

IN THE SUPREME COURT OF SEYCHELLES

GREG JACQUES

APPLICANT

VERSUS

MINISTER OF EMPLOYMENT & HUMAN
RESOURCES DEVELOPMENTRESPONDENTCivil Side No 289 of 2008

.....

Mr. A. Derjacques for the Applicant
Mr. Labonte for the Respondent

RULING**B. Renaud J**

In the instant case the Applicant Mr. Greg Jacques, referred to as the Petitioner was at all material times employed as a Chainman G5, with the Property Management Corporation (The Corporation) since the 1st of October 2004, earning a salary of SR2,525.00 per month.

On the **13th July, 2005**, during the course of his duties with the Respondent, the Petitioner was physically **injured**, in a vehicle rented by the Respondent, driven by the Respondent's employee, and thereby rendered totally incapacitated through traumatic tetraplegia, pulmonary contusion and medullar shock.

The Petitioner received his full salary from the Corporation up to 31st December 2005 and he was thereafter referred to Social Security Fund, but he was however retained in employment.

By letter dated **15th October, 2007** the Petitioner's employment contract was formally **terminated** by the Corporation and that termination was **backdated to 14th August, 2007**. The Petitioner did not receive a **salary from the Corporation for the period 1st January 2006 to 15th October 2007**.

After the Petitioner lodged his claim with the Respondent's Ministry, a meeting was set for **10th December 2007** per grievance case Rev/183/07, and the Petitioner was invited to attend a hearing before the Competent Officer regarding his claim for unpaid salaries for the period January 2006 to October 2007.

On **25th March 2008** the **Competent Officer** acting under the Employment Act **ruled** that the Petitioner's **employment contract was frustrated** in accordance with **section 12(5) of the SI 34 of 1991** since the Petitioner was unable to resume duty after he had exhausted his period of unpaid sick leave. The Competent Officer ruled that the Petitioner was therefore not entitled to salaries for that period he had claimed as the Petitioner was on unpaid sick leave and had been referred to the Social Security Fund.

The Petitioner appealed to the Respondent (Minister) against the said decision of the Competent Officer and the Minister by letter on her behalf dated 10th September, 2008 upheld the determination of the Competent Officer. The reason given by the Minister in support of her decision was that –

"It has been established on the basis of evidence that the contract of employment of the Appellant has been frustrated in accordance with Section 12(5) of S.I. 34 of 1991 since the Appellant was unable to resume duty after he had exhausted his period of unpaid sick leave.

The Minister has therefore ruled that the Appellant is not entitled to his claim of salary from 1st January 2006 up to 15th October 2007 since he was on unpaid sick leave and he had been referred to the Social Security Fund”

The Petitioner averred that the decision of the Competent Officer and the decision of the Minister upon appealed, was unlawful, contrary to Employment Act and therefore *ultra vires*, null and void for the following reasons:

(a) Petitioner’s employment contract with the Respondent was terminated only on the 15th of October 2007, in writing, and back dated to the 14th of August, 2007.

The Petitioner was awarded 1 month’s salary in lieu of notice, annual leave up to the 14th of August 2007 and compensation up to the 14th August 2007.

(b) The Petitioner as an employee until the 15th October, 2007 or 14th August 2007 was entitled to a salary.

(c) The Respondent did not exercise its option or right to terminate Petitioner’s employment contract in January 2006 when he was referred to the Social Security Division, until the 15th October, 2007.

(d) Petitioner did not frustrate his employment contract as he was injured during the course of his duties with Respondent, by Respondent’s servants and employees, and was totally incapacitated and paralysed.

- (e) As an employee until the 15th October 2007, the Petitioner was entitled to all employee's benefits including a salary.

The Petitioner is now praying for this Court to issue a Writ of Certiorari quashing the decision of the Competent Officer and the Minister and further an Order to compel the said salary be paid in the monthly sum of SR2,525.00 from 1st January 2006 to 15th of October, 2007, to the Petitioner, and interest and costs.

The Respondent objected to paragraph 7 of the pleadings of the Petitioner and averred that the decision was lawful in that:

- (i) Although the employment contract of the Petitioner was officially terminated in writing on the 14th August 2007, the Petitioner had been from 1st January 2006 to 13th August 2007 on unpaid sick leave and was drawing benefits from Social Security Fund.
- (ii) As the employment of the Petitioner terminated on 14th August 2007 he was entitled to compensation for past period of service up to that day.
- (iii) Petitioner's contract was terminated by operation on law pursuant to section 12(5) of S.I. 34 of 1991 as he was unable to resume duty after such prolonged unpaid sick leave.
- (iv) At no time did the Petitioner come out from being on unpaid sick leave and such a status does not qualify the Petitioner to a salary from his employer.

The Respondent sought the dismissal of the Petitioner's application.

The records show that on **14th August, 2007** a panel of three Doctors addressed a Medical Report to the employer of Mr. Jacques (the Corporation) and states as follows:

"This patient is employed as chainman with the Property Management Corporation.

*This board is of the opinion that, because of his illness, he is no longer fit to work in his present employment and therefore recommends **premature retirement** on medical grounds with immediate effect and **with all sickness and pensionable benefits**.*

For necessary procedural action please".

On 15th October, 2007 the Corporation, addressed a letter to Mr. Greg Jacques the text of which is hereunder reproduced in extensor:

"Re: Termination of Appointment on Medical Ground

We refer to our letter dated 1st October, 2007 pertaining to the above. We wish to inform you that approval has been granted by the Department of Public Administration for your appointment to be terminated on Medical Ground.

*As per the approval from DPA your appointment is terminated with effect from **14th August, 2007**. You will be paid your benefits as follows:*

- *1 month's salary in lieu of notice*
- *Accrued annual leave from 1st October 2004 to **14th August 2007***
- *Compensation and Proportionate Gratuity from 1st October 2004 to **14th August 2007** for past services.*

May we take this opportunity to thank you for your services rendered to Property Management Corporation. The Management and staff wish you all the best. Enclosed please find your certificate of employment and cheque”.

The Certificate of Employment issued by the employer on 15th October, 2007 states that Mr. Jacques started employment as a Chainman G5 on 1st October, 2004 at a salary of SR2,525.00 and that his contract of employment ended on **14th August, 2007.**

(All emphasis are mine).

For the purpose of this Judicial Review it is established beyond doubt that Mr. Greg Jacques was employed by the Property Management Corporation as a Chainman G5 from 1st October, 2004 on a salary of SR2,425.00 per month and his contract of employment terminated on medical ground by the Corporation with effect from **14th August, 2007.** The Petitioner was informed of this by letter from the Corporation dated 15th October, 2007.

Mr. Jacques was declared permanently incapacitated by the Medical Board on 14th August, 2007 when the Board recommended that Mr. Jacques be **prematurely retired** on medical grounds with immediate effect and **with all sickness and pensionable benefits.**

The Department of Public Administration (DPA) although not following the exact recommendation of the Medical Board yet approved that the appointment of Mr. Jacques to be **terminated on Medical Ground.** The Department of Public Administration also approved that Mr. Jacques be paid certain benefits, as stated in the letter quoted above, all these to cover the period of employment of Mr. Jacques from **1st October 2004 to 14th August 2007.**

The employer having **terminated** the employment of Mr. Jacques on **Medical Grounds** cannot be later found by the Respondent in this matter that the contract was **frustrated**. The employer obviously is estopped from raising the issue of statutory frustration of contract when it has itself never before put this as its reason for ending the employment contract of Mr. Jacques.

There is in existence what is called the **Parastatal Orders** 2nd Edition which came into force on 1st January, 1998. It contains the general conditions of service for employees employed in the Parastatal Sector of the Public Service. Although these Orders have no legislative force its provisions are normally consistent with the current employment legislation and should they be in any way at variance with the terms of any legislation to the disadvantage of an employee, the more advantageous term of such legislation prevails. The Parastatal Sector is endeared to strictly adhere to these Orders so as to maintain equity and impartiality in handling personnel matters and these Orders are to be read in conjunction with the laws of Seychelles. However, where special circumstances indicate that the provisions of the relevant Orders are inappropriate, or would cause hardship, a case may be submitted to the Head of Parastatal Organisation (Department of Public Administration (DPA) for processing, and where justified, a variation of the provisions concerned in the particular instance, is made. (Excerpts from "Introduction" of the Chapter 1 of P.O)

Hence the Parastatal Orders are in effect an extension of the terms and conditions of the contract of employment of an employee so employed in that Sector.

For ease of reference I will, hereunder, reproduce some pertinent Orders.

Chapter VI is generally concerned with '**Retirement, Resignation and Termination of Appointment**' incorporating Orders 131 to 140.

Order 133 (b) (iii) provides that:

“Appointments may be terminated by the employer, on grounds other than misconduct in the following circumstances:-

- ***On medical grounds following decision of a medical board.***

Order 133 (b) (should read (d)) states that:

“The procedure for termination of appointment other than on grounds of misconduct is set out in Appendix “C” to these Orders”.

Order 138 is specifically concerned with – **“Payment of Compensation for past period of services”**.

Order 138(j)(ii) provides that:

“The compensation following termination of appointment under the following grounds will however be paid by the employing organization, under the Employment Act:

- ***On medical grounds following decisions of a medical board”.***

Order 139(c) states that:

“Unpaid sick leave falling within the limit provided under the Employment Act Regulations, will not be deducted from gratuity”.

All Parastatal Organisations are required to comply with the provisions of the Occupational Safety and Health Decree (Cap. 151) and as such they are required to report to the Ministry responsible for employment, any accident which results in a worker’s death or injury of seriousness to necessitate absence from work for a period exceeding 3 days.

Order 322 is concerned with “**Accident whilst on duty/Payment of Compensation**”.

Order 322(a) states:

“If an employee is injured or dies as a result of an accident sustained whilst he/she is on duty, an immediate preliminary investigation should be carried out by the Head of Division and the report thereof forwarded to the Head of Organisation. A medical report giving the details of injuries sustained and capability of resuming duty and/or extent of disability should also be obtained”.

Order 322(b) states:

“The Head of Organisation will then forward a case to the Principal Secretary (Ministry of Administration and Manpower), who at his/her discretion will decide on an amount of compensation if any, to be paid for the injuries sustained or for death. Where the employees are covered under insurance, then a claim can be made against the insurance Company concerned”.

The employer no doubt suffered an accident whilst on duty. From the record submitted to this Court there is no evidence that the provisions of Order 322 were complied with by the employing Parastatal Organisation in that there is no record of any ***preliminary investigation having been carried out.***

There is also no record that the employing Parastatal Organization informed the Ministry responsible for employment of the serious accident of Mr. Jacques.

The employing Parastatal Organisation treated the case of Mr. Jacques as if he suffered from **natural medical illness** rather than a very serious accident at work. One can clearly find that the Parastatal Orders treat natural medical illness differently from **accident at work**.

Provisions exist under **Order 133** for termination of employment, other than dismissal, in the following instances:

(a) *Termination with notice upon the determination of a Competent Officer following negotiation procedure;*

(b) *On grounds other than misconduct in the following circumstances:*

(i) *Redundancy;*

(ii) *Premature retirement i.e. for employees who were holding pensionable offices as at 31st December, 1978, in circumstances set out in the Pensions Act;*

(iii) *On medical grounds following decisions of a medical board*

(c) *Termination with notice in the following cases:*

(i) *During or following a probationary period or employment, where training, guidance, counseling and adequate supervision have been to no avail, and performance is below the required minimum level;*

(ii) *Following marked deterioration in work and personal standards where remedial measures taken have been to no avail;*

- (iii) *In the interest of the organization.*

In the Parastatal Orders, there is no reference to termination of employment due to frustration of contract. Such legal provision can be found in Section 58 of the Employment Act, Cap. 69, and also in the Conditions of Employment Regulations (Act 9 of 1990), more specifically Regulations 12(4) & (5). For instance Section 58 That Section is worded as follows:

“(1). A contract is frustrated when it becomes impossible of performance as when, among other things or reasons –

(a) The business of the employer ceases through its becoming prohibited or illegal under any written law;

(b) A worker is disqualified through the suspension or cancellation of any licence, permit, registration or authority required under the written law for the purpose of exercising his occupation or profession,

and, except in the case of paragraph (b), the worker, other than a casual worker, is entitled upon frustration of the contract to one month's notice or to payment in lieu and to any additional compensation payable under Section 62.

(2).

(3). For avoidance of doubt it is declared that where a contract is frustrated, the negotiation procedure under Part VII and the grievance procedure under section 61 do not apply”.

Order 151 provides for an employee to earn and aggregate maximum of 30 days' paid sick leave in any period of 12 months. If, however, an employee has not exhausted his/her 30 days' paid sick leave and is required by a Doctor to be confined to a hospital for a continuous period which extends beyond the in-exhausted part of the 30 days' paid leave during that continuous period. After the exhaustion of such paid sick leave, an employee's salary will be paid proportionately by the Social Security Division.

The only statutory reference as to when **wages are not due** to a worker is to be found in Section 39 of the Employment Act Cap 69 which is worded as follows:

"Where a worker –

*(a) Is absent from work **without leave** and **without good cause**;*

*(b) Is **in prison** or otherwise detained in **lawful custody**,*

no wages are due to him, and the employer may, at his discretion, withhold payment for the period of absence, imprisonment or detention". (Emphasis added)

The above statutory provisions are obviously not applicable in the instant case because the Petitioner was absent on approved medical leave for good cause, having been injured in an accident at work and that he was neither in prison nor being detained in lawful custody.

By letter dated 24th July, 2007 the Department of Public Administration as the ultimate employer allowed the contract of employment of the Petitioner to continue to have effect up to 14th August 2007 on which date the employment of the Petitioner was to be terminated for medical reason and that he should be paid all benefits.

I find that there is no indication in the letter of 24th July, 2007 from the Department of Public Administration that the Petitioner's salary should not be included as one of the benefits for which he should be paid. It goes without saying that the primary benefit of any employment

is the receipt of salary. The Employer having not defined “all benefits” that should be paid upon termination cannot be interpreted to mean “excluding salary”. Had it been the decision of the Employer to exclude the benefit of “salary” this obviously would have been stated. It must be remembered that an employer has absolute discretion to give a worker any benefit over and above the statutory provision and in such cases the intention of the employer ought to be interpreted in favour of the worker.

When the matter was heard by the Employment Advisory Board, the Board advised the Respondent

“to maintain the appeal and order the employer to pay the worker his salary of SR2,425.00 from 1st March, 2006 to 15th August 2007”.

The Respondent however chose not to follow the Board’s advice without giving any reason. It appears that she accepted the advice of one of her Officer (DGIREN) as contained in a Memo dated 22nd August, 2008 where that Officer offered a “dissenting view” to that of the Board.

I have considered the reasons given for that dissenting view and find that it contains a very serious legal flaw. Even all the statutory conditions for frustration of contracts existed, as indeed it did, this does not follow that by operation of law the contract is frustrated. It must always be borne in mind that an employer is always at liberty to choose whatever approach deemed necessary, provided always that it is not contrary to law, regarding the ground that employer will adopt for terminating the employment of its workers. This is what happened in this case. Frustration of contract was indeed an option opened to the employer at the time it took the decision to terminate the employment of the Petitioner but the employer opted to instead choose “medical reason” as the ground to terminate the employment of the

Petitioner. It is now not open to a third party or to the Respondent to make a case on behalf of the employer on the basis that there was ground for termination of employment based on frustration. It is clear that the employer has waived its option to terminate the contract of employment of the Petitioner on the ground of frustration and is therefore now estopped to invoke this ground.

The basis of reasoning of advice that salary is not payable to the Petitioner is also legally flawed. A worker may have been on unpaid sick leave for whatever length of time but it does not follow that an employer is legally precluded from paying that worker all his benefits **including salary** when that employer ultimately terminates the employment of that worker on medical ground. The fact that the Petitioner was already on sick leave does not mean that the employer could not have deliberately chosen to ignore that fact. It must always be remembered that the Petitioner was on medical leave arising out of an accident which happened during the course of his employment and not for other natural cause. The employer could have therefore provided the Petitioner with more favourable conditions when eventually terminating his employment. This is supported by the fact that although the Petitioner would normally have not been legally entitled to anything beyond 1st March, 2006 the employer yet chose to favour him with enhanced conditions well above what the law provides when his employment was terminated.

In the circumstances I find that the advice of the Employment Advisory Board to the Respondent was sound and should have been adopted and applied by the Respondent in the circumstances of this case as the correct legal basis for her decision. This, the Respondent failed to do. For this reason I hereby issue a Writ of Certiorari quashing the decision of the Respondent on the ground of illegality.

In order to bring finality to this matter I recommend that the Respondent follows the advice of the Employment Advisory Board. I order costs in favour of the Petitioner.

.....

B. RENAUD

JUDGE

Dated this 22nd day of October 2010