SUPREME COURT OF SEYCHELLES

Reportable

[2019] SCSC 686

CA34 & 35/2018

(Appeal from ET184 &185/2014)

In the matter between:

DOREEN NAGARAJAN	**1st Appellant**
SYLVIA LIME	**2nd Appellant**
(rep. by Leslie Boniface)	
and	
FOUR SEASONS RESORT	**Respondent**
(rep. by Elvis Chetty)	

Neutral Citation: *Nagarajen & Lime v Four Seasons Resort* (CA34/2018 & CA35/2018) [2019] SCSC 686 (09 August 2019).

Before: Burhan J

Summary: Employment Act – unfair termination – reinstatement must be considered as the primary remedy unless employer shows reinstatement is impractical and inconvenient – delays in litigation and final resolution may render reinstatement impractical

Heard: 29 March and 19 June 2019.

Delivered: 09 August 2019.

ORDER

The appeal is dismissed. Parties to bear their own costs.

JUDGMENT

BURHAN J

[1] The appellants in this case initiated grievance procedures in which eventually a consolidated judgment dated 7th August 2018 was given by the Employment Tribunal. Accordingly for convenience, the appeals in respect of both appellants from the judgment of the Employment Tribunal have also been consolidated and the judgment in appeal follows.

[2] This matter has a protracted history of almost five years. The appellants Ms Doreen Nagarajan and Ms Sylvia Lime were employed as stewardesses at Four Seasons Resort Seychelles, the respondent in this case. On the 18th of October 2014, the night manager whilst on duty saw the appellants sleeping whilst on night duty. He had reported the matter to the Human Resources and both appellants were called upon to answer the allegation. They denied the allegation and were informed that they had breached the rules by sleeping on duty.

[3] Thereafter by letters dated 18th October 2014, the appellants were suspended from duty without pay for 30 days. By letter dated 20th October 2014, the appellants were informed that they would be facing a disciplinary inquiry on the 21st of October 2014 and thereafter they were informed that their services were terminated.

[4] Being aggrieved by the decision, the appellants filed a grievance application.

[5] After a hearing, the Employment Tribunal gave judgment in favour of the appellants stating the respondent, had failed to prove the alleged disciplinary offence. There exists no appeal in respect of this finding.

[6] Thereafter the Employment Tribunal further held as follows:

"Both Ms Nagarajan and Ms Lime have applied for reinstatement into their posts of night cleaners. Given that in our opinion, the employment relationship between the two applicants and Four Seasons Resort has irretrievably broken down, we find it impractical or inconvenient to order reinstatement. We therefore allow the termination and order Four Seasons Resort to pay the following terminal employment benefits, namely,

1. *1 month notice*

2. *Compensation for length of service*

3. *Leave due, if any.*

[7] Being aggrieved by this decision of the Employment Tribunal, the appellants lodged their appeal seeking the following reliefs as set down in their memorandum of appeal:

(i) "To reinstate in this position without any loss of earnings or order that the appellant is paid benefits up to the date of lawful termination (the date the tribunal took its decision) without any loss of earning.

(ii) The awarded cost to the appellant in accordance with law

(iii)Take any decision it deems fit in the circumstance."

[8] The main grounds urged by learned Counsel for the appellants is that the appellants could have been reinstated as the respondent resort is a large company with over 100 workers. It is the appellants' contention that usually only in circumstances where the employee is working in a small company or business that reinstatement is not ordered. Having reinstated them they could have been transferred to another part of the organisation in order that that industrial relations would not be affected. It is further submitted by learned Counsel for the appellant that by failing to award the appellant any payments up to the date of lawful termination (the date of the Employment Tribunal order), and by failing to order costs or compensation in accordance with schedule 6 of the Employment (Amendment) Act of 2008 there is no financial gain for the appellant.

[9] Firstly on a reading of the Judgement of the Employment Tribunal, it is clear that after hearing the evidence, the Tribunal came to the following conclusion at paragraph 17 of the judgment,

"We find therefore that Four Seasons Resort has failed to prove the alleged disciplinary offence, the basis of which Ms Nagarajan and Ms Lime contract of employments was terminated. Even if we were to find other wise, because the applicants have also pleaded

that the termination of their contract of employment by the respondent was too harsh and disproportionate, we also need to make a pronouncement on that point. This therefore brings us to the second point of contention....."

[10] Having considered the reasoning of the Employment Tribunal relevant to the facts, this Court agrees with the findings of the Employment Tribunal that the termination of employment of the appellant by the respondent is not justified and no appeal exists with regard to this finding. The issue that now arises is that having come to a finding that the respondent had failed to prove the alleged disciplinary offence on the basis of which the appellants' contract of services had been terminated, should the Employment Tribunal not have ordered immediate reinstatement.

[11] The Employment Tribunal after further reasoning stated at paragraph 19 of the judgment that, *"... the employment relationship between the two applicants and Four Seasons has irretrievably broken down, we find it impracticable or inconvenient to order reinstatement."*

[12] The Employment Tribunal did not grant the appellants' requested relief, namely reinstatement and back-pay. Instead the Tribunal, relying on section 61(2)(b)(iii) of the Employment Act held that reinstatement was "impracticable or inconvenient". It is this part of the decision that is being appealed, and the appellants are seeking to be reinstated to their original positions.

[13] It would be pertinent at this stage to set out the relevant provisions of the Employment Act which regulate the termination of employment and the rights of aggrieved employees and the available remedies. The grievance procedure which was initiated by the appellants under section 61 of the Employment Act was ultimately brought before the Employment Tribunal. Section 61(2) of the Act, details the relief the Tribunal may award:

(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 non be taken in lieu of termination; (emphasis mine).

(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;"

[14] It follows therefore that section 61(2) (a) (ii) of the Employment Act, appears to recognise that the primary remedy for an unfair termination is reinstatement. Reinstatement for a dismissed employee means returning to the position the employee held at the time of the dismissal or in the alternative offered other suitable employment.

[15] Subsection (iii) of section 61(2) (a) of the Act however, does recognise an exception to reinstatement where it would be "*impractical or inconvenient to reinstate the worker in the post or offer the worker other suitable employment*".

[16] Section 62 of the Act refers to the payment of compensation upon the termination of a contract 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, compensation is payable to the worker, in addition to his wages and any benefits earned, in accordance with section 47(2)(b)"

[17] Section 47(2) (b) provides for the formula to calculate compensation.

"2(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"

[18] The Employment Tribunal's decision appears to have followed this procedure in awarding compensation. However it appears that the issue of reinstatement was not fully reasoned out by the Tribunal. The importance of reinstatement as a remedy for an unfair and unjustified termination is not unique to Seychelles law. Many jurisdictions around the world have similarly couched legislative provisions. On consideration of the law pertaining to reinstatement comparable legislation (see for example, South Africa, section 193 of the Labour Relation Act (LRA) provides and in Swaziland section 16(2) of the Industrial Relations Act (IRA)) provide that the following factors may be considered:

a) The employee does not wish to be reinstated or re-engaged;

b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.

c) It is not reasonably practicable for the employer to re-instate or re-engage the employee.

d) The dismissal is unfair only because the employer did not follow a fair procedure.'

[19] It could therefore be gathered that the first issue for determination, is whether the law requires reinstatement as the primary remedy where the termination of employment is found to be unfair or unjustified. A perusal of section 61(2) (a) (ii) of the Employment Act as set out above provides for the reinstatement of the worker if the termination is not justified.

[20] The next issue to decide is whether the circumstances of this case establish that in terms of section 61(2) (a)(iii), reinstatement of the appellants is impractical or inconvenient for the respondent resort.

[21] In the Industrial Appeal Court of Swaziland, in the matter *Thandi Kunene,Makhosandile Vilakati and David Ndlovu v Swazi MTN Limited (01/2017)* the Court held that:

"Reinstatement is the primary remedy whenever a dismissal has been found to be substantively unfair. The Constitutional Court of South Africa has explained reinstatement as putting 'the employee back into the job or position he occupied before the dismissal, on the same terms and conditions'. The purpose of reinstatement is to place an employee in the position he would have been but for the unfair dismissal. Reinstatement safeguards a worker's employment by restoring the employment contract.

According to section 16 (2) (c) reinstatement will not be ordered if it is not reasonably practicable for the employer to reinstate or re-engage the employee. This is an exception to the general rule that reinstatement may be ordered. The practicability of ordering reinstatement depends on the particular circumstances of the case, but in many instances, the impracticability of resuming the relationship of employment will increase with the passage of time"

[22] Having regard to the approaches in other jurisdictions, the wording of section 61(2)(a)(iii) of the Seychelles Employment Act lends itself to similar interpretation, namely that reinstatement must be considered, unless one of the exceptions are present. Furthermore,

this authority is indicative that in some instances the passage of time my render the reinstatement impractical.

[23] In *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 11, the Court held that: *'The object of s 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the employee's job no longer exists, or the employer is facing liquidation, relocation or the like. The term "not reasonably practicable" in s 193(2)(c) does not equate with "practical"... . It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."*

[24] In terms of who bears the onus, the burden is on the employer under South African law. To succeed in a claim that reinstatement is not reasonably practicable, the employer has the onus to adduce evidence to prove that submission. The Commission for Conciliation Mediation and Arbitration (CCMA) Guidelines on Misconduct Arbitration, expounds further at para 115 with *'[t]his criterion [not reasonably practicable] will be satisfied if the employer can show that reinstatement or re-employment is not feasible or that it would cause a disproportionate level of disruption or financial burden for the employer.'*

[25] In *SA Revenue Service v Commission of Conciliation, Arbitration and Mediation and Others (2017) 38 ILJ 97 (CC),* the Constitutional Court of South Africa highlighted an arbitrator's responsibility to consider exceptions to reinstatement when deliberating on the appropriateness of the remedy of reinstatement in those circumstances. In this case an employee pleaded guilty to using racist language. Although the ultimate dismissal was found to be unfair, the Constitutional Court held that the nature of the conduct in circumstances in which the misconduct is grave or contravenes public policy, renders reinstatement 'not reasonably practicable'.

[26] Delays in finalising litigation may also be a sufficient justification to deny an employee the primary remedy of reinstatement, because it would not be reasonably practicable to do so. In the case of *Republican Press (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and*

Allied Workers' Union and Others (2007) 28 ILJ 2503 (SCA) the SCA considered the appropriateness of the remedy of reinstatement in the face of a six year delay. The Court found in favour of the employees, however, when deciding on the appropriate remedy, it considered the fact that the employer had embarked on further retrenchments since the employee's dismissal and in addition, some of the company's operations had been restructured. The SCA held that the remedy of reinstatement was inappropriate and ordered 12 months compensation instead. However, systemic delays in the finalisation of employment disputes may not always mean that reinstatement is impractical and inconvenient, and the Employment Tribunal and Courts must consider the circumstances and evidence on a case by case basis.

[27] Therefore it could be gathered that factors affecting reinstatement of an employee which could amount to being impracticable or inconvenient as identified in South African case law are:

a) replacement of one employee by another;
b) changes in the status and identity of the employer;
c) the nature of the misconduct; and
d) delays in litigation.

[28] In light of the above, a case by case basis analysis is required, however evidence of impracticality and inconvenience must be presented by the employer. In this instant case before the Supreme Court, the Employment Tribunal does not appear to have fully canvassed the issue practicality and convenience when making its order and the respondent has not demonstrated why the reinstatement staff members is impractical. At the time of hearing the matter, and if the Employment Tribunal had carried out a full enquiry into the practicality of reinstatement by requiring the respondent to present evidence, it may have been possible to order reinstatement. However, when one considers the passage of time, this matter has been carrying on since 2014, compounded by this appeal, which is regrettable, the fact that almost five years has lapsed renders reinstatement impractical. Delays in the resolution of employment disputes must be resolved expeditiously, and it is

incumbent on the Employment Tribunal to fully consider the practicalities of reinstatement based on the evidence provided.

[29] This Court therefore upholds the judgment of the Employment Tribunal and dismisses the appeal. It is further ordered considering the circumstances of this case that the parties bear their own costs in this appeal.

Signed, dated and delivered at Ile du Port on 09 August 2019.

9-08-2019

M Burhan J

SEAL OF THE SEYCHELLES SUPREME COURT