Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

YUSHI KONDO,
Petitioner,

- versus -

TOYOTA BOSHOKU (PHILS.) CORPORATION, MAMORU MATSUNAGA, KAZUKI MIURA, and JOSELITO LEDESMA,
Respondents.

G.R. No. 201396

Present:

BERSAMIN, *CJ.*,
Chairperson,
PERLAS-BERNABE,
Working Chairperson,
JARDELEZA,
GESMUNDO, and
CARANDANG, *JJ.*

Promulgated:
SEP 11 2019

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DECISION

JARDELEZA, *J.*:

In this case, We reiterate that the employee bears the burden to prove by substantial evidence the fact of his dismissal from employment. Absent any showing of an overt or positive act proving that the employer had dismissed the employee, the latter's claim of illegal dismissal cannot be sustained as it would be self-serving, conjectural, and of no probative value.[1]

Yushi Kondo (petitioner), a Japanese citizen, applied with and was hired by respondent Toyota Boshoku Philippines Corporation (Toyota) on September 26, 2007 as Assistant General Manager for Marketing, Procurement and Accounting. His net monthly salary was ₱90,000.00, to be increased to ₱100,000.00 after six months.[2] He was assured of other benefits such as 13th month bonus, financial assistance to be given before Christmas, and 15 days each of sick leave and vacation leave per year. Petitioner was also provided a service car and a local driver by Toyota's President at the time, Fuhimiko Ito (Ito).[3] Toyota caused the issuance of petitioner's Alien Employment Permit (AEP).[4]

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[1] *Cosue v. Ferritz Integrated Development Corporation*, G.R. No. 230664, July 24, 2017, 831 SCRA 605, 616.
[2] *Rollo*, p. 84.
[3] *Id.* at 84-85.
[4] *Id.* at 85.

As Assistant General Manager, petitioner implemented policy and procedural changes in his department, which have been approved by Ito.[5] After working for three months, petitioner was subjected to a performance evaluation, the result of which was "perfect." Two months later, he was again subjected to another performance evaluation. This time, his performance rating was only slightly above average. Petitioner protested the result of this evaluation, reasoning that it was impossible to get that rating after only two months from the initial evaluation.[6] The evaluation supposedly coincided with the discovery by Toyota's Japan headquarters of the anomalies committed by Ito.[7]

Petitioner was thereafter allegedly assigned the oldest company car and prevented from using other company cars for business travels. He was also prevented from further using his Caltex card for gasoline expenses, and instructed to pay for gas expenses with his own money, subject to reimbursement. He was restrained by Toyota's security personnel from going out of the office even if it were for the purpose of performing his official duty, and prevented from attending the meeting for the evaluation of employees.[8]

When respondent Mamoru Matsunaga (Matsunaga) took over as President of Toyota, petitioner was transferred to the Production Control, Technical Development and Special Project department as Assistant Manager.[9] Respondent Kazuki Miura (Miura) took over his former post. Petitioner allegedly objected to the transfer on the ground that it is in violation of the terms of his AEP, and admitted having no knowledge, skills, and experience in production control and technical development. Nonetheless, petitioner assumed his new post on July 1, 2008.[10]

On September 1, 2008, petitioner was notified that his service car and driver will be withdrawn.[11] He pleaded with Matsunaga for the benefits to be retained since he would be helpless without them. Nonetheless, Matsunaga allegedly brushed aside his plea and told him that he must shoulder his own transportation expenses.[12]

On October 13, 2008, Toyota terminated the services of petitioner's driver. Since petitioner could not report for work, he considered himself constructively dismissed.[13] On the same day, he filed a complaint with the NLRC for constructive dismissal, illegal diminution of benefits, illegal transfer of department, harassment, and discrimination against Toyota,

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5 *Id.* at 109.
6 *Id.* at 85.
7 *Id.*
8 *Id.*
9 *Rollo*, p. 85.
10 *Id.* at 85-86.
11 *Id.* at 86.
12 *Id.*
13 *Id.*

Matsunaga, Miura, and Joseph Ledesma (Ledesma), corporate officers of Toyota (collectively, respondents).[14]

Respondents denied petitioner's allegations, arguing that petitioner was entitled to the service car and driver only for a period of one year, after which he was expected to drive himself to and from work. The driver assigned to petitioner was discharged due to the termination of his employment contract.[15] Moreover, the free gasoline that may be availed with the Caltex card is a benefit exclusively given to Japanese expatriates, which petitioner was not, being a local hire. The reason why petitioner was able to use the card is that the service car he used was previously assigned to an expatriate and it had an accompanying Caltex card.[16] Petitioner also purportedly abused the Caltex card by using it for personal trips.[17] Respondents denied that petitioner was given the oldest company car, as in fact he was given a year 2000 Toyota Corolla model.[18] They denied excluding petitioner from any meeting, stating that the only meeting he was excluded from was the one exclusively for top corporate officers. Finally, petitioner's transfer to another department was an exercise of management prerogative. Petitioner had skills in planning, development, and special projects, and was thus competent for his new position. Toyota allegedly had no intention of dismissing petitioner, as it actually later sent him two notices to return to work.[19]

On November 25, 2009, Labor Arbiter Michaela A. Lontoc (LA) issued a Decision[20] holding that petitioner was constructively dismissed. Consequently, she directed the latter's reinstatement to his old department without loss of seniority rights, and ordered respondents to pay him backwages, moral and exemplary damages for their "dishonorable, unrighteous and despicably oppressive" acts toward petitioner,[21] and attorney's fees. However, the LA denied petitioner's claim for *pro rata* 13th month pay and other benefits for not having been raised in the complaint, as well as his claim for actual damages for being unsubstantiated.

First, the LA held that Toyota failed to prove that petitioner was entitled to the service car and driver for a limited period of one year. None of the respondents had personal knowledge of the extent and limitation of the benefits granted to petitioner, who was hired by Toyota's former President, Ito. Respondents did not even attempt to obtain Ito's statement to support their allegation.[22] They merely assumed that the benefits have a duration based on the limited employment contract of petitioner's driver. Hence, the withdrawal of the benefit was without justification, and thus unwarranted.[23]

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14 *Rollo*, p. 84.
15 *Id.* at 86.
16 *Id.* at 86-87.
17 *Id.* at 87.
18 *Id.* at 101.
19 *Id.* at 87.
20 *Id.* at 125-157.
21 *Id.* at 150-152.
22 *Id.* at 132.
23 *Id.* at 133-134.

Second, there was no valid justification for the withdrawal of petitioner's Caltex card. According to respondents, petitioner was not entitled to the benefit in the first place, and that he abused his use of the card.[24] However, the LA concluded that the gasoline allowance policy showed by respondents does not apply to petitioner as it applies only to employees occupying the rank of assistant manager and up, who use their own vehicle in reporting to work. Petitioner was not using his own vehicle but the service car provided by Toyota. Respondents also failed to submit the complete copy of Toyota's manual of operations, which supposedly contains the policy that only expatriates are entitled to a Caltex card. On the contrary, there is a statement in the policy which indicates that the benefit is not exclusive to expatriates.[25] The LA further ruled that respondents' assessment of abuse of the Caltex card was only presumed and not based on any mathematical computation.[26]

Third, the LA held that petitioner's transfer from the Marketing, Procurement and Accounting Department to the Production Control, Technical Development and Special Project Department of Toyota lacked justification. Petitioner did not have the technical knowledge, skills and experience for his new post, as his background pertains to trading, brokering and business consultancy.[27] His transfer was not an exercise of management prerogative as he was not appropriately trained for his new functions. Rather, it was a scheme for him to commit mistakes and create a valid reason for his subsequent termination and deportation.[28] Moreover, petitioner's transfer should have been approved by the Secretary of Labor and Employment pursuant to Article 41[29] of the Labor Code.

The LA concluded that the foregoing circumstances amount to constructive dismissal as they made petitioner's work conditions unbearable.[30] Further, the removal of his service car, driver and Caltex card amounted to a violation of the public policy of non-diminution of employee benefits.[31] Consequently, the LA adjudged respondents to be jointly liable to pay the abovementioned monetary awards to petitioner.[32]

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[24] *Id.* at 134.
[25] *Id.* at 136-138.
[26] *Id.* at 141.
[27] *Id.* at 144.
[28] *Id.* at 151.
[29] Art. 41. *Prohibition against Transfer of Employment.* – (a) After the issuance of an employment permit, the alien shall not transfer to another job or change his employer without prior approval of the Secretary of Labor. (b) Any non-resident alien who shall take up employment in violation of the provision of this Title and its implementing rules and regulations shall be punished in accordance with the provisions of Articles 289 and 290 of the Labor Code. In addition, the alien worker shall be subject to deportation after service of his sentence.
[30] *Rollo*, p. 149.
[31] *Id.* at 151.
[32] *Id.* at 157.

Respondents appealed to the NLRC which, on May 24, 2010 rendered a Decision[33] reversing and setting aside the LA Decision and dismissing petitioner's complaint. It held that the award for damages and attorney's fees should be deleted pursuant to the NLRC Rules of Procedure since these were not asked for in the complaint.[34] Moreover, there was no constructive dismissal to speak of since petitioner claimed to have been "forced to resign" as a result of respondents' acts.[35] Hence, he had no more intention of going back to work. In fact, despite receipt of notices to report for work, petitioner failed to do so. He is considered to have abandoned his job or voluntarily terminated his employment relations with Toyota.[36] Moreover, the primary and immediate cause of petitioner's claim of constructive dismissal is the withdrawal of the car and driver assigned to him, which he considered essential requisites for his continued employment.[37] To make it appear that he was constructively dismissed, petitioner made various allegations, but he failed to support them with substantial evidence.[38] Further, his transfer to another department was an exercise of Toyota's management prerogative. His position remained the same and there was no diminution of his benefits. He also agreed to the transfer and assumed his new post.[39] As regards the alleged diminution of benefits, the NLRC gave credence to Toyota's claim that the service car and driver benefits were limited to one year. Also, considering that the benefit was not embodied in an employment contract and the driver's contract of employment had expired, the privilege may be withdrawn anytime without amounting to a diminution of benefits.[40] Finally, the NLRC believed Toyota's explanation that petitioner was not entitled to the Caltex card because the benefit is extended to Japanese expatriates only and not to local hires.[41]

Petitioner filed a motion for reconsideration, but NLRC denied it. Hence, he filed a petition for *certiorari*[42] with the Court of Appeals (CA).

On October 24, 2011, the CA rendered the assailed Decision[43] denying the petition. It held that it is not the function of *certiorari* proceedings to review the factual findings of the NLRC, which findings are binding on the court if supported by substantial evidence.[44] Moreover, even if petitioner claimed that the NLRC gravely abused its discretion in reversing the Decision

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33 *Id.* at 107-119.
34 *Id.* at 113.
35 *Id.*
36 *Rollo*, p. 114.
37 *Id.*
38 *Rollo*, p. 115.
39 *Id.* at 116.
40 *Id.* at 117.
41 *Id.* at 117-118.
42 *Id.* at 158-210. The case is entitled *Yushi Kondo, Petitioner, v. National Labor Relations Commission, Third Division, Hon. Gregorio O. Bilog III, Hon. Alex A. Lopez, Hon. Pablo E. Espiritu, Jr., in their official capacities as Commissioners of the NLRC-Third Division, Public Respondents; Toyota Boshoku (Phils.) Corporation, Mamoru Matsunaga, Kazuki Miura and Joselito Ledesma, Private Respondents*, docketed as CA-G.R. SP No. 116167.
43 *Id.* at 83-103; penned by Associate Justice Vicente S.E. Veloso with Associate Justices Francisco P. Acosta and Angelita A. Gacutan, concurring.
44 *Id.* at 94.

of the LA, he nonetheless failed to allege that it was done capriciously or whimsically. He merely claimed that the NLRC was "not correct" in deciding the issues. Thus, he conceded that the NLRC merely committed errors in judgment and not errors in jurisdiction, which is the exclusive concern of a Rule 65 petition. The petition was dismissible on this premise alone.

Even if the petition were to be treated as an appeal, the CA held that it is still dismissible. Petitioner insisted that he claimed damages and attorney's fees in his complaint, but he failed to attach a certified true copy of the complaint which would have proved his point.[45] On the issues of constructive dismissal, abandonment and not reporting for work when required, the CA merely adopted the findings of the NLRC on the rationale that it is not the function of *certiorari* proceedings to review findings of fact of the NLRC.[46]

Petitioner filed a motion for reconsideration, but the CA denied it in its Resolution[47] dated April 3, 2012. He thus filed the present petition on the following grounds:

> 1. Whether or not the Honorable Court of Appeals gravely abused its discretion amounting to lack of or in excess of jurisdiction in ruling that petitioner failed to allege capriciousness or whimsicality in the issuance of the Honorable NLRC's assailed decision; and
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> 2. Whether or not the Honorable Court of Appeals gravely abused its discretion amounting to lack of or in excess of jurisdiction when it concluded that what petitioner brought as issues in the petition for *certiorari* were mere errors in judgment and not errors of jurisdiction.[48]

Petitioner insists that he alleged as ground for the allowance of his CA petition that the NLRC committed grave abuse of discretion amounting to lack or excess of jurisdiction in reversing the Decision of the LA and dismissing his complaint. The fact that he did not specifically use the words "capricious" or "whimsical" does not remove his petition from the ambit of *certiorari* under Rule 65 of the Rules of Court.[49] Moreover, the phrase "grave abuse of discretion amounting to lack of or in excess of jurisdiction" means a capricious and whimsical exercise of judgment, such that to state that the NLRC acted capriciously and whimsically would have been repetitive.[50] On the second ground, petitioner alleges that he raised only one issue in his CA petition, *i.e.*, that the NLRC committed grave abuse of discretion amounting to lack or in excess of jurisdiction. The "issues" he subsequently enumerated supported the charge of "grave abuse of discretion."[51]

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45 *Id.* at 96-98.
46 *Id.* at 98.
47 *Id.* at 105.
48 *Id.* at 31.
49 *Id.* at 32.
50 *Id.* at 33.
51 *Id.* at 34.

The petition lacks merit.

At the outset, the Court notes that the petition was correctly filed under Rule 45 of the Rules of Court. However, it alleges grave abuse of discretion on the part of the CA, which is the proper subject of a petition for *certiorari* under Rule 65. In the CA petition, on the other hand, counsel made a general allegation of grave abuse of discretion committed by the NLRC, but formulated the issues as if the NLRC committed errors of judgment. The difference between petitions filed under Rule 45 and Rule 65 of the Rules of Court is so fundamental that it is extremely lamentable that counsel still confounds one for the other and misapprehends their purpose.

To emphasize, decisions, final orders or resolutions of the CA in any case, *i.e.,* regardless of the nature of the action or proceedings involved, may be appealed to the Court by filing a petition for review under Rule 45 of the Rules of Court.[52] Through this remedy, the Court reviews *errors of judgment* allegedly committed by the CA. On the other hand, a petition for *certiorari* under Rule 65 is not an appeal but a special civil action restricted to resolving *errors of jurisdiction* and grave abuse of discretion, not errors of judgment.[53]

Jurisprudence instructs that where a Rule 65 petition alleges grave abuse of discretion, the petitioner should establish that the respondent court or tribunal acted in a capricious, whimsical, arbitrary or despotic manner in the exercise of its jurisdiction as to be equivalent to lack of jurisdiction.[54] An error of judgment that the court may commit in the exercise of its jurisdiction is not correctable through the original civil action of *certiorari.* The supervisory jurisdiction of a court over the issuance of a writ of *certiorari* cannot be exercised for the purpose of reviewing the intrinsic correctness of a judgment of the lower court—on the basis either of the law or the facts of the case, or of the wisdom or legal soundness of the decision. Even if the findings of the court are incorrect, as long as it has jurisdiction over the case, such correction is normally beyond the province of *certiorari.*[55] Errors of judgment and errors of jurisdiction as grounds in availing the appropriate remedy are mutually exclusive.[56] Hence, it is inexcusable for petitioner to state that "x x x grave abuse of discretion, in *certiorari* proceedings, contemplates errors in judgment committed in excess of or with

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[52] *Philippine Bank of Communications v. Court of Appeals*, G.R. No. 218901, February 15, 2017, 818 SCRA 68, 74.

[53] *Guzman v. Guzman*, G.R. No. 172588, March 13, 2013, 693 SCRA 318, 327. Italics supplied.

[54] *Miranda v. Sandiganbayan*, G.R. Nos. 144760-61, August 2, 2017, 833 SCRA 614, 633.

[55] *Madrigal Transport, Inc. v. Lapanday Holdings Corporation*, G.R. No. 156067, August 11, 2004, 436 SCRA 123, 134.

[56] In *Madrigal Transport, Inc. v. Lapanday Holdings Corp., supra*, the Court held that a writ of *certiorari* may be issued only for the correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. The writ cannot be used for any other purpose, as its function is limited to keeping the inferior court within the bounds of its jurisdiction (*Id.* at 133).

lack of jurisdiction"[57] to justify his deplorable lapses in making the proper allegations in the Rule 65 petition it filed with the CA.

As regards the present petition, We note that it fundamentally raises errors of judgment allegedly committed by the CA. Indeed, the measure is that as long as the lower courts act within their jurisdiction, alleged errors committed in the exercise of their discretion will amount to mere errors of judgment correctable by an appeal or a petition for review.[58] We thus excuse petitioner's erroneous allegation of grave abuse of discretion on the part of the CA.

This brings Us now to the discussion of the main issue, which is whether the CA erred in *not* finding grave abuse of discretion on the part of the NLRC when it reversed the LA's Decision and dismissed petitioner's labor complaint.

Decisions of the NLRC are reviewable by the CA through Rule 65 of the Rules of Court. The CA is tasked in the proceeding to ascertain if the NLRC decision merits a reversal exclusively on the basis of the presence of grave abuse of discretion amounting to lack or excess of jurisdiction. Hence, when a CA decision is brought before the Court through a petition for review on *certiorari* under Rule 45, the question of law that must be tackled is whether the CA correctly found that the NLRC acted or did not act with grave abuse of discretion in rendering its challenged decision.[59] The Court does not re-examine conflicting evidence, re-evaluate the credibility of witnesses, nor substitute its own judgment for that of the tribunal in determining where the weight of evidence lies or what evidence is credible.[60]

However, if the factual findings of the LA and the NLRC are conflicting, as in this case, the reviewing court may delve into the records and examine for itself the questioned findings. Under this situation, such conflicting factual findings are not binding on the Court, and We retain the authority to pass on the evidence presented and draw conclusions therefrom.[61]

In his *pro forma* complaint, petitioner indicated the following causes of action: illegal diminution of benefits, acts of harassment forcing him to resign, receiving threats through text messages, car assignment discrimination, illegal transfer of department, incomplete issuance of uniform, and discrimination of company activities.[62] In ruling that petitioner was constructively dismissed, the LA considered only the circumstances of diminution of benefits pertaining to the withholding of the Caltex card and petitioner's car and driver benefits,

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57 *Rollo*, p. 34.

58 *Guzman v. Guzman*, *supra* note 53 at 327.

59 *Philippine National Bank v. Gregorio*, G.R. No. 194944, September 18, 2017, 840 SCRA 37, 50.

60 *Career Philippines Shipmanagement, Inc. v. Serna*, G.R. No. 172086, December 3, 2012, 686 SCRA 676, 684.

61 *Paredes v. Feed the Children Philippines, Inc.*, G.R. No. 184397, September 9, 2015, 770 SCRA 203, 216-217.

62 *Rollo*, p. 112.

and his transfer to another department. She did not discuss the other causes of action.[63] Accordingly, the main issue that was brought on appeal by respondents to the NLRC was the alleged grave abuse of discretion on the part of the LA in ruling that petitioner was constructively dismissed based on those particular circumstances.

Constructive dismissal exists where there is cessation of work because continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank and a diminution in pay.[64] It also exists when continued employment has become so unbearable because of acts of clear discrimination, insensibility or disdain by the employer, that the employee has no choice but to resign. What is essential is that there is a lack of "voluntariness in the employee's separation from employment."[65]

Petitioner claimed that he was forced to resign.[66] Hence, it is incumbent upon him to prove that his resignation was involuntary and that it was actually a case of constructive dismissal, with clear, positive and convincing evidence.[67] This he failed to do.

We agree with the NLRC that, "[t]he primary and immediate cause for [petitioner's] claim of constructive dismissal is the withdrawal of his assigned car and driver," which petitioner claimed as "essential requisites of [his] continued employment."[68] In fact, despite all the allegations in his complaint, petitioner started to not report for work on October 13, 2008, the day Toyota terminated the services of his driver.[69]

To place matters in perspective, what petitioner essentially alleges is diminution of benefits. It just so happened that the benefit allegedly unreasonably withdrawn was the means used by him to report for work.

The Court has held that there is diminution of benefits when the following are present: (1) the grant or benefit is founded on a policy or has ripened into a practice over a long period of time; (2) the practice is consistent and deliberate; (3) the practice is not due to error in the construction or application of a doubtful or difficult question of law; and (4) the diminution or discontinuance is done unilaterally by the employer.[70]

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63 In her Decision the Labor Arbiter held that "It is also well to note that all other acts of discrimination, *i.e.*, the prohibition for complainant to attend officers' meeting[s], the harassing text messages, the inappropriate monitoring of complainant's official travels by the security guards, alleged by complainant were never considered in the final resolution of this case (*Id.* at 156).

64 *Galang v. Boie Takeda Chemicals, Inc.*, G.R. No. 183934, July 20, 2016, 797 SCRA 501, 513.

65 *Id.*

66 *Rollo*, p. 113.

67 *Paredes v. Feed the Children Philippines, Inc.*, *supra* note 61 at 219.

68 *Rollo*, p. 114.

69 *Id.* at 127.

70 *Vergara, Jr. v. Coca-Cola Bottlers Philippines, Inc.*, G.R. No. 176985, April 1, 2013, 694 SCRA 273, 279.

Under the first requisite, the benefit must be based on express policy, a written contract or has ripened into a practice.[71] Here, the grant of service car and local driver to petitioner was based neither on express policy or a written contract. It may also not be considered company practice.

To be considered as a regular company practice, it must be shown by substantial evidence that the giving of the benefit is done over a long period of time, and that it has been made consistently and deliberately. There must be an indubitable showing that the employer agreed to continue giving the benefit knowing fully well that the employees are not covered by any provision of the law or agreement requiring the grant thereof. In sum, the benefit must be characterized by regularity and voluntary and deliberate intent of the employer to grant the benefit over a considerable period of time. The burden of proving that the benefit has ripened into practice rests in the employee.[72]

In this case, petitioner failed to prove that the car and driver benefits were also being enjoyed by other employees who held positions equivalent to his position, or that the benefits were given by the company itself with voluntary and deliberate intent. On the contrary, the record shows that these benefits were granted by Toyota's former President specifically to petitioner at the time he was hired, in a verbal agreement.[73] As such, the grant of the benefits may be viewed more as an accommodation given to petitioner by virtue of him being a fellow Japanese working in a foreign, and presumably unfamiliar, land. Petitioner cannot demand a right to the service car and driver indefinitely, especially under new administration, when the benefit ostensibly sprung only from the magnanimity of his former superior rather than actual company practice.

As regards the Caltex card, Toyota consistently argued that the free gasoline that may be availed with it is provided only to Japanese expatriates, and not to local hires like petitioner. The latter was able to enjoy the benefit as it came with the car assigned to him.[74] On this point, there is likewise no showing that petitioner's entitlement to the Caltex card is based on an express policy, a written contract, or company practice. Considering that petitioner did not sign an employment contract, he can only anchor his claim on company practice. However, he also failed to prove that the card was being enjoyed by other employees or officials similarly situated as him, as would indicate Toyota's intention to give the benefit consistently and deliberately. Hence, petitioner cannot demand continued use of the card.

Granting *arguendo* that the benefit amounted to company practice, there is essentially no diminution to speak of. The record bears that the Caltex card was withdrawn by Toyota prior to the withdrawal of the car and driver

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71 *Id.*
72 *Vergara, Jr. v. Coca-Cola Bottlers Philippines, Inc., supra* note 70 at 279-280.
73 *Rollo*, pp. 127-128.
74 *Id.* at 128.

benefits. Petitioner did not raise this as an issue, verbally or in a written memorandum to his superior. Even then, petitioner's gasoline expenses were subject to reimbursement. Hence, at the end of the day, it was still Toyota that paid for his gasoline consumption.

Finally, petitioner argues that his transfer from the Marketing, Procurement and Accounting Department to the Production Control, Technical Development and Special Project Department was an indication of constructive dismissal because he lacked technical expertise and experience for the new position. Toyota justified this move as an exercise of management prerogative which did not entail any change in the salary and benefits being enjoyed by petitioner, who was expected to exercise the same managerial functions.[75]

Notably, petitioner did not raise any objections to his transfer prior to the filing of the complaint, nor did he amply demonstrate why he was unsuited for the new job. There was no proof of any verbal or written opposition to the transfer. In fact, as pointed out by respondents, he was assigned to the new department on July 1, 2008, but he did not complain of his new assignment until after more than three months, or on October 13, 2008, when he filed a complaint with the NLRC. Petitioner did not allege and prove specific facts that would indicate his inability to function fully in the new department as a result of his lack of expertise, or that his transfer constituted clear discrimination or harassment. He also did not address Toyota's assertion that his new function required him merely to oversee the department and carry out management policies, rather than participate in production and technical development.[76] Indeed, the mere fact of petitioner's transfer to the new department does not support his claim of constructive dismissal.

The Court reiterates the basic rules of evidence that each party must prove his affirmative allegation, and that mere allegation is not evidence. We also stress that the evidence to prove the fact of the employee's constructive dismissal must be clear, positive, and convincing. Absent any showing of an overt or positive act proving that respondents had dismissed petitioner, the latter's claim of illegal dismissal cannot be sustained.[77]

Even so, the Court does not agree that petitioner abandoned his job. For abandonment to exist, two requisites must concur: a) the employee failed to report for work or was absent without valid or justifiable reason; and b) there was a clear intention to sever the employer-employee relationship manifested by some overt acts.[78] The CA upheld the NLRC's finding that petitioner's refusal to report for work despite receiving notices from Toyota is tantamount

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75 *Id.* at 143.

76 *Id.* at 496.

77 *Doctor v. NII Enterprises*, G.R. No. 194001, November 22, 2017, 846 SCRA 53, 67-68.

78 *Tamblot Security & General Services, Inc. v. Item*, G.R. No. 199314, December 7, 2015, 776 SCRA 211, 215, citing *Protective Maximum Security Agency, Inc. v. Fuentes*, G.R. No. 169303, February 11, 2015, 750 SCRA 302, 328-329.

to abandonment.[79] In the first place, the NLRC should not have considered abandonment as an issue since Toyota never raised it before the LA.[80] Well-settled is the rule, also applicable in labor cases, that issues not raised below cannot be raised for the first time on appeal, because of basic considerations of due process.[81] Moreover, petitioner's prayer for reinstatement negates the existence of a clear intention to sever the employment relationship. He may have been mistaken in assuming that he was dismissed, but his vigorous pursuit of this case shows his intent to resume work with Toyota.

Finally, petitioner is not entitled to moral and exemplary damages and attorney's fees. Moral damages may be awarded to an employee if his 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 the like resulted therefrom.[82] Exemplary damages, on the other hand, are awarded when dismissal of the employee was done in a wanton, oppressive or malevolent manner.[83] As for attorney's fees, it is granted in actions for recovery of wages where an employee was forced to litigate and thus incur expenses to protect his rights and interests.[84]

Here, it was not established that petitioner was constructively dismissed, much less that respondents acted in bad faith or in an oppressive or malevolent manner. There is also no showing that he was not paid his wages. Consequently, he cannot rightfully claim moral and exemplary damages and attorney's fees.

WHEREFORE, the petition is **DENIED**. The Decision dated October 24, 2011 and Resolution dated April 3, 2012 of the Court of Appeals in CA-G.R. SP No. 116167 are **AFFIRMED**.

SO ORDERED.

FRANCIS H. JARDELEZA
Associate Justice

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79 *Rollo*, pp. 98-99.

80 *Id.* at 237-242, 424-436.

81 See *Halili v. Justice for Children International*, G.R. No. 194906, September 9, 2015, 770 SCRA 241, 249 and *Pag-asa Steel Works, Inc. v. Court of Appeals*, G.R. No. 166647, March 31, 2006, 486 SCRA 475, 490.

82 *Philippine National Oil Company-Energy Development Corporation v. Buenviaje*, G.R. Nos. 183200-01, June 29, 2016, 795 SCRA 79, 111.

83 *Id.*

84 *Philippine National Oil Company-Energy Development Corporation v. Buenviaje, supra* at 110.

WE CONCUR:

LUCAS P. BERSAMIN
Chief Justice
Chairperson

ESTELA M. PERLAS-BERNABE
Associate Justice
Working Chairperson

ALEXANDER G. GESMUNDO
Associate Justice

ROSMARI D. CARANDANG
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

LUCAS P. BERSAMIN
Chief Justice