

**Isaac v Seychelles Marketing Board
(2004) SLR 70**

Wilby LUCAS for the Plaintiff
France BONTE for the Defendant

Ruling on the plea in limine litis delivered on 23 January 2004 by:

JUDDOO J: The Plaintiff seeks to recover from the Defendant moral damages for prejudice and loss suffered “which had not been remedied under (the) grievance procedure under the Employment Act”. In essence, the plea in limine litis raised on behalf of the Defendant is that the Plaintiff having been compensated under the Employment Act has no further claim for moral damages.

It is not disputed that the Plaintiff’s employment was terminated in February 2000 pertaining to an accusation of breach of trust. On 31 July 2000, the competent officer adjudicated the Plaintiff’s grievance and determined that the accusation of breach of trust against the Plaintiff had not been proved; that the termination of the Plaintiff’s employment was not justified and ordered that all her legal benefits be paid to her. The said determination was upheld on appeal. The Plaintiff avers that the basis of the alleged breach of trust was false and injurious to her character, credit and reputation and claims for moral damages from the Defendant.

On behalf of the Plaintiff, it is submitted that the remedy of the Plaintiff lies with the Supreme Court, not with the Ministry of Employment as they have no jurisdiction to entertain a claim for moral damages. Therefore, that is the reason why the Plaintiff decided to lodge a case before the Supreme Court. It is also submitted that the alleged breach of trust was a “false and malicious accusation (of theft) made against her” for which she is seeking remedy.

In general, misconduct leading to dismissal covers a wide range of behaviour including, inter alia, fighting, swearing, lateness, betting, incompetence, theft, neglect, dangerous or obstructive conduct, breach of safety rules, refusal to obey orders, breach of hygiene rules, insubordination, unauthorised absenteeism and lateness. In each case the employer is to consider the gravity of the offence, its effect on the employment generally and the previous history of the employee. With regard to a charge of theft, in *Selwyn’s Law of Employment*, 3rd Edn, para 8-102, 8-103, the author states:

If an employee has committed an act of theft, it is for the management to decide what should be done in the circumstances of the case and provided a fair procedure is adopted, the eventual decision is for the management...

It would place an unreasonable burden on employers if they could not dismiss employees who have stolen property which had been entrusted to their care...

Nor need the employers prove that an offence has been committed beyond reasonable doubt, for this would impose on them a higher commitment that would even be possible to fulfil (*British House Stores v Burshell*)...

The fact that an employer faces criminal charges, and is acquitted on those charges, is also irrelevant to the issue of fairness of the dismissal.

Similarly, in *Employment Law*, BA Hepple, 3rd Edn, P259, the author states:

When considering the reasonableness of a dismissal for felonies such as dishonesty and theft... the following guidelines seem to emerge:

- (1) The employer must show the genuineness of his belief that the offence was committed.
- (2) The employer must show that at the time of his dismissal, he had in mind reasonable grounds upon which to sustain that belief. It matters not that in a criminal Court, the suspected offence was in fact not committed...
- (3) The employer must show that, having formed a preliminary view, he carried out as much investigation as was reasonable in the circumstances.

In the light of the above, where the reason for termination is breach of trust based upon an allegation of theft or dishonesty, it falls upon the employer within the contractual relationship that govern the parties to decide whether on the basis of the alleged dishonesty or theft, taking into account all the circumstances of the case and its effect on the employees generally, the alleged misconduct would result in dismissal.

Where the employer proceeds with dismissal, it falls upon the employee who is aggrieved to initiate the grievance procedure and seek remedy under the Employment Act 1995.

In *Antoine Rosette v ULC* (SCA 16 of 1994) Ayoola J.A. held:

The whole tenor of the Employment Act is to fully define the rights and liabilities of parties to a contract of employment upon termination of such contract in the provision of the Act without recourse to the provision of the Civil Code of Seychelles, Common Law, or any other law...It seems both reasonable and just that the Act having made adequate provisions for compensation and dealing with cases of unjustified termination of contracts of employment, would take away the jurisdiction of the Court to determine those same questions arising from an unjustified termination or indeed touching on whether or not there has been an unjustified

termination...

With regard to claims falling outside the ambit of the Employment Act, the learned Justice of Appeal added:

However, if in the course of terminating a contract the employer committed a delict, such for instance, as libel or assault, that act which amounted to a delict would be a separate cause of action apart from the unjustified termination...

It is settled from the above, that for a delict to be actionable as a separate cause of action it must not be one which raises "the same questions arising from an unjustified termination or indeed touching on whether or not there has been an unjustified termination". Delictual actions constituting a separate cause of action apart from or not touching upon the unjustifiable termination arose in several decisions of this Court including:

- (i) *Rosalie v Bodco Ltd* CS193 of 1997 where the Court held that the failure of an employer to comply with an order made by the competent officer and the Minister to reinstate him constituted a faute under Article 1382 of the Civil Code.
- (ii) *Elizabeth v SPTC* CS157 of 1997 where the Court found that failure to amend a certificate of conduct by the employer was an error of conduct which constituted a faute under Article 1382. The decision was affirmed on appeal CA.
- (iii) *Philo v Pension Bel Air* CS70 of 1998 where the Court found that the failure by the employer to pay statutory benefits to the Plaintiff under the Employment Act could amount to a faute under the Civil Code.

In the above instances the Court stressed the fact that the cause of action was "considered as being separate from matters relating to the contract or arising 'outside the provisions of the Employment Act'".

In the present case, the allegation of theft or dishonesty forms the basis of the unjustified termination for which remedy has been sought and obtained under the Employment Act. It does not constitute a delict which could support a "separate cause of action apart from the unjustifiable termination".

In these circumstances, the plea in limine is upheld.

Record: Civil Side No 78 of 2002