

SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 152
MA 249/2020
Arising in CA 11/2020

In the matter between:

SAVOY DEVELOPMENT LIMITED
(rep. by Manuella Parmantier)

Petitioner

and

SHARIFA SALUM
(rep. by Kelly Louise)

Respondent

Neutral Citation: *Savoy Development Limited v Salum* (MA 249/2020 (Arising in CA 11/2020)) [2021] SCSC 152 (16 April 2021)

Before: Burhan J

Summary: The disciplinary procedure adopted by the appellants was unfair and prejudicial to the respondent in this case. The appellants have failed to establish that the respondent has committed serious disciplinary offences. Termination of the respondent was not justified and the dismissal was unlawful. The date of lawful termination is the date of determination by the Tribunal. Employee is entitled to wages until lawful termination.

Heard: 12 January 2021 and 26 February 2021 (written submissions)

Delivered: 16 April 2021

ORDER

Appeal dismissed in its entirety with costs. Employment Tribunal ruling affirmed. I make further order that interest at legal rate be paid to the respondent in respect of the total sum ordered by the Employment Tribunal w.e.f. from the date of the Employment Tribunal Order 1st September 2020 until the date payment is made to the respondent.

JUDGMENT

BURHAN J

[1] This is an appeal from the ruling of the Employment Tribunal dated 1st September 2020 where the Tribunal decided in favour of the respondent as follows:

- a) *Salary from date of unjustified dismissal until date of lawful termination (which includes her suspension period) 21st August 2018-1st September 2020 in the sum of SR1,232,021.88/-;*
- b) *Compensation for length of service (totality of the employment period therefore until lawful termination) 1st June 2017-to 1st September 2020 in the sum of SR62,838.53/-*
- c) *One months' notice in the sum of SR50,270.82/-; and*
- d) *An order that the warning letter issued on the 24th July 2018 be struck out and removed from the employment record of the Applicant.*

BACKGROUND FACTS

[2] The background facts of the case are that the respondent was employed in the appellant's hotel, Savoy Hotel, as a Front Office Manager since 2017 until her employment was terminated. The respondent was issued a termination letter on 28th August 2018 by the appellant after the disciplinary committee hearings held between the 21st and 24th August 2018 were concluded. According to the letter, her termination was as a result of serious disciplinary offences involving dishonesty, breach of trust, deception or other fraudulent practices within the undertaking or during the performance of her work. The disciplinary committee concluded that the respondent being in charge of the company funds manipulated with provided funds to cover shortages and could no longer be trusted and this was based on further investigations which revealed that the taking of company funds and using it for personal use had become a negative culture and usual practice amongst the subordinates.

- [3] The respondent filed a case in the Employment Tribunal seeking reinstatement without loss of earnings, 6 months' salary as compensation award, one month's notice and withdrawal of warning letter given by the employer (herein appellant).
- [4] The Tribunal in their ruling came to a finding that asking the front office to refuse a guest by deceptively advising him that the hotel was at full capacity was not a reasonable order, and that as the appellant had brought no evidence to support their decision to issue a warning letter in respect of the respondent's alleged insubordination, the said warning letter was unlawfully issued. The Tribunal further ordered payments to the respondent as set out in paragraph [1] herein.
- [5] The appellant, being dissatisfied with the Tribunal's ruling, appealed on the following grounds:
- a. *The Tribunal erred when demonstrating bias in its procedural approach in favour of the Respondent.*
 - b. *The Tribunal erred in law and on facts when arriving at the Judgment dated 1st September 2020*
 - c. *The Tribunal erred in law and on facts when failing to consider the Respondent mitigated any loss if at all any after she commenced her new employment.*
 - d. *The Tribunal erred in failing to consider facts brought by the Appellants.*
 - e. *The Tribunal erred in law when holding the Appellant to high internal procedural standards.*
- [6] The appellant in submissions contended that Employment Act, Schedule 2 (52. 55) dealing with Disciplinary Offences states that a worker is deemed to have committed a serious disciplinary offence wherever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, inter alia, where the worker commits any offence involving dishonesty, robbery, breach of trust, deception or other fraudulent practice within the undertaking or during the performance of the work.

- [7] The appellant also argues, *inter alia*, that the Tribunal failed to consider that the employer had valid reasons to terminate the respondent immediately, as the excuses given by the respondent for her behaviour, was not a "valid reason", and any reasonable employer would deem her action to be dishonest and a breach of trust.
- [8] The appellant also alleges in appeal that the Tribunal was bias in favor of the respondent in considering the evidence before it.
- [9] The respondent (applicant in the Employment Tribunal) in her submissions states that the Tribunal rightly found that the lapses in procedure at the disciplinary inquiry had led to a procedural impropriety which had prejudiced the fairness of the proceedings and inherently tainted the final results of the same which was the unjust termination of the respondent's contract of employment. This is denied by the appellant who state that the disciplinary hearing was not conducted in an adversarial manner as the respondent was given an opportunity to bring a representative to assist her, further the respondent when invited for the disciplinary hearing was given prior notice of the agenda of the meeting and her failure to bring her representative to support this claim at the Employment Tribunal hearing does not bolster such a claim.
- [10] It is the submission of the respondent that having found that her termination had been unjust, it is justified that she would be entitled to her employment dues up to the lawful date of termination and compensation as she was not interested in reinstatement due to the clear breakdown in the relationship between the parties as borne out during the trial. The respondent submits that the Tribunal's findings as per her wages, notice and compensation, was not a punitive award of damages but in line with section 62 (2) (a)(iii) and in line with jurisprudence on this point namely the cases of, vide, *Bonnelame v Seychelles National Assembly CA I2016* and *Neddy Nourrice V Eastern Resort Limited CAJ8120J9)[2019] SCSC 904*.

THE LAW

- [11] Section 53 of the Employment Act provides for disciplinary procedures as follows –

- (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 such witnesses as the worker may wish to call.*
- (4) *Where a disciplinary offence is established, the employer shall decide on the disciplinary measure to be taken and, where such measure is termination without notice, shall inform the worker of the same in writing with copy to the union, if any.*
- (5) *A worker aggrieved by a disciplinary measure taken against the worker may initiate the grievance procedure and under that procedure the burden of proving the disciplinary offence lies on the employer.*

[12] Section 55 provides for disciplinary measures –

“Upon proof of a disciplinary offence, the employer may take anyone or more of the disciplinary measures listed in Part III of Schedule 2, but, upon the grievance procedure being initiated

under section 53 (5), the Tribunal may review such disciplinary measure and substitute another or none as the Tribunal deems fit.”

Schedule 2 (Ss.52 and 55)

Part I - Disciplinary Offences

A worker commits a disciplinary offence wherever the worker fails, without a valid reason, to comply with the obligations connected with the work of the worker and more particularly, inter alia where the worker-

(d) fails to obey reasonable orders or instructions given by the employer or representative of the employer; (emphasis added)

(...)

(h) fails to comply with the rules and regulations of the undertaking;

Part II - Serious Disciplinary Offences

A worker commits a serious disciplinary offence where-ever, without a valid reason, the worker causes serious prejudice to the employer's undertaking and more particularly, inter alia, where the worker-

(...)

(c) fails repeatedly to obey reasonable orders or instructions given by the employer or representative of the employer including orders or instructions relating to the use or care of protective equipment;

(...)

(g) commits any offence involving dishonesty, robbery, breach of trust, deception or other fraudulent practice within the undertaking or during the performance of the work of the work of the worker.

ANALYSIS

[13] A reading of the above indicates that the Employment Act provides for disciplinary offences and serious disciplinary offences. As the name suggests, the latter category

are more serious and have a greater impact on the work and the working relationship between the parties. In instances where the disciplinary offence is of a serious nature then the termination is justified. It is therefore necessary for this court to determine whether the offence committed by the respondent in this case was a serious disciplinary offence to warrant the dismissal of the respondent.

[14] According to the termination letter, her termination was as a result of serious disciplinary offence involving dishonesty, breach of trust, deception or other fraudulent practices within the undertaking or during the performance of her work. Failure to obey reasonable instructions has also been alleged by the appellant (employer). However, under part 1 (d) schedule 2 of the Employment Act, an employee commits a minor disciplinary offence where the employee fails to obey reasonable instructions given by the employer.

[15] It should be kept in mind that once a grievance procedure is initiated by an employee, the burden of proving the disciplinary offence lies on the employer, in accordance with Section 53(5) of the Employment Act. Therefore, the burden of proof in this matter lies with the appellant. When one considers the events leading to the termination of employment of the respondent, the sequences of events leading to her dismissal as borne out in the evidence are set down and analysed as follows.

[16] The first incident was when the respondent received instructions from the Deputy General Manager (DGM) not to check in a guest without prior payment. The guest was a coloured person on a diplomatic mission. The respondent felt that the instructions were discriminatory because they allowed a Reunion guest to check in with no payment.

[17] The next incident was in July 2018 when a South African guest with a voucher for two nights attempted to settle his bill with a Maestro card. The card was not accepted and the guest was asked to go to the ATM to withdraw cash. The following day the

guest opened an account and incurred a bill of SR 10, 000.00. Despite the instructions of the respondent not to open a credit line as a precautionary measure taken by the respondent, due to the earlier instructions received from the DGM concerning this client, the DGM had cancelled her instructions and authorized the opening of the account. Thereafter the same guest wanted to book for additional nights, the DGM had given instructions to inform the guest that the hotel was now fully booked. As a result of her not following orders she was issued with a warning letter. Her defence was that she was following hotel protocol and she had refused to lie to a guest upon the instructions of the DGM. She challenged the warning letter by filing a grievance but was suspended on the 20th of August 2018 before the matter could be adjudicated.

[18] I will first deal with this warning letter. It is apparent that the warning letter was issued on the 24th July 2018 in accordance with part 1(d) Schedule 2 of the Employment Act, for committing a minor disciplinary offence where the employee fails to obey instructions given by the employer which causes reputational risk to the hotel as per the- Disciplinary Warning Form produced as an exhibit.

[19] Having noted the contents and evidence led in respect of the warning letter by the respondent, the following facts emerge. The DGM had given instructions not to grant an extension of stay to the South African guest and to inform him that the hotel was fully booked. It is apparent that these instructions were given as the DGM was aware that the guest was involved in importation of controlled drug. It is the contention of the respondent that if the DGM suspected so in order to black list the guest the DGM had to follow certain procedures, which he had not done. When this particular guest arrived the respondent had been instructed not to accept the maestro card of the guest but ask the guest to go to the ATM and pay for his stay in cash. Due to these instructions the respondent had refused to open for the guest an account /credit line. However, the DGM had overruled her decision and the guest was permitted to open an account/credit line, despite the respondent refusing to do so. The DGM had ordered the credit line in her name which meant that if the guest did not pay, the

respondent would have had to. It is her grievance that as it was a guest of Savoy and not hers, it was not fair for her to be made responsible for settlement of the credit line opened by the DGM. This fact was not challenged and I feel it unfair that such orders should be given by the DGM.

[20] However, thereafter the DGM had instructed that the stay of the guest not be extended and that he be informed the hotel is fully booked. It is clear from the evidence of the respondent that she had not checked her emails and got to know of this order through the Senior Supervisor Mr. Randolph. It is the respondent's contention that as the hotel had advertised online the availability of rooms, to say now that no rooms were available, would cause reputational risk to the hotel's name before the Seychelles Tourism Board and even open the hotel to being sued by the guest. It is the contention of the respondent that guest had been in the room since the day before, the hotel could have got the security to remove the guest from his room, if there was sufficient cause to do so.

[21] The appellant has not led any evidence on the issue of the warning letter at the Tribunal hearing. This court is of the view that considering the background circumstances under which the warning letter was issued, an inquiry should have been conducted to determine whether the order given by the DGM was a reasonable order (refer to paragraph [12] herein), and also whether the respondent by refusing to follow orders was committing a minor disciplinary offence which causes reputational risk to the hotel refer paragraph [18] herein or was protecting its reputation by not telling the guest an untruth. It is only after coming to such a finding that a warning letter could be issued. No evidence was led by the appellants to establish these facts at the Tribunal inquiry. I therefore am of the view that the warning letter had been arbitrarily issued and should be set aside and removed from the record of the respondent (emphasis added).

[22] The respondent's suspension letter dated 20th August 2018, also contained an invitation to attend a disciplinary meeting 24 hours later. The respondent in her evidence at the Tribunal states that at the disciplinary inquiry issues were raised that

she had no prior knowledge of and which were not included in her suspension letter. However when one considers the suspension letter marked at the Employment Tribunal Inquiry, it clearly refers to three incidents, occurring on the 12 July 2018, 24th July 2018 and 29 of July 2018. Therefore the respondent was given notice of the incidents albeit very short notice indeed.

[23] I will next proceed to deal with the three incidents referred to above. In respect of the incident of 12th July 2018, the respondent admits that on the 12th of July 2018, when a spot check was done she was accused of taking money out of Ms Babelle Barker's cash float and putting it into her float. She does not seek to deny this but said she had taken the money from Ms Babelle's float to replace money in her float as she had taken money from her float to give a loan to another employee Lisette Bastienne. Thereafter when her float tallied she had sent money through a trainee to be given to Babelle in order that her float would have tallied. All this had been caught on camera and she does not deny the incident. She states a statement was taken from her on the following day. Whatever money taken was replaced immediately. It is her contention that if there is a shortage and the employee fails to refund the money, an investigation must be carried out within two days. In this instant case, the money was refunded immediately and no further investigation conducted until the disciplinary inquiry.

[24] Having considered the facts in relation to this incident, this court is of the view it is unfair and unjustified to terminate the services of an employee on a single incident concerning money in a cash float especially when the money was replaced by the end of the day and there were no prior warning in respect of cash float shortages against the respondent. A written warning would suffice for such conduct at the maximum.

[25] The other incident mentioned occurred on the 24 of July 2018 as mentioned in the suspension letter was again in respect of the money in the cash float. One Jelina Havelock had been observed by camera taking money from her own cash float and giving it to the respondent which the respondent had put in her pocket. Firstly it is clear that it was Jelina Havelock who had taken the money from the cash float and

not the respondent. Further Jelina was called by the respondent to give evidence at the Tribunal inquiry and stated she owed the respondent money for paying her TV bill online. The money was her tips which she kept in the cash box. She further stated on an earlier occasion the camera had caught her putting her tips in the cash box and she had to give an explanation. She stated she did so as she had no drawer. She further stated there was no detection of shortfall of money in the cash box on that day. I find that absolutely no blame could be attached to the respondent in respect of this incident. Further, I observe that the respondent was made aware of this incident only on the 20th of August 2018 in her letter of suspension dated 20th August 2018. The respondent states she could not recall this incident. Understandably, as the explanation was not called within the specified time, an employee who is handling money continuously on a daily basis is not going to remember every single transaction several weeks or months later.

[26] The other incident in respect of the cash float referred in her notice of suspension letter dated 20th August 2018 was again in respect of the cash float and occurred on the 29th of July 2018. One Ms Babelle Barker was noticed taking money from her own cash float and giving it to the respondent who was in her car who had left the property with the money. It appears that Ms Babelle Barker was not called by the appellant at the Tribunal inquiry. The respondents explanation at the Tribunal inquiry and disciplinary was that she did call Ms Babelle and ask her for a refund of SR 1000/- money borrowed from her by Ms Babelle. The camera's had shown Ms Babelle taking money from the cash box going to the car of the respondent and handing it over to the respondent. Once again it was not the respondent taking money from the cash box but Ms Babelle. Ms Babelle did not give evidence at the Tribunal inquiry. Ms Babelle has admitted taking the money from cash box. She did not deny the respondent's contention that she was refunding SR 1000/- owed to the respondent.

[27] Further there is no evidence to indicate Babelle's cash box was checked on that date and a shortage discovered. The income auditor Mohammed Medany Abdelhady

called by the respondents at the Tribunal inquiry stated that he knew nothing about the incidents that occurred on the 24th and 29th of July 2018. Here too this court cannot attach any blame to the respondent as she had not taken the money herself from the cash float, her explanation had not been contradicted by Ms Babelle and no immediate detection was made in respect of any shortage in the cash box. For the aforementioned reasons, I am of the view no blame can be attached to the respondent in respect of the incidents of 24th July 2018 and 29 July 2018. The finding of the Disciplinary Committee to terminate the services of the respondent on these two incidents i.e., incidents of 24 July 2018 and 29th July 20018 on the basis of dishonesty, breach of trust, deception or other fraudulent practices is incorrect and not justified.

[28] It is the also the contention of the respondent that she was not given time to prepare for the disciplinary inquiry as the time of 24 hours given to her was insufficient. I observe that the evidence of Ingrid Panagary indicates that the respondent was invited for the disciplinary committee meeting by letter dated 20 August 2020 and the first disciplinary meeting was held on the 21st of August 2018. She states she cannot recall whether the respondent was present or not. From her evidence, it appears that the evidence of the respondent that she was only given 24 hours' notice to prepare for the disciplinary inquiry is correct which, in the view of this court, is insufficient time and speaks of an undue and unnecessary rush to hold a disciplinary inquiry against the respondent. Further her evidence that she was not allowed to participate in certain parts of the inquiry when evidence was being taken has not been countered or contradicted by the appellants. Witness Ingrid Panagary, when questioned about the presence of the respondent at the inquiry on other dates, states she could not recall the presence of the respondent. I am inclined to agree with the finding of the Tribunal that the above lapses in procedure at the disciplinary inquiry had led to a procedural impropriety which had prejudiced the fairness of the proceedings and inherently tainted the final results of the same which was the unjust termination of the respondent's contract of employment.

[29] It appears to this court that the procedure adopted by the appellants in taking belatedly, all cash float incidents together and inquiring into them is unfair and prejudicial to the respondent in this case. It is also to be kept in mind that the respondent had filed a grievance application against the appellants by this time and therefore it appears that the conduct of the appellant in suddenly deciding to have a disciplinary inquiry by lumping three incidents together is questionable. The excuse given by learned counsel that the company being a large company cannot keep to deadlines in investigating cash flow shortages is not acceptable. Giving merely 24 hours to prepare for an inquiry indicates an undue rush and these are not internal procedures and standards that should be followed or encouraged. I also note the evidence at the Employment Tribunal indicates that respondent was the only one issued with a suspension letter prior to the disciplinary hearing and at no point in the course of the investigation or after were the other employees issued a warning for their participation in these practices or their involvement in these particular incidents.

[30] For the aforementioned reasons this court is satisfied that the appellants have failed to establish that the respondent has committed serious disciplinary offences involving dishonesty, breach of trust, deception or committed any other fraudulent practices during the performance of her work. This court holds that the termination of the respondent is not justified and her dismissal unlawful.

[31] I will next proceed to deal with the compensations orders of the Tribunal. In determining the payment of salary to the respondent following the unlawful termination, the Tribunal relied on a number of authorities, as follows: In the case of ***Cap Lazare v Ministry of Employment and Social Affairs CS 18/2008*** the Court reiterated that the calculation of salary should be made until the lawful termination pronounced by the Tribunal. In ***Nourrice v European Resort Ltd (2013) SLR 233*** the Court upheld the case of ***Cap Lazare v Ministry of Employment and Social Affairs (supra)***, and reaffirmed that compensation should be paid up to the date of lawful termination pronounced by the Tribunal and not up to the time that the

employer terminated the employment. This was more recently affirmed in ***Chang-Time v Four Seasons Resort (CA24/2019) [2019] SCSC 904 (11 October 2019)***, which case the Employment Tribunal relied on.

[32] The appellant, on the other hand, has cited the case of ***Mahe Builders Co Ltd V Madeleine (CS 29/2018)[2019] SCSC 292***, which adopted an alternative position and held that an employee who has been unlawfully dismissed is not entitled to salary after the date of the unlawful dismissal as they would not have worked to “earn” those wages. I am inclined to disagree with this judgment as in all cases of unlawful termination employees are unable to “continue to work to earn wages” not due to any fault of theirs but due to being deprived of the opportunity to work by the unlawful termination done by the employer.

[33] The case of ***Nourrice (supra)*** was upheld by Court of Appeal in ***European Hotel Resort v Nourrice (SCA 23/2013) [2015] SCCA 6 (17 April 2015)***. The Court of Appeal held –

“The Supreme Court in its judgment had pronounced that that “the date of the judgment by the Tribunal is the actual date of lawful termination” and that the Respondent was entitled to her salary and other terminal benefits up to that date, namely 28th May 2012. On an examination of the relevant provisions of the Employment Act and the decision in the case of *Sams Catering (Prop) Limited VS The Minister of Employment*, Civil Side No.312 of 2006 relied on by the Supreme Court in its judgment, we are in agreement with the decision of the Supreme Court. In our view where the Tribunal determines that the termination was justified, lawful termination would take place at the time of actual termination by the employer, but where it is determined that the termination was not justified but cannot recommend reinstatement, the termination takes place on the date of the determination of the Employment Tribunal.”
(emphasis added)

- [34] In light of these conflicting positions, that of the higher court takes precedence, and therefore the court must find in favour of the respondent in this regard.
- [35] Furthermore, the argument that the respondent mitigated any loss if at all any after she commenced her new employment does not hold water since it could not have been reasonably expected of the respondent to not seek other means of income or alternative employment pending the outcome of her application, not knowing for certain what that outcome would be. The respondent's right to work is safeguarded by the Constitution and once ones employment has been terminated by an employer one has every right to seek employment elsewhere and should not be discriminated for doing so. This in my view has no effect on the entitlement of an employee (who has been unlawfully dismissed) to wages until the date of lawful termination, being the date of the determination by the Tribunal. The question of unjust enrichment referred to by learned counsel for the appellant therefore fails.
- [36] This court is of the view that the awards made by the Tribunal were not disproportionate to the nature of the grievance before it and were founded in law. In its Ruling, the Tribunal considered the evidence that had been put before it by both parties and it cannot be said that they disregarded any particular piece of evidence due to bias towards the respondent.
- [37] For all the aforementioned reasons this court is of the view that the appeal should be dismissed in its entirety with costs. Employment Tribunal ruling affirmed. I make further order that interest at legal rate be paid to the respondent in respect of the total sum ordered by the Employment Tribunal w.e.f. from the date of the Employment Tribunal Order 1st September 2020 until the date payment is made to the respondent.

Signed, dated and delivered at Ile du Port on 16th of April 2021.

M Burhan J