

SUPREMECOURT OF SEYCHELLES

Reportable
[2019] SCSC 904
CA24/2018

In the matter between

MARIE DANIELLA CHANG-TIME
(Rep. by Mr Leslie Boniface)

Appellant

and

FOUR SEASONS RESORT SEYCHELLES
(Rep. by Elvis Chetty)

Respondent

Neutral Citation: *Chang-Time v Four Seasons Resort* (CA24/2019) [2019] SCSC 904
(11 October 2019).

Before: Govinden J

Summary: Appeal from the decision of the Employment Tribunal allowed. Respondent ordered to pay terminal benefits up to the date of decision of the tribunal.

Heard: 27 March 2019

Delivered: 11 October 2019

JUDGMENT

GOVINDEN J

[1] Introduction

This is an appeal to the Seychelles Supreme Court against a decision of the Employment Tribunal. The appeal before this Court proceeded to an *ex parte* hearing in favour of the Appellant as a result of the Respondent abandoning the appeal.

[2] Issues before the Employment Tribunal

The Appellant who was employed by the Respondent as a Room Attendant was suspended from duty on the 17th of July 2015. Through a letter of suspension of even

date the Appellant was informed by representative of the Respondent that in an incident dated Thursday the 15th of July 2015 he had a discussion with the Director of residence about a work related disciplinary action and the Director of Residence felt threatened and intimidated by his behaviour and action and as a result he will be suspended from duty without pay with effect from the 17th of January 2015 for a period of 2 days and that during this time an investigation will be carried out and she would be invited for a disciplinary hearing. The hearing was conducted by the Respondent on the 19th of July 2015. Following the hearing, the Respondent found that the Appellant action showed a lack of respect and threatened the representative of the employer. As a result of which the representative of the Respondent found that the Appellant had committed a serious disciplinary offence which constituted violation of the Four Seasons Resort Seychelles Policy which is found under work Rule No(1) and (7) and that of the Employment Act under Schedule (2) and Part II of the serious disciplinary offence. The Appellant's contract of employment with the Respondent was terminated on this basis.

- [3] As a result the Appellant initiated a grievance procedure under the Employment Act, claiming reinstatement in her former employment without loss of earning.
- [4] The parties went through a mediation process as part the grievance procedure. This mediation was unsuccessful in view of the fact that they failed to agree on a settlement in accordance with S 61(10) of the Employment Act. The matter thereafter was heard on the facts before the Employment Tribunal.
- [5] After hearing the evidence of the two parties and submissions on their behalves, the tribunal found that the Respondent had failed to adduce evidence to prove the alleged disciplinary offence on the part of the Appellant and in accordance with S61(2)(a)(i) of the Act, declared that the termination of the Appellant's employment to be not justified. However, the tribunal was of the view that as the Appellant had produced no evidence of loss of earnings as a result of her termination of employment, it will not make any findings in that regards. The tribunal accordingly, ordered that the Appellant be paid one month salary in lieu of notice and compensation for length of service.

[6] The Appeal

Feeling aggrieved by the said judgment the Appellant has appeared on the following grounds:-

(1) *“That the Employment Tribunal erred in not reinstating of the Appellant in her employment.*

(2) *In the alternative, should the Appellant be not qualified for reinstatement on the grounds that she had found alternative employment since the termination of the employment by the Respondent, the Employment Tribunal erred by not establishing whether the salary being received by the Appellant in the new position was over or below the salary that she was receiving in the original position so that any adjustment could be made. By not explicitly establishing the facts the Employment Tribunal is essentially saying that any employment and salary being received by the Appellant was immaterial as long as she had found new employment. This is erroneously because the position taken by the Appellant could be lower in status than the previous position held and the status may be lower and therefore adjustment should have been made.*

(3) *The Employment Tribunal erred in its computation of the employment benefits of the Appellant. Section 61(2) (iii) provides the alternative remedy for cases where reinstatement in the work place is impracticable. In accordance with that Section salary and other benefits are payable up to the date of the Employment Tribunal takes its decision. These benefits were not included in the terminal benefits as computed by the Employment Tribunal in this present case.”*

[7] As a result the Appellant prays for a judgment reversing the order of the Employment Tribunal appealed against by ordering that the Appellant is reinstated in her post without any loss or earnings or in the alternative be paid legal benefits up to the date of lawful termination of the Appellant’s contract of employment and compensatory award in accordance with paragraph 7 of the Schedule 6 of the Act 21 of 2008.

[8] Analysis of the grounds of appeal and determination

In her first ground of appeal, the Appellant claims that the tribunal has made an error in not reinstating her in her former employment when it made the finding that her dismissal was not justified. In his submission in support of this ground of appeal Learned Counsel for the Appellant submitted that reinstatement was meritorious in this case as the Respondent organisation is large consisting of many employees and that case law has determined that in such instances reinstatement would be justified.

[9] I had given careful consideration to the arguments put forward in support of the grounds of appeal, having done so I find that the crux of this issue in this appeal does not lie in the fact that the Appellant was not reinstated in her employment but in the fact that the tribunal did not give a reason why it did not reinstated the Appellant.

[10] S61(2) (a) (iii) of the Employment Act provides inter alia, the following

“That reinstatement 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.”

- [11] The tribunal in its decision did not give any reasons why it did not find reinstatement of the Appellant in the employment of the Respondent conducive. It failed to make any findings in that regards. It failed to show why it was impractical or inconvenient to reinstate the Appellant. I find that this finding is a mandatory requirement in law if the tribunal was to make the order that it purported to do in this case.
- [12] Additionally, given the substance of its determination and the content of its order it is clear that the Employment Tribunal was acting under S61 (2) (a) (iii) of the Employment Act and not S61 (2)(a)(ii) of the said Act. The former provisions is the only provision that relates to a finding of unjustified termination of employment where the reinstatement is impractical or inconvenient. S61 (2)(a) (ii) which is referred to by the tribunal in their decision relates to a scenario where determination is not justified and the worker is ordered to be reinstated in the post or offered other suitable employment, which was clearly not the case here. In this respect again the Tribunal makes an error. Accordingly, I will uphold the first ground of appeal, to the extent that the Employment Tribunal erred in not giving reasons why it found the reinstatement of the Appellant in her previous employment to be “inconvenient” or “impracticable” and for making reference to the wrong provisions of the Act in their determination.
- [13] The second ground of appeal is to the effect that the Employment Tribunal should have carried out an exercise of computing the difference in the salary between the worker’s previous salary and the one being earned at the time of the grievous procedure and to the extent that it found that there was a deficit between the two salaries’ to have ordered for the Respondent to pay the difference.

- [14] I have carefully scrutinised the provisions of the Employment Act, especially those of S62 to 63(A) with a view to find the legal basis for this ground of appeal and the submissions in support. Upon doing so I find that there is no statutory provisions that support such arguments. The Tribunal can only make a finding on the justification of the decision to terminate the contractual relation between the worker and the employer and following that the payment of terminal benefits provided in the contract of employment under the law. This could include reinstatement depending on the facts of each case, loss of earnings based on a deficit in the total of the salary between the salary earned under the contract which is the subject matter of grievance and that of the new employment, as equitable as it sounds, falls outside the ambit of the Employment Act. At best I find that it can be the subject matter of a separate action before another forum, of which the competence of the action itself might be questioned, given that public policy has ruled that such kind of issues has to be determined under the Employment Act.
- [15] Moreover, on this point I also agree with the decision of the Employment Tribunal that at any rate the Appellant has failed to produce any evidence before the Tribunal showing the difference between the two salaries.
- [16] As regard the third ground of appeal I find that it has merits. It is settled law in his jurisdiction that salaries and other benefits are payable by the employer to the employee up to the date of the determination of the Employment Tribunal, if the Tribunal was to make a determination under S61(2)(a)(iii) of the Employment Act. Vide, *Bonnelame v/s Seychelles National Assembly CA6/2016* and *NeddyNourrice v/s European Resort Ltd CA18/2012*.
- [17] In this case the Employment Tribunal did not make such an order, instead it ordered that one month salary in lieu of notice be paid. The Tribunal gave its decision on the 21st of May 2018. The Appellant was unlawfully dismissed on the 15th of July 2015. I find that she is accordingly deemed to have been in employment as of the date of her dismissal. The Respondent hence should have been ordered to pay her salaries as of the 15th of July 2015.

[18] Accordingly, I will order that she be paid 30 months and 10 days salary being the salaries that she would have earned in the period between her unjustified dismissal and that of the pronouncement of the Tribunal. Her compensation for length of has to be computed on the totality of this employment period. This Court finds that it makes no difference in law that the worker had managed to secure an employment between her unjustified termination and that of the decision of the Tribunal.

[19] Accordingly the 3rd ground of appeal is upheld by this Court

[20] I therefore order the Respondent to pay to the Appellant all her terminal benefits, being the salary earned up to the date of the decision of the Tribunal and compensation for the length of service up to the same date.

[21] I order accordingly. I make no order as to cost.

Signed, dated and delivered at Ile du Port 11 October 2019

Govinden J