

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 54/2014

[2017] SCSC

JOELY ETIENNE

Plaintiff

versus

PUBLIC UTILITIES CORPORATION (PUC)

Defendant

Heard:

Counsel: Ms. Pool for plaintiff

Mr. Rajasundaram for defendant

Delivered: 20 June 2017

JUDGMENT

Renaud, J

[1] The Plaintiff Joely Etienne filed this Plaint before the Court on 12 June 2014, wherein he seeks damages against the Defendant, Public Utilities Corporation, his former employer, for allegedly committing a faute by failing to appreciate that his heavy work duties damaged his health.

[2] On 16 June 2014, Defendant filed a response, which generally denied the allegations and included a plea in limine litis requesting the dismissal of the Plaintiff for failing to invoke the Employment Act.

PRAYER

[3] The Plaintiff is claiming the sum of SR1,244,908.00 with interest and costs, which he particularized as follows:

- | | | |
|--|----|------------|
| - Pain and suffering | SR | 500,000.00 |
| - Loss of earnings (Had to retire seven years before retiring age) | SR | 544,908.00 |
| - Moral Damage | SR | 200,000.00 |

Total: SR 1,244,908.00

BACKGROUND

[4] Plaintiff testified and introduced several witness testimonies. From 1980 through 2013, Plaintiff was employed for a total of (33) thirty-three years by Defendant. As an employee of Defendant, a public corporation doing business as a distributor of water electricity to the general public, Plaintiff worked as a labourer and was subsequently promoted in 2003 to the position of Artisan G4. His employment with Defendant required that he performed various duties like digging up roads, demolishing concrete and laying heavy pipes, and carrying heavy things.

[5] Plaintiff contends that the damages are the result of sciatica, a severe back pain injury, which was caused by Defendant failing to appreciate his medical condition and nonetheless insisting that he perform heavy duties.

[6] Plaintiff testified that prior to his employment he underwent a medical test required by Defendant and was found to be fit. In 2007, around the age of fifty-one, he started to develop chest, chronic allergy, and then back pain and went to see a doctor at English River Clinic. He testified that he was given two days of medical leave and some pills and then went back to work.

- [7] Meanwhile, in 2008, given his medical condition, Plaintiff applied for a voluntary departure scheme opened to anyone wishing to take early retirement that had been initiated by the Government of Seychelles. His application was denied. On appeal before the Ministry of Administration at National House, the denial was maintained. Plaintiff testified that he then made a verbal agreement with Defendant, wherein he was told they would change his duties. Thereafter, Plaintiff continued working.
- [8] As a result of his back pain, in 2010, Plaintiff visited Dr. Kenneth Steven Henriette, who was monitoring his medical condition, and the Doctor recommended that he be given light duties for a period of six months like sweeping, emptying the garbage, and cleaning toilets; this period was subsequently renewed for another six months. Although assigned to do light duties, Plaintiff testified that he still felt pain, but that it had started to calm down. Prior to the expiration of the second sixth month period, Plaintiff visited Dr. Henriette for an assessment of his condition. However, Dr. Henriette was overseas.
- [9] Plaintiff advised Defendant of Dr. Henriette's absence and requested that Defendant wait for an assessment of his medical condition before going back to his heavier work duties (i.e., break down service work). Since he did not have a Doctor's note, Defendant denied his request. Plaintiff testified that he was told by Mrs. Naiken and Mr. Placidus, two of his supervisors, that Mr. Morin, Defendant's C.E.O., had instructed that Plaintiff be sent to his former position, doing heavy duties. Plaintiff testified that he was feeling a bit better and went back to work digging ditches, breaking tarmac on the road, using a jackhammer machine, shovels, and hammers.
- [10] Plaintiff testified that in February 2012, he visited Dr. Henriette again, who told him that Defendant should not have let him go back to work and should have waited for him to redo a medical check-up. However, Plaintiff added that Dr. Henriette gave him a letter to give to Defendant, in which indicated that Plaintiff was able to go back to work and that if he felt the pain getting worse, to come back.
- [11] Plaintiff added that around February or March 2012, he was digging a ditch when he felt a hard strong pain. He informed Mrs. Naiken who told him not to go to Dr. Henriette, but that Defendant would send him to do a medical test. Thereafter, Dr. Meggy Louange, a doctor at English River Clinic, determined that Plaintiff had chronic problems in his chest

and sent a letter to Defendant indicating that Plaintiff was not supposed to work in the dust or soil and to avoid prolonged bending, standing, and travelling at the back of the pickup truck.

[12] Plaintiff testified that, nonetheless, he remained in the same position and that the doctor's recommendations were ignored by Defendant. He added that the Personnel Office found that the doctor had declared him fit, that the doctor letter was invalid, and that he had to continue working as usual or otherwise he would be given a warning and then suspended, which would result in the loss of all his benefits.

[13] Around October 2012, Plaintiff testified that it was recommended that he be removed from breakdown duties to start doing the job of leak detection, a light job. However, he testified that he never ended up doing those light duties, but was told to go back to his original work. Plaintiff then testified that he had a second medical test with Dr. Louange in November 2012 and complained about his problems at work. She explained to him that she could not force Defendant to follow her instructions.

[14] Moreover, he testified that on 24 December 2014, he was working and felt ill. He went to "casualty" and received six days of medical leave. After his second medical exam with Dr. Louange, he testified that he never received a response and never knew what the doctor had said while employed. In February 2013, he testified that he was removed from his original work duties and given light duty work.

[15] On 30 April 2013, Plaintiff's employment with Defendant was terminated, as a result of his health because he could not lift things and stand for a long time. Plaintiff indicated that there was nothing for him to do, so he did not challenge his termination and collected around SR 180,000. Six months after leaving work, Plaintiff requested Dr. Louange's note and it indicated that he had sciatica.

[16] Moreover, he had never taken an MRI for his back, but that he had gotten an X-Ray examination "from casualty" prior to seeing Dr. Louange in 2012. Plaintiff maintains that his medical condition was aggravated in his old job and that he frequently had to go on medical leave; and that despite several visits to the doctor, his medical condition persisted and his pain became unbearable. There were a lot of older people working for Defendant

who did not have any of his problems, and that as a married man, he found it difficult to perform his “husband duties” because of the pain.

[17] Finally, Plaintiff testified that he cannot find employment and that it is not easy to find private sector employment doing light duty, as they employ people who are still strong and contribute to their Company. Sometime after receiving his benefits, he complained to the Employment Tribunal of his medical issues and his problems with Defendant, and that that is when he was told to file a case.

MEDICAL EVIDENCE

[18] In addition to testifying at trial, Plaintiff submitted the witness testimony of Dr. M. Louange, Dr. Henriette and Dr. D. Louange.

[19] During her testimony, Dr. M. Louange indicated that she worked in occupational medicine, and that she examined Plaintiff because he was having chronic back pain, which is a common problem in the population – especially for persons of a certain age. She indicated that based on his history and district notes, Plaintiff’s back pain was something he had been having for a while. Dr. M. Louange indicated that the reasons for back pain are varied and that she wrote a note recommending that he not do heavy lifting, prolonged standing, and walking. Moreover, she testified that an employer would be wise to follow the doctor’s recommendation, as there may be certain implications medically, which can range from muscle strain to “disc disease.”

[20] Dr. M. Louange explained that sciatica is a general term to refer to the sciatic nerve, which runs at the back of your buttock to right up to under your foot. This nerve can become irritated if you have a prolapsed disc that impinges on the root at the lumbar spine level, which can be painful. She indicated that back pain is not curable, but that the pain can be managed. She testified that you cannot really confirm that back pain is a result of the type of work one does, because some people may only do light work but still have back pain. She added that back pain is the result of a myriad of situations, including psychological and emotional aspects; and that unless there is a documented injury, then one can say maybe that that injury is the cause.

- [21] Moreover, Dr. M. Louange testified that the nature of Plaintiff's work was crucial to aggravation of his medical condition, but not necessarily the cause. She indicated that she did not know the cause of Plaintiff's back pain, but that an employer insisting on Plaintiff doing heavy work would definitely aggravate the pain, which would lead to disability and the inability to function at 100%. She also indicated that if Plaintiff's employer did not follow her recommendation, Plaintiff's condition would worsen depending on how long he continued to do heavy work and how often; but that continued heavy duty work would aggravate his conditions.
- [22] Furthermore, Dr. M. Louange testified that she did not conduct an X-ray or MRI because when patients come to her, they are already being followed by other Doctors. She explained that depending on the severity of the back pain, a General Practitioner could treat these issues, not simply an orthopedic specialist. She testified that Plaintiff had complained to her about his employer not observing her recommendation and assigning him heavy duty work and that she had written to his employer more than once regarding that. Lastly, she testified that she could not confirm that age was a factor that caused Plaintiff's back pain, but that it definitely has a role.
- [23] During his testimony, Dr. Henriette indicated that he had seen Plaintiff on three occasions for severe backaches. He first saw him on 8 June 2009 because he had swollen feet and issued him a medical sick note. Thereafter, in 2010, since his MRI machine was not working, Dr. Henriette examined Plaintiff's symptoms physically and it showed that Plaintiff was having severe back pain that radiated to his leg. After conducting the straight leg raising ("SLR") test, which consists of assessing whether the patient can raise his leg below 45 degrees while lying down, Dr. Henriette concluded that Plaintiff had a positive test and issued a medical letter for him to rest.
- [24] Dr. Henriette confirmed that he had recommended Plaintiff perform light duties for six months. He testified that he renewed the six month period because he was still in pain, and also testified that by that time, Plaintiff's condition had improved considerably. Although his condition had improved and he was having less pain, Dr. Henriette indicated that heavy duty work could aggravate a patient's condition, and that a patient's quality of life would be adversely affected from such a condition.

- [25] On cross-examination, Dr. Henriette confirmed that sciatica was a nerve pain due to a disk prolapse. He also indicated that his testimony was based on his recollection, as he had not been able to access and review Plaintiff's file. Moreover, he testified that because his MRI was not working, it could not be confirmed conclusively that he had sciatica; therefore, that the diagnosis was an inference based on symptoms or probably from compression. He also testified that the SLR test was not a conclusive one and that you have to add other tests, like touching your tiptoes, which would render the examination more objective. He indicated that Plaintiff was asked to do these tests.
- [26] Finally, Dr. Henriette indicated that sciatica pain can be due to a lot of causes, but that heavy lifting may have been one of the contributing factors to Plaintiff's back pain. Moreover, he testified that this pain can affect persons of young age; and that doing light duties will not cure the pain but reduce it. On re-examination, Dr. Henriette testified that he believed that Plaintiff was suffering from sciatica pain.
- [27] Dr. D. Louange is the Deputy CEO at the Ministry of Health and also an Orthopedic Spine Surgeon. He discussed the MRI Report of the Plaintiff conducted on 29 October 2015, which was written by Radiologist Dr. Joseph Bistoquet which mainly describes Plaintiff's lumbar spine. Dr. Danny Louange confirmed that Dr. Bistoquet had found degeneration of Plaintiff's spine, which corresponds to the medical term "spondylosis." He described degenerative disc disease as an aging process and wear and tear.
- [28] He also testified that the Report indicated that there was compression of the thecae sac, narrowing of the spinal canal and a small broad based hernia ion, which in laymen's terms corresponded to a disc prolapse or slipped disc, which is a form of degeneration. He testified that the slipped disc is what causes the narrowing of the canal. Regarding the finding of a compressed thecae sac, Dr. Danny Louange explained that the thecae sac envelops the nerves at the lumbar spine level. He then explained that these findings do not necessarily mean that a person will have pain or symptoms; and that it only requires treatment if the patient has symptoms. He testified that there was no evidence in the MRI Report that Plaintiff's degenerative disc disease was due to heavy work or an injury due to heavy work; but a function of wear and tear and excessive bending and use of the spine.

[29] Dr. D. Louange also testified that there is no evidence showing that if you do a particular or normal activity it will lead to an advanced or accelerated degeneration. However, he indicated that precipitation of the degeneration will depend on load of the heavy objet and the frequency of the activity, excessive weight and exercise in theory may lead to accelerated degeneration. Although there was no evidence to indicate what weight should serve as a benchmark, he indicated that 10% of one's body weight is used as a guideline. While the onset of degeneration is a mystery, he testified that the cervical spine has been observed to degenerate at around nine to eleven years of age; and that the lumbar spine around nineteen or twenty years of age.

[30] Moreover, Dr. Danny Louange testified that an individual without pain or symptoms will have features of degeneration and that there are multiple factors that lead to degeneration, but that the probability of degeneration increases with age. He indicated that other major factors are genetics, smoking, obesity, lack of physical exercise, or posttraumatic injury. Finally, he testified that it was possible that the medical personnel's findings in Exhibits P2-P5 were related to Plaintiff's sciatica condition.

[31] On 3 January 2017, Learned Counsel for the Plaintiff filed a Written Submission. On 8 May 2017, Defendant filed its Written Submission.

THE ISSUES

[32] Upon review, the Court is in agreement with Defendant's contention that the issues to be determined are the following:

(1) whether the Plaint is maintainable against Defendant given the provisions of the Employment Act ? ;

(2) whether Defendant's actions amount to a faute?; and

(3) if Defendant's actions amount to a faute, whether the Plaintiff entitled to all the damages requested?

PLEA IN LIMINE LITIS

[33] In its plea in limine litis, Defendant maintains that the Plaintiff should be dismissed because seeing as this is a matter between an employer and an employee regarding the latter's redundancy, it is to be addressed by an employment tribunal as contemplated under the Employment Act. Section 64 of the Employment Act provides that:

“Wherever a dispute, other than one for which the grievance procedure is expressly provided under other provisions of this Act, arises between employer and worker and internal dispute procedures, if any, have been exhausted without agreement, either party to the dispute may initiate the grievance procedure.”

[34] The Grievance Procedure generally provides that a worker whose employment contract is terminated for disciplinary issues may initiate a grievance procedure. This Court has held that “where a grievance has been lodged . . . and an employee was awarded statutory benefits for unjustified termination” under the Employment Act, that employee cannot “commence and drag the employer through fresh proceedings based on the same cause of action in another forum.” See *Alcindor v Plantation Club Resort & Casino*, SSC 345/1997, at p. 2.

[35] However, if “in the course of terminating a contract, the employer committed a delict . . . that act which amounted to a delict would be a separate cause of action” *Id.* (see *Rosette v Union Lighterage Co*, Civ App 16/1994 (SCA 1995)) see also *Farabeau v Casamar Seychelles Ltd*, [2012] SCSC 20 (finding employer liable for negligence for failing to provide a safe workplace during employee's course of employment).

[36] While Defendant characterises Plaintiff's Plaintiff as a matter regarding Plaintiff's redundancy, the focus of Plaintiff's Plaintiff is not a claim arising under his employment contract. Although Plaintiff appears displeased with his termination, he acknowledges having received benefits and does not appear to be contesting those benefits, but the circumstances that allegedly eventually resulted in his employer finding him unfit to work. Plaintiff is alleging that Defendant's actions during his employment amount to a faute, as they allegedly failed to appreciate his medical condition and insisted that he performed heavy duties, which resulted in allegedly aggravating his injury.

THE LAW

[37] In his Complaint, Plaintiff maintains that Defendant committed a *faute* in failing to appreciate that the heavy duties he performed had damaged his health. Article 1382 provides in its most relevant part that:

1. *Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
2. *Fault is an error of conduct which would not have been committed by a prudent person in the special which the damage was caused. It may be the result of a positive act or an omission.*

[38] Courts interpreting the notion of *faute* have found that it is an “error of conduct,” which emanates from the breach of a duty of care. See *Pierre (born Timonina) v Attorney-General & Ors*, [2008] SCSC 34. Additionally, the precise nature of the *faute* must be proved and the burden of proving it lies on the plaintiff. Mere conjectures and presumptions are not sufficient. See *Aithal v Seychelles Breweries Ltd.*, [2006] SCSC 26. As this is a civil case, the burden of proof is one of “a balance of probabilities” and not the higher standard of “beyond a reasonable doubt” found in criminal cases. See *Marengo & Ors v Anderson*, [2016] SCSC 44.

[39] In *Bristol v United Concrete Products Seychelles Ltd.*, [2006] SCSC 26, the Court *inter alia* held:

“An employer is bound to provide a safe system of work to his employee. Failure to do so amounts to a ‘faute’. (Adolphe & or v Donkin (1983) SLR). It is the duty of the employer to ensure that the work in which his employee is engaged should be safe, and failure to do so constitutes ‘faute’, and he is responsible for any damage that results to the employee. (Servina v W&C French (Sey) Ltd (1968) SLR)”.

LIABILITY

- [40] According to the testimony presented by all three Doctors, a conclusive cause to Plaintiff's initial back pain could not be identified, as back pain can be triggered by a multitude of reasons and can affect people of all ages. Specifically, Dr. Meggy Louange testified that one cannot really confirm that back pain is a result of the type of work one does and that back pain is the result of a myriad of situations. Similarly, Dr. Henriette indicated that sciatica pain can be due to a lot of causes, but that heavy lifting may be a contributing factor. Likewise, Dr. Danny Louange testified that there are multiple factors that lead to degeneration.
- [41] There is a reason to think that performing heavy lifting duties for a period as long as Plaintiff's employment with Defendant may have contributed to Plaintiff's medical condition. However, given the medical testimony and the evidence presented, it has not been established that Defendant's actions caused, in part or in full, Plaintiff's initial medical condition.
- [42] Although it was not established that Defendant's actions caused Plaintiff's initial medical condition, all three doctors testified that heavy lifting would aggravate Plaintiff's medical condition. Significantly, Dr. Meggy Louange testified that insisting on Plaintiff doing heavy work would definitely aggravate his pain, which would lead to the inability to function at 100%. Dr. Henriette testified that heavy duty work could aggravate a patient's condition and that a patient's quality of life would be adversely affected. Finally, Dr. Danny Louange testified that the lifting of excessive weight and repetitious exercise in theory may lead to accelerated degeneration.
- [43] Based on the medical testimony evidence presented, Defendant's action in response to Dr. Henriette did not aggravate Plaintiff's medical condition. On the other hand, the evidence indicates that in disregarding Dr. Meggy Louange's recommendation, Defendant's actions aggravated Plaintiff's medical condition.
- [44] After the second six month period of light duties recommended by Dr. Henriette, given Plaintiff's medical history and the nature of his injury, Defendant was imprudent in allowing Plaintiff to return to work without a doctor's note. Indeed, Dr. Henriette testified that Defendant should not have let Plaintiff go back to work and should have waited for him to get a check-up, presumably to avoid any aggravation of Plaintiff's condition. Out

of precaution for Plaintiff's safety, Defendant should have required him to get approval to return to work.

[45] Importantly, however, from the time Plaintiff returned to work to his heavy duty work after the second six month period to his February 2012 visit to Dr. Henriette, no evidence of aggravation was presented. After his February 2012 visit, Plaintiff testified that Dr. Henriette gave him a letter to give to Defendant, which indicated that he was able to go back to work and that if he felt the pain getting worse, to come back. Because Dr. Henriette found Plaintiff fit to go back to his normal work duties, the Court is unable to find that Defendant's actions, at that juncture, amount to a faute.

[46] The same cannot be said of Defendant's actions in response to the injury Plaintiff incurred while digging a ditch and Dr. Louange's subsequent letter to Defendant around March 2012. In her letter, she indicated inter alia that Plaintiff should avoid bending, standing, and travelling at the back of the pickup truck. On this point, Plaintiff testified that the employment bureau found that the doctor's letter was invalid and that he had to continue work as usual. Importantly, Defendant does not appear to have provided the reason for contesting the validity of this letter and disregarding the doctor's medical recommendation.

[47] Thereafter, from February to October 2012, Plaintiff continued his usual heavy work until Defendant recognized that his medical condition was affecting his ability to work. Despite acknowledging that Plaintiff's duties should be changed, Plaintiff remained at the same position doing heavy duty work. He continued like this until February 2013, when he was transferred to light duty work and subsequently terminated in April 2013.

[48] In light of the medical testimony presented, it is unsurprising that Plaintiff's medical condition grew worse. Plaintiff's back pain would not have been "cured" by light duty work, however, according to the medical testimony, his pain could have been "managed" by lighter work duties. Instead of complying with the doctor's medical recommendation, Defendant insisted and/or allowed Plaintiff to continue doing heavy duty work for around an entire year until he was determined to be unfit for the job. The evidence presented suggests that Plaintiff's medical condition progressively got worse as a result of his heavy work duties.

[49] Defendant's decision to disregard Dr. Meggy Louange's opinion and to neglect to transfer Plaintiff to lighter work duties during the course of a year amounts to a breach of its duty of care. On the balance of probabilities, the Court finds that Defendant's actions caused an aggravation in Plaintiff's medical condition. (See Bristol, supra). Accordingly, the Court finds that Defendant's actions amount to a faute.

[50] Based on the review of the evidence presented and the law applicable in the circumstances, this Court finds that, on the balance of probabilities, Plaintiff has presented sufficient evidence demonstrating that Defendant's actions or omissions amount to a faute in law and resulted in damages to the Plaintiff. Judgment is accordingly entered in favour of the Plaintiff as against the Defendant.

QUANTUM

[51] Having found Defendant liable for faute, the Court must now determine whether Plaintiff is entitled to his entire claim of damages of SR1,244,908.00

[52] Regarding the assessment of damages in a tort case, the Court recalls that damages are compensatory and not punitive. See Jacques v Property Management Corporation, (2011) SLR 7. Moral damage refers to "damage that is neither material nor corporeal. It is something intangible as in the case of suffering." Denis v Ryland, [2016] SCSC 10. Moreover, the Seychelles has not established a method to assess moral damages; no method of assessment is set out either in the Constitution or in the Civil Procedure Code. (See Michel & Ors v Talma & Anor (2012) SLR 95).

[53] Nevertheless, in awarding delictual damages for personal injuries, "this Court has sought to maintain a certain amount of consistency in respect of particular types of injuries and at the same time been flexible when the circumstances and nature of the injuries in a particular case demanded a deviation from the general pattern." See Confiance v Allied Builders Seychelles, (1998) SLR 164. Previous awards in comparable cases therefore are an important and useful guide, which "is not to say that damages should be standardised, or that there should be any attempt at rigid classification." (See Singh v Toong Omnibus Co [1964] 3 All ER 925).

- [54] Here, Plaintiff appears to have presented two separate claims for moral damages (one for SR200,000.00 and another for SR500,000.00, which he has qualified as pain and suffering, yet he has not provided the basis underlying the distinction he makes between moral damages and damages for pain and suffering. For the purpose of assessing damages these two head of claims shall be considered together.
- [55] The Plaintiff has not provided the Court with any guidance to evaluate his claim. The Court does note, however, that in *Bristol v United Concrete Products Seychelles*, the Court awarded SR60,000.00 for pain and suffering to a Plaintiff who required surgery for his sciatica condition. The Plaintiff in *Bristol* had also claimed damages of SR500,000.00 for pain and suffering.
- [56] Without any statutory yardstick and in the absence of any guidance or evidence from the Plaintiff, the award this Court makes in the present case can only be arbitrary. See *Denis v Ryland*, [2016] SCSC 10. Here, Plaintiff has demonstrated that his medical condition became so aggravated and painful that he could no longer perform heavy work duties. However, unlike *Bristol*, his condition was not such that it required surgery.
- [57] Damages under these two heads are not for the health condition of the Plaintiff as being arising out of his employment, but for Defendant requiring the Plaintiff to work despite his painful condition as confirmed by the Doctor. It is evident that humaneness was lacking on the part of the Supervisor and Chief Executive Officer of the Defendant.
- [58] Albeit that there is no proof that the health condition of the Plaintiff arose out of his employment with the Defendant doing heavy work involving digging, lifting heavy objects etc over 33 years, yet it cannot be said that such is not an element that aggravated the situation of the Plaintiff. Once Plaintiff's condition was established and confirmed by various Doctors, it was reasonable to expect the Defendant acting as a responsible employer to act reasonably in the circumstances and show some understanding towards the painful condition of the Plaintiff.
- [59] The Doctor recommended light duty for a period of time and upon review found that as the situation had not improved considerably, recommended further period of light duty. In the absence of the Doctor who was not in the country the Plaintiff could not get a

medical certificate to continue light duty and as such the Defendant allocated back to his normal duties despite his complaint of painfulness. I believe that any reasonable employer would have at least allowed the worker to continue on light duty until the Doctor stated otherwise. It is clear that the Plaintiff was suffering from a condition that has no cure and he had only to manage it by not doing heavy work in order to relieve the pain.

[60] The Plaintiff had put in 33 continuous years for the Defendant and when reaching an advanced age to treat him with such attitude is indeed unbecoming of a reasonable employer. I take judicial notice that the Defendant is among the biggest employer in Seychelles involved in many and varied activities. It is unconceivable that the Defendant could not have arranged to transfer the Plaintiff to other lighter duties until his retirement. Taking into consideration the factors set out above, I believe that the Plaintiff ought to be awarded SR50,000.00 as moral damages and SR50,000.00 for pain and suffering.

[61] The Plaintiff has claimed loss of earnings, yet he has not presented any evidence or figures to support this claim thus leaving it to this Court to determine whether he is entitled to such claim and if so, how much. In view of the continuous pain the Plaintiff was having, he applied for early retirement. This request was turned down by the Defendant. It is incomprehensible as to why an employer would want to keep back a “sickly” worker when that worker wants to leave. The Plaintiff continued to suffer and live in pain and that could lead him to a point when he would not be able to stand up anymore. The Plaintiff opted to resign after such long period of service and few years away from retirement. He took that risk knowing that his prospect of getting new employment was minimal. This situation can be equated to constructive dismissal. It is my considered judgment that, in the circumstances, Plaintiff ought to benefit from some compensation as loss of earning.

[62] When assessing his loss of earning, I do not believe that the Defendant ought to be made to reimburse all the possible future earnings the Plaintiff would have continue to draw from the Defendant had he not resigned, yet I am of the considered view that the Defendant ought to compensate the Plaintiff for resigning his job because of his health

condition since the Defendant did not want to accommodate his painful condition, and, refusing him early retirement.

[63] The Plaintiff is not that old (55 years) which would render him unable to earn albeit not to the level he was earning after 33 years with the Defendant. The quantum of future earnings cannot be determined with certainty but using the previous earning capacity as well as actual immediate past earning, and bearing in mind that any damage will be paid up front, an amount for damages for future loss of earning can be reasonably arrived at.

[64] There remained another 7 years (or 84 months) for the Plaintiff to work for the Defendant before he would have reached retirement age when he would have received a pension of not less than SR5,050.00. Award of damages by the Court is free from Tax and Pension deductions that the Plaintiff would normally incur if the Plaintiff was in employment.

[65] The Plaintiff would obviously incur expenses to enable him to attend to his work which he does not have to incur now. The Plaintiff is not that old or is not totally incapacitated that would prevent him to earn some income, albeit not the same amount that he was drawing from the Defendant. The Plaintiff is a renowned musician of traditional music which activities is not unduly affected by his medical condition.

[66] He is now claiming SR544,908.00 covering the 84 months or SR6,457.00 per month as loss of earning. Taking into consideration the factors outlined earlier, I assess that the Defendant ought to pay the Plaintiff 20% percent of his claim as damages for future loss of earnings which I set at SR109,000.00.

[67] I accordingly enter judgment in favour of the Plaintiff as against the Defendant in the total sum of SR 209,000.00 with interests and costs of this action.

B. Renaud

Judge of the Supreme Court

Delivered in open Court by on 20 June 2017

Signed, dated and delivered at Ile du Port on 20 June 2017