

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA33/2014

Appeal from Magistrates Court Decision /20

[2016] SCSC113

NADDY SERVINA

Appellant

versus

NAVAL SERVICES LTD

Respondent

Heard:

Counsel: Mr. J. Camille for appellant

Mr. B. Julie for respondent

Delivered: 26 February 2016

JUDGMENT

Renaud J

[1] The Appellant being aggrieved by the decision of the Employment Tribunal given on 23rd July, 2014 is now appealing against the whole of that decision on the following single ground:

Ground

The Tribunal erred in law and on the facts in concluding that the dismissal of the Appellant by the Respondent was justified in law.

- [2] The brief facts of this case are that the Appellant was employed by the Respondent as a Mechanic Assistant from September, 2008 to 11th April, 2014 when he was summarily dismissed. The reasons for his dismissal were that (a) failing (on 2 occasions) to obey reasonable orders and instructions of the employer or its representative contrary to Schedule 2 Part II (c) of the Employment Act 1995; (b) committing an offence involving dishonesty and breach of trust – contrary to Schedule 2 Part II (3) of the Act; and (c) does an act ... causing serious prejudice to the employer's undertaking.
- [3] The letter of termination indicates that the Appellant was only to receive 9 days' pay for April 2014 and a total of 30 and a half days as earned leave for 2013 up to the date of termination.
- [4] The Appellant before the Tribunal was asking for an additional 1 month salary in lieu of notice and 55.83 days compensation for length of service. The Appellant was in the employment of the Respondent for a total period of 5 years and 6 months. The last gross salary of the Appellant was SR7,686.82.
- [5] The Employment Tribunal (the Tribunal) concluded that the summary dismissal of the Appellant was based on the grounds that the Appellant has - (a) failed to obey reasonable orders and instructions given by the employer; (b) offence involving breach of trust; and (c) causing serious prejudice to the employers undertaking.
- [6] On 11th April, 2014 the Respondent issued a Circular Memo informing all employees that with immediate effect a Security Guard (Guard) has been appointed and that he will be stationed at the gate. The Appellant saw the Circular and was aware of its contents.
- [7] In the morning of 11th April, 2014 there was no Guard at the gate because that Memo was circulated after all employees had entered the premises. After work at 4.30 pm that same day the Appellant was about to go through the gate when the Guard stopped him and several times asked to search his bag. The Appellant refused to comply with the requests of the Guard for the reason that the Guard was not stationed at the gate when he

(Appellant) entered in the morning. The Appellant contended that such exercise had never been there in the past and that a Guard used to be there in the past only to control the movement of vehicles in and out of the premises, as was done by the previous Guard. The Appellant admitted that at that time he was in possession of certain tools in his bag which were similar to the ones he normally used to carry out his duties. According to him the Guard would not have known if those tools belonged to him or his employer.

- [8]** When the Appellant was exchanging words with Guard the Managing Director of the Appellant's employer, Mr. Morgan, came on the scene and several times implored the Appellant to allow the Guard to search his bag – the Appellant again refused – thus causing humiliation to the Managing Director in front of the other employees. The Appellant walked home and was called in by the Managing Director the next day when he was given his letter of dismissal.
- [9]** On the basis of evidence adduced by the parties, the Tribunal made the findings that the Appellant had neither reasonable excuse nor good reason to refuse to be searched by the Security Guard at the exit gate. Therefore the Appellant's refusal to submit to such search even after being so requested by the Managing Director of his employer to do so, gave rise to reasonable suspicion that the Appellant was hiding something. The Tribunal also found that that was sufficient reason to warrant dismissal even if there was insufficient evidence to prove that the Appellant actually stole anything belonging to his employer. The Tribunal held the view that obviously, the right to search would be useless if an employer cannot take action against an employee who refuses without reason to submit to a search.
- [10]** Learned Counsel for the Respondent submitted that Schedule 2 of Part III of the Employment Act 1995 (the Act) provides for disciplinary measures to be taken against a worker for offences committed under Schedule 2 Parts I and II of the Act. It inter alia states that – “in the event of the commission of a disciplinary offence any one of the following disciplinary measures may be taken”. The Act also empowers an employer to use its discretion to take any appropriate measure depending on the gravity of the

offence. Schedule 2 Part II (c) states that – “failing repeatedly to obey reasonable orders ...” as being a serious disciplinary offence.

- [11] Counsel for the Respondent also submitted that the Appellant was also terminated for breach of trust pursuant to Schedule 2 of Part II of the Act because the Appellant showed total disregard to the authority of the employer and clearly displayed a negative attitude towards rules and regulations at the workplace. He added that any employer would have felt humiliated in the presence of other employees.
- [12] Counsel for the Respondent further submitted the Appellant was terminated for also causing serious prejudice to his employer because throughout the hearing the Appellant never showed an ounce of remorse and refused to admit that he had committed an offence. The attitude of the Appellant would have set a bad example to the workers who would have assumed that the Respondent cannot be taken seriously.
- [13] On the other hand Counsel for the Appellant inter alia submitted that Section 57(A) of the Act allows summary dismissals where the worker committed a serious disciplinary offence within the meaning of Section 52(2) of the Act which recognizes a serious disciplinary offence as one listed in Part II, Schedule 2 of the Act and that any minor disciplinary offence which is preceded by 2 or more disciplinary offences. He added that Part I Schedule 2 defines a disciplinary offence as one where the worker fails without valid reason to comply with the obligation connected with the work of that worker, and inter alia under paragraph (d) of Part I Schedule 2 – “fails to obey reasonable orders or instructions given by the employer or representative of the employer.”
- [14] Counsel submitted that a serious disciplinary offence must be an act committed, the effect of which is to cause a serious prejudice to the employer’s business undertaking. An act which is not shown to have caused such serious prejudice to the business undertaking of the employer cannot amount in law to a serious disciplinary offence. The refusal of the Appellant to obey an instruction to search his bag, Counsel submitted, cannot be said to be serious disciplinary offence unless the Tribunal is satisfied that the act seriously caused prejudice to the business of the employer.

- [15] Counsel, however, admitted that the act of the Appellant though unreasonable and unjustified falls clearly as a disciplinary offence within the meaning of Part I Schedule 2 para (d) which warrants one of the measures prescribed under Part III Schedule 2 of the Act rather than instant dismissal.
- [16] Counsel for the Appellant is now seeking an order of this Court to set aside the decision of the Tribunal and to declare that the dismissal of the Appellant by the Respondent was unlawful.
- [17] I have carefully and meticulously analysed the records of the proceedings of this matter before the Tribunal. I have likewise reviewed the reasonings of the Tribunal and its decision. I also gave careful considerations and diligent thought to the submissions made by Learned Counsel for the respective parties.
- [18] The thrust of this appeal is whether the decision of the Respondent was reasonable when it instantly terminated the employment of the Appellant without notice or pay in lieu and without payment of compensation? In other words - did the action of the Appellant merit and call for instant dismissal under the law without notice or pay in lieu and without payment of pro-rata compensation due and accumulated? Was the disciplinary measure meted out fair and reasonable in all the circumstances of the case?
- [19] The evidence establishes that the Appellant disobeyed the instruction of his employer in refusing to allow the Guard to search his bag when coming out of the gate where he was employed. That was a reasonable arrangement put in place by the employer to safeguard its properties by verifying that these are not removed from the premises. The employer informed all its employees of that arrangement by a Circular Memo. As such, all its workers, including the Appellant, were deemed to have been duly informed of such.
- [20] The Appellant refused to comply with this order by refusing the Security Guard to search his bag thereby committing a disciplinary under Schedule 2, Part I of the Act which states that –

“A worker commits a disciplinary offence wherever the worker fails, without valid reason, to comply with the obligations connected with the work of the worker and more particularly, inter alia, where the worker ... (d) fails to obey reasonable orders or instructions given by the employer or representative of the employer.”

[21] Disciplinary measures applicable to disciplinary offences are set out in Part III of Schedule 2 of the Act which states that –

“In the event of the commission of a disciplinary offence any one of the following disciplinary measures may be taken - (i) termination of employment without notice i.e. instant dismissal without payment of compensation.”

[22] It is evident that in the instant case the employer applied the above-stated provision of the Employment Act.

[23] The Appellant had been in the employment of the Respondent for over 5 years and there is no evidence that the Appellant prior to that incident committed any disciplinary offence throughout his employment. For all intents and purposes that was the first infringement by the Appellant of the Respondent’s laid down regulations. The Appellant committed that offence only on 11th April, 2014. There is no evidence that the Appellant repeated the committal of such or other offence on any other occasion.

[24] There is no evidence adduced by the Respondent that the Appellant committed any offence of breach of trust or committed an act whereby the Appellant caused serious prejudice to the employer’s undertaking by the Appellant’s refusal to have his bag searched, as set out in the Appellant’s letter of dismissal dated 14th April, 2014.

[25] Therefore the only offence established by evidence is that the Appellant failed to obey reasonable orders and instructions given by the employer by refusing to heed the order for search of his bag again made to him by the Managing Director of the Respondent. In view of the second aspect the hitherto minor offence this may caused the Respondent to apply the severest penalty that is applicable in such circumstance - that is termination of

employment in accordance with (d) of Schedule 2 Part I of the Act i.e. - fails to obey reasonable orders or instructions given by the employer or representative of the employer.

- [26]** In such case the Respondent may apply disciplinary measures set out in Part III of Schedule 2 of the Act. However, it is a cardinal principle that when meting out punishment for any breach of the law, the penalty must commensurate with the seriousness of the offence bearing in mind all the circumstances of the offence as well as the offender, and any sentence must be seen to be fair and reasonable in all the circumstances. Termination of employment, without notice or pay in lieu with forfeiture of legal benefits accrued, is one of the severest penalties applicable in the world of employment.
- [27]** In the instant case the Appellant committed the minor offence of failing to obey reasonable orders or instructions given by the employer or representative of the employer. It is the first disciplinary offence that the Appellant committed during his over 5 years of employment. In the instant case the Managing Director of the Respondent chose to part company with the Appellant in order to assert his position.
- [28]** I find that in all the circumstances of this case the punishment applied by the Respondent did not commensurate with the severity of the offence committed by the Appellant and was inordinate and overly severe. The disciplinary measure meted out was not fair and reasonable in all the circumstances of the case. Termination of employment with notice or payment in lieu is the appropriate disciplinary measures that should be applicable in the circumstances of this case.
- [29]** For reasons set out above, I allowed the appeal and set aside the order of the Tribunal and substitute instead, termination of employment with one month's pay in lieu of notice and any pro-rata compensation due and unpaid to the Appellant at the date of termination in addition to the pay for days worked in April, 2014 and pay for leave earned and not taken.
- [30]** I award cost to the appellant.

Signed, dated and delivered at Ile du Port on 26 February 2016

B Renaud
Judge of the Supreme Court