

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2022] SCCA 18 (29 April 2022)
SCA 59/2019)
(Arising in CA 41/2018 Appeal from
ET 98/2017)

In the matter Between

THERANCE DALPEZ

Appellant

(rep. by Ms. Kelly Louise)

And

ISPC (SEYCHELLES) LIMITED

Respondent

(rep. by Mr. Elvis Chetty)

Neutral Citation: *Dalpez v ISPC (Seychelles) Ltd* (SCA 59/2019) [2022] SCCA 18 (29 April 2022) (Arising in CA 41/2018 Appeal from ET 98/2017)

Before: Twomey, Tibatemwa-Ekirikubinza, Andre JJA

Summary: Appeal against a decision of the Supreme Court- Employment Act – Sections 56 (1), 56 (3), and 62 A (1) - whether the resignation letter issued by the Appellant complied with the law – whether or not the Appellant is entitled to three months’ salary following the termination of his employment.

Heard: 19 April 2022

Delivered: 29 April 2022

ORDERS

The Court makes the following Orders:

- (i) The Appeal wholly succeeds.
 - (ii) Orders of the Learned Judge of the Supreme Court are reversed.
 - (iii) The decision of the Tribunal is upheld.
 - (iv) The Appellant is entitled to be paid his three months’ salary in lieu of notice.
 - (v) Costs awarded in favour of the Appellant.
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JUDGMENT

ANDRE, JA

INTRODUCTION

[1] The Appellant (Therance Dalpez of Beau-Vallon, Mahe), is appealing the decision of the Supreme Court in C A 41/18 on two grounds set out in paragraph 2 of the notice of appeal filed on the 13 November 2019. The Appellant further seeks the reliefs set out in paragraph 3 thereof, namely:

- i. an order allowing the appeal, reversing the orders of the Learned Judge, and upholding the decision made by the Employment Tribunal (hereinafter referred to as “Tribunal”); and
- ii. an order against the Respondent to pay the Appellant his three months’ notice period.

[2] The Respondent (ISPC (Seychelles) Limited), objects to the grounds of appeal as set out in the said notice of appeal as per the Respondent’s skeleton heads of argument filed on 8 February 2022.

[3] Both Learned Counsels filed skeleton heads of arguments and the same have been duly considered for the purpose of the Judgment.

BACKGROUND

[4] The Appellant, Mr. Therance Dalpez was employed as an executive chef by the Respondent. From the evidence of the record of proceedings before the Tribunal, a complaint was received from “Bravo”, one of the regular clients of the Respondent. The complaint was directed towards the inconsistency of the size of the beef burgers supplied by the Respondent company.

[5] As the Applicant was employed as a chef, his main duty being to manage the fish and meat products being sent to clients, this issue was addressed to him by the management of the Respondent’s company.

[6] As a result of the complaint by Bravo, a first warning letter was issued to the Appellant on the 23rd of May 2017, which he refused to sign acknowledging acceptance. Another letter was sent to the Appellant on the 29th of May 2017 referring to the warning letter of the 27th of May 2017 (which letter is not part of the Brief), and fixing an official disciplinary hearing for the 1st June 2017.

[7] On the said date of the disciplinary hearing, the Appellant sent in his resignation giving three months' notice. Meanwhile, the Respondent decided to terminate the Appellant's services for a serious disciplinary offence by way of a letter dated the 5th of June 2017.

[8] The Appellant filed a claim before the Tribunal for three months' salary in lieu of notice, which was granted. The Tribunal found that:

“8. It cannot be understood therefore how the termination letter of the 5th June 2017 is based on the Applicant's “willfully, repeatedly and without justification failed to achieve a normal output as fixed in accordance with the standards applicable to the worker's work. To this Tribunal it is clear that it was the attitude of the Applicant subsequent to the issue of the first warning letter that had led to the disciplinary hearing. It would appear therefore that the disciplinary hearing reconsidered the issue of the loss of the Respondent's client due to lack of consistency in the burger patties after a disciplinary measure had already been taken against the Applicant for the said offence. What this means is that the Applicant was disciplined twice for the same offence. First by the warning letter of the 23rd May 2017 and second by the termination of his employment following a disciplinary hearing on the 5th June 2017.

9. In view of the Tribunal findings above, the termination of the Applicant's employment on the grounds stated in the termination letter of the 5th June 2017 was not justified. Having given notice of his resignation during the suspension period, which he was entitled to do under section 56 (3) of the Act, and with no finding on the incidents that led to the setting up of the disciplinary hearing having been made against him, the Applicant is entitled to his claim of three months' salary in lieu of notice. Tribunal to commute this award and notify the parties forthwith.”

- [9] Dissatisfied with the decision of the Tribunal, the Respondent appealed to the Supreme Court. The appeal was before Learned Burhan J who allowed the appeal and held that in instances where the employee's services are terminated due to a serious disciplinary offence whilst on suspension, he is not entitled to any benefits. (paragraph [16] of the Judgement of the Supreme Court refers).
- [10] Further, on the appeal before the Supreme Court, Learned Judge Burhan held a different view from the Tribunal findings. In particular, the Learned Judge disagreed with the Tribunal's findings that the appellant had been punished twice "*...as the termination letter, not only refers to his inconsistency in the preparation of food but also his conduct thereafter and his sarcasm and refusal to take responsibility for his wrongdoing and his conduct in making it impossible to discuss solutions to such issues all amounting to lack of respect and wilful attempts not to achieve normal standards or outputs.*" (See: Burhan J at paragraph 9 of the Supreme Court Judgment). With this, the Court found that the termination by the employer was justified. Moreover, the Court found the employer did need to pay terminal benefits in lieu of notice. The Court came to this finding upon relying on section 62 A (2) of the Employment Act.
- [11] In addition to the above, the Learned Judge highlighted the fact that the employer was well within its right to terminate the contract of employment, despite being given notice by the employee.
- [12] The Appellant has appealed to the Seychelles Court of Appeal seeking an order allowing the appeal, reversing the Learned Judge's orders, upholding the Tribunal's decision, and order against the Respondent to pay the Appellant his three (3) months' notice period.

GROUND OF APPEAL

- [13] The appellant raises two grounds of appeal, namely:-
1. *The orders made by the Learned Judge on the demeanour of the Appellant which is completely opposite to the findings of the Employment Board are erroneous as*

the Learned Judge did not have the benefit of observing the witness at the time of deponing.

2. *The Learned Judge in finding that the alleged disciplinary offence related to the letter of dismissal issued to the Appellant by the Respondent was a separate and new offence which was a serious disciplinary offence that justified the immediate termination of the Appellant's employment without notice.*

RELIEFS SOUGHT ON APPEAL

[14] The Appellant sought relief from this Court as follows:-

1. *An order dismissing the appeal, reversing the orders of the Learned judge, and upholding the decision made by the Learned Employment Tribunal.*
2. *An order against the Respondent to pay the Appellant his three months' notice period.*

SUBMISSIONS BY BOTH COUNSELS FOR THE APPELLANT AND THE RESPONDENT:

[15] At the hearing of the appeal on the indicated date, the Appellant withdrew ground one (1) of the grounds of appeal and proceeded on ground two (2) only.

[16] On the second ground of appeal, the Appellant argued that the termination letter was issued because of the Appellant's conduct during the meeting where discussions of the loss of Bravo as a client took place. Counsel for the Appellant submitted that the Appellant's conduct should have been brought up at the meeting before the disciplinary letter was issued.

[17] On the second ground of appeal, the Respondent submitted that the appeal was without merit, as the Court did not find that a new serious disciplinary offence had been committed, rather it based itself on facts emanating from the evidence adduced before the Tribunal.

THE LAW

[18] Section 56 (1) of the Employment Act provides as follows:-

*(1) When investigating a **serious disciplinary offence**, the employer may suspend a worker without pay-*

(a) pending the investigation but for no longer than 1 month;

(b) where the investigation is discontinued under section 54(1), pending the outcome of the trial, and shall inform the worker, in writing, of the outcome of the investigation.

Section 56 (3) of the Employment Act provides that:-

A worker who is suspended under subsection (1) may terminate the contract of employment with notice.

However, section 62 A provides that:-

*62A (1) Where a worker resigns, otherwise than in the circumstances referred to in subsection (2) compensation shall not be paid to a worker under subsection (1) where the worker resigns **during a period of suspension from service for disciplinary reasons**, or where the circumstances of **the resignation are such that's serious disciplinary action could have been taken against the worker by the employer**. (Emphasis is mine).*

ANALYSIS

[19] Having stated the grounds of appeal and submissions from both the Appellant and Respondent, the main issues that arise are (i) whether the resignation letter issued by the Appellant complied with the law; and, (ii) whether or not the Appellant is entitled to three (3) months' salary following the termination of his employment.

[20] The Appellant was first served with a warning letter dated 23 May 2017, although he refused to acknowledge its receipt. This led to the second letter, of 29 May 2017

suspending him while awaiting a disciplinary hearing on 1 June 2017. In the meantime, the Appellant submitted his resignation letter giving three months' notice.

- [21] The question that should have been answered first is whether or not a serious disciplinary offence had occurred warranting an investigation and suspension. From a reading of the Tribunal ruling and submissions of both parties, it appears to me that the disciplinary proceedings were because of the Appellant's refusal to sign the first warning letter. This warning letter was issued following the upset over low standards which eventually saw the Respondent losing a client, namely Bravo.
- [22] What is, therefore, mind-boggling, is what serious disciplinary offence was committed by the Appellant between the refusal to sign the first warning letter and his subsequent dismissal.
- [23] The Employment Act provides that a worker can terminate his employment contract during suspension and also provides that when the worker resigns during a period of suspension from service for a disciplinary reason, he will not be compensated.
- [24] Handling disciplinary proceedings are difficult enough for employers, but if the employee then resigns during part-heard proceedings, many employers are left feeling unsure what they should do. If the employee resigns with immediate effect, their employment will terminate on that day. There is little point in continuing a disciplinary procedure in respect of an employee who is no longer employed, as no disciplinary sanction can be imposed against a former employee.¹
- [25] If an employee resigns with notice, as a general rule, the disciplinary procedure should be progressed to its conclusion during the employee's notice period; the employee is still employed during this period and there is no reason why they should avoid a possible disciplinary sanction just because they have chosen to resign.²

¹ Laura Franklin (2019) What should an employer do if an employee resigns during disciplinary proceedings? Beswicks Legal, available at <https://www.beswicks.com/what-should-an-employer-do-if-an-employee-resigns-during-disciplinary-proceedings/> accessed on 14/April 2022.

² Ibid.

- [26] When an employee resigns during a disciplinary proceeding, whether or not one should continue the disciplinary procedure will depend on whether the employee has resigned with notice or resigned with immediate effect.³
- [27] If an employee gives notice of their resignation, the employer should continue the disciplinary process. The outcome of this process is important. It may show that the employee has committed an act of minor misconduct which only results in a warning, in which case there will be no repercussions on the individual. However, if the disciplinary process determines that the employee has committed an act of gross misconduct, such as theft, physical violence, gross negligence, or serious insubordination, they can be summarily dismissed. In other words, dismissed without notice. This will supersede their resignation, and the reason for the termination of the employment relationship will be deemed as dismissal for gross misconduct rather than resignation.
- [28] There is no record of the disciplinary hearing, the findings and the outcome before me in order for me to cogitate on the outcome and subsequently see if there was indeed a serious disciplinary offence committed. I, therefore, disagree with the Learned Judge of the Supreme Court, who stated that:-

“As to whether the manner in which the termination was effected was proper, there are several options open to an employer where a disciplinary offence has been committed (Part III of Schedule 2). Among the measures available to the employer upon determining that serious disciplinary offence has been committed, are inter-alia-

- *a written warning*
- *termination of employment with notice or payment in lieu of notice*
- *termination of employment without notice i.e., instant dismissal without payment of compensation.*

³ Ibid.

- *Therefore, it is apparent upon proof of disciplinary offence, that the employer may take any one or more of the disciplinary measures listed in part III of Schedule 2 (section 55, Employment Act). As such, the Appellant was within their right to issue a warning and suspension, and, subsequently terminate the Respondent's employment.*

The Respondent's main grievance was not in respect of his termination but the failure of the appellant company his three months' salary in lieu of notice. It would be pertinent to refer to section 62A (2) which reads as follows:

Compensation shall not be payable to a worker under subsection (1) where the worker resigns during a period of suspension from service for disciplinary reasons, or where the circumstances of the resignation are such that serious disciplinary action could have been taken against the worker by the employer.

The evidence indicates that after the letter of 29th of May 2017, the respondent was suspended. He does not deny that fact. He admits he resigned on the 1st of June 2017. The letter of the 9th May 2017 indicated he was suspended pending an official disciplinary hearing. Therefore, as in terms of section 62A (2), as he had resigned during a period of suspension from service for disciplinary reasons and as it was a serious disciplinary offence, he is not entitled to nay benefits including compensation.

Further, this Court is of the b view that the employer, the appellant, was still within their right to terminate the respondent's services even though he had resigned, given that the resignation was after suspension and pending a disciplinary hearing, in which he was found to have committed a serious disciplinary offence. The employer is not obligated to maintain the employee in their employment, where the latter has committed a serious disciplinary offence, merely because the said employee has tendered his resignation."

[29] I am of the view that the court was misguided in failing to consider if, in fact, the Appellant had conducted himself in a manner that is considered to be a serious disciplinary offence. Where this is established, then section 62 A (2) would be in

operation. There are no records of the 1 June 2017 disciplinary hearing, the findings, and the outcome. Therefore, we cannot ascertain whether a finding was made that a serious disciplinary offence had been committed in order to trigger the operation of section 62 A (2).

[30] Counsel for the Appellant argues that because the Appellant has already been issued with a warning letter, it was unfair and improper to sanction him again for the same offence in what would have been the 1st June 2017 disciplinary hearing and investigations. I agree with the Appellant's Counsel as there is no record of the 1 June 2017 disciplinary hearing, findings, and outcome.

[31] From a reading of the pleadings, the Respondent argues that the demeanour of the Appellant constituted a serious disciplinary offence. In response to this, the Appellant contends that this averment is not supported by facts and when the Supreme Court relied on this, it misled itself. I reiterate my reservation on the existence of a finding of a serious disciplinary offence, as there is no record of the disciplinary hearing, findings, and outcome. We cannot, therefore, say with certainty that there was a serious disciplinary offence that warranted dismissal.

[32] I also find extreme difficulty in accepting that a person is given the first warning, and within a few days, this too is considered to be part and parcel of proceedings relating to a serious disciplinary offence that warrants dismissal. We must distinguish between the first offence and its action thereon, and the second offence and its action thereon.

[33] The first offence is clear, and the sanction was a warning letter. The second offence arises out of the refusal on the part of the Appellant to accept the warning letter. To me this is hardly an offence. I cannot see where it would fit within Schedule 2 of the Employment Act.

[34] A warning letter remains a valid warning letter, whether or not the employee accepts it. As long as the employer submits the warning letter to the employee, they would have fulfilled their obligation in this respect. A warning letter is a unilateral act that does not necessarily need the acceptance of the other party. Suppose the challenge comes when it

becomes a matter of proof service of the said letter. However, in this matter, this was not the case. The employee was issued a warning letter and has not claimed that he was not served with the same.

[35] With this, I opine that the Respondent’s view on the Appellant’s conduct in relation to the letter cannot be viewed as an offence. I find difficulty with categorizing the alleged disciplinary offence under Schedule 2 of the Act.

DECISION

[36] In view of the discussion above, the termination of the Appellant was not justified. The Appellant was justified in giving notice as provided for under section 56 (3) of the Employment Act. An Order allowing the appeal is granted. The orders of the Learned Judge of the Supreme Court are reversed. The decision of the Tribunal is upheld.

ORDER

[37] As a result, the appeal wholly succeeds, and this Court orders as follows:

- (i) The Appellant is entitled to his three (3) months’ salary in lieu of notice.
- (ii) Costs are awarded to the Appellant.

S. Andre, JA

I concur

Dr. M. Twomey-Woods, JA

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA

Signed, dated, and delivered at Ile du Port on 29 April 2022.