1

IN THE SUPREME COURT OF SEYCHELLES

Cap Lazare
Herein represented by its

General Manager Mrs. A. Albert **Petitioner**

Vs

Ministry of Employment and Social Affairs of

Herein represented by Minister Marie-Pierre Lloyd

Of Victoria House, Victoria
Respondent

Civil Side 18 of 2008

==========

Mr. F. Bonte for the petitioner

Ms. E. Carollus for the respondent

D. Karunakaran, J.

JUDGMENT

The petitioner in this matter seeks this Court for a writ of *certiorari to* quash the decision of the Respondent - the Minister for Employment and Social Affairs - dated 23rd November 2007, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by article 125(1) (c) of the Constitution.

At all material times, the Petitioner was and is an hotelier running restaurant business. From November 2005 to August 2006, the Petitioner - hereinafter referred to as the "employer" - had employed one Mr. Godfrey Barrack - hereinafter referred to as the "worker" - as Pastry Cook. Consequent upon an allegation involving *a serious disciplinary offence* made against the worker, the petitioner on the 9th August 2006 terminated his employment without notice and without paying his salary dues and other legal benefits payable upon such termination. Hence, the worker initiated the "grievance procedure" before the Competent Officer of the Ministry of Employment, under the provisions of the Employment Act, 1995 - hereinafter referred to as the Act - alleging that the termination was unjustified. Upon conclusion of the said "grievance procedure", the Competent Officer, in his determination- vide his letter dated 1st June 2007- held thus:

> "Following the review of the above case, it has been determined that on the basis of evidence the applicant (worker) did not self-terminate his contract of employment, rather terminated by the employer. Since the respondent has not brought forth any evidence of a serious disciplinary offence having been committed by the applicant (worker), the competent officer has therefore,

determined that the termination of the applicant's contract of employment was not justified in accordance with Section 61 (2) (a)(iii) of the Employment act,1995.

The applicant is therefore, entitled to be paid the following up to 27*th* *October 2006 the date considered as the lawful termination:-*

- *One month's notice*
  Rs. 3,700.00

- *Salary from 9th August 2006 up to*
  27th October 2006
  Rs.11100.00

19.25 days accrued leave
Rs.2341.64

Total

Rs.18707.02

Less 5% social security
(Rs. 935.35)

Balance to be paid

Rs.17771.66

The employer being aggrieved by the said determination of the Competent Officer appealed against it to the Respondent, the Minister for Employment, in terms of Section 65 of the Employment Act. After having consultation with the Employment Advisory Board (EAB) that heard the appeal, the Minister in her Ruling dated 23rd November 2007, dismissed the said appeal, confirmed the determination of the Competent Officer and directed the petitioner to pay the sum Rs.17771.66 to the worker.

The employer, being dissatisfied with the said Ruling of the Minister - hereinafter called the *"impugned ruling"*, has now come before this Court for a *"Judicial Review"* of it, alleging that the said "Ruling" is unfair, unjust and unreasonable.

Before proceeding further, I should mention here that on a careful perusal of the pleadings in the petition and the written submission filed by Mr. Bonte - learned counsel for the petitioner - it seems to me that there is an inconsistency on a material fact as pleaded in the petition and his submission on that point. Indeed, the petitioner in paragraph 4 of the petition as well as in the accompanying affidavit has pleaded and made averments thus:

> "The petitioner appealed to (sic) the above decision and on the basis of evidence, the Respondent (the Minister) ruled that the termination of Godfrey Barrack's contract of employment ***was justified*** *(sic) and the decision of the Competent Officer was upheld"*

If the above averments are true and correct, with due respect to Mr. Bonte, there cannot possibly be any grievance for the petitioner, since the ruling in question, has been given in support of petitioner's case upholding the determination of the Competent Officer in that, the termination of the worker's contract of employment ***was justified*****.** However, contrary to the said pleading, Mr. Bonte has contended in his written submission dated 21st January 2009, to the effect that the *impugned ruling* has been given by the respondent against the petitioner upholding the determination of the Competent Officer in that, the termination of the worker's contract of employment ***was not justified.*** It seems, this inconsistency emanates presumably, from a genuine mistake that has occurred in the pleading of facts under paragraph 4 of the petition. For the ends of justice, I will eschew this inconsistency in the pleadings and proceed to examine the merits of the petitioner's case based on the written submission filed by the petitioner's counsel, as it correctly reflects the version of fact found on the records on the Ministry.

On the other side, the respondent having denied the allegations made in the petition, has raised a *plea in limine litis* on a point of procedural law contending that:

(i) *The affidavit accompanying the petition is not a proper affidavit as it has been sworn by the attorney for the petitioner; and*

The petition discloses no reasonable cause of action and shows no grounds for quashing the respondent's decision.

On the merits, according to the respondent, the decision of the Minister is neither unfair nor unreasonable. The Minister has reached a reasonable decision within her power and in accordance with law, which any other reasonable Tribunal could have reached in the given matrix of facts and circumstances surrounding the instant case. Hence, the respondent seeks a dismissal of the instant petition.

The background facts that led to the employment dispute are these:

According to Mr. Annick Albert, the petitioner's representative on the 9th August 2006, whilst the worker was on duty, as she was entering the kitchen she noticed that the worker was preparing only a small bowl of food for a group of 40 clients. She asked the worker why he was preparing

7

only a small amount of food. The worker did not reply. Later, the worker threw a colander at her and then he placed a kitchen towel in the casserole of curry. The worker also removed his apron and threw it at her. The worker then went to sit outside the kitchen. She then told him to go away if he did not want to work. The worker went away and did not return to work the following day. The worker never asked for a termination letter. Moreover, Mrs. Albert stated that the employer had previously issued two warning letters to the worker.

On the other hand, according to the worker, his contract was terminated by the employer without being issued a letter of termination, even though he insisted that he should be issued with one. However, he was told by the employer's representative that his termination letter would be sent to the Ministry of Employment, but that never happened. Since the worker was the only person working in the kitchen, he was working under a lot of pressure and the employer's representative used to develop arguments with him. On that particular day of incident, the worker avoided arguments with the employer's representative by ignoring her but she still persisted and asked him to get out of the kitchen. Therefore, he gave her the chop-board and he went outside. Again, she came outside and told the worker to leave the employer's compound. He therefore, had to leave the compound and reported the matter to the Ministry of Employment. Moreover, the worker denied the allegation of putting kitchen towel in the casserole of curry and throwing the colander at the employer's representative.

Having considered the above facts, the competent officer came to the following conclusion:

(a) If the worker had indeed, committed a serious disciplinary offence, the employer should have issued him with a termination letter.

The employer did not at any time issue the worker any letter acknowledging his self-termination, if the latter had really, self-terminated his employment.

Admittedly, the employer's representative told the worker to go home since the worker allegedly placed a dirty towel in the pot of curry and then she expected the worker to return to work the following day.

It is more probable than not, the employer did terminate the worker's contract of employment since the employer's representative stated that the worker had committed a serious disciplinary offence and the employer could not tolerate such a behavior in their company's premises.

(b) The employer has failed to prove that the worker committed a *serious disciplinary offence* before the competent officer and no investigation was carried out by the respondent as required under Section 53(1) of the Employment Act 1995.

The worker is therefore entitled to be paid all his legal benefits up to 27th October 2006 in accordance with Schedule I Part II 5(3) of the Employment Act 1995.

(c) The worker had 15. 75 days accrued leave with the employer.

9

In the circumstances, the worker did not self-terminate his contract of employment; rather he was terminated by the employer.

(d) Since the employer has not brought forth any evidence of a disciplinary offence being committed by the worker, the termination of the worker's contract of employment by the employer was ***not justified.***

The essence of Mr. Bonte's submission on the merits is that the *impugned ruling* is *unfair, unjust* and *unreasonable* because the Minister, in the absence of any evidence and without giving proper consideration to the proceedings before the competent officer, has upheld the determination of the competent officer stating that the termination was ***not justified***. Moreover, it is the submission of Mr. Bonte that the affidavit accompanying the petition in this matter though sworn by its Attorney, it is a proper affidavit since the Attorney was privy to and had been involved through all the stages of the proceedings before the Ministry and as such had personal knowledge of all the facts that transpired throughout that proceeding. In the alternative, Mr. Bonte submitted that if the Court finds that the affidavit is improper or defective, then he prayed the court to use its discretion judicially, and grant time for the petitioner to file a fresh affidavit to rectify such defect, if any.

Furthermore, Mr. F. Bonte submitted that the termination of the

worker from employment is justified since the acts and conducts of the worker in the entire episode as they appear on record, such as *throwing a colander at his employer's representative*, *throwing apron etc*. evidently constitute a *disciplinary offence* under the Act. Hence, the decision of the Minister stating that the employer failed to prove any disciplinary offence against the worker is erroneous, as it is contrary to law and evidence on record. Moreover, Mr. Bonte contented that the decision of the Minister is unreasonable since she has failed to give due consideration to the entire circumstances surrounding the commission of the disciplinary offences by the worker and has awarded compensation without evidence to substantiate the alleged unlawful termination.

For these reasons, according to the petitioner, the Ruling of the Minister dated 23rd November 2007, is unfair and unreasonable. Therefore, the petitioner seeks the Court for a writ of *certiorari* to quash the said Ruling and render justice.

After meticulously perusing the records of the proceedings before the Ministry of Employment, I analysed the arguments advanced by both counsel touching on points of law as well as facts.

First of all, I will proceed to examine the ***plea in limine litis*** raised by the respondent on the issues pertaining to the ***affidavit of counsel*** and the alleged ***non-disclosure of cause of action***. In fact, ***Rule 2 (1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rule 1995*** - hereinafter called the ***"Rules of the Court"*** - stipulates

thus:

> "An application to the Supreme Court for the purposes of Rule 1(2), shall be made by petition accompanied by an affidavit in support of the averments set out in the petition"

Needless to say, an affidavit is a declaration on oath, reduced to writing, affirmed or sworn to by a deponent, before some person who has authority in law to administer oath and also attested by the latter. Indeed, an affidavit is nothing but a form of evidence on oath. However, the weight and the credibility of such affidavit-evidence are **questionable** or to say the least, whose veracity is ***untested*** as the averments made therein were not subjected to cross-examination. Be that as it may, the Rule supra obviously contemplates that the accompanying affidavit should be ***in support of the averments set out in the petition.*** In a particular case, if circumstances so dictate, the deponent of the accompanying affidavit may be called upon as a witness to stand cross-examination by the opponent. Hence, the competent and best person with personal knowledge, who will be able to depone as a witness to the averments made in the petition is evidently, the petitioner, not his counsel or attorney, who is after all retained for services and could be changed by the petitioner at any stage of the proceeding. Therefore, it goes without saying, that the affidavit that accompanies the petition as a rule should be deponed by the petitioner. It is truism that an attorney or counsel in his capacity as such, might have acquired personal knowledge of certain facts required to be proved in a case, in which he appears as attorney/counsel for a client; this knowledge in my view, cannot qualify him to change his role and become a witness to testify or to depone an affidavit on behalf of his client to evidence those facts.

Hence, it is neither proper nor desirable for a person, who appears as counsel or attorney for the petitioner to depone the affidavit, which is required to accompany the petition in terms of ***Rule 2 (1)*** of the Rules of the Court and so I find. In the present case, however, there is a procedural impropriety in the affidavit since the attorney himself has deponed that affidavit in support of the averments made in the petition. However, in this particular case, it appears to me that such impropriety would be more of technical in nature rather than prejudicial to the other side. In any event, as I see it, change of deponent in the instant case, may not change the substance of those facts contained in the affidavit. Hence, in the interest of justice and having given due consideration to the entire circumstances of this particular case, I move on to examine the other issue as to ***"cause of action"*** eschewing the said impropriety but not condoning it.

It is important in matters of judicial review that the grounds of challenge, which indeed, constitute "the cause of action", should be specifically and clearly pleaded in the petition. This is axiomatic from rule 3(b) of the Rules of the Court, which reads thus:

> "The petition under Rule 2 shall contain a statement of-
> *the relief sought and the grounds upon which it is sought"*

What are then, the ***grounds of challenge*** to be pleaded in a petition for a judicial review? The principle ***Lord Diplock*** propounded in the case of ***Council of Civil Service Union Vs. Minister for the Civil Service (1985) AC p374*** gives a valuable guidance to all concerned in this respect. His Lordship therein divided the grounds of challenge into three categories namely, (i) ***illegality*** (ii) ***irrationality*** or ***unreasonableness*** and (iii) ***procedural impropriety***. In my considered view, in any petition for judicial review, the pleading

therein should disclose at least any one or more of the said three categories of grounds identified by ***Lord Diplock***. In the instant petition, the petitioner has pleaded in paragraph 5 thus:

"The petitioner avers that the Respondent's decision is unfair and unjust"

Although the vague expression ***"unfair and unjust"*** used herein by the petitioner does not constitute in form any of the said three categories named by ***Lord Diplock*** supra, I believe, the meaning of this expression in substance, constitute the category of ***irrationality or unreasonableness*** , since one cannot divorce "***unreasonableness"*** from an ***unjust and unfair*** act. As I see it, their meanings are intertwined. In any event, the pleadings in the instant petition with due respect to counsel, should have been better worded using the apt, simple and unequivocal legal terms required to constitute the relevant "grounds of challenge" rather than shifting the burden on the court to embark on a voyage in order to discover the meaning of those expressions. In the circumstance, I find that the petition does disclose a valid *ground of challenge* though latent under paragraph 4, which indeed, constitutes a *"reasonable cause of action"* in this matter.

I will now move on to examine the merits of the case in the light of the record of the proceedings held before the ministerial authorities and the submission made by counsel on both sides. To my mind, two fundamental questions arise for determination in this case. They are:

(1) *Is the decision of the Minister illegal, when she upheld the findings of the competent officer that the employer did not adduce evidence (i) to prove that the worker committed a serious disciplinary*

offence under the Act and (ii) to prove that the worker self-terminated his contract of employment? And

(2) *Is the decision of the Minister upholding the determination of the Competent Officer in this matter, unreasonable having regard to all the circumstances of the case?*

Firstly, I would like to restate herein what I have stated before in ***Cousine Island Company Ltd Vs Mr. William Herminie, Minister for Employment and Social Affairs and Others - Civil Side No. 248 of 2000.*** Whatever is the nature of issue factual or legal that may arise for determination following the arguments advanced by counsel, the fact remains that this Court is not sitting on appeal to examine the facts and merits of the case heard by the Competent Officer or by the Minister on appeal. Indeed, the ***system of judicial review*** is radically different from the ***system of appeals***. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the Court is concerned only with the ***"legality", "rationality" (reasonableness)*** and ***"propriety"*** of the decision in question ***vide the landmark dictum of Lord Diplock in Council of Civil Service Union vide supra..*** On an appeal the question is "right or wrong"? - Whereas on a judicial review the question is "lawful or unlawful?" or "reasonable" or "unreasonable"? - Or rational or irrational? - Or procedurally proper or improper?

On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the court may without much ado determine the issue of “legality” of any administrative decision, which indeed, includes the issue whether the decision-maker had acted in accordance with law, by applying the *litmus test,* based on *an objective assessment* of the facts involved in the case. On the contrary, the entity of “fairness” or “reasonableness” cannot be defined, ascertained and brought within the parameters of law; there is no *litmus test* to apply, for it requires *a subjective assessment* of the entire facts and circumstances of the case under consideration and such assessment ought to be made applying the yardstick of human reasoning and rationale.

Since, the first question (supra) involves the issue of “legality” of the impugned decision one should examine what constitutes a ***serious disciplinary offence*** under the Act and what does not. And, whether the employer adduced sufficient evidence to prove that the worker committed a ***serious disciplinary offence;*** whether the employer carried out any investigation into the alleged incident pursuant to section 53(1) of the Act; whether the employer informed the worker in writing of the nature of the offence as soon as possible after it is alleged to have been committed pursuant to section 53 (2) of the Act. Have all these been considered and rightly applied by the Minister in her decision of the case?

The starting point in this exercise is the interpretation of the words used in the particular section of the Act, which empowers the employer to terminate a worker without notice. In this regard, *Section 57 (4) of the Act* reads thus:

> "Notwithstanding section 47, an employer may terminate a contract of employment without notice where the worker has committed a serious disciplinary offence within the meaning of that expression in section 52(2)"

Section 52 (2) of the Act inter alia, defines the "serious disciplinary offence" thus:

> "Any-
>
> (a) *Disciplinary offence listed in Part II of Schedule 2 and*
>
> *Minor disciplinary offence, which is preceded by 2 or more disciplinary offences, whether of the same nature or not, in respect of which some disciplinary measure has been taken, is a serious disciplinary offence"*

Part II of Schedule 2 paragraphs (c) and (l) which are relevant to the instant case reads thus:

> "A worker commits a serious disciplinary offence, whenever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, inter alia, where the worker-
>
> *(c) Fails repeatedly to obey reasonable orders or instructions given by the employer or*

representative of the employer;

(l) shows lack of respect to insults or threatens a client of the employer or another worker whether it be a superior, a subordinate or a colleague"

In the proceedings below, the Minister has obviously, examined the facts of the case in the light of the above provisions of law and has come to the right conclusion since the alleged conduct of the defendant did not satisfy and fall within the legal definition of "*serious disciplinary offence"* stipulated in the Act for lack of evidence and so I find.

It is also pertinent to note, Section 53(1) of the Act reads thus:

> "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"

Obviously, employer did not adduce any evidence to show that the alleged incident was investigated into or that the worker was given opportunity of being heard before resorting to the measure of termination.

Section 53(2) states that:

> "Where the disciplinary offence relates to a serious disciplinary offence, the worker shall be informed in writing with copy to the Union, if any, of the nature of the offence as soon as possible after it

> is alleged to have been committed and of the suspension of the worker, where the employer deems suspension to be necessary as a precautionary measure or for investigative purposes.

Obviously, the employer did not inform either the worker or the Union as required in Section 53(2) supra. In any event, there is no evidence at all on record to substantiate the allegation of a *serious disciplinary offence, which warranted a termination without notice.*

Whereas Section 53(4) states that:

> "Where a disciplinary offence is established, the employer shall decide on the disciplinary measure to be taken and, where such measure is termination without notice, shall inform the worker of the same in writing with copy to the Union, if any"

If the employer had indeed, decided *on the disciplinary measure and* had terminated the worker without notice, then the employer is duty-bound to *inform the worker of the same in writing.* The employer never did comply with any of those requirements in law in order to validate a termination for a serious disciplinary offence. In any event, the employer never adduced any evidence as to compliance of those requirements. In the circumstances, I hold that the decision of the Minister cannot be faulted in this respect, when she upheld the findings of the competent officer that the employer did not adduce evidence (i) to prove that the worker committed a serious disciplinary offence under the Act; and (ii) to prove that the worker self-terminated his contract of employment. Hence, I find the answer to the first fundamental question in the negative.

I will now, turn to the second issue as to ***"reasonableness"*** of the decision in question. What is the test the Court should apply in determining the reasonableness of the impugned decision in matters of judicial review?

In order to determine the issue as to *reasonableness of a decision* one has to invariably go into its merits, as formulated in ***Associated Provincial Picture Houses V Wednessbury 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 merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. 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 (Michael Molan, Administrative Law, 3 Edition, 2001). Applying this test, as I see it, the court has to examine whether the decision in question is unreasonable or not.

At the same time, here one should be cautious in that, the "Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal

where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer." ***Per Lord Fraser Re Amin [1983] 2 All E R 864 at 868.***

In determining the issue of reasonableness of the decision in the present case, the court has to make *a subjective assessment* of the entire facts and circumstances of the case and consider whether the decision of the Minister is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account ***per Lord Green in Cumming Vs. Jansen (1942) 2 All ELR at p656.***

In my considered view, the Minister in her decision has rightly considered the evidence on record and the relevant facts and circumstances of the case in arriving at her decision. Obviously, the petitioner's contention to the contrary, stating that she has acted unreasonably and without evidence is highly farfetched. Hence, the submission of the petitioner's counsel that the Minister acted without evidence did not appeal to me in the least.

In any event, in the absence of any evidence to prove the alleged ***serious disciplinary offence*** and the alleged ***self-termination*** by the worker it is indeed, reasonable for any adjudicating authority to arrive at the conclusion, which the ***competent officer*** and subsequently the ***Minister*** arrived at, in their respective consideration and determination of the case.

For the reasons stated hereinbefore, I hold that that the "Ruling" of the Minister dated 23rd November 2007 in this matter, is neither *illegal* nor *unreasonable.* Therefore, I decline to grant the *writ of certiorari* and dismiss the petition accordingly. I make no orders as to costs.

……..

D. Karunakaran

Judge

Dated this 30th day of March 2009