IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 06/2016

Appeal from Public Service Appeal Board Decision Complaint No 1807

[2017] SCSC

FLOSSY BONNELAME

Appellant

versus

NATIONAL ASSEMBLY OF SEYCHELLES

Respondent

Heard: 21 September, 2017

Counsel: L. Boniface for appellant

D Cesar for respondent

Delivered: 19 October 2017

JUDGMENT

Dodin J

[1] The Appellant being dissatisfied with the judgment of the Public Service Appeal Board (PSAB) delivered on the 4th March 2016 appealed to the Supreme Court against the said Order of the PSAB on the following grounds:-

i. That PSAB erred in its decision not to reinstate the Appellant in her post of Constituency Clerk without any loss of earnings after finding that there

was no justification in the termination f the Appellant's contract of employment by the Respondent.

ii. That, alternatively, the PSAB erred by not ordering that the Appellant be paid employment benefits up to the date of lawful termination of the contract of employment of the Appellant (i.e. the date the PSAB took its decision) when it found that the termination of the Appellant's contact of employment was terminated unfairly but that it was impractical to reinstate the Appellant in her position as Constituency Clerk. The PSAB should have made such an award up to the date of its decision especially as the Appellant was seeking for reinstatement in the job that she was terminated from. In the Thelnesse Simara v/s Ministry of Tourism and Transport Complaint, No.693 the PSAB did make an order for payment of employment benefits, including salary up to the date of this decision despite the Applicant (Thelnesse Simara) not requesting for reinstatement.

[2] The Appellant seeks the following relief from this Court:

i. Deeming the order of the PSAB appealed against as invalid, or, alternatively.

ii. Reversing the order of the PSAB appealed against by declaring that the Appellant should be reinstated in her post of Constituency Clerk without any loss of earning; or

iii. Ordering, alternatively, that if it is impractical to reinstate the Appellant in her post as Constituency Clerk the Appellant is paid up to the date the PSAB took its decision i.e. 4th March 2016.

iv. Making any other order it deems fit under the circumstances.

[3] Learned counsel for the Appellant submitted the following on the grounds of appeal.

> *"That the 1st Respondent erred in its decision not to reinstate the Appellant in her post of Constituency Clerk without any loss of earnings after finding that there was no justification in the termination of the Appellant's contract of employment by the 2nd Respondent.*
>
> *In this case the Appellant filed a case before the 1st Respondent against the 2nd Respondent in which she was claiming reinstatement. After hearing the case the 1st Respondent ruled on 4th March 2016 that "the reason for the termination of the Complainant contract is not clear; we feel that there has been a lack of communication and hostility toward the complainant and her employer which has led to her termination." The 1st Respondent then proceeded to award certain terminal benefits to the Appellant and not*

reinstatement. Regarding reinstatement the 1st Respondent stated in its ruling that the "the Complainant is requesting to be reinstated in employment. We are unable to do so. The trust existing between the Aux Cap Members of the National Assembly and the complainant is broken and it would be unwise to get the Complainant to work with her MNA again." It is conceded that the relationship between the Appellant and the MNA had broken down. However, the employer the Appellant was no the MNA. The employer of the Appellant was Seychelles National Assembly which is the 2nd Respondent. The 2nd Respondent is a relatively big organisation employing dozens of workers and dozens other constituency clerk. Therefore to reinstate the Appellant pursuant to the prayer in her claim would not have been a farfetched decision for the 1st Respondent to take. The 2nd Respondent could easily have ordered reinstatement and one likely practical move, if their relationship had broken down, would have been to transfer the Appellant to another district. The 1st Respondent could have also ordered reengagement in another position in the 2nd Respondent's organisation but failed unreasonably to do so, hence erred. Moreover the 1st Respondent did not even justify its decision not to reinstate the Appellant but simply stated in its judgment that "the complainant (the Appellant) is requesting to be reinstated in employment. We are unable to do so." The only thing that was said by the 1st Respondent by way of justification was that the relationship had broken down between the Appellant and the Member of the National Assembly (MNA) of the Au Cap district but this does not go far enough because the Appellant was not employed by the MNA of Au Cap District but by the 2nd Respondent. The 1st Respondent should have explored the request for from the perspective of the 2nd Respondent not the Au Cap MNA and the practicability of reinstating the Appellant in general. This is failed miserably to do. This view is supported by Selwyn's Law of Employment, Eight Edition, page 359 which states that;

> *"it must be stressed that the Tribunal has a discretion in making either of these orders (reinstatement and reengagement). It must first consider whether to make an order for reinstatement, and in doing so, it must take into account three considerations;*
>
> *Whether the applicant wishes to be reinstated;*
>
> *Whether it is practicable for the employer to comply with an order for reinstatement;*
>
> *Where the applicant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.*
>
> *If the tribunal decides to make an order, it shall then consider whether to make an order for reengagement, and if so, on what terms."*

An authority on the reinstatement issue is Boots Co Plc v Lees Collier [1986] ICR 728, .

Alternatively, the 1st Respondent also erred by not ordering that the Appellant be paid employment benefit up to date of lawful termination of the contract of employment of the Appellant (i.e. the date the 1st Respondent took its decision) when it found that the termination of the Appellant's contract of employment was terminated unfairly but it was impractical to reinstate the Appellant in her position as Constituency Clerk in the 2nd Respondent employment The 1st Respondent should have made such an award up to the date of its decision especially as the Appellant was seeking for reinstatement in the job that she was terminated from. In Thelnesse Simara v/s Ministry of Tourism and Transport Complaint, No. 693 the PSAB did not make an order for payment of employment benefits, including salary up to the date of its decision despite the Applicant (Thelnesse Simara) not requesting for reinstatement.

It is conceded that there is no regulations guiding the 1st Respondent, but be that as it me, the 1st Respondent cannot argue that there are no laws governing such issues in Seychelles which it could have considered. In fact the 1st Respondent itself has made such orders before in another case. The Employment Act, 1995 provides the way such benefits are calculated and so does the Public Service Orders but the 1st Respondent considered none of them and went on a totally inconsistent tangent about its own calculations of the Appellant's benefits and as a result erred.

It is noted that in the case of Cap Lazare v Ministry of Employment and Social Affairs Cs 18/2008 and Sams Catering (Pty) Ltd v Ministry of Employment Cs 312l2006, the Court has reiterated that the calculation of salary should be made until the lawful termination pronounced by the Tribunal. In this case Judge Gaswaga stated "in fact, in the case of Sams Catering (Pty) Ltd, Perera CJ, as he then was, agreed that if it is ruled that termination was unjustified then the position is that there has been no termination. Therefore, the termination will be construed as per Section 61(2)(a)(iii) of the Act.

In the case of Cap Lazare v Ministry of Employment and Social Affairs, this Court presided over by myself held that Minister was right in holding that compensation should be paid up to the date of lawful termination pronounced by the Tribunal and not up to the time that the employer terminated the employment.

In the present case it is obvious that the termination was declared unjustified only on 28 May 2012 and the Tribunal lawfully terminated the employment on that day. Therefore, the date of lawful termination cannot be 3 November 2011, the date the Appellant's employment was terminated by the employer, s on the date there was no lawful termination. For all

legal intents and purposes, lawful termination was only on 28 May 2012 when the Tribunal delivered its judgment.

[4] Learned counsel for the Appellant moved the Court to find in favour of the Appellant and to order in accordance with the reliefs prayed for in the Memorandum of Appeal.

[5] Learned Counsel for the Respondent made the following submission in respect to the grounds of appeal and also intimated to the Court that the Respondent would go with any decision that this Court shall deem fit.

"Facts

The Appellant's employment contract was frustrated. Pursuant to the contractual terms and in accordance with the Employment Act, the Appellant was given one month's notice and was remunerated. The Appellant. Seeking reinstatement or compensation, brought a case before the Public Service Appeal Board (PSAB). On 4th March 2016, the PSAB ruled in favour of the Respondent.

Issues

It is submitted that the PSAB was correct in its decision not to reinstate the Appellant in the post of Constituency Clerk without loss of earnings.

It is further submitted that the PSAB was correct in its decision not to order that employment benefits was paid to the Appellant up to the lawful date of termination of the Appellant's contract.

The Appellant's Employment Contract, which was signed by the Appellant on 29th January 2014, clearly stipulates, under clause 8.4, that in the event where the employer ceases to be a member of the National Assembly or for any other cause whatsoever directly attributable to Employer resulting in frustration of the contraction, the Employment Contract shall terminate.

At that time elections were called, the National Assembly was dissolved, and the Appellant's employer who was the Honourable Murielle Marie, ceased to be a Member of the National Assembly. Thus as per the terms and conditions of the signed Employment Contract and by no fault attributable to the Respondent, the Employment Contract was frustrated.

Proper Notice was given to the Appellant in accordance with clause 8.3 of the Employment Contract, and all dues were paid to the Appellant in accordance with clause 8.4, read in conjunction with clause4. By signing and initialling every page of the employment contract on 29th January

2014, the Appellant indicated that she was aware of, and understood these contractual terms and conditions.

The Appellant humbly prays that this Honourable Court be pleased to uphold the decision of Public Service Appeals Board."

[6] In this case I note that the contention of the Respondent is that the contract was frustrated and therefore termination was justified. The PSAB did not agree to that and found that the contract was unlawfully terminated. If the contract was terminated for reasons other than frustration but not attributable to the Appellant then section 57 of the Employment Act should have been complied with. Section 57 of the Employment Act states:

57. (1)" An employer may terminate a contract of employment with notice upon a determination by the competent officer following the negotiation procedure initiated under Part VI that the contract may be terminated."

[7] From the records there is no indication that that process had been engaged by the employer of the Appellant. Claiming that the contract was frustrated exempts the Respondent from engaging the provision of section 57 of the Employment Act in accordance with the provision of section 58(3) of the Act. PSAB did not subscribe to that argument.

[8] Furthermore, since the Appellant was asking for re-instatement, it was even more important that for such termination for a reason other than those provided for in the Employment Act and not attributable to the Appellant, the date of termination should be the date when the PSAB determines that re-instatement is not a reasonable or wise in the circumstances. In fact, considering the facts of the case, the employer of the Appellant was the Institution of State, the National Assembly. The Appellant's immediate superior for whom she provided direct services was the then MNA of Au Cap. There had been no election at the time the Respondent attempted to terminate the employment of the Appellant and it is irrelevant whether the MNA was to remain in office or be a candidate for future election as she was not the employer of the Appellant. The PSAB was therefore correct to find that termination was not justified. Hence the termination would only be effective on the date of pronouncement by the PSAB.

[9] Consequently terminal benefits should be calculated up to the date of termination which is the date of the Order of PSAB, that is 4th March, 2016. The PSAB was therefore wrong to make an arbitrary award not based on any supporting reasoning or basis and outside the legal requirement.

[10] I therefore find that the PSAB erred as submitted by the Appellant and I quash the Orders of the PSAB as set out from line 37 of the Order and I make the following award to the Appellant.

i. The National Assembly pays the Appellant all terminal benefits, being salary up to the date of termination which is 4th March 2016; two month notice; compensation for length of service up to the same date; proportionate gratuity up to the same date and annual leave due up to the same date.

ii. Payment shall be made within 30 days of today failing which interest at the Court rate of 15% per annum shall accrue until payment is made.

[11] I award costs to the Appellant.

Signed, dated and delivered at Ile du Port on 19 October 2017

G Dodin
Judge of the Supreme Court