i) Acts mentioned in Article 309; [or]
>
> (j) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.
>
> The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.
>
> The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named.

CIVIL CODE, art. 2219.

477. *Id.* art. 2217.

478. Philippine Aeolus Automotive United Corporation v. NLRC, 331 SCRA 237, 249-51 (2000) & *Paguio*, 393 SCRA at 388-89.

479. *Blue Sky Trading*, 667 SCRA at 755 & Chaves v. National Labor Relations Commission, 493 SCRA 434, 432-44 (2006).

Thus, the mere finding that the employee has been wrongfully dismissed does not automatically warrant an award of moral damages. "A dismissal may be contrary to law but by itself alone, it does not establish bad faith"[480] to entitle the dismissed employee to moral damages.[481]

Such damages cannot be justified solely upon the premise that the employer fired his employee without just cause or due process.[482] Additional facts must be pleaded and proven in order to validly grant moral damages under the Civil Code.[483] There must be a showing that the dismissal "was attended by bad faith or fraud, or [was] oppressive to labor, or [ ] done in a manner contrary to morals, good customs[,] or public policy, and that [ ] social humiliation, wounded feelings, grave anxiety, and mental anguish resulted therefrom."[484]

It should be noted that "[m]ere allegations of besmirched reputation, embarrassment[, humiliation,] and sleepless nights are insufficient to warrant an award for moral damages. It must be shown that the proximate cause thereof was the unlawful act or omission of the [employer]."[485]

The Court has ruled that moral damages are not intended "to enrich a complainant at the expense of the [employer. S]uch damages are awarded only to enable the illegally dismissed employee to obtain means, diversion, or amusements that will serve to alleviate the moral suffering he has undergone, by reason of the [employer's culpable] action."[486]

3. Exemplary or Corrective Damages

The grant of exemplary or corrective damages is made "by way of example or correction for the public good[.]"[487] This is normally given in addition to the award of moral damages.[488]

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480. Palmeria, Sr. v. National Labor Relations Commission, 247 SCRA 57, 64 (1995).

481. Primero v. Intermediate Appellate Court, 156 SCRA 435, 443-44 (1987).

482. *Id.*

483. *Id.*

484. Torres v. Rural Bank of San Juan, Inc., 693 SCRA 357, 380 (2013); General Milling Corporation v. Viajar, 689 SCRA 598, 614 (2013); San Miguel Properties Philippines, Inc., v. Gucaban, 654 SCRA 18, 33 (2011); & M+W Zander Philippines, Inc. v. Enriquez, 588 SCRA 590, 608-09 (2009).

485. Francisco v. Ferrer, Jr., 353 SCRA 261, 266 (2001).

486. Balayan Colleges v. NLRC, 255 SCRA 1, 18 (1996).

487. CIVIL CODE, art. 2229 & *Philippine Aeolus*, 331 SCRA at 249.

488. CIVIL CODE, art. 2229.

Under Article 2232 of the Civil Code, exemplary damages may be awarded "if the defendant acted in a wanton, fraudulent, reckless, oppressive, or malevolent manner."[489]

The same concept and standard as that enunciated in the Civil Code have been followed in illegal dismissal cases where this form of damages is granted. Thus, exemplary damages cannot be recovered as a matter of right.[490] The court will have to decide whether or not they should be adjudicated.[491] In the absence of evidence that wantonness, fraud, oppression, or malevolence attended the dismissal, the award of exemplary damages may not be justified.[492]

The Court has held that "[t]he working class has a right to recover damages for unjust dismissals tainted with bad faith; where the motive of the employer in dismissing the employee is far from noble."[493]

4. Nominal Damages

Under the Civil Code from whence the concept of this form of damages is derived, "nominal damages are adjudicated in order that a right of the plaintiff which has been violated or invaded by the defendant, may be vindicated or recognized, and not for the purpose of indemnifying the plaintiff for any loss suffered by him."[494]

As applied to illegal dismissal cases, the Court, as early as in two 1998 cases, has pronounced that nominal damages should be granted to vindicate or recognize the employees' right to procedural due process which was violated by the employer.[495]

But it was only in 2004, in the *en banc* case of *Agabon*, that the doctrine of awarding an indemnity in the form of nominal damages was officially recognized and made applicable to all cases where the dismissal is for just cause but without compliance with procedural due process.[496]

As extensively discussed earlier in Chapter Two, under the *Agabon* and *Jaka* doctrines, dismissal for just or authorized cause, respectively, without

489. *Id.* art. 2232.

490. *Id.* art. 2233.

491. *Id.*

492. *Acesite Corporation*, 449 SCRA, 377-79 & *National Bookstore*, 378 SCRA at 204.

493. Coca-Cola Bottlers Philippines, Inc. v. Del Villar, 632 SCRA 293, 321 (2010).

494. CIVIL CODE, art. 2221.

495. *See* Malaya Shipping Services, Inc. v. NLRC, 288 SCRA 181, 189 (1998) & Iran v. NLRC (Fourth Division), 289 SCRA 433, 442-44 (1998).

496. *Agabon*, 442 SCRA at 617.

observance of procedural due process is legal and valid, but the employer will be required to pay to the dismissed employee a ₱30,000.00 indemnity in the form of nominal damages, for just cause termination under the *Agabon* doctrine;[497] or a stiffer amount of ₱50,000.00, for authorized cause termination under the *Jaka* doctrine.[498]

Having established this doctrine in jurisprudence, it is high time that the same be reflected in the Labor Code's Article 293 [279] in order to better protect the security of tenure of illegally dismissed employees. This is as it should be because the remedy of indemnity in the form of nominal damages is not based on Article 293 [279] or on any other provision of the Labor Code. And yet, this is now the prevailing doctrine in the situations described above.

The extreme necessity of enshrining this doctrine in Article 293 [279] is highlighted by the fact that clearly, if viewed from the standpoint of the protection-to-labor clause in the Constitution, [499] it may be said to be in derogation of the right to security of tenure of illegally dismissed employees as it effectively operates as a total departure from the previous long-standing rule — that an employee who is dismissed for just or authorized cause but without affording him procedural due process would result in the declaration of the dismissal as illegal which would mean that the employee will have the concomitant right to claim the twin reliefs of reinstatement and full backwages as expressly provided under Article 293 [279].

To make this doctrine fully justified and continuously operative, it should be enshrined as a statutory principle by incorporating it as part and parcel of Article 293 [279] — the only provision that breathes life to the primordially important principle of security of tenure. It should not remain merely as a jurisprudential precept which may be subject to constant changes in interpretation and construction by the Court. This is extremely necessary because the relief granted, which takes the formula of indemnity in the form of nominal damages in such small amounts as ₱30,000.00 and ₱50,000.00 for just cause and authorized cause termination, respectively, is indeed very insignificant and trivial compared to the reliefs of reinstatement and full backwages expressly provided in Article 293 [279].

That the employers may now openly violate the requisite compliance with procedural due process is to be expected in light of the very mild sanction imposed for the violation thereof. But by making it part of the law,

497. *Id.* at 620.

498. *Jaka*, 448 SCRA at 128.

499. *See* PHIL. CONST. art. XIII, § 3.

questions as to its validity and legality as a matter of legal principle would be laid to rest.

5. Attorney's Fees

Attorney's fees have been awarded to illegally dismissed employees under certain justifying circumstances. But the basis for its grant, as earlier pointed out, is the Civil Code[500] and not the Labor Code.[501]

While the Labor Code contains a provision on attorney's fees in its Article 111,[502] this, however, is not specifically the pertinent provision that

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500. Article 2208 of the Civil Code provides —

> Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:
>
> (a) When exemplary damages are awarded;
>
> (b) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
>
> (c) In criminal cases of malicious prosecution against the plaintiff;
>
> (d) In case of a clearly unfounded civil action or proceeding against the plaintiff;
>
> (e) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just[,] and demandable claim;
>
> (f) In actions for legal support;
>
> (g) In actions for the recovery of wages of household helpers, [laborers,] and skilled workers;
>
> (h) In actions for indemnity under workmen's compensation and employer's liability laws;
>
> (i) In a separate civil action to recover civil liability arising from a crime;
>
> (j) When at least double judicial costs are awarded; [or]
>
> (k) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.
>
> In all cases, the attorney's fees and expenses of litigation must be reasonable.

CIVIL CODE, art. 2208.

501. LABOR CODE, art. 111. *But see Viernes*, 400 SCRA at 568.

502. This Article provides —

> Article 111. Attorney's Fees. —

should be properly cited as basis for the award of attorney's fees in illegal dismissal cases. The reason is that Article 111 makes itself applicable only to cases of unlawful withholding of wages and not to illegal dismissal cases. On the other hand, Article 2208 of the Civil Code, which cites the instances where attorney's fees and expenses of litigation may be awarded, squarely applies to illegal dismissal cases as the same are deemed part of damages.[503]

Hence, the general rule is that the award of attorney's fees in illegal dismissal cases is justified on the basis of the fact that the employee was compelled to litigate in order to seek redress for his illegal termination.[504]

The fact that an illegal dismissal case has spanned the whole judicial process from the labor arbiter to the NLRC, the Court of Appeals, and all the way up to the Supreme Court justifies the award of attorney's fees.[505]

However, it should be underscored that in order to justify the award of attorney's fees in the concept of damages, there must be evidence that bad faith attended the dismissal or that the employee was compelled to litigate or incur expenses to protect his rights by reason of the unjustified act of his employer.[506]

The 2010 case of *Philippine Airlines* best exemplifies this situation. The dismissal of private respondent in the instant case was held valid.[507] However, on equitable grounds, she was awarded separation pay since the transgressions imputed to her have never been firmly established as deliberate and willful acts clearly directed at making petitioner lose millions of pesos; at the very most, they can only be characterized as unintentional, albeit major, lapses in professional judgment. Likewise, the same cannot be described as

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(a) In cases of unlawful withholding of wages, the culpable party may be assessed attorney's fees equivalent to [10%] of the amount of wages recovered.

(b) It shall be unlawful for any person to demand or accept, in any judicial or administrative proceedings for the recovery of wages, attorney's fees which exceed [10%] of the amount of wages recovered.

LABOR CODE, art. 111.

503. Padilla Machine Shop v. Javilgas, 546 SCRA 351, 361-62 (2008).

504. *Macasero*, 577 SCRA at 507 & CRC Agricultural Trading v. National Labor Relations Commission, 609 SCRA 138, 152 (2009).

505. *The Orchard Golf and Country Club*, 693 SCRA at 520-21 & Valiant Machinery and Metal. v. NLRC, 252 SCRA 369, 372-78 (1996).

506. *Valiant Machinery*, 252 SCRA at 377-78.

507. *2010 Philippine Airlines*, 634 SCRA at 47.

morally reprehensible actions.[508] However, the Court held that the award of attorney's fees was considered not proper because the same can only be granted when the employee is illegally dismissed in bad faith and is compelled to litigate or incur expenses in order to protect her rights by reason of the unjustified act of her employer.[509] These conditions were not present in this case.[510]

The need to include in Article 293 [279] a provision on attorney's fees is highlighted not only by the fact that it is of necessity that it should be included therein as a form of damages to which an illegally dismissed employee is entitled as a matter of legal right, but most importantly, to stabilize and ensure uniformity in the application of the rule on attorney's fees.

Under the concept of damages in the Civil Code, it is a well-settled rule that the award of moral damages would automatically result in the kindred award of attorney's fees.[511] Conversely, if no moral damages can be granted under the facts of a case, the consequence is that there can also be no award of attorney's fees.[512]

To illustrate, it was held in the 2012 case of *Blue Sky Trading Company, Inc. v. Bias*,[513] that since the decision rendered by the NLRC on 29 November 2007, did not award moral and exemplary damages in favor of the respondents, the award of attorney's fees in their favor should likewise be deleted.[514] This is so because albeit respondents' dismissal from service was found to be illegal, bad faith cannot be attributed on the part of petitioner Blue Sky, which merely acted with intent to protect its interest.[515] Hence, the NLRC's award of attorney's fees in respondents' favor lacked any basis.

Nevertheless, it should not be disregarded that there are a number of cases where even if there is no award of moral and exemplary damages, attorney's fees were still awarded.

For instance, according to the 2013 case of *Torres v. Rural Bank of San Juan, Inc.*,[516] "[s]ince no moral damages can be granted under the facts of the

508. *Id.* at 42.

509. *Id.* at 44-47.

510. *Id.* at 46.

511. Acuña v. Court of Appeals, 489 SCRA 658, 668 (2006).

512. *Id.* & Pacquing v. Coca-Cola Philippines, Inc., 543 SCRA 344, 363 (2008).

513. *Blue Sky Trading*, 667 SCRA at 727.

514. *Id.* at 751-52.

515. *Id.* at 751.

516. Torres v. Rural Bank of San Juan, Inc., 693 SCRA 357 (2013).

case, exemplary damages cannot also be awarded."[517] Despite this ruling, however, the Court held that the award of attorney's fees was proper on the basis of the well-settled rule that "where an employee was forced to litigate and, thus, incur expenses to protect his rights and interest, the award of attorney's fees is legally and morally justifiable."[518] Using Article 111 of the Labor Code as basis, 10% of the total award was deemed the reasonable amount of attorney's fees that should be granted.[519]

As far as the dependence of the award of attorney's fees on the grant of exemplary damages is concerned, it was ruled in the 2013 case of *The Orchard Golf and Country Club*, that the "argument that in the absence of an award of exemplary damages, attorney's fees may not be granted is unavailing. An award of attorney's fees is not predicated on a grant of exemplary damages."[520]

6. Recommended Amendatory Provision to Article 293 [279] on Damages and Attorney's Fees

In light of the foregoing exposition on damages and attorney's fees, the following amendatory provision to Article 293 [279] is suggested —

> (h) An employee who is illegally or constructively dismissed or involuntarily forced to resign from work shall be entitled to the following reliefs:
>
> ...
>
> (1) Actual or compensatory damages;
>
> (2) Moral damages;
>
> (3) Exemplary or corrective damages;
>
> (4) Attorney's fees which shall not exceed ten percent (10%) of the total monetary awards, separation pay and backwages;
>
> ...
>
> (9) In case the dismissal is for just or authorized cause but without procedural due process, the dismissal shall be considered legal and valid but the employer shall be held liable to pay an indemnity in the form of *nominal damages*, the amount of which shall be subject to the sound discretion of the court.

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517. *Id.* at 381.

518. *Id.* at 382.

519. *Id.*

520. *The Orchard Golf and Country Club*, 693 SCRA at 521.

D. Imposition of Legal Interest on Monetary Awards, Separation Pay, and Backwages

One of the confounding reliefs rarely granted by the Supreme Court is the imposition of legal interest on monetary awards, separation pay, and backwages.

This Section will discuss this topic quite extensively, as this Note will recommend that a provision thereon be introduced as part of Article 293 [279] of the Labor Code.

1. Lack of Labor Code Provision on Imposition of Legal Interest in Illegal Dismissal Cases

A review of the Supreme Court's decisions for the last 20 years or so reveals that it is quite infrequent that the Court has imposed legal interest not only on the monetary awards but on separation pay and backwages as well.

The Labor Code, however, does not embody any provision mandatorily requiring the imposition of any legal interest thereon. Of course there is Article 129[521] of the same Code, which mentions that the imposition of

521. This Article provides —

> Article 129. *Recovery of Wages, Simple Money Claims and Other Benefits.* — Upon complaint of any interested party, the Regional Director of the Department of Labor and Employment or any of the duly authorized hearing officers of the Department is empowered, through summary proceeding and after due notice, to hear and decide any matter involving the recovery of wages and other monetary claims and benefits, including legal interest, owing to an employee or person employed in domestic or household service or househelper under this Code, arising from employer-employee relations: *Provided*, That such complaint does not include a claim for reinstatement: *Provided, further*, That the aggregate money claims of each employee or househelper does not exceed [₱5,000.00]. The Regional Director or hearing officer shall decide or resolve the complaint within 30 calendar days from the date of the filing of the same. Any sum thus recovered on behalf of any employee or househelper pursuant to this Article shall be held in a special deposit account by, and shall be paid on order of, the Secretary of Labor and Employment or the Regional Director directly to the employee or househelper concerned. Any such sum not paid to the employee or househelper because he cannot be located after diligent and reasonable effort to locate him within a period of three years, shall be held as a special fund of the Department of Labor and Employment to be used exclusively for the amelioration and benefit of workers.
>
> Any decision or resolution of the Regional Director or hearing officer pursuant to this provision may be appealed on the same grounds provided in Article 229 [223] of this Code, within five calendar days from receipt of a copy of said decision or resolution, to the National Labor Relations

"legal interest" on "unpaid wages and other monetary claims and benefits" as may be "found owing to any employee or house helper under [the Labor] Code."[522] However, this provision — Article 129 — applies only to cases of "recovery of wages, simple money claims, and other benefits" whose aggregate amount per employee or house helper does not exceed ₱5,000.00.[523] In no way, therefore, does this Article pertain to illegal dismissal cases; hence, it cannot be invoked as a basis for the grant of legal interest on separation pay, backwages, or monetary claims that are raised in illegal dismissal cases.

Therefore, it is an incontrovertible fact that the grant of legal interest contemplated in illegal dismissal cases proceeds not from law but from jurisprudence. Enshrining this benefit as part of the reliefs to be mandatorily required under Article 293 [279] will redound, in a very significant way, to the benefit of illegally dismissed employees.

Under the Civil Code, payment of legal interest is expressly mentioned and mandated under Articles 2209,[524] 2211,[525] 2212,[526] 2213,[527] and 2215.[528]

> Commission which shall resolve the appeal within 10 calendar days from the submission of the last pleading required or allowed under its rules.
>
> The Secretary of Labor and Employment or his duly authorized representative may supervise the payment of unpaid wages and other monetary claims and benefits, *including legal interest*, found owing to any employee or household under this Code

LABOR CODE, art. 129. (emphasis supplied).

522. *Id.*

523. *Id.*

524. This Article provides —

> Article 2209. If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six per cent per annum.

CIVIL CODE, art. 2209.

525. This Article provides that "[i]n crimes and quasi-delicts, interest as a part of the damages may, in a proper case, be adjudicated in the discretion of the court." *Id.* art. 2211.

526. This Article states that an "[i]nterest due shall earn legal interest from the time it is judicially demanded, although the obligation may be silent upon this point." *Id.* art. 2212.

527. This Article states that "[i]nterest cannot be recovered upon unliquidated claims or damages, except when the demand can be established with reasonable certainty." *Id.* art. 2213.

However, these articles, though they may be applied suppletorily to the Labor Code, are not completely applicable to illegal dismissal cases.

Besides, referring to provisions of one Code — the Civil Code — in order to resolve issues and controversies arising from another Code – the Labor Code – is legally absurd and works as an indicium, nay, admission, that the Labor Code is deficient and inadequate in some material respect.

2. Imposition of Legal Interest, a Creation of Jurisprudence

Under established jurisprudence, the Court justified its imposition of legal interest based on its ruling in the 1994 case of *Eastern Shipping Lines, Inc. v. Court of Appeals.*[529]

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528. This Article declares —

> Article 2215. In contracts, quasi-contracts, and quasi-delicts, the court may equitably mitigate the damages under circumstances other than the case referred to in the preceding article, as in the following instances:
>
> (a) That the plaintiff himself has contravened the terms of the contract;
>
> (b) That the plaintiff has derived some benefit as a result of the contract;
>
> (c) In cases where exemplary damages are to be awarded, that the defendant acted upon the advice of counsel;
>
> (d) That the loss would have resulted in any event; [or]
>
> (e) That since the filing of the action, the defendant has done his best to lessen the plaintiff's loss or injury.

Id. art. 2215.

529. Eastern Shipping Lines, Inc. v. Court of Appeals, 234 SCRA 78 (1994). The ruling in this case was modified by Bangko Sentral ng Pilipinas Monetary Board Circular No. 799, Series of 2013, which provides that —

> The Monetary Board, in its Resolution No. 796 dated 16 May 2013, approved the following revisions governing the rate of interest in the absence of stipulation in loan contracts, thereby amending Section 2 of Circular No. 905, Series of 1982:
>
> Section 1. The rate of interest for the loan or forbearance of any money, goods[,] or credits and the rate allowed in judgments, in the absence of an express contract as to such rate of interest, shall be six percent per annum.
>
> Section 2. In view of the above, Subsection X305.1 of the Manual of Regulations for Banks and Sections 4305Q.1, 4305S.3[,] and 4303P.1 of the Manual of Regulations for Non-Bank Financial Institutions are hereby amended accordingly.
>
> This Circular shall take effect on 1 July 2013.

The following rules of thumb are clearly enunciated therein, to wit:

> I. When an obligation, regardless of its source, i.e., law, contracts, quasi-contracts, delicts, or quasi-delicts is breached, the contravenor can be held liable for damages. The provisions under Title XVIII on 'Damages' of the Civil Code govern in determining the measure of recoverable damages.
>
> II. With regard particularly to an award of interest in the concept of actual or compensatory damages, the rate of interest, as well as the accrual thereof, is imposed, as follows:
>
> 1. When the obligation is breached, and it consists in the payment of a sum of money, i.e., a loan or forbearance of money, the interest due should be that which may have been stipulated in writing. Furthermore, the interest due shall itself earn legal interest from the time it is judicially demanded. In the absence of stipulation, the rate of interest shall be 12% per annum to be computed from default, i.e., from judicial or extrajudicial demand under and subject to the provisions of Article 1159 of the Civil Code.
>
> 2. When an obligation not constituting a loan or forbearance of money is breached, an interest on the amount of damages awarded may be imposed at the discretion of the court at the rate of [five percent] per annum. No interest, however, shall be adjudged on unliquidated claims or damages except when or until the demand can be established with reasonable certainty. Accordingly, where the demand is established with reasonable certainty, the interest shall begin to run from the time the claim is made judicially or extrajudicially (Article 1159, Civil Code) but when such certainty cannot be so reasonably established at the time the demand is made, the interest shall begin to run only from the date the judgment of the court is made (at which time the quantification of damages may be deemed to have been reasonably ascertained). The actual base for the computation of legal interest shall, in any case, be on the amount finally adjudged.
>
> 3. When the judgment of the court awarding a sum of money becomes final and executory, the rate of legal interest, whether the case falls under paragraph 1 or paragraph 2 above, shall be 12% per annum from such finality until its satisfaction, this interim period being deemed to be by then an equivalent to a forbearance of credit.[530]

Bangko Sentral ng Pilipinas, Circular No. 799 [BSP-MB Circ. No. 799, s. 2013] (June 21, 2013).

530. *Eastern Shipping*, 234 SCRA at 95-98. *But see* BSP-MB Circ. No. 799, s. 2013.

i. When Monetary Awards in Illegal Dismissal Cases are Subjected to Legal Interest

Based on the foregoing ruling in *Eastern Shipping Lines*, the Court has imposed legal interest in the following cases involving monetary awards:

(a) The 2013 case of *The Orchard Golf and Country Club*, where the undisputed claims of respondent employee for all her accrued salary differential, merit increases, and productivity bonuses that became due during the pendency of her constructive dismissal case were made subject to the legal interest of 12% per annum on any outstanding balance thereof, computed from the finality of the decision until full payment.[531]

(b) The 2012 case of *Blue Sky Trading*, where an interest of 12% per annum was imposed on the total sum of the monetary award granted to respondent, to be computed from the date of finality of the decision until full satisfaction thereof.[532]

(c) The 2008 case of *The Hon. Secretary of Labor and Employment v. Panay Veteran's Security and Investigation Agency, Inc.*,[533] where the obligation of respondents to pay the lawful claims of petitioners Edgardo M. Agapay and Samillano A. Alonso, Jr. was made subject to legal interest at the rate of six percent per annum from 30 October 2000 — the date when their claims were established with reasonable certainty — until the 10 May 2001 order of the DOLE-NCR Regional Director attained finality.[534] Thereafter, from the time the 10 May 2001 order of the DOLE-NCR Regional Director became final and executory, petitioners Agapay and Alonso, Jr. were adjudged entitled to 12% legal interest per annum until the full satisfaction of their respective claims.[535]

ii. When Separation Pay in Lieu of Reinstatement and Backwages are Subjected to Legal Interest

As far as the awards in illegal dismissal cases of separation pay in lieu of reinstatement and backwages are concerned, legal interest was also imposed

531. *The Orchard Golf and Country Club*, 693 SCRA at 522–23.

532. *Blue Sky Trading*, 667 SCRA at 752.

533. Secretary of Labor and Employment v. Panay Veteran's Security and Investigation Agency, Inc., 563 SCRA 112 (2008).

534. *Id.* at 123.

535. *Id.*

thereon in some cases. In the survey of illegal dismissal cases, however, it appears that not all cases where such awards are made that the Court has imposed legal interest thereon. As to how and why the Court has not been consistent on imposing legal interest in all instances of illegal dismissal cases involving such awards has not been made clear, notwithstanding the ruling in *Eastern Shipping Lines*.

In fact, research indicates that even in cases where both separation pay in lieu of reinstatement and backwages were awarded, the Court's rulings vary as to which of the awards should be made subject to legal interest. In some instances, only separation pay was subjected to legal interest; in other cases, only the backwages; and in some others, legal interest was imposed on both awards.

In the 2010 case of *Session Delights* the Court declared the reason for the imposition of legal interest on separation pay in lieu of reinstatement[536] in this wise —

> Article [293 [279]] provides for the consequences of illegal dismissal in no uncertain terms, qualified only by jurisprudence in its interpretation of when separation pay in lieu of reinstatement is allowed. When that happens, the finality of the illegal dismissal decision becomes the reckoning point instead of the reinstatement that the law decrees. In allowing separation pay, the final decision effectively declares that the employment relationship ended so that separation pay and backwages are to be computed up to that point. The decision also becomes a judgment for money from which another consequence flows — the payment of interest in case of delay. This was what the [Court of Appeals] correctly decreed when it provided for the payment of the legal interest of 12% from the finality of the judgment, in accordance with our ruling in [*Eastern Shipping Lines*].[537]

As to why there is no consistency in applying the rule on legal interest in illegal dismissal cases subsequent to this pronouncement in *Session Delights* still perplexes the mind.

And as to why there has been no uniformity in the fixing of the rates of legal interest — either six percent or 12% — likewise is baffling, to say the least.

It thus becomes urgently compelling to elevate this important piece of well-established jurisprudence on the imposition of legal interest on monetary awards, separation pay in lieu of reinstatement, backwages, and attorney's fees, to the level of a statutory mandatory requirement, by making it part and parcel of the reliefs expressly to be provided and granted under

536. *Session Delights*, 612 SCRA at 27.

537. *Id.* at 26–27.

Article 293 [279] of the Labor Code. In this way, any and all awards for monetary claims, separation pay in lieu of reinstatement and backwages made in connection with, and arising from, illegal dismissal cases will be subjected to this mandatory legal interest imposition.

For purposes of showing the rather inconsistent application of the rule on legal interest, the specific instances are cited in the ensuing sections of this Chapter.

iii. When Both Backwages and Separation Pay in Lieu of Reinstatement are Subjected to Legal Interest

In the cases cited below, legal interest was imposed on both the backwages and the separation pay granted in substitution of reinstatement:

(a) The 2010 case of *C. Alcantara & Sons, Inc.*, where both the backwages and separation pay equivalent to one-half month salary for every year of service awarded to the union members who participated in the illegal strike were subjected to an interest of 12% per annum, computed from the time the decision became final and executory until they are paid.[538]

(b) The 2010 case of *Malig-on*, where both backwages, inclusive of allowances, other benefits or their monetary equivalent as well as separation pay awarded to the illegally dismissed petitioner were subjected to the legal interest of six percent per annum until fully paid.[539]

(c) The 2010 case of *Session Delights*, where the total monetary awards of backwages and separation pay of one month pay per year of service, were subjected to legal interest of 12% per annum until their full satisfaction.[540]

(d) The 1998 case of *Dela Cruz v. NLRC*,[541] where separately, the backwages and separation pay were made subject to different legal interests.[542] Thus, backwages were subjected to the legal interest of six percent per annum, computed from the date petitioner was illegally dismissed until the decision became final and executor, and legal interest of 12% per annum until the amounts due are actually paid; and the separation pay of one

538. *C. Alcantara & Sons, Inc.*, 631 SCRA at 503.

539. *See Malig-on*, 622 SCRA at 333.

540. *Session Delights*, 612 SCRA at 27.

541. Dela Cruz v. National Labor Relations Commission, 299 SCRA 1, (1998).

542. *Id.* at 15.

> month pay for every year of service computed from the date he was first employed until the finality of the decision was subjected to the legal interest of 12% per annum from the date of promulgation of the decision until actually paid.[543]

iv. When Only the Separation Pay in Lieu of Reinstatement is Subjected to Legal Interest

In the following cases, only the separation pay was made subject to the legal interest despite the fact that backwages were also awarded in the same illegal dismissal case:

(a) The 1993 case of *Yu v. National Labor Relations Commission*,[544] where legal interest of six percent per annum was levied on the amount of unpaid wages and separation pay, computed from the date of promulgation of the award made by the Labor Arbiter.[545]

(b) The 1998 case of *Magos*, where the separation pay of one-half month salary for every year of service inclusive of allowances was subjected to 12% per annum from the date of promulgation of the decision until fully paid.[546]

(c) The 2003 case of *Sy v. Court of Appeals*,[547] where the separation pay awarded under Article 299 [284] (disease) of the Labor Code was subjected to the legal interest of six percent per annum computed from the finality of the decision until fully paid.[548] Additionally, six percent legal interest per annum was imposed thereon for any delay.[549]

v. When Only the Backwages are Subjected to Legal Interest

In the cases cited below, legal interest was imposed only on the backwages but not on the separation pay, notwithstanding the fact that both of these reliefs were awarded in the same case:

(a) The 2013 case of *Torres*, where petitioner was awarded both backwages and separation pay in lieu of reinstatement equivalent

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543. *Id.*

544. Yu v. National Labor Relations Commission, 224 SCRA 75 (1993).

545. *Id.* at 85-86.

546. *Magos*, 300 SCRA at 493.

547. Sy v. Court of Appeals, 398 SCRA 301 (2003).

548. *Id.* at 313.

549. *Id.* at 312-13.

to one month salary for every year of service, with a fraction of at least six months to be considered as one whole year, to be computed from the date of his engagement by respondent bank up to the finality of the decision.[550] But legal interest of six percent per annum was levied only on the backwages from the date of the petitioner's illegal dismissal until the finality of the decision, after which the rate was increased to 12% per annum until fully paid.[551]

(b) The 2012 case of *Aliling v. Feliciano*,[552] where, despite the award of separation pay of one month salary for every year of service, with a fraction of at least six months considered as one whole year and backwages, computed from the date of illegal dismissal up to the finality of the decision, only the latter were made subject to the legal interest of six percent per annum on the principal amount until fully paid.[553]

(c) The 1999 case of *Austria v. National Labor Relations Commission*,[554] where the legal interest, the rate of which was not specified, was imposed on the backwages, computed from the time of his dismissal up to the time of his death.[555]

(d) The 1997 case of *Dela Cruz v. NLRC*,[556] where the unspecified rate of legal interest was imposed on the full backwages awarded to petitioner, computed from the time she was temporarily laid off until she is fully paid her separation pay.[557]

vi. When Reinstatement (Not Separation Pay in Lieu Thereof) and Backwages are Granted and the Latter are Subjected to Legal Interest

The 2013 case of *Automotive Engine Rebuilders, Inc. (AER) v. Progresibong Unyon ng mga Manggagawa sa AER*,[558] illustrates the situation where both reinstatement (not separation pay in lieu thereof) and backwages were

550. *Torres*, 693 SCRA at 382.

551. *Id.*

552. Aliling v. Feliciano, 671 SCRA 186 (2012).

553. *Id.* at 221.

554. Austria v. National Labor Relations Commission, 310 SCRA 293 (1999).

555. *Id.* at 303.

556. Dela Cruz v. National Labor Relations Commission, 268 SCRA 458 (1997).

557. *Id.* at 471-72.

558. Automotive Engine Rebuilders, Inc. (AEF) v. Progresibong Unyon ng mga Manggagawa sa AER, 688 SCRA 586 (2013).

granted, and the latter were made subject to the legal interest of six percent per annum which should be increased to 12% per annum after the finality of the decision.[559]

vii. When No Reinstatement or Separation Pay in Lieu Thereof is Granted and Backwages are the Only Ones Awarded and Subjected to Legal Interest.

The 2005 case of *Equitable Banking Corporation v. Sadac*,[560] exemplifies the situation where no reinstatement or separation pay in lieu thereof was awarded but only the backwages were subjected to 12% interest per annum, computed from the time the judgment became final and executory until full satisfaction thereof.[561]

3. Recommended Amendatory Provision to Article 293 [279] on Imposition of Legal Interest on Monetary Awards, Separation Pay, and Backwages

The foregoing presentation on the significant variations in the rulings of the Court on how legal interest is reckoned and computed, and on which instances the same should be imposed justifies the embodiment of an amendatory provision to Article 293 [279] which would not only mandatorily impose legal interest on awards of monetary claims, separation pay in lieu of reinstatement, and backwages, but would clearly enunciate the proper rate/s thereof.

By so expressly providing legal interest in Article 293 [279], no more controversy will arise therefrom; and uniformity and constancy in the rulings thereon by the labor courts and the Court would be achieved. The end result would undoubtedly be to the benefit of the illegally dismissed employees who, untrained in law and uninformed in jurisprudence, almost always fail to assert what are rightfully theirs in terms of reliefs or remedies.

In view thereof, the following amendatory provision thereon is recommended —

> (h) An employee who is illegally or constructively dismissed or involuntarily forced to resign from work shall be entitled to the following reliefs:
>
> ...
>
> 8. Legal interest on all monetary awards, separation pay, and backwages, at the rate of six percent per annum from the time the obligation became due until the date of the final and executory decision and, thereafter, at the rate of 12% per annum until fully paid.

559. *Id.* at 595.

560. Equitable Banking Corporation v. Sadac, 490 SCRA 380 (2006).

561. *Id.* at 422-23.

V. CONCLUSION AND RECOMMENDATIONS

A. Is Article 293 [279] adequate and complete in providing the proper reliefs and remedies to illegally dismissed employees?

Based on the discussion in the preceding chapters of this Note, the answer to this question is evidently in the negative. There are only two basic remedies provided in Article 293 [279] — reinstatement and full backwages — which clearly do not find application to all cases of illegal dismissal of employees. Various other remedies are pronounced by the Court which, strictly and even loosely speaking, do not find their legal mooring in the said provision.

B. Is the Supreme Court engaged in "judicial legislation" when it declared and established doctrinal rulings on reliefs and remedies not found in, or based on, the provision of Article 293 [279]?

As intimated in its very title, this Note aims to dissect closely the most important provision of the Labor Code on security of tenure — Article 293 [279] — in order to ascertain not only its deficiencies and inadequacies insofar as the reliefs and remedies available to illegally dismissed employees are concerned, but most importantly, the adverse effects of such deficiencies on their constitutionally and legally guaranteed right to security of tenure — the very title of Article 293 [279] — which right this Provision is principally tasked to promote and protect.

The Labor Code has been in existence in our statute books for almost four decades now. Several amendments have been introduced thereto but somehow, the reliefs and remedies provided in Article 293 [279] remain archaic and evidently out-of-date; they no longer address the constantly changing scenarios in the workplace brought about by the introduction of modern trends and developments as well as novel practices in business. The reliefs and remedies applicable at the advent of the Labor Code in the early part of the 1970s are no longer sufficient to address the needs and requirements of the complex labor situation in the 21st century.

As discussed quite extensively in the preceding chapters, the Court has no doubt been compelled to engage in judicial legislation to fill up the gaping gaps in, and significant inadequacies of, the law. It has to create "laws" by making judicial pronouncements which constitute a departure from the strict interpretation of the existing law — Article 293 [279] — in the pretext of breathing life to the otherwise manifest intention of the Legislature.

Thus, instead of interpreting and construing the law, the Court engaged in legislating it. It steps in to craft missing parts or to fill in the gaps in the

law or, in some cases, it oversteps its discretional boundaries and goes beyond the law to coin doctrines or principles where none was before.[562] In this regard, judicial legislation carries on its face the notion of judicial usurpation.[563]

However, viewed from another angle, the Court cannot be blamed for engaging in judicial legislation involving the issue on the proper reliefs and remedies that should have been, by law, granted to illegally terminated employees. As one eminent Justice of the Court of Appeals wrote —

> [I]t bears noting that the judicial power is vested in the Supreme Court which is empowered by the Constitution to exercise the power of judicial review. Thus, the magistrates could not shirk their duties as arbiters on the basis that the issue raised in a case is rather gray. The court is expected to declare that black is black and white is white. Thus, however doubtful or difficult the situation is, the court has no choice but to exercise its bounden obligation to hear and decide the controversy brought before it. Necessarily, it is not allowed to abandon its vested jurisdiction.
>
> Truly, the Judiciary has a significant role to fulfill in an orderly society. It must take an active role in the adjudication of disputes. Perforce, as the sole interpreter of the law and dispenser of justice, the power of the judicial pen should not be decreased by the adverse opinions of the other branches of government or of the other sectors of the community, be it the left or the right. Naturally and expectedly, decisions of the High Tribunal and its exercise of rule-making power may receive either public acceptance or criticisms. It may either be praised or accused of going beyond its mandate. 'Indeed, the judicial power *is a power that can make a difference. The power is weak only in the hands of weaklings; the power is puny only to those whose minds no longer dream and dare.*'[564]

C. Are the doctrinal pronouncements of the Supreme Court arbitrary in nature as would result in the deprivation of illegally dismissed employees to their right to security of tenure?

While the Court is well-intentioned in its pronouncements, it cannot be gainsaid, however, that in the course of the discharge of its power of judicial review, there are instances where it may have overstepped the bounds of its proper exercise. This is most unfortunate but it is bound to happen in the light of the seeming want or inadequacy in the provision of Article 293 [279].

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562. Justice Myrna Dimaranan Vidal, Judicial Decision: Dissected *available at* http://ca.judiciary.gov.ph/index.php?action=mnuactual_contents&ap=j60200&p=y (last accessed on Dec. 31, 2014).

563. *Id*

564. *Id.* (emphasis supplied).

Viewed from the standpoint of a distant, detached onlooker, the flip-flopping and constantly changing rules on certain points of law would appear to be an arbitrary and whimsical exercise of judicial power. In fact, it is worrisome to see the spectacle of the Court trying to explain why there is a change in the rule.

This is best illustrated lately in the case of *Agabon*, where it was constrained to explain itself on why it has to abandon past rulings to give way to its newly-minted rule on granting of indemnity in the form of nominal damages in cases where an employee is dismissed for just cause but without affording him procedural due process. In so explaining its change in doctrine, the Court was constrained to openly assert in very clear terms that "[t]his is not to say that the Court was wrong when it ruled the way it did in *Wenphil*, *Serrano*[,] and related cases. Social justice is not based on rigid formulas set in stone. It has to allow for changing times and circumstances."[565]

The portion where this pronouncement was made in *Agabon* is quoted below to put it in its proper perspective, thusly —

> After carefully analyzing the consequences of the divergent doctrines in the law on employment termination, we believe that in cases involving dismissals for cause but without observance of the twin requirements of notice and hearing, the better rule is to abandon the *Serrano* doctrine and to follow *Wenphil* by holding that the dismissal was for just cause but imposing sanctions on the employer. Such sanctions, however, must be stiffer than that imposed in *Wenphil*. By doing so, this Court would be able to achieve a fair result by dispensing justice not just to employees, but to employers as well.
>
> The unfairness of declaring illegal or ineffectual dismissals for valid or authorized causes but not complying with statutory due process may have far-reaching consequences.
>
> This would encourage frivolous suits, where even the most notorious violators of company policy are rewarded by invoking due process. This also creates absurd situations where there is a just or authorized cause for dismissal but a procedural infirmity invalidates the termination. Let us take for example a case where the employee is caught stealing or threatens the lives of his co-employees or has become a criminal, who has fled and cannot be found, or where serious business losses demand that operations be ceased in less than a month. Invalidating the dismissal would not serve public interest. It could also discourage investments that can generate employment in the local economy.
>
> The constitutional policy to provide full protection to labor is not meant to be a sword to oppress employers. The commitment of this Court to the

565. *Agabon*, 442 SCRA at 615 (emphasis omitted).

cause of labor does not prevent us from sustaining the employer when it is in the right, as in this case. Certainly, an employer should not be compelled to pay employees for work not actually performed and in fact abandoned.

The employer should not be compelled to continue employing a person who is admittedly guilty of misfeasance or malfeasance and whose continued employment is patently inimical to the employer. The law protecting the rights of the laborer authorizes neither oppression nor self-destruction of the employer.

It must be stressed that in the present case, the petitioners committed a grave offense, i.e., abandonment, which, if the requirements of due process were complied with, would undoubtedly result in a valid dismissal.

An employee who is clearly guilty of conduct violative of Article 282 should not be protected by the [s]ocial [j]ustice [c]lause of the Constitution. Social justice, as the term suggests, should be used only to correct an injustice. As the eminent Justice Jose P. Laurel observed, social justice must be founded on the *recognition of the necessity of interdependence among diverse units of a society and of the protection that should be equally and evenly extended to all groups as a combined force in our social and economic life*, consistent with the fundamental and paramount objective of the state of promoting the health, comfort, and quiet of all persons, and of bringing about 'the greatest good to the greatest number.'

This is not to say that the Court was wrong when it ruled the way it did in *Wenphil*, *Serrano*[,] and related cases. Social justice is not based on rigid formulas set in stone. It has to allow for changing times and circumstances.

Justice Isagani Cruz strongly asserts the need to apply a balanced approach to labor-management relations and dispense justice with an even hand in every case:

We have repeatedly stressed that social justice — or any justice for that matter — is for the deserving, whether he be a millionaire in his mansion or a pauper in his hovel. It is true that, in case of reasonable doubt, we are to tilt the balance in favor of the poor to whom the Constitution fittingly extends its sympathy and compassion. But never is it justified to give preference to the poor simply because they are poor, or reject the rich simply because they are rich, for justice must always be served for the poor and the rich alike, according to the mandate of the law.

Justice in every case should only be for the deserving party. It should not be presumed that every case of illegal dismissal would automatically be decided in favor of labor, as management has rights that should be fully respected and enforced by this Court. As interdependent and indispensable partners in nation-building, labor and management need each other to foster productivity and economic growth; hence, the need to weigh and balance the rights and welfare of both the employee and employer.[566]

566. *Id.* at 613-16 (emphasis omitted).

While certainly no ill-will may be ascribed behind the act of the Court in constantly changing the rules, it remains a fact, however, that such changing of the rules does not promote stability and constancy, where stability and constancy are much desired most especially in cases of termination of employment — a very sensitive event where both the constitutional and legal protection of security of tenure are amply needed by the terminated employee.

However the Court justifies its action in invoking social justice, it pronounced that "[s]ocial justice is not based on rigid formulas set in stone[;] [i]t has to allow for changing times and circumstances."[567] This statement resonates with an empty promise of redemption. More so when, under the new *Agabon* doctrine, the resulting relief or remedy made available to an employee who is dismissed for just cause but without procedural due process is the payment of an indemnity in the form of nominal damages in the very paltry amount of ₱30,000.00[568] — a mere pittance compared to *Serrano*'s ineffectual dismissal declaration which would resultantly mean the payment to the dismissed employee of full backwages reckoned from the time he is ineffectually dismissed up to the finality of the decision.[569]

Indeed, the arbitrariness that attended the constant changing of the rules and doctrines because of the absence of any specific legal anchor and firm footing in Article 293 [279] which could effectively bar or restrict such changes, would lead one to conclude that security of tenure may no longer be the stable principle it seem to be within the context of the constitutional guarantees. As openly described in *Agabon* by the Court itself, security of tenure's twin guarantee of social justice is no longer cast and "set in stone" and should now "allow for changing times and circumstances."[570]

Without need to state more and sans any doubt, this revealing pronouncement was made in defense of the interest of the employer and not aimed at protecting the right to security of tenure and social justice of the dismissed employee. This was openly admitted by the Court in *Agabon*, when it said that "management has rights that should be fully respected and enforced by this Court."[571]

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567. *Id.* at 615 (emphasis omitted).

568. This amount was raised to ₱50,000.00 in case the termination is for an authorized cause but without procedural due process. *Jaka Food Processing*, 454 SCRA at 127.

569. *Agabon*, 442 SCRA at 620.

570. *Id.* at 615 (emphasis omitted).

571. *Id.* at 616.

D. Is an amendment to Article 293 [279] of the Labor Code necessary to reflect the reliefs and remedies that are not embodied therein but have been for years doctrinally promulgated and pronounced by the Supreme Court in illegal dismissal cases?

To address all the issues cited and discussed above, and to avoid any further confusion and debate over the proper reliefs and remedies available to illegally dismissed employees, an amendatory legislation is urgently necessary to be passed to make Article 293 [279] whole and complete by and in itself instead of simply continuing to rely on the wisdom and good judgment of the Court on how this provision should be properly construed and interpreted in the face of the patent absence of the basic legal bases embodied in the law itself.

The amendments should reflect well-established and immemorially honored doctrines and principles which, by reason of their inherent merit and continuing validity in the face of "changing times and circumstances," deserve to be enshrined in the hallowed pages of the Labor Code, as part of its Article 293 [279].