IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CA 14(A)/2011

Appeal from Employment Tribunal Decision ET/184/2009

[2018] SCSC 141

JANE LABICHE

Appellant

versus

MARIE-MAI KOLSH

Respondent

Heard: 6 December, 2017, 31 January, 2018.

Counsel: J Camille for appellant

S Rajasundaram for respondent

Delivered: 14 February 2018

JUDGMENT

Dodin J

[1] The Appellant was employed as a maid and housekeeper by the Respondent from 1st day of April 2007 to 31st June 2009 when her employment was terminated for reasons not attributable to her. She was paid salaries up to 31st August being one month in lieu of notice including one month's bus fare for August, and holiday pay due all amounting to SCR 9,417.00. The Appellant being dissatisfied with the terminal payment, brought a case under the Employment Act for additional end of employment payments for 10 days

worked, being 3 Saturdays, 4 Sundays, 1 Friday and 2 public holidays worked from March to April. She also claimed 55 days holiday pay for which she had been paid 21 days only and compensation for length of service but dropped that ground of appeal.

[2] The Employment Tribunal after hearing the Appellant, determined that she had not proved her claims for 55 days annual leave (holidays pay), that the claim for public holiday, Saturdays and Sundays had not been proved, that the Appellant had not proved that the SCR500 paid to her monthly was for housing allowance and not transport allowance as stated in the terminal due. The Tribunal awarded the Appellant 21 days annual leave only and as ex-gratia payment agreed to by the Respondent.

[3] The Appellant being dissatisfied with the decision of the Employment Tribunal appeals to the Court raising the following grounds:

> **1.** The learned magistrate erred in law and on facts in having dismissed the Application of the Appellant and having concluded that the tribunal finds no evidence that the Appellant has proved her case before them.
>
> **2.** Learned Magistrate erred in law and on the facts in attaching insufficient weight and/or to address itself on the amount being claimed for accrued leave which claim was for 34 days and not 21 days as accepted by the learned magistrates.
>
> **3.** Learned Magistrate erred in law and on the facts in attaching insufficient weight to the totality of the evidence tendered by the Appellant and in concluding that the Appellant has failed to prove her claim for payment of salary for Saturdays works and public holiday works.
>
> **4.** Learned Magistrates erred in law in having failed to appreciate that the Respondent had the legal burden of proving that which they claimed to have paid as against in the claim being made by the Appellants in all circumstances of the case.

[4] Learned counsel withdrew ground 2 of appeal but moved the Court to quash the judgment of the Employment Tribunal and to award the Appellant all her claims as prayed before the Employment Tribunal on the other grounds.

[5] Learned counsel for the Appellant submitted that article 1315 of the Civil Code provides that a person who demands the performance of an obligation shall be bound to prove it. Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation. On that basis, the Respondent bears the burden of proving to the Tribunal that the Appellant had been paid. Since the Respondent had not discharged that burden, the Tribunal could not have concluded that the Appellant needed to prove her case as regards to the payment.

[6] Learned counsel submitted that she had worked 4 Sundays, 3 Saturdays, 1 Friday and 2 public holidays and she had recorded the days. That evidence was not challenged or rejected by the respondent. Therefore the Tribunal could not have concluded that the Appellant had failed to prove her claims for payment for work done for those days. Learned counsel further submitted that the Tribunal erred in concluding that the Respondent did not owe the Appellant the sum of SCR500 monthly as bus fare for the period of January to June 2009. Learned counsel submitted that records show that payment for bus fare was paid for the last two months and the Appellant had testified that agreement for such payment was made by phone between herself and the Respondent. Learned counsel submitted that the Tribunal appeared to have place insufficient weight to that evidence or overlooked the same.

[7] Learned counsel for the Respondent submitted that the Employment Tribunal has properly weighed the credibility of the evidence and came to the correct conclusion in respect to the claims. Learned counsel maintained that under article 1315 of the Civil Code of Seychelles Act, he who asserts must prove, the exception being the person who has been released who is bound to prove payment or performance. In this case the Appellant was found to be ineligible to claim hence the Tribunal found that she was not entitled to her claims.

[8] Learned counsel submitted that the Appellant, being the claimant was burdened to prove her claim which she failed hence the Tribunal had to dismiss her claim. The Respondent on the other hand genuinely offered to pay the 28 days compensation for length of

service. Learned counsel moved the Court to dismiss the appeal and uphold the determination of the Employment Tribunal.

[9] Article 1315 of the Civil Code of Seychelles states:

> *"Article 1315*
>
> *A person who demands the performance of an obligation shall be bound to prove it.*
>
> *Conversely, a person who claims to have been released shall be bound to prove the payment or the performance which has extinguished his obligation."*

[10] Section 36 of the Employment Act also states:

> *"36. (1) An employer when paying the wages of a worker shall keep a record of the payment together with evidence of receipt of payment by the worker, and issue a pay slip recording details of payment to the worker; and*
>
> *(2) Where an employer fails to comply with subsection (1) and there is a dispute over the fact of payment, a presumption that the employer has not made payment arises against the employer.*
>
> *(3) Where the receipt of payment is not recorded on the record kept under section 35(1), the receipt of payment shall contain the particulars of wages together with the deductions made therefrom."*

[11] Section 36 of the Employment is of particular importance to employment cases in that it impacts on article1315 of the Civil Code and places on the employer the burden of proving that payments claimed were made instead of the claimant employee who does not have obligation to keep records to prove otherwise. It would be unconscionable and a gross violation of natural justice. In the case of *Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR 1* the Court said at [47] and [65] that the term "legitimate expectation" had limited utility and scope in Australian law now that it was accepted that, in the absence of a clear contrary legislative intention, decision-makers must comply with the rules of procedural fairness. As concisely put by Gleeson CJ:

> *"Fairness is not an abstract concept. It is essentially practical. Whether*

one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

[12] In most situations, however, the burden of proof allocation is not likely to affect the outcome unless the defendant does nothing and argue only that the plaintiff failed to prove his or her case which is an imprudent way to defend a case persuasively and potentially fatal to the defense in this context which I find was in fact the position adopted in this case. Hence in evaluating the persuasiveness of the evidence each side present had to present, the Employment Tribunal had only the evidence of the Appellant to go on whilst the Respondent did not present to the Tribunal any document to show why its decision was justified. So in turn, the Appellant could not explain to the Tribunal either why the reasons advanced by the defendant lacked credibility or, even if believable, simply failed to meet the requirements of the law or set forth in the contract.

[13] I therefore conclude that it was only fair in the circumstances for the Appellant to provide her own records of work on Saturdays, Sundays and public holidays. Although I do not find any supporting evidence to sustain the claim that a housing allowance was being paid to the Appellant throughout her employment, I find that bus fares at SCR 500/- monthly was paid to the Appellant for the months of July and August, 2009. I therefore find that she was due bus fare as claimed for the months of January to June, 2009.

[14] Consequently I find that the Employment Tribunal misguided itself by applying an extremely simplified interpretation of the burden of proof which led it conclude that solely the Appellant had to discharge the burden of proof as claimant and the Respondent had nothing to prove. This error in judgment led to other errors of failing to appreciate the evidence of the Appellant the way it should have been and to the erroneous conclusion that the Appellant has failed to prove her case.

[15] For the above reasons, I allow the appeal on grounds, 4, 3 and 1. Consequently I make the following awards to the Appellant.

1. I award the Appellant salaries at 1.5 day's pay for Saturdays worked (3).

2. I award the Appellant salaries at 2 days' pay for work on Sundays

and Public Holidays. (7)

3. I award the Appellant 6 months transport allowance at SCR500 per month (January to June, 2009).

[16] I order the Competent Officer of the Ministry of Employment to do the computation as necessary and submit a copy to this Court and to the parties within two weeks of today.

[17] I award cost to the Appellant.

Signed, dated and delivered at Ile du Port on 14 February 2018

G Dodin
Judge of the Supreme Court