

SUPREME COURT OF SEYCHELLES

Reportable

CA 29/2018
(Arising in ET 103/2017)

In the matter between

MAHE BUILDERS CO. LTD
(rep. by Mr. Padiwalla)

Appellant

and

DIDIER MADELEINE
(rep. by Mr. Guy Ferley)

Respondent

Neutral Citation: *Mahe Builders Co Ltd v Madeleine* (CA 29/2018) [2019] SCSC 292
(3rd April 2019)

Before: Nunkoo J
Summary: **Breach of contract of Employment. Termination by conduct of Employer.**
Heard: [13th March 2019]
Delivered: [5th April 2019]

ORDER

Employer to pay compensation in respect of years of service; one month salary in lieu of notice and unpaid salaries.

JUDGMENT

NUNKOO J

[1] The Respondent was in the employment of the Appellant as a quantity surveying technician. Following the termination of his employment and after the failure of

mediation, he sought compensation for unlawful dismissal before the Employment Tribunal. The Respondent claimed the following:

- (a) Unpaid salary from 1st June 2017 to 9th June 2017.
- (b) 13 days annual leave.
- (c) 60 days compensation for length of service.
- (d) one month notice.

[2] The Appellants case is that the Respondent terminated his employment by failing to work for three consecutive days. Therefore no notice had to be served on him. The Appellants further claim that the Respondents was paid compensation for length of service.

[3] During the course of the trial a plea in limine to the effect that the claim was prescribed as the Respondent had only 14 days to file his application ie in February 2017. The application was made some time in June 2017 therefore the claim was prescribed under the law.

[4] The Tribunal ruling was that the contract of employment was in effect in June 2017 when the respondent was dismissed, as such, the claim was not prescribed.

[5] At the end of the hearing the Tribunal found that the employee was still employed by the Appellant on 9 June when he was unfairly dismissed and made the following orders: Appellant were to pay salaries for the period 1 June to 9 June; to pay 60 days annual leave; to pay one month salary in lieu of notice; to compensation for the period of January 2011 to June 2017.

[6] The Appellants have appealed on the following grounds:

1. The Tribunal erred in finding that the Appellant (Respondent at Tribunal) terminated the Respondent's (applicant at Tribunal) employment because the weight of the evidence goes against such a finding;
2. Although the Tribunal correctly stated the principle relating to the burden of proof at para 31 of the judgment, the Tribunal erred in its application of that burden on the Applicant (Respondent at Tribunal)

3. The tribunal erred in not finding on the available evidence that the Respondent (Applicant at Tribunal) terminated his contract of employment without giving one month's notice.
- [7] Learned Counsel has rightly submitted that these three grounds can be taken together. In simple terms the questions before the court are: was there a termination of employment? If so, who terminated it? It is the contention of the Respondent that it was terminated by the Appellant. The Appellant is contending that it was self-terminated.
- [8] To understand what really happened one must go to the meeting between the Appellant and the Respondent. The facts have been amply recited in the judgment of the Tribunal. The Tribunal heard evidence and after considering all the facts that were before them they concluded that the employment was terminated by the Appellant.
- [9] Learned Counsel for the Respondent has submitted that the language and the tone used by the Appellant and the fact that he was asked to leave the office of the Appellant- in a most uncivilised way to say the least - and the fact that he was asked to leave his mobile and bus pass amount to acts that can be interpreted as termination. This is simply unacceptable. I have gone thoroughly through the judgment and it is my view that the findings of the Tribunal that the employment of the Respondent was terminated cannot be faulted.
- [10] The termination of employment is the core issue and it has been properly addressed and determined. The Respondent's view and belief that his contract was terminated when the Appellant asked him to leave his office and return everything that belonged to the Company and go is plausible. The Tribunal have analysed this aspect fully and have concluded that at that stage the relationship based on mutual trust between employer and employee was broken. Reference is made to the case of **Wood Vs WM Car Services Peterborough 1981, ICR 666**.
- [11] Now Learned Counsel for Appellant has submitted that "*it is quite obvious that the Respondent did not see the incident as a termination but instead took it upon himself to go and find new employment*" is farfetched. Where a person considers that his employment has been terminated and therefore seeks an alternative employment, this fact

cannot necessarily be interpreted as proof that such a person ab initio had decided to terminate his employment. Then anyone dismissed under such circumstances and attempts to seek other employment would not be able to plead unfair dismissal or termination as he might face accusations that he had terminated his employment himself. In my humble view such reasoning is faulty. I do not intend to comment further on the factual issues. These have been fully considered by the Tribunal.

[12] The next point I wish to address regards the burden of proof. Learned Counsel has submitted as follows:

“Faced with these two opposing versions,. The Tribunal does not analyse. Faced with these two opposing versions, the Tribunal does not analyse the evidence in order o assess which version is more credible or which or which to be the correct version. Instead the Tribunal imports into its evaluation of the evidence, the ‘burden of proof’, which it places squarely on the on the shoulders of the Appellant, by finding that on the Appellant has not proved that the Respondent had terminated his employment.

.....”

The rule is he who asserts must prove. The Applicant had to prove termination, which in my view he did. It is then for the Appellant to bring evidence that there was no termination. To that extent they not only have an evidential burden but they also bear the burden of proof.

The Tribunal has not in any way gone against established rules of evidence in its assessment of the facts or in applying the law.

[13] Whether Mr Zialor, who according to the submission of Learned Counsel, encouraged the Respondent to terminate the contract is a matter of speculation. The Tribunal was right in not giving this any weight.

[14] This Court will not interfere with the finding on facts.

[15] Now I have to consider whether the payment of wages up to 20 January 2019 was correct in law. Learned Counsel for the Appellant has submitted that the payment of wages was

not prayed for and has sought to distinguish between employment benefits and wages. I will now look at this point. He has referred to Section 46 (2) which provides:

(1) Workers under contracts of employment for a fixed-term are entitled to all employment benefits up to the day the fixed-term contract expires or the earlier lawful termination of the contracts, as the case may be.

[16] This provision has several elements:

(a) Workers who are under a fixed term contract are entitled to all their benefits up to the day that the fixed term contract expires.

(b) If their fixed term contract lawfully terminates earlier than the period envisaged in the contract, then they are entitled to the benefits up until that time.

[17] Section 46 falls under Part V of the Act. This part is headed 'Regulation of wages and conditions of employment'. As it suggests very clearly, this part regulates wages and other conditions of employment under the Act. Section 46 especially regulates employment benefits. Section 46(2) says that upon lawful termination, employees on fixed term are entitled to all their benefits up until their termination date. By way of example, if an employee is employed for two years and the contract gets terminated lawfully prior to the end of the two year period, then that employee is entitled to all her benefits up until the date of termination. This provision is limited to lawful terminations, and the entitlements that arise in that instance. It does not deal with benefits or entitlements arising from unlawful or unfair terminations.

[18] Those entitlements arising from an unlawful termination are dealt with in a different section of the Act, namely Part VI, under the chapter headed 'Protection of employment'. In terms of s 62, which falls under this part:

“62. Where-

(a) a contract of employment is frustrated, other than under section 58(1)(b);

(b) a contract of employment is terminated by an employer-

(i) under section 57(2)(a) or (b) and the grievance procedure is initiated by the worker with the result that termination is allowed under section 61(2)(a)(iii);

(ii) other than for a serious disciplinary offence under section 57(4);

(c) a contract of employment is terminated by the worker and the Tribunal determines pursuant to section 61(2)(b)(i) that the worker is justified in terminating the contract,

[19] Compensation is payable to the worker, in addition to his wages and any benefits earned, in accordance with section 47(2)(b) or (c).”

[20] It is necessary to set out all the provisions that are referred to in this provision. This will help distil the circumstances under which an employee may be entitled to his wages and any benefits earned.

[21] Section 47

“Restriction on termination of contracts

[22] (1) Subject to Part VIII, an employer shall not terminate, or give notice of termination of a worker’s contract of employment except under section 49 or 50 unless the employer first initiates and complies with the negotiation procedure.

(2) Where, consequent upon the negotiation procedure initiated under subsection (1), the competent officer determines that-

(a) a contract of employment should not be terminated, the contract shall continue to have effect;

(b) a contract of employment may be terminated and the cause of the termination is in no way attributable to the worker, the employer shall pay to the worker compensation calculated at-

(i) the rate of five sixths of one day's wage for each completed month of service in the case of contracts of continuous employment;

(ii) double the rate in sub-paragraph (1) in the case of fixed term contracts; or

(iii) such higher rate as may be prescribed;

(c) a contract of employment may be terminated and the cause of the termination is partly or wholly attributable to the worker, the employer shall pay to the worker a lesser rate of compensation than at paragraph (b) or none, as the competent officer may assess.

[23] Section 57

“Termination by employer

(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.

(2) Notwithstanding section 47, an employer may terminate a contract of employment with notice in the following cases-

(a) where the worker is on probation, during the worker's probationary period if the worker does not satisfactorily complete the period;

(b) where the worker is a trainee under section 27(a), at the end of the training period if the worker fails to satisfactorily complete the training;

(c) where the termination is under section 49 or 50, on the occurrence of the event specified therein;

(d) where the worker is a casual, part-time or domestic worker, at any time.

(3) Notwithstanding subsection (2), notice of termination shall not be given to a worker while that worker is on sick leave or pregnant or on maternity leave unless the competent officer so authorises.

(4) Notwithstanding section 47 an employer may terminate a contract of employment without notice where the worker has committed a serious disciplinary offence within the meaning of that expression in section 52(2).

(5) An employer shall not, otherwise than under this section, terminate the contract of employment of a worker.

(6) An employer shall notify a worker,

(a) who is employed under a fixed term contract; or

(b) a worker who is about to reach retirement age,

at least 1 month before the expiration of the contract or the date of retirement, as the case may be, of that fact failing which the employer shall pay the worker referred to in paragraph (a) or (b) 1 month's wages in lieu of such notice."

[24] Section 61

Grievance procedure

(1) A worker-

(a) whose contract of employment is terminated-

(i) pursuant to section 57(2)(a) or (b);

(ii) for a serious disciplinary offence pursuant to section 57(4);

(c) who terminates his contract under section 60(2)(a) or (b), may initiate the grievance procedure.

(d) (1A) where a worker or employer has registered a grievance, the competent officer shall endeavor to bring a settlement of the grievance by mediation.

(e) (1B) A competent officer in mediating a settlement, shall draw up a mediation agreement which shall be signed by the parties and be presented to the Tribunal for endorsement as a form of judgment by consent.

(f) (1C) If a party breaches the mediation agreement or any part thereof, the agreement shall be enforced by the Tribunal.

(g) (1D) If the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties as evidence that mediation steps have been undergone by such parties.

(1E) A party to a grievance shall bring the matter before the Tribunal within 30 days if no agreement has been reached at mediation.

(2) Upon conclusion of a case before the Tribunal initiated under subsection (1), the Tribunal may determine as follows-

(a) in the case of subsection (1)(a)-

(i) that termination is justified;

(ii) that termination is not justified and that the worker is reinstated in the post or offered other suitable employment and that, where applicable, some disciplinary measure or none be taken in lieu of termination;

(iii) that termination is not justified but, as it would be impractical or inconvenient to reinstate the worker in the post or offer the worker other suitable employment, allow the termination subject, in the case of subsection (1)(a)(ii), to the payment in lieu of notice of one month's wages or, where an amount is specified in the worker's contract of employment in the case of a non-Seychellois worker referred to in section 59(c), that amount and in any other case subject to the termination taking effect on the date of the competent officer's determination;

(b) in the case of subsection (1)(b)-

(i) that termination is justified, in which case the worker is entitled to the payment of one month's salary in addition to any benefits or compensation the worker may have earned;

(ii) that termination is not justified, in which case the worker is liable to pay the employer a sum equal to one month's salary or, where an amount specified in the contract of employment in the case of a non-Seychellois worker referred to in section 60(1)(d), that amount and the employer may deduct the sum or the amount from any payments owed by him to the worker in accordance with section 33(2).”

[25] Interpretation of 62

Reverting to s 62, it seems the provision states the following. In certain instances, where the employer or employee terminates a contract, the employee is entitled to compensation. The employee is also entitled to wages, and any other benefits earned in

terms of s 47(2)(b). Section 47(2)(b) deals with the calculation of compensation where a contract of employment has been terminated and the cause of the termination is in no way attributable to the employee. In terms of this provision, the employee's compensation is calculated as follows: (a) five sixths of one day's wage for each completed month of service if it is not a fixed term contract; (b) double of the aforementioned rate if it is a fixed term contract; (c) or any higher rate that is prescribed. From this then, it seems certain workers may be entitled to this additional benefit. This is the 'any benefits earned' that the provision speaks of.

[26] The question that arises is which workers are these? The answer is in s 62. It states that these workers have right to this benefit: in terms of s 57(2)(a) or (b), employees who were on probation and those under traineeship – where they have failed to perform satisfactorily, and where the Tribunal has in terms of s 61(2)(a)(iii) determined that termination was not justified but, it also finds that it would be impractical or inconvenient to reinstate the worker in the post or offer the worker other suitable employment. Section 61(2)(a)(iii) entitles employees to the payment in lieu of notice of one month's wages. The second category of worker is those who terminated their contract of employment and the Tribunal finds that their termination was justified. It seems that these are the categories of employees who are entitled to the benefit set out in s 47: probation and trainee employees whose dismissal was unjustified, who cannot be reinstated, and employees who themselves terminated their employment and were justified in doing so.

[27] **To sum up:**

Section 46 deals with employment benefits. Fixed term employees are entitled to all benefits up until the day the contract terminates. However, if the contract terminates earlier, they are entitled to the benefits up until the earlier period. This only applies to lawful terminations. For unlawful terminations, compensation is dealt with in s 62. It sets out the entitlements to compensation, and to such benefits earned in accordance with s 47(2)(b).

[28] This provision sets out the calculation of compensation where a contract of employment has been terminated and the cause of the termination is in no way attributable to the employee. In terms of this provision, the employee's compensation is calculated as follows:

five sixths of one day's wage for each completed month of service if it is not a fixed term contract;

(b) double of the aforementioned rate if it is a fixed term contract;

(c) or any higher rate that is prescribed. This is the benefit envisaged in s 62. And in terms thereof, two categories of employees are entitled to it:

(a) those who were on probation or traineeship who did not perform and were dismissed, but whose dismissal was unjustifiable but could not be reinstated; second (b) those who terminated their employment contracts justifiably.

- [29] Learned counsel for the Appellant has taken the view that employment benefits as provided for in s 46(2) is restricted to benefits only; wages is a different matter.
- [30] Section 46(2) does not entitle an employee who has been unlawfully dismissed to any wages under s 46(2) as a payment of wages is regulated by the contract itself which provides for payment of wages for work done. A person is not entitled to any wages for work not done. This is axiomatic. Section 46 cannot go against this logic.
- [31] The definition of wages in s 1 of the Employment Act, 1995 clarifies the issue. In terms of this provision, “wages” means the remuneration or earnings, however calculated, expressed in terms of money payable to a worker in respect to work done under the contract of employment of the worker but does not include payment for overtime work or other incidental purposes.
- [32] This definition read along with various sections of the Employment Act, more specifically, s 46(2)(b); s 47(2)(b); s 57(2)(a) and (b) and 57(4); and 61(2)(a)(iii) and s 62 makes clear this distinction between wages and benefits.
- [33] In the context of minimum wages under the Employment (National Minimum Wage) Regulations, 2008, wages have been defined as "payment for work done by an employee, as provided by law or in terms of an agreement but not lower than the amount prescribed by law." Further," it does not include payment for overtime work or shift allowances; and benefits provided by employers such as housing, transport and food”.
- [34] This definition supports the distinction that exists between wages and benefits. Thus, Counsel for the Appellant has correctly submitted that wages and benefits must be distinguished.

[35] I allow the appeal to the extent that no payment is to be made to the Respondent for wages until the period June 2017 to January 2019.

[36] I therefore maintain the following orders made by the Tribunal.

- i. Unpaid salaries from 1 to 9 June 2017.
- ii. Annual leave earned for the five months
- iii. One month's salary in lieu of notice.
- iv. Compensation for length of service 21 January 2011 to 9 June 2017.

Signed, dated and delivered at Ile du Port on 5th April 2019.

Nunkoo J