IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2023] SCA 10/2023 (18 December 2023)
(Appeal from CA 13/2021)
[2021] SCSC 111)

ISLAND CONSERVATION SOCIETY **Appellant**
(Represented by Mr. Olivier Chang-Leng)

versus

SHEILA BASTIENNE **Respondent**
(Represented by Mr. Joel Camille)

Neutral Citation: *Island Conservation Society v Sheila Bastienne* (SCA 10/2023) [2023] (Appeal from CA 13/2021) [2021] SCSC 111)

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA.

Summary: **Employment law-** Interpretation of Section 53 (3) of the Employment Act within the context of tenets of natural justice and the principle of fairness.

Section 53 of the Employment Act obligates the employer to ensure that any investigation conducted is fair. Although there is no specific call for oral hearing, whether dispensing with the oral testimony of the employee under investigation will not violate their right to a fair hearing is a question to be settled on a case to case basis.

Heard: 6 December 2023.

Delivered: 18 December 2023

ORDERS

The appeal fails and it is dismissed with costs to the Respondent. Consequently, the judgment and orders of the Trial Judge are upheld

JUDGMENT

DR L. TIBATEMWA-EKIRIKUBINZA JA

The Facts

1. This is an appeal against the decision of the Supreme Court (Esparon J). The suit originated in the Employment Tribunal *viz* ET 80. 2019 where the Respondent sued the Appellant for unlawfully terminating her employment.

2. After considering the evidence of the parties, the Employment Tribunal had *inter alia* held that:
   i. The Respondent's action of waving her index finger in the face of the Appellant's Chairperson who was also the Respondent's supervisor amounted to lack of espect and constituted a serious disciplinary offence.
   ii. That prior to the Respondent's termination, the company followed the due process of the law as laid out in Section 53 of the Employment Act and therefore the termination was lawful.

3. Dissatisfied with the Tribunal's decision, the Respondent appealed to the Supreme Court (before Esparon J.) on grounds that:
   i. The Employment Tribunal erred in law and on the facts, for having concluded that the reasons for the termination of the employment was justified in Law, on the basis of the evidence before the Trial Court. [sic]
   ii. The Employment Tribunal erred in law and on the facts in concluding that the procedure and requirement, as laid down in ***Section 53*** *of the* ***Employment Act****, was adequately followed by the Appellant.*
   iii. The Employment Tribunal erred in law and on the facts, for having wrongly applied the law in its determination that the termination of the Respondent's employment, by the Appellant, was justified in law.

4. On ground (i), Esparon J stated that the issue to be addressed concerned the credibility of the two witnesses namely Mr. Adrian Skerrett and Miss Muray who testified before the Tribunal that the Respondent made certain gestures with her finger to the Chairman of the board and walked out of the room. Based on several authorities, Esparon J held that the

court shall not interfere with the findings of the Employment Tribunal on the credibility of the said witnesses since it is the Tribunal which saw and heard the witnesses and therefore was in a better position than the court to evaluate the credibility of the witnesses.

5. On ground 2 which dealt with the issue of procedural fairness, Esparon J held that Section 53 of the Employment Act imposes an obligation on an Employer to conduct investigations into allegations of misconduct of an employee in a fair manner. The Judge cited the Ugandan High Court case of *Batwatala vs. Madhvan Group, [Labour dispute reference 146 of 2019 (2021 UGIC 7)]*, where the court stated the following guidelines as to what constitutes a fair hearing:

   (a) Notice of allegations against the Plaintiff was served on him and sufficient time allowed for the Plaintiff to prepare a defence.
   (b) The notice should set out clearly what the allegation against the plaintiff and his right at the oral hearing were. Such rights would include the right to respond to the allegation against him orally and /or in writing, the righto be accompanied at the hearing and the right to cross examine -the defendant's witnesses or call witnesses of his own.
   (c) The Plaintiff should be given a chance to appear and present his case before the impartial committee in charge of the disciplinary issues of the defendant.

6. After referring to the above guidelines, Esparon J. held that although the Respondent made a written statement denying the allegation of misconduct, the evidence on record clearly showed that she was neither called to testify before the Company's disciplinary committee nor was she given an opportunity to be present at the disciplinary hearing. This amounted to breach of the rules of natural justice. That had the Respondent been called, she would have been able to call witnesses on her behalf or cross-examine the Appellant's witnesses in accordance with Section 53 (3) of the Employment Act. Thus, the Judge found that the termination of the Respondent's contract of employment by the Appellant was unjustified.

7. In view of the finding above, the court found it not necessary to make any pronouncement on ground (iii). The Trial Judge therefore ordered the matter to be remitted to the

Employment Tribunal for the purpose of computing the Respondent's employment benefits as a result of her unjustified dismissal.

8. Dissatisfied with the decision of the Supreme Court, the Appellant lodged an appeal before this Court on grounds that:

   1. The Learned Judge erred in law when he quoted and relied upon Ugandan jurisprudence in coming to his decision.

   2. The Learned Judge erred in fact and law when he found that the Appellant had breached the rules of natural justice by not calling the Respondent before the disciplinary panel.

   3. The Learned Judge erred in law in the way he interpreted and applied Section 53(3) of the Employment Act to the present facts.

Reliefs sought:

9. The Appellant prayed that the Judgment of the Supreme Court is quashed with costs and the ruling of the Employment Tribunal be maintained.

Appellant's submissions on ground 1

10. Counsel submitted that there was no need for the Judge to have referred to the **Batwatala case** in considering what would be a fair hearing in a disciplinary action against an employee because the Seychelles Employment Act clearly provides for the procedure under Section 53 of the Employment Act. Counsel argued that the Trial Judge did not justify his need to look to foreign jurisprudence when the courts in Seychelles have previously pronounced themselves on what amounts to a fair hearing.

11. That the said case was merely persuasive and not binding but the Judge used the case as if it were a decision of courts in Seychelles and that this underpins his decision.

12. Furthermore, counsel faulted the Trial Judge for relying on the decision of **Letshego Bank of Namibia v Bahm**[1] **-** foreign jurisprudence to highlight the test of procedural fairness, when local case law was sufficient. In that case, the High Court of Namibia held that: "*the test for a fair dismissal is twofold and both requirements of substantive and procedural fairness must be met. If an employer fails to satisfy one leg of the test, he fails the test of fairness and the dismissal is liable to be held as an unfair dismissal*."

13. Counsel submitted that, the test enunciated in the Namibian case is irrelevant and not binding in the instant case.

Respondent's reply

14. The Respondent's counsel submitted that this ground of appeal is without merit and should be dismissed. That it is clear that the learned Judge in referring to jurisprudence from other jurisdictions was for purposes of expounding on the principles of law well known in Seychelles jurisdiction. Counsel argued that what is important is whether the learned judge appreciated the law relating to procedural fairness in instances of unlawful termination of employment.

Court's consideration of ground 1

15. A reading of the Judgment of Esparon J. clearly shows that in arriving at his decision that the disciplinary committee of the Employer breached the rules of natural justice and thus failed the test of procedural fairness, the court was guided by the requirements of Section 53 (3) of the Employment Act. The judge first pointed out the obligation imposed on the employer - by Section 53 - to conduct the investigation fairly. This was immediately followed by a pronouncement of this Court in **Savoy Development Limited vs Sharifa Salum**[2] wherein Twomey JA clearly states that investigations by an employer cannot ignore the principle of fairness, the rules of natural justice demanded by Section 53 of the Employment Act.

[1](HC)-MD- Lab AAP 11 2021.
[2] (SCA 10 of 2021) [2021] SCCA 79.

16. Whereas the judge referred to foreign jurisprudence (a Ugandan authority) as to what a fair hearing entails, it is clear that the basis of his finding was a juxtaposition of the requirements of the Employment Act on the one hand and the facts of the case presented before him. Esparon J. stated thus:

> *"It is clear that the said disciplinary committee in not calling the Appellant to be present at the disciplinary hearing … breached the rules of natural justice as regards the Appellant … in accordance with section 53 (3) of the Employment Act."*

And it may also be significant to note that the principles enunciated by the Ugandan authority were neither in conflict with the relevant statutory provision nor with local jurisprudence.

Ground 1 has no merit and it is dismissed.

Grounds 2 and 3

Appellant's submissions

17. Under ground 2, counsel submitted that the learned Trial Judge failed to appreciate the fact that Section 53 of the Employment Act does not oblige an employer to hear an employee orally before commencing investigations.

18. Counsel explained that, an investigation was conducted by the Appellant as evidenced by the setting up of a disciplinary panel to make a determination on the allegation of a serious disciplinary offence having been committed by the Respondent. Secondly, the Respondent was informed in writing of the same by way of a letter of suspension dated 17th June, 2019 and she thereafter gave a detailed written statement in which she denied the allegations. Third, the disciplinary panel's minutes show that it was conducted in a fair and transparent manner.

19. Counsel submitted that in light of the fact that the Respondent had already tendered a written statement in which she denied the allegations, her physical presence to give oral

testimony was not required. Furthermore, that the meeting in which the incident occurred only involved 3 persons, so there was no need of calling witnesses. That therefore, the Trial Judge was incorrect to have found that there was a failure of procedural fairness yet the Appellant strictly followed the provisions of Section 53 of the Employment Act.

20. In respect of ground 3, Counsel reiterated the submissions in respect of ground 2 and emphasized that section 53(3) does not oblige the employer to call the employee to give testimony before the disciplinary panel. Furthermore, that a disciplinary panel is not akin to a court of law and strict procedures which are to be followed in court cannot apply to what is essentially a panel of lay persons with limited resources. Counsel supported the Tribunal's finding that the Respondent was made aware of the complaint against her and was given an opportunity to give her side of the events by providing a written statement. That the facts of the case were simple and the Respondent's statement was sufficiently detailed for the panel to reach a determination. The tribunal relied on the testimony of witnesses who were adjudged honest and credible. That therefore, the learned Judge, sitting in his capacity as an appellate court, ought not to have disturbed the findings of the Employment Tribunal without sufficient cause or explanation.

Respondent's reply

21. In reply to ground 2, the Respondent supported the analysis and findings of the Supreme Court.

22. Counsel referred to the minutes of the meeting of the Appellant's Disciplinary Committee held on the 21 June 2019. He drew attention of the Court to the purpose of the Disciplinary Committee 'to investigate the incident which occurred on 14th June 2019 during a meeting held by the Appellant's Chairman - Mr. Adrian Skerrett, the Respondent, the company's Human Resource Manager as well as the Appellant's CEO-Ms Michelle Murray.'

23. Counsel pointed out that both Ms. Murray and Mr. Skerrett sat on the Disciplinary Committee. In effect they acted both as complainant and as juror of facts on that committee.

Furthermore, that whereas Murray was allowed to present her case against the Respondent, the latter was not given an opportunity to appear before the committee.

24. That the right to a fair hearing embodies even-handedness between the opposing parties in relation to obtaining and making available, information to each party. That two important elements are embedded herein – the right to know the opposing case and a fair opportunity to answer the case.

25. Thus, Counsel argued that given the circumstances of this case, the Supreme Court's finding of procedural unfairness and abuse of principles of natural justice by the Appellant cannot be faulted.

26. Regarding ground 3, Counsel adopted the submissions made under ground 2.

27. In conclusion, the Respondent prayed for the following reliefs:
    (a) An order dismissing the appeal in its entirety.
    (b) Costs.

Court's consideration of grounds 2 and 3

28. These grounds will be dealt with together because they both speak to the interpretation of **Section 53** of the **Employment Act**. The Section provides *inter alia* as follows:

> **(1) No disciplinary measure shall be taken against a worker for a disciplinary offence unless there has been an investigation of the alleged offence or where the act or omission constituting the offence is self-evident, unless the worker is given the opportunity of explaining the act or omission.** (My emphasis)
>
> **(2)** _____
>
> **(3) The employer shall ensure that the investigation pursuant to subsection (1), even where it consists in no more than requiring an explanation for a**

self-evident act or omission, <u>is conducted fairly and that the worker has, if the worker so wishes</u>, the assistance of a colleague or a representative of the Union, if any, and of <u>such witnesses as the worker may wish to call.</u> (My emphasis)

(4) _____

(5) _____

(6) _____

29. The Appellant's counsel was emphatic that Section 53 of the Employment Act does not make it a requirement to call an employee to give oral testimony in their defence. On the face of it, Counsel is correct in that assertion. Nevertheless, whereas there is indeed no specific call for oral hearing, this does not in any way mean that that the section provides a one-size-fits all approach to a fair hearing. Whether dispensing with the oral testimony of the employee under investigation will not violate their right to a fair hearing is a question to be settled on a case to case basis.

30. In the matter before us, in a letter written by the Chief Executive Officer (CEO) dated 17th June and addressed to the Respondent, the latter was informed that "the incident (of the 14th June) was being investigated by ICS (the employer) and we would appreciate if you could send us, in writing, your statement." In a letter dated 19th June, the Respondent addressed her reply the CEO and stated thus:

    "On 17th June, I received a letter suspending me from employment and also accusing me of gesturing my index finger in Mr. Skerrett's face. I would like to formally deny this statement as a false accusation."

    One may argue, as indeed has been argued by Counsel for the Appellant, that the Respondent was offered an opportunity to defend herself in regard to the incident of the 14th June, albeit only in writing. But whereas the Respondent was on the face of it dismissed for her conduct on the 14th June, the minutes of the Disciplinary Committee reveal that the

discussion of the Respondent's conduct was extended beyond what happened on the said date. As a matter of fact, it was minuted that "her conduct on the 14th June was seen by the Committee as the last straw that broke the camel's back." And thus her dismissal. One cannot therefore argue that she was given an opportunity to defend herself against all the accusations that were used as a background to the conclusion that the 14th June conduct was but just the straw that broke the camel's back. The respondent was specifically asked for a statement regarding a particular incident and she limited her response to that which was asked of her. She could not defend herself against whatever else was said about her. She could not ask for answers from the two witnesses.

31. A comprehensive understanding of Section 53 of the Employment Act is that the employer is obligated to ensure that any investigation conducted is fair. The essence of the provision is to uphold principles of fairness by allowing the worker to present their case with necessary support to ensure a just and impartial inquiry. Specifically, it refers to the importance of providing the worker with the opportunity to have assistance from witnesses during the investigation process.

32. In my view, fairness may involve giving an opportunity to the employee to choose whether to limit participation in the investigation process to providing a written statement or to in addition, participate in an oral hearing where they can substantiate statements made in the written defence, provide additional information, and respond to questions. Denying the opportunity for oral testimony could be seen as limiting the employee's ability to fully and effectively present their side of the story.

33. In the present appeal, the record indicates that the Appellant's witnesses (Murray and the Chairman of the Board, Skerrett) were given an opportunity to present their case orally before the disciplinary committee. An oral hearing would have accorded the Respondent opportunity to cross-examine the Appellant's witnesses. She was not given that opportunity. Indeed, in arriving at its decision that the employer had failed to satisfy the court of the test of procedural fairness, the Supreme Court held as follows:

> It is clear from the evidence on record before the disciplinary committee that two witnesses gave evidence for the Respondent but the Appellant did not testify on her behalf nor was she called or present at the hearing, but she gave a statement denying the allegations after that she was informed in writing by a letter of suspension dated the 17th June 2019. Furthermore, Counsel for the Respondent admitted in Court that both Skerrett and Murray were present as board members at the hearing. … leaves this Court's mind further in doubt.
>
> In view of the above, it is clear that the said disciplinary committee in not calling the Appellant to be present at the disciplinary hearing whereby the employer chose to have one, breached the rules of natural Justice as regards to the Appellant. Had they called the Appellant, the Appellant would have been able to call witnesses on her behalf or cross examine the witnesses for the Respondent whilst being well within her rights if she was desirous to be assisted by another person in accordance with section 53 (3) of the employment Act. This Court finds that since the employer has failed to satisfy this Court of the test of procedural fairness since there was a breach of the rules of natural justice, this Court finds that the termination of the contract of employment of the Appellant by Respondent was unjustified.

34. In the addition to the above, we cannot ignore another irregularity pointed out to us by the Appellant's Counsel - both the Chief Executive Officer of the Appellant (Murray) and the Chairman of the Board (Skerrett) sat on the Disciplinary Committee. In effect they acted both as complainant and as juror of facts on that same committee. This anomaly too was referred to by the Supreme Court judge. The Respondent was entitled to be fairly "judged" by the Disciplinary Committee. The point of a disciplinary hearing is to enable members of the committee to weigh the evidence for and against the employee and to make an informed and considered decision. This presupposes that the individuals will have and keep an open mind throughout the proceedings. A reasonable apprehension of bias arises when individuals sit in judgement over matters concerning themselves and/or in matters in

respect of which they have prior personal knowledge or experience. This is what happened when Murray and Skerrett sat on the Disciplinary Committee.

35. I therefore hold that the Learned Trial Judge did not err in finding that the Appellant breached the rules of natural justice by not calling the Respondent before the disciplinary panel.

36. I also hold that the Learned Trial Judge did not err in his interpretation and application of Section 53(3) of the Employment Act.

37. Thus, grounds 2 and 3 of the appeal fail.

Conclusion and orders

38. 1. Since the appeal fails on all the grounds, it is hereby dismissed with costs to the Respondent.

2. Consequently, the judgment and orders of the Trial Judge are upheld. For clarity, the Trial Judge ordered that the matter be remitted to the Employment Tribunal for the purpose of computing the Respondent's employment benefits as a result of her unjustified dismissal.

Tibatemwa.

Dr. Lillian Tibatemwa-Ekirikubinza, JA.

I concur

Dr. M. Twomey-Woods, JA

I concur

F. Robinson, JA

~~7th Dec.2023.~~

Signed, dated and delivered at Ile du Port on 18 December 2023.