

SUPREME COURT OF SEYCHELLES

Reportable

[2020] SCSC ...
CA 280/2019
(Appeal from ET 150/2015)

**CITIZENS ENGAGEMENT PLATFORM
SEYCHELLES**

(rep. by Lucy Pool)

Appellant

versus

VERONIQUE BONNELAME

(rep. by Leslie Boniface)

Respondent

Neutral Citation: *Citizens Engagement Platform Seychelles v Bonnelame* (CA 28/2019)
[2020] SCSC 990 (28 December 2020)

Before: Dodin J.

Summary: Termination of employment – claim for reinstatement – calculation of terminal benefits.

Heard: 2 September 2020

Delivered: 28 December 2020

ORDERS

The appeal is dismissed in its entirety with costs to the Respondent.
Copy of this judgment shall be served on the Employment Tribunal and the parties.

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 and prematurely terminated on the 17th September 2015 without compliance with the provisions of the Employment Act. The Employment Tribunal determined that the Respondent should be paid all legal benefits being compensation for length of service on fix term contract, notice, salaries and annual leave up to the expiry of her contract on 31st May 2017. The Appellant

being dissatisfied with the decision of the Employment Tribunal appeals against the whole of the judgment raising the following grounds:

- i. *The Learned Tribunal erred both on the fact and on the law in holding that the Respondent's employment was unlawfully terminated.*
- ii. *The Learned Tribunal failed to take into consideration that the Respondent was on a fixed term contract and that she was still on probation when she was terminated.*
- iii. *The learned Tribunal was wrong to hold that the Respondent had a legitimate expectation that her contract will run until its expiry when the said contract contained probation period and termination clauses.*
- iv. *The calculations of the benefits are erroneous and unreasonable and do not reflect the objects and reasons of Employment legislations.*
- v. *CEPS is a non-profit organisation that that the learned Tribunal ought to have taken into consideration in deciding on the legal benefits due to the Respondent. The award of R 674,463.22 is unreasonable and creates bad precedent.*
- vi. *In all the circumstances of the case the learned Tribunal failed to make a fair assessment of the whole of the evidence placed before it.*

[2] On the 1st ground of appeal learned counsel for the Appellant submitted that the Respondent was on a two year fixed contract with a probationary period of 3 months which could be extended to 6 months. The contract also had a termination clause whereby the employee had to give 1 month notice and the employer could terminate in accordance to section 57 of the Employment Act. The Tribunal failed to apply section 53 of the Employment Act to the facts which if it had the Tribunal would have come to a different conclusion.

- [3] On grounds 2 and 3 learned counsel submitted the Respondent was on probation for 3 months which could have been extended for 6 months had she not been terminated. Since the contract had termination clauses for both parties there was no ground for the Tribunal to find that the Respondent had a legitimate expectation to be employed for two years.
- [4] On ground 4 learned counsel submitted that the length of service of the Respondent was only 3 months, notice, one month's salary and annual leave. Learned counsel submitted that whilst section 46(2) does provide for all employment benefits until the expiry of a fixed term contract, it does not apply to fixed term contracts containing termination clauses. The Tribunal should have calculated the terminal benefits based only on the months worked, one month's notice and compensation for 3 months worked.
- [5] On ground 5 of appeal learned counsel submitted that CEPS is a non-profit organisation and at the time the case was heard the members of the board had changed and the composition of the board had been restructured. CEPS is a charitable organisation and an award of such magnitude will financially bankrupt the organisation which is a fact the Tribunal failed to take into consideration.
- [6] Learned counsel for the Respondent submitted on grounds 1, 2 and 3 that the clause for probation alluding to the Respondent being on probation is null and void since section 70 of the Employment Act only provides for probation for employees under a contract for continuous employment. Learned counsel submitted that the Tribunal applied section 53 correctly and found that⁵ the termination was not in conformity with the provisions of section 53.
- [7] On ground 4 of appeal learned counsel submitted that the Tribunal was bound by section 61(2)(iii) once it determined that termination was not justified. Payment of terminal benefits should be up to the date of lawful termination.
- [8] On ground 5 of appeal, learned counsel submitted that neither the fact that the Appellant is a charitable organisation or the risk of bankruptcy is a defence for failing

to comply with the provisions of the Employment Act. Learned counsel further added that CEPS is actually funded from the national budget and in 2018 it received SCR 2.5 million. In 2019 it received SCR 2.3 million and in 2020 it received SCR 2.4 million.

- [9] As stated the England and Wales Court of Appeal in the case of Clydesdale Bank v Duffy [2014] EWCA Civ 1260:

“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.... 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”.

- [10] The same was adopted by the Supreme Court of Canada in Housen v Nikolaisen [2002] 2 SCR 235:

“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.”

- [11] In the case of McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477 Lord Reed quoted Lord Thankerton from the case of Thomas v Thomas 1947 SC (HL) 45; [1947] AC 484:

“(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."

[12] On the 1st ground of appeal this court is called upon to determine whether the Tribunal erred on the facts and on the law in holding that the employment of the Respondent was unlawfully terminated. The Tribunal heard evidence from the Respondent Veronique Bonnelame who was the only witness for the Respondent and from Michel Raymond Pierre who was the only witness for the Appellant. The Tribunal also considered several exhibits including the contract of employment between the Appellant and the Respondent, various correspondences between the Appellant and the Respondent including the letter of termination issued to the Respondent. Having assessed the evidence and having had the opportunity to assess the demeanour of the two witnesses, the Tribunal concluded that the termination of the Respondent's employment was unlawful.

[13] Sections 53(1)(2) and (3) and section 57(2)(a) and (4) referred to by the Appellant state:

"53. (1) No disciplinary measure shall be taken against a worker for a disciplinary offence unless there has been an investigation of the alleged offence or where the act or omission constituting the offence is self-evident, unless the worker is given the opportunity of explaining the act or omission.

(2) Where the disciplinary offence relates to a serious disciplinary offence, the worker shall be informed in writing with copy to the Union, if any, of the nature of the offence as soon as possible after it is alleged to have been committed and of the suspension of the worker, where the employer deems suspension to be necessary as a precautionary measure or for investigative purposes.

(3) The employer shall ensure that the investigation pursuant to subsection (1), even where it consists in no more than requiring an explanation for a self-evident act or omission, is conducted fairly and that the worker has, if the worker so wishes, the assistance of a colleague or a representative of the Union, if any, and of such witnesses as the worker may wish to call.

57. (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;

(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).”

[14] The Tribunal found that the issue of serious prejudice was never put to the Respondent prior to termination. Although the Respondent was asked to give an explanation on certain issues particularly refusal to follow instructions, which the Respondent did give, the Tribunal found that the facts leading to the allegation of refusal to follow instructions are different to the ones made in the Respondent’s letter of request for written explanation. The Tribunal after considering these factors concluded that the Appellant failed to deal with the alleged disciplinary offences of insubordination, serious prejudice and refusal to follow instructions in accordance with the Employment Act as the Appellant did not give the Respondent the opportunity to be heard on or give an explanation to these specific allegations.

[15] Having reviewed the record of proceedings and the relevant exhibits placed before the Tribunal, I find that the Tribunal came to a reasonable conclusion based on the facts before it. The finding in fact determined that the Appellant acted in violation of section 53(1)(2)and (3). I therefore find no reason to interfere with the findings of the Tribunal on the facts or in respect of section 53(1)(2)and (3) of the Act. This ground of appeal is dismissed accordingly. The effect of section 57(2)(a) and (4) shall be dealt with in grounds 2 and 3 of the appeal.

[16] From the record of the Employment Tribunal, the evidence established that the Respondent in a fixed term contract of employment which term was for a two year period. Clause 2 of the contract purported to place the Respondent on probation for 3 months which could be extended for 6 months. However as submitted by learned counsel for the Respondent, the Employment Act only provides for probation for employees in continuous employment. Section 70 of the Act states in respect of probation:

70. *An employer shall not employ a worker on probation-*

(a) except under a contract of continuous employment when the worker is first employed by the employer; and

(b) for longer than 6 months unless authorized by the competent officer.

[Emphasis mine].

[17] Since such provision placing the Respondent who was on a fixed term contract on probation is not permitted by law, the Appellant cannot rely on this unlawful provision in grounds 2 and 3 of appeal. Section 57(2)(a) does not apply to the Respondent who was on fixed term contract. Although the Tribunal did not appreciate this particular aspect in assessing the evidence before it, it did come to the correct conclusion that the Respondent had a legitimate expectation that her contract would run until the expiry of its term on 31st May 2017. Grounds 2 and 3 of appeal therefore have no merit and are dismissed accordingly.

[18] I shall in short order deal with ground 5 of appeal before considering ground 4. The fact that CEPS is a charitable organisation relying on donations and government grants does not affect its position as an employer in terms of the Employment Act. The Act makes no provision for exemption or special consideration for charitable organisations. Further, the fact that the organisation may go bankrupt if a substantial award is made against it is not an issue that the Tribunal is bound to consider. This court also cannot and will not use its equitable powers to condone the wrongdoings of the Appellant. This ground of appeal is dismissed.

[19] In respect of ground 4 of appeal, the Employment Act is clear and logical in respect of the various contracts of employment. In contracts of continuous employment the law has specific provisions for termination which are different from fixed term, part-time or casual contracts. The only common ground for termination is for serious disciplinary offence. For fixed term contracts, there is no provision for probation and termination would only occur on mutually agreed grounds, for serious disciplinary offences or at the expiration of the fixed term. None of these occurrences were proved in this case and the Tribunal concluded that termination was unlawful.

[20] Section 46(2) of the Employment Act provides that:

“46. (2) 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.”

As has been determined by the Employment Tribunal and upheld by this court, the contract of the Respondent was unlawfully terminated. Hence there was no earlier lawful termination of contract.

[21] The fact that there were clauses in the contract for earlier termination has no effect on the unlawful termination of the Respondent's contract of employment for two very precise reasons: Firstly, the fact that the Respondent had a two year fixed term contract cannot be defeated by a provision for earlier termination as this would defeat the main objective of the contract which is a two year fixed term contract of employment. Secondly, to award the Respondent less terminal benefits than she would have had had she completed her full term of the contract would be rewarding the Appellant for the earlier unlawful termination of the Respondent's contract of employment. Hence the Respondent is entitled to all benefits calculated up to the expiry of the contract. This ground of appeal also therefore fails.

[22] Having dismissed all the above grounds of appeal, there is no necessity to address ground 5 of the appeal.

[23] Consequently, I do not find it necessary to interfere with the determination of the Employment Tribunal and the calculations submitted to the Employment Tribunal in respect of the terminal dues.

[24] This appeal is dismissed in its entirety.

[25] I award costs to the Respondent.

A copy of this judgment shall be served on the Employment Tribunal and the parties.

Signed, dated and delivered at Ile du Port on 28th December 2020.

Dodin J