IN THE SUPREME COURT OF SEYCHELLES

Compagnie Des Isle
Trading as L'Archipel Hotel
Of Anse Gouvernment,
Praslin **Petitioner**

Vs

Minister for Employment and Social Affairs
Represented by the Attorney General of
National house, Victoria **Respondent**

Civil Side No: 53 of 2002

Mr. M. Vidot for the petitioner
Mr. G. Dodin for the respondent

D. Karunakaran, J

JUDGMENT

This is a petition for judicial review of an executive decision. The petitioner in this matter has invoked the supervisory jurisdiction of the Court, seeking *a writ of certiorari* to quash the decision of the respondent namely, the Minister for Employment and Social Affairs, dated 17th of December 2001 made under the provisions of the Employment Act, 1995 hereinafter referred to as the "Act".

The petitioner, hereinafter referred to as the "employer" is a company, engaged in the business of hotelier. It is operating a hotel by name Hotel L' Archipel at Anse Gouvernment, Praslin. It is not in dispute that since August 2000 the petitioner had employed one Mr. Sheldon Duval, hereinafter called the "*worker"* as a senior cook at the Hotel L' Archipel. In April 2001, the employer terminated the worker's contract of employment alleging that the worker had failed to come to work over and above his normal working hours in that, he was absent from work without justification, which is a serious disciplinary offence pursuant to section 57(4) of the Act. The worker denied the allegation. As a result, a dispute arose between the worker and the employer over the termination.

The aggrieved worker registered a complaint with the competent officer of the Ministry of Employment and Social Affairs and initiated the grievance procedure against the employer in terms of section 61(1) (ii) of the Act. The competent officer, after holding a due inquiry into the grievance concluded that the allegation made by the employer that the worker had failed to come to work over and above his normal working hours was not valid. According to the competent officer, the worker was right in refusing to work any more overtime as the employer had not paid him for the overtime work for several months. Therefore, the competent officer determined that the said termination of the worker's employment by the employer was not justified. However, the competent officer allowed the termination in terms of section 61(2) (a) (iii) of the Act, as he presumably found that it was impractical and inconvenient for the employer to reinstate the worker in his post or offer him other suitable employment. The competent officer, having thus allowed the termination, directed the employer to pay the legal benefits in the sum of Rs 5, 590-39 to the worker as detailed below:-

• One month's notice	SR 4500-00
• 8 days compensation for length of service	SR 1384-62
	SR 5884-62
Less 5% Social Security	SR 294-23
Net to be paid	**SR 5590-39**

The competent officer accordingly, conveyed his determination to both parties through a letter dated 30th of July 2001. The employer being dissatisfied with the said determination of the competent officer appealed against it to the Minister *(MESA),* the respondent herein. After having consultation with the Employment Advisory Board as provided by the Act and considering the facts of the case, the Minister dealt with the appeal and `decided the case on its merits. In his decision on the appeal dated 17th December 2001, the Minister upheld the finding of the competent officer. The Minister also found that the termination of the worker's contract of employment was not justified and held that:

- *On the basis of evidence, it has been established that Mr. Duval had been working from August 2000 up to April 2001, at an average of 12 hours per day with no overtime paid during that time.*
- *Mr. Duval was right to refuse to work any more overtime in view that he had not been paid for several months.*
- *the Employer should pay the total sum of Rs.33, 837-10 to the worker, being his terminal benefits inclusive of his salary due for the period of 1374 hours overtime the worker performed from August 2000- April 2001.*

Being dissatisfied with the above decision of the respondent, the worker has now come before this Court with the instant petition, seeking the writ first above mentioned. The petitioner challenges herein the decision of the Minister on the following grounds:

(i) *There is no sufficient evidence to establish that the worker was working in excess of the number of hours prescribed by the Employment Act 1995. Furthermore, in any case the worker was not entitled to overtime as provided under the Employment Act in view of the salary he was earning.*

(ii) *The decision of the respondent is unjust, unreasonable, irrational and inconsistent with the facts of the case.*

In short, it is the submission of the petitioner's counsel Mr. Vidot that the worker did not work overtime. There was no evidence before the respondent to show that the worker was entitled to any overtime. Further, the counsel submitted that in any event, since the worker was earning a salary of RS 4,500/- per month, which exceeds the sum RS4100/- per month, he is not entitled to any overtime payments in terms of Regulation 6 (3) under the Act. Hence, the petitioner contends that the decision of the respondent is not based on evidence nor has the respondent given due consideration to the Regulation in this respect. Therefore, according to the petitioner the decision of the respondent is ultra virus, null and void. Moreover, the petitioner claims that the worker was in breach of the contract of employment as he had already quit the job even before he was given the termination letter. In the circumstances, Mr. Vidot submitted that the termination of the worker was justified. The respondent has failed to appreciate the facts and apply the

relevant provision of the law and so has arrived at a wrong decision in this matter. Hence, the petitioner prays this Court to quash the impugned decision of the respondent and grant the writ accordingly.

On the other side, the learned counsel for the respondent Mr. Dodin contended that the decision of the respondent was correct and based on evidence and law. According to the respondent, he was correct in concluding that the worker was entitled to overtime- pay, because the petitioner, on whom the burden of proof lies, failed to adduce any evidence to support its case. Moreover, the petitioner has clearly admitted on record before the competent officer that the worker had been working more than 60 hours a week. Hence, the worker was right in refusing to work any more overtime in view of the fact that he had not been paid overtime for several months. Therefore, as regards the first ground of challenge Mr. Dodin submitted that there was sufficient evidence before the respondent to rely and act upon, which he did and rightly determined that the termination was not justified. Hence, he directed the petitioner to pay the worker for the overtime he had performed during the relevant period. In the circumstances, Mr. Dodin contended that the first ground of challenge is unfounded, contrary to the evidence on record and so devoid of merit.

As regards the second ground of challenge, the respondent contends that the decision in question is just, reasonable, rational and well considered in the light of the given circumstances of the case. According to the learned counsel Mr. Dodin, the decision of the respondent is not only consistent with the facts on record but also made in accordance with the Act. Therefore, the counsel urged the Court to dismiss the petition in its entirety.

I meticulously scrutinized the entire record of the proceedings before the Competent Officer as well as the Employment Advisory Board of the Ministry of Employment and Social Affairs. I carefully perused all the documentary evidence adduced by the parties in those proceedings. I gave diligent thought to the submissions of the counsel on both sides.

With regard to the first ground of challenge, it is evident from the undisputed statement of the worker dated 26th of April 2001- vide Folio 2 of the record of the proceedings in exhibit P1- that he had been working overtime at least 4 hours per day over and above the normal hours of work during the period from August 2000 to April 2001. Moreover, the appellant did not adduce any evidence and has failed to discharge his

burden as required under section 53 (5) of the Act to establish the terms and conditions of the contract of employment and that of the overtime. In the absence of any other evidence to the contrary, the respondent has rightly relied and acted upon the evidence of the worker in order to determine the terms of employment and overtime payments. The decision in question therefore, cannot be faulted in this respect and so I find. As regards the issue as to payment for overtime, I note, Regulation 6 (3) of S. I 34 of 1991 as amended by S. I 3 of 2000, made under the Act, reads as follows:

> *"Except under and in accordance with the contract of employment, sub-regulation (2) shall not apply to a worker in receipt of a wage exceeding R4100.00 per month"*

It is true that Regulation 6 (3) above states as a general rule that a worker, who is earning more than Rs4100.00 per month is not entitled to overtime payment as prescribed under Regulation 6(2) thereof. However, this rule is obviously, subject to an exception in that, it shall not apply, when there is a contract of employment between the parties stipulating terms as to overtime payments notwithstanding the amount of wage drawn by the worker. In such cases, the contractual terms agreed upon by the parties as to payment of overtime shall prevail and apply, not the Regulation 6(2) and (3) made under the Act. In the present case, although the worker had been earning Rs4500.00 per month, the case clearly, falls under exception to the said rule, as there has been uncontroverted evidence before the respondent to establish a verbal agreement between the parties as to overtime payments. All agreements lawfully concluded shall have the force of law for those who have entered into them **vide Article 1134 of the Civil Code of Seychelles**. In the circumstances, I find that the respondent has applied the relevant law to the facts of the case and has awarded overtime payment to the worker based on evidence on record. With due respect to the views of the appellant's counsel, his argument that the worker is not entitled to overtime in view of the quantum of salary he was earning, does not appeal to me in the least as such argument is based on a misinterpretation of Regulation 6 (3) supra disregarding the built-in exception clause.

In determining the reasonableness of a decision one has to invariably go into its merits, as formulated in ***Associated Provincial Picture Houses V Wednesbury Corporation [1948] 1 KB 223***. Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merit and legality of the decision in such cases are intertwined. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a

thing; it is one outside the limit of reason. Bearing these principles in mind, I went through the entire record of the proceedings before the competent officer and the Employment Advisory Board. In fact, the respondent has made his decision after having consultation with the Employment Advisory Board as contemplated by the Act. Having considered all the facts and circumstances of the case on hand, I find the respondent's decision herein reasonable, rational and consistent with the evidence on record. Besides, it has been made in accordance with the Regulations under the Act. Hence, I decline to issue the writ sought by the petitioner in this matter.

In the final analysis, I find the petition is utterly without merit. It is accordingly, dismissed. I make no order as to costs.

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D. Karunakaran

Judge

Dated this 9th day of February 2004