

**IN THE COURT OF APPEAL OF SEYCHELLES**

**[Coram: A. Fernando, (J.A) M. Twomey (J.A), J. Msoffe (J.A).**

**Civil Appeal: CA 12/2015**

**(Appeal from Supreme Court Decision 24/14 out of Employment Tribunal  
Decision151/2013)**

**[201 ] SCSC**

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Seychelles Credit Union

Appellant

versus

Emile Esparon

Respondent

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Heard: 4 August 2017

Counsel: Bernard Georges for appellant  
Serge Rouillon for respondent

Delivered: 11 August 2017.

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**JUDGMENT**

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**M. TWOMEY, J.A.**

[1] Between the 15 and 16 June 2013 a theft was carried out at the Seychelles Credit Union office in which over SR 1 million was taken. At the time of the incident, the Respondent was the Chief Executive Officer and also the duty manager and Ms Jacqueline Hermitte the Bank Manageress of the institution. There was also a banking supervisor Farah Tirant

who was on leave. Two independent sets of keys to the vault were normally kept by the two latter people to ensure a dual control security scheme.

- [2] On the Saturday of the incident, present in the banking hall were the Respondent, Ms. Hermitte, Mr. Keddy Philoé the IT Officer and Mr. Jossy Moustache. It is alleged by Ms. Hermitte, but contested by the Respondent, that when he left before closing time, he handed over his set of keys to the Ms. Hermitte. The Respondent testified that he did not have the keys with him at all during the week or the weekend when the theft happened.
- [3] On Sunday when the bank was opened, Ms. Hermitte noticed that the vault was opened and money missing. The police investigation in the matter was inconclusive and no one has ever been prosecuted for the theft.
- [4] The Respondent testified that he started work with the Credit Union in 1977 and moved up through the ranks to become Office Manager. After a government restructure in 2012, he was appointed the Banking and Administrative Executive and then elected as a Board member to the Credit Union and subsequently CEO.
- [5] As a result of the theft, his employment was terminated on the ground that there were serious breaches of trust, of his fiduciary duties and of his responsibility to the bank which had occasioned the loss of about SR1 million.
- [6] He filed an application in the Employment Tribunal in which he claimed he had been unfairly dismissed and was owed one month salary in lieu of notice, 12 days annual leave and his salary from 31 July 2013 to 30 June 2015.
- [7] The Appellant in reply submitted that the termination was justified on account of the whole circumstances of the case.
- [8] In its decision of 20 May 2014, the Employment Tribunal concluded, pursuant to section 61 (2) (a) (i) of the Employment Act 1995 (hereinafter the Act), that the Respondent's termination was justified, namely in view of the fact that he committed a serious wrongdoing by handing a set of keys to Ms. Hermitte in breach of the dual control system

and that this failure had caused serious prejudice to the Appellant. The Appellant, it concluded, had committed a serious disciplinary offence under Part II of the Act.

- [9] In his appeal before the Supreme Court, the Respondent submitted that the Tribunal erred in deciding that the termination of his employment was an appropriate disciplinary measure given the fact that he was the longest serving employee of the Credit Union, that the loss of the money could not be attributed to him, or in terms of the complaint made against him, namely the lack of maintenance of a dual control scheme regarding keys to the vault at the Credit Union.
- [10] Further, he submitted that the Tribunal was swayed by the amount of money lost. Yet there was no link between the loss of the money and himself or evidence that despite the dual control scheme being maintained the loss would have been prevented. In any case the police had not solved the case.
- [11] The appellate court found that since the Respondent's employment was terminated for serious disciplinary reasons, section 23 of the Act came into play. In its view, the procedures under these provisions had not been engaged and the Respondent given no opportunity to explain the act or omission which constituted the alleged serious offence.
- [12] Further, the procedural requirement to inform the Respondent in writing that the offence has been established had also not been complied with. Moreover, once the grievance procedure was initiated by the Respondent, the burden of proving the disciplinary offence under section 53 (5) of the Act lay with the Appellant. It had not proven the causal connection between the failure to abide by the dual control scheme and the prejudice caused to the Appellant. Nor had the Scheme ever been accepted as a binding regulation on the Credit Union.
- [13] In the circumstances the appellate court found that the termination was not justified and the disciplinary measure meted out not commensurate with any offence committed by the Appellant. It found therefore that the Respondent should be awarded one month salary in lieu of notice, 12 days annual leave and compensation at the rate of one day's pay based

on his last salary from 1 December 1977 to the date of the its judgment with interest and costs.

- [14]** From this decision the Appellant has appealed on 13 grounds which we have no wish to repeat but summarise instead. First, it is submitted that there is bias on the part of the appellate court in favour of the Respondent, secondly that there was insufficient evidence to find in favour of the Respondent, thirdly, that the appellate court erred in not appreciating the duties and responsibilities of the CEO of a bank and fourthly, that the court erred in awarding the wrong damages.
- [15]** We are grateful to both Counsel for their thoroughly researched submissions.
- [16]** We state from the outset that we are unable to discern any bias on the part of the appellate court. On the ground of appeal, concerning the sufficiency of evidence we are not convinced that the learned appellate judge was wrong in his appreciation of the evidence before the Tribunal. Section 55 of the Act requires proof of the disciplinary offence. There was neither a satisfactory conclusion to the internal enquiry nor indeed any fruitful conclusion to the police investigation.
- [17]** There was above all no proof that the breach of the dual control scheme resulted in the theft or that there was a dereliction of duties on the part of the Respondent in leaving the bank at lunchtime leaving two subordinates in the banking hall. There is also no evidence as to what and how the Respondent breached any fiduciary duties owed to the Bank. The blame for the theft could not in the circumstances be laid at the door of the Respondent.
- [18]** It must also be noted that if the contention of the Appellant is that the Respondent had committed an act that had seriously prejudiced the Appellant and therefore committed a serious disciplinary offence (under Part II of Schedule 2 to the Act) it was never clarified and substantiated by evidence as to which of the 13 listed offences under the Act was committed by the Appellant. At the most, the only evidence brought was that the Respondent had failed to obey orders or failed to comply with rules or regulations but these are not offences warranting instant dismissal.

- [19] Insofar as the Respondent's fiduciary duties are concerned it is the Appellant's submission that the relationship of trust and confidence was breached or that the Respondent should "reasonably have known that some hazardous condition or activity under his control could injure" the Appellant.
- [20] It has not been demonstrated how the trust or confidence in the parties' relationship was breached. A theft happened. It has not been linked to any actions on the part of the Respondent save for the allegation that he should have ensured that two independent sets of keys to the bank vault was kept by separate persons at all times. It has not been proven that if this had happened the theft would not have occurred.
- [21] We are therefore unable to find any support for the submission on this ground from the evidence adduced and dismiss this ground of appeal.
- [22] In regard to the damages awarded by the trial judge, the Appellant is on stronger ground. It is conceded by the Respondent that the award was *ultra petita*. The Respondent had resigned his employment from the Appellant in 2012 at the time of the restructure of the Credit Union and had been paid all his legal dues from the time he started work to his resignation. He was in the circumstances of the present case only due what he had claimed and was allowable under the Act namely: one month salary in lieu of notice, 12 days annual leave and his salary from 31 July 2013 to 30 June 2015. It is also not contested that the Respondent has already been paid SR55, 547.61 net of tax by the Appellant.
- [23] For the avoidance of doubt we state that the sums payable are as follows: one month salary in lieu of notice amounting to SR 31, 856.29 less tax; 12.75 days annual leave amounting to SR 15, 653.08; salary from 31 June 2013 to 30 June 2014 amounting to SR 724, 656.43 gross (SR780, 204.04 (SR31, 856.29 x 23 months) less SR 55, 547.61 already received.

[24] In the circumstances, for the reasons given above this appeal is partly successful. We find that the dismissal of the Respondent was not justified but that the award of benefits wrongly computed by the appellate court. We substitute therefore the award as computed in the preceding paragraph which award should be paid after the deduction of due taxes.

**M. Twomey (J.A)**

**I concur:** ..... A. Fernando( J.A)

**I concur:** ..... J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 11 August 2017