Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

ALLAN REGALA, *Petitioner,*	**G.R. No. 204684**
	Present:
- *versus* -	PERLAS-BERNABE, J., Chairperson, HERNANDO, INTING, DELOS SANTOS, and BALTAZAR-PADILLA,[*] *JJ.*
MANILA HOTEL CORPORATION, *Respondent.*	Promulgated: 05 OCT 2020

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DECISION

HERNANDO, *J.*:

This Petition for Review on *Certiorari*[1] assails the May 22, 2012 Decision[2] of the Court of Appeals (CA) in CA-G.R. SP No. 120748, which set aside the March 24, 2011 Decision[3] and May 31, 2011 Resolution[4] of the National Labor Relations Commission (NLRC) declaring herein petitioner Allan Regala (Regala) a regular employee of respondent Manila Hotel Corporation (MHC) who was constructively dismissed from employment. In a November 19, 2012 Resolution,[5] the CA refused to reconsider its earlier Decision.

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[*] On leave.

[1] *Rollo*, pp. 8-27.

[2] Id. at 264-274; penned by Associate Justice Vicente S.E. Veloso and concurred in by Associate Justices Stephen C. Cruz and Myra V. Garcia-Fernandez.

[3] Id. at 171-179; penned by Presiding Commissioner Alex A. Lopez and concurred in by Commissioner Gregorio O. Bilog, III.

[4] Id. at 196-197.

[5] Id. at 289.

Antecedent Facts

This case stemmed from a complaint for constructive dismissal and regularization, non-payment of paternity leave pay, and claims for backwages filed by Regala against MHC, and Emilio Yap (Yap), Teresita Gabut (Gabut), and Marcelo Ele (Ele), President, Food and Beverage Manager, and Vice President for Legal, Personnel and Security Administration, respectively, of MHC.

Regala was hired by MHC sometime in February 2000[6] as one of its waiters assigned to the Food and Beverage Department.[7] He was later assigned as cook helper at MHC's Chocolate Room/Cookies Kitchen during the period from October 18, 2004 to June 26, 2006.[8] In the course of his employment as waiter/cook helper, Regala worked for six (6) days every week,[9] and was paid a daily salary of ₱382.00 until sometime in December 2009.[10] MHC also remitted contributions in Regala's behalf to the Social Security System (SSS) and Philippine Health Insurance Corporation (PhilHealth).[11]

As waiter, Regala's duties and responsibilities included preparing the *mise en place*, taking of orders, and serving food and beverages to hotel guests at tables and inside MHC's dining establishments. In the course of his engagement with MHC, Regala was directed to report to a Captain Waiter, and assigned to work for its Cowrie Grill, Pool Bar, Mini Bar, Kitchen Ginza, Tap Room, Champagne Room, Room Service, Mabuhay Palace, Banquet Services, and Pastry and House Keeping.[12] From October 2008 to May 2009, Regala was made to attend and participate in hotel trainings for Basic Food Safety Strategies,[13] Food Safety Awareness,[14] and Customer Service Awareness.[15]

Regala alleged that he was not recognized as a regular rank-and-file employee despite having rendered services to MHC for several years. Regala also claimed that MHC constructively dismissed him from employment when it allegedly reduced his regular work days to two (2) days from the normal five (5)-day work week starting December 2, 2009, which resulted in the diminution of his take home salary.[16]

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[6] CA *rollo*, p. 95.
[7] *Rollo*, p. 11.
[8] CA *rollo*, p. 94.
[9] *Rollo*, p. 12.
[10] Id. at 10.
[11] CA *rollo*, pp. 77-93.
[12] *Rollo*, p. 12.
[13] CA *rollo*, p. 74.
[14] Id. at 75.
[15] Id. at 76.
[16] *Rollo*, p. 22.

On its part, MHC denied outright that Regala is its regular employee, and claimed that he is a mere freelance or "extra waiter" engaged by MHC on a short term basis. It explained that it employs extra waiters at fixed and/or determinable periods particularly when there are temporary spikes in the volume of its business. It is during these specific periods when management is forced to supplement the hotel's regular staff of waiters with temporary fixed-term employees, such as Regala, in order to meet increases in business activities in its food and beverage functions, special events and banquets. In engaging extra or temporary waiters, MHC relies on loose referrals from its employees and on a list of waiters who have expressed interest in part-time or temporary engagements.[17] It further explained that its system of hiring freelance waiters on an informal and temporary basis is a common practice in the hotel and restaurant industry and that it is through this industry practice that these extra waiters, including Regala, are able to offer their services to other hotels, restaurants, and food catering companies despite their existing engagement with MHC.[18]

MHC then presented a sample fixed-term service contract,[19] and copies of Regala's Department Outlet Services Contracts for Extra Waiters/Cocktail Attendants (Service Agreements)[20] covering the periods of his supposed temporary engagement with MHC, or from March 1, 2010 to March 3, 2010. MHC contended that prior to engaging the services of extra waiters, applicant waiters, such as Regala, and MHC execute fixed-term service contracts and agree on a specific duration of engagement depending on the requirement of the hotel in a given period. The Service Agreements and the fixed-term service contracts similarly state the following terms, *to wit:*

> This is to confirm your engagement to render Extra Waiter/Cocktail Attendant with Manila Hotel strictly under the following terms only:
>
> DATE (Duration):_____
> DEPARTMENT/OUTLET_____
> TIME:
> RATE PER HOUR:_____
> FUNCTION (If applicable)_____
>
> It is understood that the above rate is inclusive of emergency cost of living allowance and that this Service/Function Contract is only for the above-indicated outlet/department or function and which Terminates or Co-terminus with the completion of the function, work or services for which you have been engaged.
>
> For all intents and purposes, you are not considered employees of the Company. You shall, however, abide and be bound by rules and regulations issued.

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[17] Id. at 300.
[18] Id. at 302.
[19] Id. at 304.
[20] CA *rollo*, pp. 33-35.

MANILA HOTEL

By:

Personnel Department[21]

On this premise, MHC argued that there can be no illegal dismissal to speak of since the expiration of the period under Regala's Service Agreements simply caused the natural cessation of his fixed-term employment with MHC.[22]

Ruling of the Labor Arbiter

On September 8, 2010, the Labor Arbiter promulgated a Decision[23] dismissing the complaint for lack of merit, the dispositive portion of which states:

> **WHEREFORE,** premises considered, judgement is hereby rendered DISMISSING the instant complaint for lack of merit.
>
> **SO ORDERED.**[24]

The LA held that Regala is a fixed-term employee of MHC and that he voluntarily executed the Service Agreements with MHC with a full understanding that his engagement with it was only for a fixed period. Meanwhile, Regala failed to present evidence which would prove that he was forced or coerced into executing the said Service Agreements, that his consent was vitiated by any unlawful means when he signed the same, or that MHC exerted moral dominance over him at the time he was engaged by it as a waiter for a fixed period.

On the issue of constructive dismissal, the LA held that Regala's claim of constructive dismissal must fail considering that he continued reporting for work at MHC at the time he instituted the instant complaint for illegal or constructive dismissal.

The LA also denied Regala's claims for payment of paternity leave pay and backwages and exonerated MHC, Yap, Gabut, and Ele from any liability.

Ruling of the National Labor Relations Commission

In his appeal[25] to the NLRC, Regala averred that the LA erred in finding that he was a fixed-term employee of MHC and that he was not constructively

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[21] *Rollo*, pp. 309.
[22] Id. at 313.
[23] Id. at 127-134.
[24] Id. at 134.

dismissed from employment. Petitioner mainly contended that, using the four-fold test, he is a regular employee of MHC. Petitioner added that his duties and functions as a waiter are necessary and desirable to the food and beverage business of MHC, and that his continued employment since February 2000 is sufficient evidence of the necessity and indispensability of his services to its business. Petitioner further argued that MHC's practice of making him sign fixed-term service contracts from time to time is a scheme devised by it to preclude him from attaining regular employment status. Petitioner also claimed that MHC outsourced the services of a contractor which supplied the "extra waiters." This purportedly affected Regala's working hours.

Being a regular employee of MHC, Regala argued that MHC's act of unreasonably reducing his work days is tantamount to constructive dismissal.

In its March 24, 2011 Decision,[26] the NLRC reversed the Decision of the LA and held that Regala is a regular employee of MHC.

In so ruling, the NLRC noted that MHC failed to furnish a copy of Regala's written contract executed at the time of his engagement on February 2000, which would show that he was engaged for a fixed period or duration. In the absence of a clear agreement or contract, the NLRC held that Regala enjoys the presumption of regular employment in his favor. The NLRC also emphasized that Regala's position as waiter required him to perform activities which are usually necessary and desirable to the usual trade and business of MHC.

Being a regular employee of MHC, the NLRC found that Regala was constructively dismissed from employment when MHC reduced his take-home pay as a consequence of the hotel's changes in his work schedule which reduced his work days from five (5) days a week to two (2) days a week. The NLRC thus ordered Regala's reinstatement to his former position without loss of seniority rights, and payment of full backwages computed from December 2, 2009 up to his actual reinstatement, less the amount of wages he actually received beginning December 2, 2009, and from March 1 to 3, 2010.

The dispositive of the Decision states, as follows:

> **WHEREFORE**, the Labor Arbiter's Decision dated September 8, 2010 is hereby REVERSED and SET ASIDE. Respondent MHC Corporation is ordered to reinstate the complainant to his former position without loss of seniority rights and to pay his full backwages computed from December 2, 2009 up to his actual reinstatement, but deducting therefrom the wages he received for two (2) days a week beginning December 2, 2009 and his wages for March 1-3, 2010, and is tentatively computed up to March 30, 2011 in the amount of P170,618.54
> x x x x

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[26] Id. at 171-179.

SO ORDERED.[27]

MHC filed a Motion for Reconsideration[28] which was, however, denied in the May 31, 2011 Resolution[29] of the NLRC.

Ruling of the Court of Appeals

Aggrieved, MHC filed a Petition for *Certiorari*[30] (with Application for the Issuance of a Temporary Restraining Order and/or Writ of Preliminary Injunction) before the CA ascribing upon the NLRC grave abuse of discretion when it held that Regala is a regular employee of MHC and that he was constructively dismissed from employment.

MHC averred that its practice of hiring additional waiters on a fixed or short term contractual basis is a valid exercise of its management prerogative in order for it to meet client demands as a result of unforeseen spikes in the volume of its business.[31] It further argued that the fact Regala was engaged to perform activities which are usually necessary or desirable to its business does not preclude the fixing of employment for a specified duration or period.[32]

In his Comment/Opposition[33] to respondents' Petition for *Certiorari*, Regala averred that his fixed-term contract of employment basically rendered his work at the pleasure of MHC which was intended to prevent security of tenure from accruing in his favor.[34]

On May 22, 2012, the CA rendered its assailed Decision[35] granting MHC's Petition for *Certiorari* and setting aside the March 24, 2011 Decision and May 31, 2011 Resolution of the NLRC. The dispositive portion of the May 22, 2012 Decision reads, as follows:

> **WHEREFORE**, the instant petition is **GRANTED.** Setting aside NLRC's assailed Decision dated March 24, 2011, and Resolution dated May 31, 2011, the complaint below is dismissed for being devoid of merit.
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> **SO ORDERED.**[36]

The CA concluded that Regala showed no proof that MHC forced or coerced him to execute his fixed-term employment contracts, nor did he

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[27] Id. at 177.
[28] Id. at 181-194.
[29] Id. at 196-197.
[30] Id. at 28-54.
[31] Id. at 38-39.
[32] Id. at 44.
[33] Id. at 198-211.
[34] Id. at 204-205.
[35] Id. at 264-274.
[36] Id. at 274.

establish that MHC was "engaged in hiring workers for work for such periods [which were] deliberately crafted to prevent the regularization of employees x x x x."[37] As Regala validly entered into fixed-term employment agreements with MHC, his displacement each time the said fixed-term employment expired did not result in illegal dismissal.

Petitioner filed a Motion for Reconsideration[38] but the CA denied the same in its November 19, 2012 Resolution.[39] Hence, the instant Petition.

It is worth noting at this point that MHC filed before this Court its March 10, 2016 Motion for Leave of Court to File and Admit Attached Manifestation[40] and the Manifestation[41] on March 31, 2016. Annexed to the March 10, 2016 Manifestation were photocopies of Regala's Daily Time Records (DTR)[42] covering the period from March 4, 2009 to March 4, 2016, and his Regular Payroll Journals (Payroll Journals)[43] for the period from January 25, 2009 to February 25, 2016.

Issues

Regala raised the following issues for resolution:

> THE HONORABLE [CA] ERRED IN DISMISSING THE CASE FOR REGULARIZATION AND CONSTRUCTIVE DISMISSAL FILED BY PETITIONER.
>
> THE HONORABLE [CA] ERRED IN RESOLVING THAT PETITIONER IS A FIXED-TERM EMPLOYEE OF THE RESPONDENT [MHC].[44]

It is undisputed that Regala is an employee of MHC. The crux of the controversy lies in petitioner's employment status.

Simply stated, the issues before this Court are the following: 1) whether Regala is a regular employee of MHC; and 2) whether he was constructively dismissed from employment.

Our Ruling

The Court grants the Petition.

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[37] Id. at 272.
[38] Id. at 275-278.
[39] Id. at 196-197.
[40] Id. at 328-332.
[41] Id. at 335-337.
[42] Id. at 339-392.
[43] Id. at 393-543.
[44] Id. at 13.

Preliminary Matters

The belated submission of additional documentary evidence by MHC cannot be permitted.

In a March 10, 2016 Manifestation filed before this Court, MHC, for the first time, submitted photocopies of Regala's DTRs covering the period from March 4, 2009 to March 4, 2016, and his Payroll Journals for the period from January 25, 2009 to February 25, 2016.

While it admitted that it inadvertently failed to attach the documents to its April 24, 2013 Comment to Regala's Petition for Review, it requested this Court to admit the same as part of the records of this case.[45] Petitioner argued that an examination of the DTRs and Payroll Journals reveals that Regala continuously reports for work in MHC since January 11, 2010, or at the time he filed the instant complaint for constructive dismissal. In this regard, MHC brings to fore the following propositions, *viz.*: (1) there is no dismissal to speak of, let alone one that is illegal or constructive, as there was no actual severance of employment from January 11, 2010, the date Regala filed the instant complaint, to date, or at least until the time the March 10, 2016 Manifestation was filed before this Court, or on March 31, 2016; and (2) Regala is not entitled to his claim for payment of backwages as he has been continuously receiving his salaries since January 2009.[46]

In sum, MHC is requesting this Court to receive belatedly submitted evidence and consider its new theory that no actual dismissal took place.

This we shall not tolerate.

This Court does not make findings of facts particularly on evidence submitted for the first time on appeal. It is well settled in this jurisdiction that "[p]oints of law, theories, issues and arguments not brought to the attention of the lower court x x x need not be considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic considerations of fairness and due process impel this rule."[47] In the present case, MHC did not even provide any justifiable reason why it had failed to present Regala's DTRs and Payroll Journals during the proceedings held before the LA or the NLRC. It bears noting that the DTRs and Payroll Journals have been in MHC's possession since January 2009, and yet it was only after more than seven (7) years therefrom that it presented the same to this Court on appeal for its appreciation. Not only does the unjustified belated submission of these records

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[45] Id. at 330.
[46] Id. at 329.
[47] *SPO2 Jamaca v. People*, 764 Phil. 683, 692 (2015), citing *S.C. Megaworld Construction and Development Corporation v. Parada*, 717 Phil. 752 (2013).

make a mockery of this Court's judicial processes, but this also casts doubt on their credibility, more so when they are not even newly discovered evidence.

In its attempt to persuade this Court to allow the reception of additional evidence, MHC cites *CMTC International Marketing Corporation v. Bhagis International Trading Corporation* (*CMTC International Marketing Corporation).*[48] Its reliance, however, on the said case is misplaced as the factual milieu therein is not on all fours with the case at bench. *CMTC International Marketing Corporation* involves, on one hand, the belated filing of the appellant's brief before the trial court. The case before this Court, on the other hand, underlines the belated submission to it of evidence and argument of new issues on appeal.

This being the case, MHC's plea that its evidence be admitted in the interest of justice does not deserve any consideration.

We cannot also allow MHC, at this point of the proceedings, to take an inconsistent position – that no actual dismissal transpired. To be clear, the hotel had argued before the labor tribunals that there is no basis to support the claim that Regala was illegally dismissed from employment as the expiration of the term under his Service Agreements simply caused the natural cessation of his fixed-term employment with MHC.[49] Contrarily, it now asserts in its March 10, 2016 Manifestation that "there was never any severance or break in [Regala's] employment with the Hotel."[50]

In other words, while MHC earlier argued that Regala's dismissal was valid, it now posits in a mere Manifestation filed before this Court that no actual dismissal transpired.

This Court cannot simply permit MHC to raise a new issue, take an inconsistent position, or change its theory on appeal as these would offend the basic rules of fair play, justice and due process.

We have held in *Maxicare PCIB Cigna Healthcare v. Contreras*[51] that:

> As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court, will not be permitted to change theory on appeal. Points of law, theories, issues and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. It would be unfair to the adverse party who would have no opportunity to present further evidence material to the new theory, which it

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[48] 700 Phil. 575 (2012).
[49] *Rollo*, p. 313.
[50] Id. at 329.
[51] 702 Phil 688 (2013).

> could have done had it been aware of it at the time of the hearing before the trial court. x x x[52]

This Court cannot tolerate this procedural scheme adopted by MHC. To hold otherwise will result in a great injustice to Regala as he no longer has the opportunity to present counter evidence to overcome and refute MHC's evidence on new issues raised by it at this very late stage of the proceedings.

The issue of Regala's employment status is essentially a question of fact.

Whether Regala is a regular or fixed-term employee of MHC, or whether he was constructively dismissed from employment, are essentially questions of fact, which, as a rule, cannot be entertained in a Petition for Review on *Certiorari* filed under Rule 45 of the Rules of Court. Consistent therewith is the doctrine that this Court is not a trier of facts, and this is strictly adhered to in labor cases.[53] However, where, like in the instant case, there is a conflict between the factual findings of the LA and the CA, on one hand, and those of the NLRC, on the other, it becomes proper for this Court, in the exercise of its equity jurisdiction, to review the facts and re-examine the records of the case.[54] Thus, this Court shall take cognizance of and resolve the factual issues involved in this case.

Regala is a regular employee of MHC.

MHC does not deny that Regala was employed as one of its waiters.[55] It maintains, however, that Regala was only engaged for a fixed duration or period, and, therefore, the severance of his employment upon the expiration of the duration or term specified in his Service Agreements cannot be made as a basis for any claim of illegal or constructive dismissal.[56] The CA, on its part, gave credence to MHC's assertions and held that "Regala is one of its fixed-term employees whose contracts with [MHC] were validly entered into and whose displacement each time said fixed-term employment expired did not result in illegal dismissal."[57]

We disagree.

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[52] Id. at 696.
[53] *PCL Shipping Philippines, Inc. v. National Labor Relations Commission*, 540 Phil. 65, 74-75 (2006).
[54] *Reyes v. Glaucoma Research Foundation, Inc.*, 760 Phil. 779, 790 (2015).
[55] *Rollo*, p. 300.
[56] Id. at 313.
[57] Id. at 273.

Presumption of regularity in favor of Regala.

At the outset, MHC has not categorically denied in its pleadings before the labor tribunals that Regala was employed by it as early as February 2000. On this point, the records of the case are bereft of evidence that Regala was duly informed of the nature and status of his engagement with the hotel. Notably, in the absence of a clear agreement or contract, whether written or otherwise, which would clearly show that Regala was properly informed of his employment status with MHC, Regala enjoys the presumption of regular employment in his favor.[58]

Regala is performing activities which are necessary and desirable, if not indispensable, in the business of MHC. Moreover, Regala has been working for MHC for several years since February 2000.

The employment status of a person is defined and prescribed by law and not by what the parties say it should be.[59] In this regard, Article 295 of the Labor Code "provides for two types of regular employees, namely: (a) those who are engaged to perform activities which are usually necessary or desirable in the usual business or trade of the employer (first category); and (b) those who have rendered at least one year of service, whether continuous or broken, with respect to the activity in which they are employed (second category)."[60] While MHC insists that Regala was engaged under a fixed-term employment agreement, the circumstances and evidence on record, and provision of law, however, dictate that Regala is its regular employee.

First, Regala is performing activities which are usually necessary or desirable in the business or trade of MHC. This connection can be determined by considering the nature of the work performed by Regala and its relation to the nature of the particular business or trade of MHC in its entirety.[61] Being part of the hotel and food industry, MHC, as a service-oriented business enterprise, depends largely on its manpower complement to carry out or perform services relating to food and beverage operations, event planning and hospitality. As such, it is essential, if at all necessary, that it retains in its employ waiting staff, such as Regala, specifically tasked to attend to its guests at its various dining establishments.

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[58] See *Omni Hauling Services, Inc. v. Bon*, 742 Phil 335, 344-345 (2014), and *Basan v. Coca-Cola Bottlers Philippines*, 753 Phil 74, 90-91 (2015).

[59] *Fuji Television Network, Inc. v. Espiritu, 749 Phil. 388, 439 (2014)*, citing *Price v. Innodata Philippines Corp.*, 588 Phil. 568, 582-583 (2008).

[60] *University of Santo Tomas v. Samahang Manggagawa Ng UST*, 809 Phil. 212, 221 (2017).

[61] Id. at 222.

Notably, the desirability of his functions is bolstered by the fact that MHC retains in its employ regular staff of waiters charged with like duties or functions as those of Regala's.

Second, the fact alone that Regala was allowed to work for MHC on several occasions for several years under various Service Agreements is indicative of the regularity and necessity of his functions to its business. Moreover, it bears to emphasize that MHC has admitted, albeit implicitly, that it renewed Regala's Service Agreements on various occasions, *i.e.,* during temporary spikes in the volume of its business since February 2000. Thus, the continuing need for his services for the past several years is also sufficient evidence of the indispensability of his duties as waiter to MHC's business.[62] Additionally, Regala has already been working with the hotel for many years when he was supposedly constructively dismissed from employment on December 2, 2009.

In any event, it is worth noting that MHC failed to deny that Regala's work as waiter is necessary and desirable to its business.

The foregoing notwithstanding, the CA ratiocinated that the fact that the nature of Regala's work is necessary and indispensable to its business did not impair the validity of the Service Agreements which specifically stipulated that his employment was only for a specific term or duration.[63]

This Court is aware that there is nothing contradictory between the nature of an employee's duties and the setting of a definitive period of his or her employment. We have held in *St. Theresa's School of Novaliches Foundation vs. National Labor Relations Commission*[64] that "[i]t does not necessarily follow that where the duties of the employee consist of activities usually necessary or desirable in the usual business of the employer, the parties are forbidden from agreeing on a period of time for the performance of such activities." However, this Court also held that if it is apparent from the circumstances of the case "that periods have been imposed to preclude acquisition of tenurial security by the employee," such fixed term contracts are disregarded for being contrary to law and public policy.[65] Thus, to our mind, while the principle enunciated by the CA is true, it is accurate only if the same is premised on the finding the the fixed-term employment agreement entered into between the employer and the employee complies with the requirements of a valid fixed-term employment arrangement provided for under the labor laws.

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[62] See *Philips Semiconductors (Phils.), Inc. v. Fadriquela*, 471 Phil. 355, 370 (2004).
[63] *Rollo,* p. 271.
[64] 351 Phil. 1038, 1043 (1998).
[65] *University of Santo Tomas v. Samahang Manggagawa Ng UST*, *supra* note 60, at 225.

The Service Agreements and fixed-term service contracts executed between MHC and Regala are invalid and are not true fixed-term employment contracts.

As proof of Regala's fixed-term employment status, MHC depended heavily on Regala's Service Agreements [66] covering the periods of his supposed temporary engagement with MHC, or from March 1, 2010 to March 3, 2010. It then asserted that the Service Agreements entered into by and between MHC and Regala are valid for the following reasons: (1) the terms thereof are clear and bereft of ambiguity; (2) the duration or terms of Regala's employment as indicated in the Service Agreements were determined and made known to him before each engagement; and (3) the Service Agreements were freely entered into by both parties.

A fixed-term employment, while not expressly mentioned in the Labor Code, has been recognized by this Court as a type of employment "embodied in a contract specifying that the services of the employee shall be engaged only for a definite period, the termination of which occurs upon the expiration of said period irrespective of the existence of just cause and regardless of the activity the employee is called upon to perform."[67] Along the same lines, it has been held that "[t]he fixed-term character of employment essentially refers to the period agreed upon between the employer and the employee." [68] Accordingly, "the decisive determinant in term employment should not be the activities that the employee is called upon to perform, but the *day certain* agreed upon by the parties for the *commencement and termination* of their employment relationship. [69] Specification of the date of termination is significant because an employee's employment shall cease upon termination date without need of notice.[70]

In other words, a fixed-term employment contract which otherwise fails to specify the date of effectivity *and* the date of expiration of an employee's engagement cannot, by virtue of jurisprudential pronouncement, be regarded as such despite its nomenclature or classification given by the parties. The employment contract may provide for or describe some other classification or type of employment depending on the circumstances, but it is not, properly speaking, a fixed-term employment contract.

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[66] CA *rollo*, pp. 33-35.
[67] *Basan v. Coca-Cola Bottlers Philippines, supra* note 58, at 89.
[68] *Colegio Del Santisimo Rosario v. Rojo*, 717 Phil. 265, 279 (2013) citing *Mercado v. AMA Computer College Parañaque City, Inc.*, 632 Phil. 228 (2010).
[69] *Brent School, Inc. v. Zamora*, 260 Phil. 747, 756-757 (1990).
[70] *Labayog v. M.Y. San Biscuits, Inc.*, 527 Phil. 67, 73 (2006).

The case of *Poseidon Fishing v. National Labor Relations Commission*[71] is instructive:

> Moreover, unlike in the Brent case where the period of the contract was fixed and clearly stated, **note that in the case at bar, the terms of employment of private respondent as provided in the Kasunduan was not only vague, it also failed to provide an actual or specific date or period for the contract.** As adroitly observed by the Labor Arbiter:
>
> > There is nothing in the contract that says complainant, who happened to be the captain of said vessel, is a casual, seasonal or a project worker. The date July 1 to 31, 1998 under the heading *"Pagdating" had been placed there merely to indicate the possible date of arrival of the vessel and is not an indication of the status of employment of the crew of the vessel.*
> >
> > **Actually, the exception under Article 280 of the Labor Code in which the respondents have taken refuge to justify its position does not apply in the instant case.** The proviso, "Except where the employment has been fixed for a specific project or undertaking the completion or determination of which has been determined at the time of the engagement of the employee or where the work or services to be performed is seasonal in nature and the employment is for the duration of the season." (Article 280 Labor Code), **is inapplicable because the very contract adduced by respondents is unclear and uncertain. The kasunduan does not specify the duration that complainant had been hired** x x x.[72] (Emphasis and underscoring supplied.)

Considering the above premises, we find that the three Service Agreements presented by MHC cannot be regarded as true fixed-term employment contracts. A perusal thereof shows that the term of Regala's engagement with the hotel merely indicate the dates March 1, 2010, March 2, 2010, and March 3, 2010 – all of which pertain only to specified effectivity dates of Regala's engagement as waiter of MHC. The Service Agreements do not, however, unequivocally specify the periods of their expiration.

Notably, even the very terms of the Service Agreements purportedly proving Regala's fixed-term employment status are uncertain, if not altogether evasive of Regala's actual period of employment with MHC, which, in this case, commenced as early as February 2000. It bears noting that the Service Agreements furnished by MHC do not even account for Regala's employment for the previous years, especially at the time of Regala's hiring in February 2000. On this point, it is incredulous, to say the least, that the hotel merely hired Regala under a fixed-term agreement since February 2000.

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[71] 518 Phil. 146 (2006).
[72] Id. at 158-159.

All things considered, the Service Agreements presented by MHC deserves scant consideration from this Court. Mere presentation thereof does not prove that Regala had been a mere fixed-term employee. The Court cannot simply rely on the vague provisions of the Service Agreements as proof of his fixed-term employment status. To do so would erroneously warrant their enforcement despite their apparent failure to express the term/s of Regala's engagement as waiter since February 2000.

The Service Agreements and/or fixed-term service contracts do not meet the criteria for valid contracts of employment with a fixed period.

Even if this Court gives credence to the Service Agreements, it can be deduced with certainty from the circumstances of the case that they do not meet the criteria of valid fixed-term employment contracts.

MHC contends that the Service Agreements, including the fixed-term service contracts, which Regala was required to sign from time to time were freely entered into by him, that the terms thereof were determined and made known to Regala at the time of his engagement, and that there was no showing that he was forced, coerced, or manipulated into signing the same.[73] In the same vein, the CA held in its May 22, 2012 Decision that "an examination of the employment contracts between the parties shows no indication that [Regala] was forced or coerced to execute the same.[74]

The foregoing contentions deserve no merit.

While this Court has recognized the validity of fixed-term employment contracts, it has consistently held that they are the exception rather than the general rule. [75] A fixed-term employment is valid only under certain circumstances. We thus laid down in *Brent School, Inc. v. Zamora* [76] parameters or criteria under which a "term employment" cannot be said to be in circumvention of the law on security of tenure, namely:

> 1) The fixed period of employment was knowingly and voluntarily agreed upon by the parties without any force, duress, or improper pressure being brought to bear upon the employee and absent any other circumstances vitiating his consent; or

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[73] *Rollo*, p. 310.
[74] Id. at 272.
[75] *Price v. Innodata Philippines Corp., supra* note 59, at 582 (2008).
[76] *Supra* note 69, at 763.

> 2) It satisfactorily appears that the employer and the employee dealt with each other on more or less equal terms with no moral dominance exercised by the former or the latter.[77]

In *GMA Network, Inc. v. Pabriga*,[78] we held that "[t]hese indications, which must be read together, make the Brent doctrine applicable only in a few special cases wherein the employer and employee are more or less in equal footing in entering into the contract." The reason for this precept is premised on the following principles - "when a prospective employee, on account of special skills or market forces, is in a position to make demands upon the prospective employer, such prospective employee needs less protection than the ordinary worker. Lesser limitations on the parties' freedom of contract are thus required for the protection of the employee."[79]

As to the first guideline, the Service Agreements signed by Regala do not even prove that he knowingly agreed to be hired by MHC for a fixed-term way back in February 2000. At best, they only account for Regala's supposed fixed-term status from March 1 to 3, 2009.

It is worth noting at this point that MHC persistently asserted that Regala agreed upon a fixed-term employment while making reference to his fixed-term service contracts. Concomitantly, it failed to disprove the allegations of Regala that he was made to sign various fixed-term service contracts prepared by MHC before he can be given work assignments.[80] Indeed, MHC's failure to furnish copies thereof gives rise to the presumption that their presentation is prejudicial to its cause.[81]

At any rate, the sample fixed-term service contract[82] presented by MHC, including the Service Agreements of Regala, readily show that they were entirely prepared by its Personnel Department. On this premise, it appears that the Service Agreements and/or the fixed-term service contracts are contracts of adhesion whose terms must be strictly construed against its unilateral crafter, MHC.[83]

A contract of adhesion is one wherein a party, such as MHC in this case, prepares the stipulations in the contract, and the other party, like Regala, merely affixes his signature or his "adhesion" thereto. It is an agreement in which the parties bargaining are not on equal footing, the weaker party's participation being reduced to the alternative 'to take it or leave it.'[84] Clearly,

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[77] Id. at 763.
[78] 722 Phil. 161, 178 (2013).
[79] Id.
[80] *Rollo*, p. 18.
[81] *Basan v. Coca-Cola Bottlers Philippines, supra* note 58, at 90-91.
[82] *Rollo*, p. 304.
[83] See *Philippine Federation of Credit Cooperatives, Inc. v. National Labor Relations Commission*, 360 Phil. 254, 261 (1998).
[84] *Rowell Industrial Corporation v. Court of Appeals*, 546 Phil. 516, 528 (2007).

the Service Agreements and fixed-term service contracts were contracts of adhesion, which evidently gave Regala no realistic chance to negotiate the terms and conditions of his employment, or at best, bargain for his job at MHC. Hence, it cannot be gainsaid that Regala signed the Service Agreements and the fixed-term service contracts willingly and with full knowledge of their impact.

As to the second guideline, this Court is inclined to believe that Regala can hardly be on equal terms with MHC insofar as negotiating the terms and conditions of his employment is concerned. To be clear, a fixed-term employment agreement should result from *bona fide* negotiations between the employer and the employee. As such, they must have dealt with each other on an arm's length basis where neither of the parties have undue ascendancy and influence over the other. As a waiter, a rank-and-file employee, Regala can hardly stand on equal terms with MHC. Moreover, no particulars in the Service Agreements or the fixed-term service contract regarding the terms and conditions of employment indicate that Regala and MHC were on equal footing in negotiating them. The case of *Rowell Industrial Corporation v. Court of Appeals*[85] is instructive on this point:

> With regard to the second guideline, this Court agrees with the Court of Appeals that petitioner RIC and respondent Taripe cannot be said to have dealt with each other on more or less equal terms with no moral dominance exercised by the former over the latter. As a power press operator, a rank and file employee, he can hardly be on equal terms with petitioner RIC. As the Court of Appeals said, almost always, employees agree to any terms of an employment contract just to get employed considering that it is difficult to find work given their ordinary qualifications.[86] [Citation omitted]

Considering that the foregoing criteria were not met, the Service Agreements and the fixed-term service contracts which MHC had Regala execute should be struck down for being illegal.

In an attempt to convince the Court of the validity of Regala's Service Agreements, MHC contended that its system of hiring freelance waiters on an informal and temporary basis is a common practice in the hotel and restaurant industry if only to address the unforeseen rises or spikes in the volume of business.

We are not persuaded.

The practice of utilizing fixed-term contracts in the industry does not mean that such contracts, as a matter of course, are valid and compliant with labor laws.[87] Moreover, the rise and fall of customer demands are presumed in

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[85] Id.
[86] Id.
[87] See *Dumpit-Morillo vs. Court of Appeals*, 551 Phil. 725, 735 (2007).

all businesses or commercial industries, more so in the industry where MHC has been a part of for several years. At this point in time, it would be incredulous to believe that it cannot yet anticipate business fluctuations to the point that it has to employ ruses and subterfuges to deny workers from attaining regular employment status. Indeed, one's employment should not be left entirely to the whims of the employer for at stake is not only the employee's position or tenure, but also his means of livelihood. In *Innodata Philippines, Inc. v. Quejada-Lopez,*[88] we held that:

> By their very nature, businesses exist and thrive depending on the continued patronage of their clients. Thus, to some degree, they are subject to the whims of clients who may decide to discontinue patronizing their products or services for a variety of reasons. Being inherent in any enterprise, this entrepreneurial risk may not be used as an excuse to circumvent labor laws; otherwise, no worker could ever attain regular employment status.[89]

In sum, Regala attained regular employment status long before he executed the Service Agreements considering that at the time he signed them in March 2010, he has already been in the employ of MHC for more than nine (9) years. Moreover, as discussed above, the nature of Regala's work is necessary and desirable, if not indispensable, in the business in which MHC is engaged. Undoubtedly, Regala has been a regular employee of the hotel since February 2000. At any rate, the Service Agreements and/or the fixed-term service contracts which MHC and Regala executed were only meant to preclude Regala from attaining regular employment status, and, thus, should be struck down or disregarded for being contrary to law, public policy or morals.

Regala was constructively dismissed from employment.

Being a regular employee of MHC, Regala is entitled to security of tenure. Hence, he cannot be dismissed from employment, constructive or otherwise, except for just or authorized causes.

At this juncture, Regala claims that despite having attained regular employment status, MHC, without any valid cause, reduced his regular work days to two (2) days from the normal five (5) day work week starting December 2, 2009. Regala insisted that MHC's act of unreasonably reducing his work days is tantamount to constructive dismissal.

Without addressing the issue of constructive dismissal, MHC contended, by way of rebuttal, that Regala's supposed severance from service simply resulted from the expiration of his fixed-term employment contract. Along the same lines, the CA held in its May 22, 2012 Decision that Regala's

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[88] 535 Phil. 263 (2006).
[89] Id. at 273.

"displacement each time said fixed-term employment expired did not result in illegal dismissal."[90]

Both MHC and the CA completely missed the point at issue.

Regala's case is premised on the notion that he is a regular employee entitled to security of tenure but was otherwise constructively dismissed when MHC, without valid cause, reduced his regular work days from five (5) days to two (2) days. In other words, the question to be resolved here is whether the *reduction* of his regular work days and consequent *diminution* of his salary amounted to constructive dismissal, and not whether the supposed *cessation* of his services constituted illegal dismissal. Indeed, the determination of the latter issue is impracticable in the case at bench as MHC, and even the CA, cannot even show or identify to this Court when or at what point in time Regala's services were terminated by MHC.

Nor can it be said that MHC's defenses were responsive to Regala's allegations as they did not address the propriety or impropriety of the reduction of his regular work days.[91] Notably, on this point, what is clear to this Court is that MHC failed to deny Regala's allegation of constructive dismissal. Nor did it present any controverting evidence to prove otherwise. It is worth noting that, Section 11, Rule 8 of the Rules of Court, which supplements the NLRC Rules of Procedure,[92] provides that allegations which are not specifically denied are deemed admitted.[93]

In any event, this Court will look into the merits of Regala's allegations in resolving the issue of constructive dismissal.

There is constructive dismissal where "there is cessation of work because 'continued employment is rendered impossible, unreasonable or unlikely, as an offer involving a demotion in rank or a diminution in pay' and other benefits. Aptly called a dismissal in disguise or an act amounting to dismissal but made to appear as if it were not, constructive dismissal may, likewise, exist if an act of clear discrimination, insensibility, or disdain by an employer becomes so unbearable on the part of the employee that it could foreclose any choice by him except to forego his continued employment."[94]

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[90] *Rollo*, p. 273.

[91] In fact, in addressing Regala's claims of constructive dismissal, Regala's employment status *i.e.*, regular or fixed-term, is inconsequential as both types of employees enjoy security of tenure. In particular, while a regular employee is entitled to security of tenure during the period of his employment, a fixed-term employee enjoys security of tenure during the pre-determined period of employment agreed upon by him and his employer. Hence, granting for the sake of argument that Regala is a fixed-term employee, MHC may not pre-terminate his services, constructive or otherwise, or commit such other acts to that effect, unless of course there are just or authorized causes and only after compliance with procedural and substantive due process.

[92] 2011 NLRC RULES OF PROCEDURE, AS AMENDED, Rule 1, Sec. 3.

[93] *Traders Royal Bank v. National Labor Relations Commission*, 378 Phil. 1081, 1087 (1999).

[94] *Ico v. Systems Technology Institute, Inc.*, 738 Phil. 641, 669 (2014).

Patently, the reduction of Regala's regular work days from five (5) days to two (2) days resulted to a diminution in pay. Regala's change in his work schedule resulting to the diminution of his take home salary is, therefore, tantamount to constructive dismissal.

The fact that Regala may have continued reporting for work does not rule out constructive dismissal, nor does it operate as a waiver.[95] Thus, in *The Orchard Golf and Country Club v. Francisco,*[96] this Court held that:

> 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.[97]

Considering the foregoing recitals, the fact of constructive dismisal should be reckoned on December 2, 2009, or from the time Regala was made to accept the changes of his work schedule which thereby resulted in the diminution of his take home pay.

In view therefore of Regala's constructive dismissal, reinstatement and payment of backwages must necessarily be made. Regala must be reinstated to his former position as a regular waiter of MHC without loss of seniority rights and shall enjoy the same employment benefits and privileges of a regular employee of MHC. Regala's backwages **must be computed from the time he was made to accept the changes of his work schedule which thereby resulted in the diminution** of his take home pay, or from December 2, 2009, up to actual reinstatement. The amount thereof shall include benefits and allowances, or their monetary equivalent, regularly received by a regular employee of MHC with like position and rank of Regala as of the time he was constructively dismissed, as well as those granted under the Collective Bargaining Agreement, if any.

WHEREFORE, the instant Petition is hereby **GRANTED**. The May 22, 2012 Decision and November 19, 2012 Resolution of the Court of Appeals in CA-G.R. SP No. 120748 are **REVERSED** and **SET ASIDE**. The March 24, 2011 Decision and May 31, 2011 Resolution of the National Labor Relations Commission, which declared petitioner Allan Regala, a regular employee of respondent Manila Hotel Corporation, to have been constructively dismissed from employment, are **REINSTATED and AFFIRMED.**

The case is **REMANDED** to the Labor Arbiter for the purpose of re-computation of Regala's full backwages.

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[95] *The Orchard Golf and Country Club v. Francisco,* 706 Phil. 479, 499 (2013).
[96] Id.
[97] Id.

SO ORDERED.

RAMON PAUL L. HERNANDO
Associate Justice

WE CONCUR:

ESTELA M. PERLAS-BERNABE
Senior Associate Justice
Chairperson

HENRI JEAN PAUL B. INTING
Associate Justice

EDGARDO L. DELOS SANTOS
Associate Justice

On leave
PRISCILLA J. BALTAZAR-PADILLA
Associate Justice

ATTESTATION

I attest that 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.

ESTELA M. PERLAS-BERNABE
Senior Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

DIOSDADO M. PERALTA
Chief Justice