SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 804
Civil Appeal 30/2019
(Appeal from ET 76/2016)

ZIL AIR (PTY) LTD **Appellant**
(rep. by Laura Valabhji)

versus

DOMINIC WOODRUFF **Respondent**
(rep. by Leslie Boniface)

Neutral Citation:	*Zil Air v Woodruff* (Civil Appeal 30/2019 2020 SCSC 29 October 2020
Before:	Dodin J.
Summary:	Termination of employment – calculation of terminal benefits – both grounds of appeal dismissed.
Heard:	22 July, 11and 17 September, 2020.
Delivered:	29 October 2020

ORDERS

1. The appeal is dismissed in its entirety. 2. A copy of the judgment to be served on the Ministry responsible for employment with a view to clarify regulation 5(3) of Employment (Conditions of Employment) Regulations as per the recommendation contained in paragraph 24 of this judgment.

JUDGMENT

DODIN J.

[1] This is an appeal from the judgment of the Employment Tribunal which found that the employment of the Respondent was unlawfully terminated and that he was entitled to be paid 3 days public holiday and all terminal benefits up to 1st March 2017 and one month salary in lieu of notice. The grounds of appeal are:

i. *The Learned Tribunal erred in finding that, "in the absence of clear provisions of the Respondent's policy on giving workers off days in lieu of public holidays worked, the tribunal relies on the employment Act to find that the Applicant is entitled to be paid for his 3 days public holidays as claimed.*

ii. *The Learned Tribunal erred in finding that a waiver of the Appellant's right to notice translates into an unlawful termination of contract of the Respondent by the Appellant, thereby entitling the Respondent to notice payment and terminal benefits.*

[2] Learned counsel submitted that the Tribunal failed to take into consideration Regulation 6 of the Employment Regulations (Conditions of employment) which provides that the employer may give the worker time off equivalent to not more than 2 thirds of the number of hours worked as overtime in lieu of payment unless both parties have agreed to convert all of the overtime worked into cash. Learned counsel argued that there is no requirement for the employee to have to apply to the employer to take the overtime hours nor is there a requirement for there to be mutual agreement between the employee and the employer for overtime to be taken. Accrued overtime is not the same as accrued annual leave. An employee can decide to have the employer take his accrued overtime whenever the employer feels it is able to give the employee that time off. Contrary to the finding of the Tribunal, there is no need for a company to have a policy on giving employee time off in lieu of payment of overtime as the law clearly provides that the employer has the discretion to do that. Learned counsel submitted that the way Section 6 is worded, time off in lieu of payment of overtime is the general rule applicable. Payment of

[3] Payment of overtime is the exception of the rule and is applicable only if the two parties mutually agree to convert the overtime hours partly or fully into cash.

[4] Learned counsel further submitted that if the Appellant had the choice to waive notice, then it cannot be said to have unjustifiably or unlawfully terminated the contract of employment of the Respondent and compelling it to pay one month notice or compensation. Having found that Appellant had that choice to waive notice, that confirmed that Appellant's ending of the contract before the end of the notice period was not justified and all the Tribunal had to determine at that point was whether or not the Respondent was entitled to be paid until the end of his notice period or notice in lieu. The Tribunal cannot in the same breath find that the Appellant had a choice to waive notice but at the same time conclude that the Appellant has unjustifiably terminated the contract of the Respondent thus giving rise to payment of compensation and notice.

[5] Learned counsel referred the Court to the Canadian case of *Asphalte Desjardins Inc v Commision des Normes Du Travail* in support of its submission and submitted that had the Tribunal kept that finding in mind when determining whether or not the Respondent was entitled to claim for benefits it would not have erred. The Tribunal at this point either advertently or error made a complete 360 degree turn and casting aside its findings and reasoning, which was in line with the Supreme Court judgment of *Desjardins*, only to conclude that the Respondent had been unfairly or unlawfully terminated. In doing it then ended up having to find the lawful date of termination which it set as 1st March 2017 and thus awarded the Respondent compensation for length of service up to that date.

[6] Learned counsel concluded that it is unconceivable that on the findings of the Tribunal it could conclude that there was unjustified or unlawful termination

giving rise to payment of compensation. Learned counsel hence moved the Court to the finding of the Tribunal that the Appellant unlawfully or unjustifiably terminated the Respondent's contract of employment by its letter of 8th February 2017 thus entitling him to compensation and quashing the finding of the Tribunal in respect of the entitlement of the Respondent to payment of 3 days in lieu of public holidays and to make such other orders as this Court deems fit.

[6] Learned counsel for the Respondent submitted on the first ground of appeal that the Appellant's argument that the Tribunal failed to take into consideration regulation 6 of the Employment Regulations which provides that the employer may give the worker time off equivalent to not more than 2 thirds of the number of hours worked as overtime in lieu of payment unless both parties have agreed to convert all of the overtime worked into cash is wrong. Learned counsel submitted that the argument of the Appellant is misconceived in the sense that she confused public holidays with overtime. The 1st ground of appeal the Appellant clearly indicates that the Respondent was claiming 3 days' public holidays. However she submitted on overtime and quoted the provision in the regulations dealing with over time. Whilst overtime is indeed dealt with by Regulation 6 Employment Regulations (Conditions of Work), 1991, public holidays are governed by Regulation 5.

[7] Learned counsel further submitted that overtime is not public holiday. As the term suggests, over time is time worked after normal working hours. Collins Dictionary describe over time as "overtime is time that you spend doing your job in addition to your normal working hours. He would work overtime, without pay, to finish a job. Union leaders had argued miners to vote in favour of an overtime ban". A worker may work an hour of overtime after their contracted hours or even more. This over time is governed by Regulation 6. Working on a public holiday has a different meaning altogether. It means a

worker is requested to work as if the worker is working their normal working hours on a public holiday. This is governed by Regulation 5.

[8] On the second ground of appeal learned counsel submitted that the Learned Tribunal did not err in determining that the Respondent was entitled to notice payment and terminal benefits. The Appellant's argument is that if the Tribunal finds that the Appellant had a right to waive notice given to it by the Respondent then it can waive the notice subject to payment being made up to the end of the said notice period. In that case, according to the Appellant to order that notice is and other benefits are paid would be erroneous and there lies the error of the Tribunal supposedly. Learned counsel submitted that this provision allows a worker to terminate the contract of employment of the worker by giving to the employer a month's notice. The worker, the Respondent, in the instant case provided that notice period to the Appellant. This is not denied by the Appellant. The Respondent's contract of employment was terminated whilst serving his notice period activated by himself. However, this notice was interrupted and his contract was terminated. As a result, he activated the grievance procedure.

[9] Learned counsel submitted that there was no need for the Appellant to terminate the contract prematurely and the circumstances of the termination, as found by the Tribunal was unjustified and unlawful. He submitted that the Appellant, should have sent the Respondent on "garden leave" and pay him his dues at the end of the notice period. "Garden leave" describes the practice whereby an employee leaving a job – having resigned or otherwise had their employment terminated – is instructed to stay away from work during the notice period, while still remaining on the payroll. This is used when an employee position is no longer needed during the notice period.

[10] Learned counsel concluded that it is the Respondent's contention that there are no errors in the order of the Tribunal. Garden leave is well practiced in every democratic society in the world. The reasons for it are many, including the need to prevent sabotage by the departing employee. The Respondent should have been sent on such leave instead of being sacked. Being terminated in employment has other repercussions such as the chances of the Appellant finding new employment with curriculum vitae that would indicate he was terminated when indeed that should not have been the case. Learned counsel moved the Court to dismiss the appeal.

[11] Learned counsel for the Appellant made further submissions on both grounds of appeal emphasising that the Tribunal failed to take into consideration Regulation 5 of the Employment Regulations (Conditions of employment) which provides that a worker who works on public holidays is entitled to double pay or to an alternative holiday at the option of the employer. Learned counsel submitted further that even if the Respondent objected to taking days in lieu for the 3 PH, he in fact did not come to work for those 3 days. And from the evidence of both the respondent and Mr Savy despite not coming to work for those 3 days the Respondent was paid for those three days. Le3arned counsel argued that this is corroborated by the calculation in respect of the dues paid out to the Respondent which was exhibited. The calculation of the Respondent's dues shows that he was paid his salary from 1st to 11th February. The Respondent accepted that he had been paid up to 11th February 2017. Therefore the finding of the Tribunal that the Appellant should pay the Respondent for 3 days PH is baseless and if upheld would amount to unjust enrichment as the Respondent would be paid twice for the same 3 days PH.

[12] In response to the Respondent's conclusion that the Appellant terminated the contract of employment, thus resulting in repercussions on his CV, learned counsel submitted that it is completely misleading. The Appellant has always

maintained that the Respondent resigned from his employment and the Appellant merely waived his right to notice. It is the Respondent that has alleged that the waiver of notice translates into termination. The certificate of employment and the resignation letter of the Respondent as produced at the trial are proof that the Respondent resigned from employment and was not terminated.

[13] An appeal is not generally an opportunity for the appellate court to re-assess the facts of the case and make its own conclusion. As stated in the case of *Clydesdale Bank v Duffy [2014] EWCA Civ 1260* the England and Wales Court of Appeal stated:

> *"The Court of Appeal is not here to retry the case. Our job is to review the decision of the trial judge. If he has made an error of law, it is our duty to say so, but reversing a trial judge's findings of fact is a different matter....f persuading an appeal court to reverse a trial judge's findings of fact is a heavy one. Appellate courts have been repeatedly warned by recent cases at the highest level not to interfere with findings of fact by trial judges unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. The series of cases, all in the House of Lords or the Supreme Court, culminates in McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477".*

[14] The Supreme Court of Canada in *Housen v Nikolaisen [2002] 2 SCR 235* adopted and noted the same at paragraph 14:

> *"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."*

[15] In the case of *McGraddie v McGraddie* referred to above Lord Reed with whom Lord Neuberger, Lady Hale, Lord Wilson and Lord Hughes agreed quoted Lord Thankerton from the case of *Thomas v Thomas 1947 SC (HL) 45; [1947] AC 484*, at pp 54 and 487-488:

> *"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."*

[16] I shall start with the determination of the Employment Tribunal as per the second ground of appeal that the employment of the Respondent was unlawfully terminated. It is obvious from the evidence before the Employment Tribunal that the Respondent submitted his resignation on the 7th February, 2017. The Appellant wanted him to reconsider which he did not. The Appellant gave a letter purporting to accept the resignation but imposing other conditions which included the taking of leave in lieu of payment the 3 days holidays worked and deciding not to apply or accept the notice period hence requiring the Respondent to stop working before the completion of the notice period.

[17] Section 47(1) of the Employment Act states:

> *"47. (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."

Section 49 provides for termination upon unsuccessful variation of terms of employment whilst section 50 provides for termination upon change of ownership. None of these sections are applicable to this case. Part VIII of the Employment Act which provides for the lawful termination of a worker was also not relevant and was hence not invoked in this case.

[18] Based on the evidence before the Employment Tribunal the last date that the Respondent was to be in employment was the 28th February 2017. The Employment Act does not have any provision for termination during notice period. Hence determination of a worker's employment prior to the last working day of the worker who is working a notice period must be treated as termination by the employer and if such termination is not in compliance with sections 47, 49, 50 or Part VIII of the Act such termination would not be fair or sanctioned by law. The Employment Tribunal therefore rightly concluded that the employment of the Respondent was unfairly and unlawfully terminated. The Employment Tribunal was therefore correct to determine that waiver of notice period followed by immediate cessation of employment amounted to unlawful termination. This ground of appeal therefore lacks merits and is dismissed accordingly.

[19] The 1st ground of appeal now deal with leave and holidays worked. Regulations 5 and 6 of the Employment Regulations (Conditions of Employment) Regulations provide that:

"*Holidays*

5. (1) Except in an essential service, an employer shall not require a worker, other than a shift-worker or a watchman, to work on holidays.

(2) A worker, other than a shift-worker or a watchman, who works on a holiday is entitled to double-pay for that day, or to an alternative holiday, at the option of the employer.

(3) A shift-worker or watchman who works on a public holiday is entitled to double pay for that day, or to an alternative holiday, at the option of the employer.

(4) Nothing in the preceding provisions of this regulation shall be construed as preventing an employer who requires any worker to work on a holiday from agreeing to allow double pay for that day or an alternative holiday at the worker's option.

Overtime hours

6. (1) Notwithstanding regulation 3, a worker, other than a watchman-

a) may agree,

(b) may, in exceptional circumstances, be required by his employer,

to work for up to 60 additional hours per month or an aggregate of 15 hours per day.

(2) Subject to subregulation (3), overtime is payable-

(a) in the case of a worker, other than a shift worker or a watchman, at the rate of-

i) 1½ hours' pay for 1 hour's work on a week-day;

(ii) 2 hours' pay for 1 hour's work on a holiday;

(b) in the case of a shift-worker, at the rate of-

(i) 1½ hours' pay for 1 hour's work on a week-day or Sunday;

(ii) 3 hours' pay for 1 hour's work on a public holiday,

but the employer may, give the worker time off equivalent to not more than two-thirds of the number of hours worked as overtime in lieu of

payment, unless the employer and the worker agree to convert any part or all of the overtime hours worked into cash.

Additional employment prohibited."

[20] Paragraph 5(3) is not clear as to whether an employee who works on Sundays and public holidays is entitled to a day off or two days off to make up for the double salary he is entitled for that day. This is probably bad drafting but it appears that the Appellant interprets the words alternative holiday as a day off. Nevertheless what is most unacceptable is that the Appellant in its letter of 8th February 2017 accepted the resignation, then in the same latter terminated the Respondent's employment and awarding the Respondent 3 days off for holidays worked.

[21] On the facts, the Employment Tribunal rightly found that there was no evidence of policy adduced by the Appellant to the effect of granting days leave for public holidays worked. The Respondent however agreed that he did not turn up for work on those 3 days and that he was paid 3 days up to 11 February 2020. The law does not provide for days off for public holidays but for *double day's salary* for each public holiday worked or for an *alternative holiday* for each holiday worked. Giving the worker one day off for public holidays work is equivalent to paying only one half of the holiday pay which the worker is entitled.

[22] Since the Respondent has been paid only 3 days off and not 3 days holiday, he is entitled to the 3 days salary which the Employment Tribunal awarded to make up for the double pay he should have received for the public holidays worked.

[23] Consequently, I do not find it necessary to interfere with the determination of the Employment Tribunal and the calculations submitted by the Employment in respect of the terminal dues. This ground of appeal is therefore also declined.

[24] I recommend that the Ministry responsible for employment relook at regulation 5(3) with a view to clarify what is meant by alternative holiday and whether it should result in double days' pay for the holidays worked or in single days salary as in days off.

[25] The appeal is dismissed in its entirety.

[26] I make no order for costs.

Signed, dated and delivered at Ile du Port on 29th October 2020.

Dodin J