(26)

IN THE SEYCHELLES COURT OF APPEAL

MARYLIANE NOLIN

V.

ATTORNEY GENERAL

CIVIL APPEAL NO. 30[illegible]/1995

(BEFORE GOBURDHUN, P., SILUNGWE, AYOOLA JJ.A)



Mr. A. Derjacques for appellant

Mr. A. Fernando for respondent

JUDGMENT OF GOBURDHUN, P. AND AYOOLA, J.A.

The appellant who was petitioner at the Constitutional Court, aggrieved by the termination of her appointment with the Public Utilities Corporaton ("PUC") on 30th April 1993 initiated grievance procedure for unlawful and unjustified termination pursuant to the Employment Act 1990 ("the Act"). The "competent officer", so designated by the Act, upon conclusion of the grievance procedure determined as he was empowered to do by sction 61(2)(a)(i) of the Act, that the termination was justified. Pursuant to section 66(1) of the Act, the appellant appealed to the Minister who ruled on 29th September 1993 that the termination of the appellant's contact was not justified and that she should be paid legal benefits up to 11th August 1993. These consisted of salary, one month's salary in lieu of notice, accrued leave and compensation for length of service at the prescribed rate. Payment of the said benefits was effected. The Minister's decision was made pursuant to section 61(2)(a)(iii) of the Act which provided that if he determined that the termination was not justified but, as it would be impractical or inconvenient to reinstate

the worker in his post or offer him other suitable employment shall allow the termination subject to the payment of legal benefits. If the termination had not been allowed, the Minister would have ordered a re-instatement of the appellant pursuant to section 61(2)(a)(ii).

By petition dated 6th July 1994 the appellant sought redress from the Constitutional Court and sought by her amended petition the following reliefs:-

That the Constitutional Court do:

1. determine whether or not the provisions of section 61(2)(a)(iii) of the Act is constitutional;

2. determine whether the petitioner's rights have been infringed;

3. make such declaration or order or issue a writ to re-instate the said petitioner in her employ;

4. order damages to the petitioner in the sum of R.82,432.

5. make such order as may be just and appropriate in all the circumstances of the case.

The allegation in the petition which, it is assumed, the appellant claimed enabled her to invoke the jurisdiction of the Constitutional Court as contained in paragraph 5 of the amended petition is that her right to work safe guarded by article 35 of the Constitution of the Republic of Seychelles ("the Constitution") has been breached.

All three members of the Constitutional Court (Perera, Amerasinghe, Bwana, JJ) were unanimous in their decision that section 61(2)(a)(iii) of the Act is not unconstitutional. However, only two of them (Perera, J. and Bwana, J.) rejected the petition in its entirety. Perera,J.

was of the view that the material provisions of the Act not being unconstitutional the exercise of power by the Minister under that provision would not concern the Constitutional Court. Observing that the Minister had a discretion to re-instate the appellant or not in the interest of the employer, he was of the opinion that the Constitutional Court was not empowered under the provisions of the Constitution to exercise supervisory jurisdiction of the Supreme Court and to declare that the Minister had not used his discretion correctly. Being of the view that absence of elaborate reasoning behind the Minister's decision would not invalidate his decision, and, that by accepting compensation, the appellant was not aggrieved, Bwana, J. agreed that the petition should be dismissed.

In his dissenting judgment, Amerasinghe, J. held that failure to reinstate the appellant in her position with PUC on the finding that her termination was unjustified, without reasonable grounds adduced, amounted to an infringement of her Constitutional guarantee of right to work. He awarded damages to the appellant.

The short question in this appeal from the majority decision is whether the decision of the Minister amounted to a contravention of article 35 of the Constitution. It is to be observed that an appeal from the decision of the Constitutional Court in which there has been a dissenting opinion is an appeal from the majority decision which is the judgment of the court and not an appeal as well from the minority decision. If an appellant finds anything useful in the opinion of the dissenting judge he may incorporate such in his argument. If, on the other hand, he is of the view that he is not in entire agreement with the opinion of the dissenting judge, or, as in this case with the award of compensation made by him he need not appeal from such since this court will not proceed to regard the minority opinion as

the judgment of the court and set it aside as such. This is why the grounds of appeal criticising the award of damages by Amerasinghe, J. will not be considered.

Article 35 of the Constitution is a declaration of the State's recognition of the right of every citizen to work and to just and favourable conditions of work. It also makes several provisions for the effective exercise of these rights in undertaking to pursue the measures which are contained in paragraphs (a) to (g) of that article. The Constitution, however, does not define the nature of the "right to work" which it recognises. It is left to the courts to spell out what that right consists of and what it does not.

It was argued for the appellant that the appellant had under article 35 a right in maintaining her job unless a decision not to maintain her in her job was based on lawful and constitutional reasons. It was conceded that she has no right under that article to be given a job if she was unemployed, but a right to be maintained in her present job. For the Attorney-General, it was argued, in effect, that the right to work would not include the right to be maintained in her present job. Reference was made to Shukla's Constitution of India (9th Edition) where at page 137 et seq article 19(1)(a) of the Indian Constitution which guarantees to the citizen the right of freedom of trade and occupation was discussed. Freedom of occupation implies a right not to be prevented from engaging in and carrying on an occupation or disturbed in that occupation. Right to work does imply the freedom to practice one's profession, engage in trade or business and in economic activities of one's choice. In the context of worker in the employment of another or one seeking employment, it is a right not to be deprived of freedom to continue to offer labour to a willing employer. Where there is a willing employer any obstruction

of the worker not justified by law in offering his services or of that employer in accepting such offer constitutes an infringement of the right to work.

Although the right to work is not capable of exact definition, the underlying principle of the right is freedom. A passage cited with approval in Larkin v Long (1915) AC 814 and taken from the essay of Sir W. Erle on Trade Unions (p.12) encapsulates the essence of that right. It stated:

> "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every person is subject to the correlative duty arising therefrom and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others."

The right to work recognised by the Constitution is thus to be understood as including the freedom under the law available to the worker as it is to the employer to engage or disengage freely in the employer/employee relationship. Infringement of that right would often take the form of obstruction of or interference with that freedom by or under a law not justifiable in a democratic society or, by an act not sanctioned by the law.

However, the general right to be free from obstruction from working that is implied in the right to work does not impose a corresponding duty on the employer not to terminate an appointment or to reinstate a person in a job or employment or to find employment for the worker. Such obligation may arise if it is provided for by statute which would constitute state intervention in the contract of employment or to the extent which the law of contract permits. Such statutory intervention is that Act with which

this case is concerned. It imposes, in regard to a worker whose appointment is terminated unjustifiably, an obligation on the employer if so ordered, to re-instate the worker on a decision being taken to that effect pursuant to section 61(2)(a)(ii) of the Act. If the "competent officer" fails to decide that the worker be reinstated when in the circumstances of the case he ought to have so decided, that lapse is not a contravention of the right to work recognised by the Constitution but, put at the highest, is a breach of the obligation imposed by the Act.

Judicial review of an administrative action which does not involve a breach of the Constitution but only of an empowering statute as alleged in the instant case, is within the supervisory powers of the Supreme Court and not a matter for the Constitutional Court. The case of Maharaj v A.G. of Trinidad (No. 2) (1978) 2 All E.R. 670 (P.C) to which counsel for the appellant has referred can be distinguished from the instant case. In that case a contravention of the right not to be deprived of liberty otherwise than by due process of law was clearly found. The problematic question was whether the decision of the judge could be questioned before a judge of equal rank. In that case it was held that section 6(1) of the Constitution of Trinidad and Tobago 1962 granted a remedy against any interference with the rights or freedom protected by section 1 of that Constitution. Lord Diplock at p. 677 - 678 said:

> "The order of Maharaj J committing the appellant to prison was made by him in the exercise of the judicial power of the state; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the state. So if his detention amounted to a contravention of his rights under s.1(a) it was a contravention by the state against which he was entitled to protection." (Emphasis supplied).

What significantly distinguishes the instant case from Maharaj's Case is that in the Maharaj case a contravention of the human rights provision was found, whereas in the present case the decision of the Minister, even if it is wrong in administrative law and subject by its nature to judicial review or to the supervisory jurisdiction of the Supreme Court, is, as has been earlier demonstrated and as held by the Constitutional Court in its majority decision, not a contravention of the Seychellois Charter of Fundamental Human Rights and Freedoms. ("the Charter").

The majority decision of the Constitutional Court, if properly understood, is correct when Perera, J. said:

> "The constitutional court is empowered to make declarations or orders and issue writs, and also award damages ..... when it has been established that a provision of the charter of fundamental human rights and freedoms has been or is likely to be contravened. This does not entitle the Court to exercise the supervisory jurisdiction of the Supreme Court to declare that the Minister has not used his discretion correctly."

It only needs be added, if only by way of emphasis and clarification that where the wrongful exercise of discretion by the Minister amounts to a contravention of a provision of the Charter the Constitutional Court may hear the application pursuant to article 46(4) of the Constitution notwithstanding that the applicant could have ~~been~~ obtained redress in any other court under any other law. Thus for the purpose of determining this appeal it would suffice to state that as the fundamental right of the appellant has not been infringed the Constitutional Court was right in not making any consequential declaration and order as prayed for in the appellant's petition. That, in short, is the kernel of this judgment.

In the result, this appeal fails and is dismissed without order as to costs.

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(H. GOBURDHUN)
PRESIDENT

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(E.O.AYOOLA)
JUSTICE OF APPEAL

23. 7. 96
Judgment delivered in open court in the presence of counsel.

A. R. Nowrojee
Judge
23/7/96.