

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 344

CA04/2020

Appeal Arising in ET44/2019

In the matter of:

SEYCHELLES PUBLIC TRANSPORTATION CORPORATION

PLAINTIFF

(rep. by Kieran Shah)

And

VINCENT ERNESTA

DEFENDANT

(rep. by Brian Julie)

Neutral Citation: *Seychelles Public Transportation Corporation vs. Ernesta (CA04/2020)*

[2021] SCSC 344

Before: Dodin J.

Summary: Appeal from Employment Tribunal – termination of employment – whether employer followed correct procedures – Part II Schedule 2 of Employment Act.

Heard: 29th March 2021

Delivered: 13th May 2021

ORDER

It is necessary for the employer to state the offence under Part II Schedule 2 of the Employment Act upon termination of the employment of an employee for serious disciplinary offence. The reasoning of the Employment Tribunal was not unreasonable in the circumstances. The judgment of the Employment Tribunal is upheld. Appeal is dismissed.

JUDGMENT

DODIN J.

[1] This is an appeal against the determination of the Employment Tribunal which found that the Appellant, then Respondent, did not follow correct procedure in terminating the employment of the Respondent, then Applicant. Consequently, the Employment Tribunal found that the termination was not justified and the Respondent was awarded all terminal benefits in view that re-instatement was no longer an option.

[2] The Appellant raised following three grounds of appeal:

- i. *The Employment Tribunal erred in finding that the suspension letter and letter of termination did not indicate or list which of the offences listed under Schedule 2 of the Employment Act that the Respondent had committed, in that*
 - a. *The suspension letter clearly states that the Respondent had committed a serious offence, namely driving a bus whilst having an alcohol level of 107 micrograms when involved in accident.*
 - b. *The termination letter (Exhibit A1) issued after the investigation and explanation from the Respondent, was expressly based on driving a bus whilst he had alcohol content above the limit.*
- ii. *The Employment Tribunal erred in finding that the nature of the offence was not explained to the Respondent and that the Appellant did not inform the Respondent the nature of the offence, in that*
 - a. *The Respondent was told the gist of the complaint against him. He was given an opportunity to explain himself to the Investigation Officer.*
 - b. *Suspension letter clearly states that the offence of driving under the influence is of serious nature.*
 - c. *The termination letter also states that the offence of driving while not sober is an offence of serious nature.*
- iii. *That the Employment Tribunal erred in finding that the termination was unjustified, in that*
 - a. *The termination was justified. An investigation was carried out and the Respondent was given an opportunity to explain himself.*
 - b. *The Respondent admitted that he had been drinking prior to driving the SPTC bus.*

- c. *The act (disciplinary offence) committed by the Respondent was self-evident.*
- d. *It is patently wrong to say an employee can only be terminated for offences listed in the 2nd Schedule to the Employment Act (Cap 69), as offences are all relative to the kind of activity being performed, and the offences listed in the schedule are not exhaustive*

[3] On the 1st ground of appeal learned counsel for the Appellant submitted that the suspension letter (Exhibit R4) clearly states that the Respondent had committed a serious offence, namely driving a bus whilst having an alcohol level of 107 micrograms when involved in an accident. Furthermore, the termination letter (Exhibit A1) issued after the investigation and explanation from the Respondent was received, clearly states that the termination was expressly based on driving a bus whilst he had alcohol content above the limit.

[4] Learned counsel submitted that it is self-evident that driving a public bus whilst under the influence of alcohol is a serious disciplinary offence that puts others' lives at risk, and in this case the unauthorized passenger on the bus had to seek medical attention and a collision occurred with one Mr. Morin, resulting in damage to his vehicle. The act committed was self-evident and an investigation was carried out prior to the Respondent being terminated.

[5] Learned counsel further submitted that there is no prescribed form for a suspension letter or termination letter in the Employment Act. Both the suspension letter (Exhibit R4) and termination letter (Exhibit A1) expressly referred to the fact that the Respondent was driving a bus whilst he had alcohol content above the limit. The Respondent admitted in cross-examination that he was fully aware of the Applicant's zero tolerance to drug and alcohol policy.

[6] On the 2nd ground of appeal learned counsel submitted that the Respondent was told the gist of the complaint against him and he was given the opportunity to explain himself in

accordance with section 53(1) of the Employment Act. The Respondent stated in examination-in-chief that he gave a report to Mr. Dogley (the Investigation Officer). The Respondent also admitted in cross-examination that he was aware that if the reading for alcohol content following a breathalyzer test was above 10 micrograms, he could be terminated, however he also stated that he didn't consider the act of driving SPTC property under the influence of alcohol as being a serious offence.

- [7] Learned counsel further submitted that the termination letter (Exhibit A1) explicitly sets out the complaint against the Respondent and the disciplinary consequences of committing such an offence. It is evident from the suspension letter (Exhibit R4) that it was the offence of driving an SPTC bus with alcohol content above 10 micrograms that was being investigated.
- [8] On the 3rd ground of appeal learned counsel submitted that the termination was justified. An investigation was carried out by the Investigation Officer and the Respondent was given an opportunity to explain himself. The Respondent admitted in cross-examination that he had been drinking prior to driving the SPTC bus. The act of being unable to carry out his duties (returning the bus to the depot) because he was under the influence of alcohol committed by the Respondent, is a serious disciplinary offence that is self-evident (in accordance with section 53(1) of the Employment Act).
- [9] Learned counsel further submitted that it is patently wrong to say an employee can only be terminated for offences listed in the 2nd Schedule to the Employment Act (Cap 69). The offences listed in the schedule are not exhaustive. The Respondent caused serious prejudice to the Appellant's undertaking. Offences are all relative to the kind of activity being performed, the Respondent in his capacity as an SPTC bus driver is tasked with the responsibility of driving a large motor vehicle, carrying many passengers at one time, on often narrow and/or winding roads in residential areas requiring extra care and precaution to be taken by the driver.
- [10] Learned counsel hence moved the Court reverse the judgment of the Employment Tribunal and find that the termination was justified.

[11] Learned counsel for the Respondent informed the Court that no submission would be made for the Respondent except that he moved the Court to uphold the judgment of the Employment Tribunal for the reasons stated in the judgment.

[12] A cursory reading of the judgment of the Employment shows that the Tribunal actually found that the Respondent was under the influence of alcohol and the test showed that he was above the legal limit. Paragraph 38 of the judgment states:

“From R3 it is clear that on the day in question there was alcohol in the Applicant’s system. This cannot be denied by the Applicant. This is in breach of the Respondent’s memo in relation to their drug and alcohol policy found in R1 which the Applicant was aware of is also evident.”

[13] The Employment Tribunal also found that there is uncontroverted evidence that the Applicant, now Appellant, was speeding at the time of the accident although that did not seem to be the reason for the termination of his employment This is at paragraph 39 of the Employment Tribunal’s judgment.

[14] The reasoning for the determination that the termination of employment was unlawful is found in paragraphs 40, 41 and 42 of the judgment.

*“[40] The Employment Act lists all the serious disciplinary offences for which termination is possible under Part II of Schedule 2 to the Act. However, a reading of the both A1, being the termination letter, and R4 being the suspension letter do not indicate which of the offences listed under the Schedule that the Applicant has breached. Unfortunately for the Respondent, the Tribunal cannot assume the offence; that is clear from the judgment in **Philoe**. Instead we are of the opinion, **Philoe** stipulate that employers must clearly state, if at any point in the suspension letter, which offence the employee is being investigated for. It follows that if that offence is proved, it will be listed in the termination letter. There is however, no mention of which offence under the Employment Act the Applicant is alleged to have committed.”*

“[41] And whilst it can be argued that it is sufficient that the employee is aware that breach of the policy would result in termination, the issue in relying upon that becomes that it is only for those offences listed in Schedule 2 that an employee can be terminated. Therefore, the Respondent has a duty to link the

*offence of the breach of policy to the serious disciplinary offences listed in Schedule 2; the law leaves no room for maneuvering given that section 53(2) requires the employer to explain the **nature** of the offence in relation to a serious disciplinary offence.”*

“[42] Thus, it is our response to query in (b) must be that the offence listed, do not appear under the serious disciplinary offence of Scheduled 2. Further, given that the Respondent did not inform the Applicant of the nature of the offence, section 53(2) was not followed and thus our answer to (c) must be in the negative.”

[15] This Court is therefore only left to determine not whether the Respondent was under the influence of alcohol at the time of the accident or whether being under the influence of alcohol breached the employer’s policy or caused prejudice to the employer’s enterprise. This Court can only determine whether the Employment Tribunal considering the evidence before it arrived at a decision that is so unreasonable that no other tribunal considering the same could have arrived at. Otherwise it is not the role of an appellate court to re-evaluate the evidence brought before the trial court and make its own finding thereon.

[16] The impugned letters issued to the Respondent state:

“RE: Positive breathalyzer test

Reference is made to the incident; whereby on the 14th March 2019 whilst performing driving duties in bus S18740, you were involved in an accident at Anse Aux Pins. As per procedure you underwent a breathalyzer test at Anse Aux Pins Police Station of which the reading was 107 micrograms.

Note that such offence is considered very serious and warrants termination of employment as management has zero tolerance on drug and alcohol, as per addendum to policy on drug and alcohol dated 27th September 2011.

In view of the above you are suspended from your normal driving duty without pay effective today 15th March 2019, pending further investigation.

You are to surrender all the company belongings to your manager and all cash and hand ticket in your possession to the cashier's office before leaving the premises."

RE: Termination of employment

Reference is made to our suspension letter dated 15th March 2019; whereby on the 14th March 2019 whilst performing driving duties in bus S18740, you were involved in an accident at Anse Aux Pins. As per procedures you underwent a breathalyzer test at Anse Aux Pins Police Station of which the reading was 107 micrograms.

Your written explanation has been received. Note that the offence is considered very serious and warrants termination of employment as per company policy and also the addendum to policy on drug and alcohol dated 27th September 2011.

Do note that public safety is an important aspect of our operation and it is the Management's responsibility to ensure that all our drivers are fit and sober when performing driving duty and conducting these tests are part of ensuring the safety of the public. Such negligent action from your part shows that you have completely no regards for public safety and for other road users. Your action could have resulted in catastrophic consequence for the company should an accident had happened.

Having that said the management has no other alternative but to terminate your employment effective 15th March 2019.

Please surrender all company belongings to your manger and all collected cash and hand tickets to the cashier's office before leaving the premises.

Note that you will be advice of your final dues/deduction under a separate cover. We take the opportunity to thank you for the time you spend with us and we urge you to take your responsibility more serious in your future endeavor."

- [17] The operative part of the judgment of the Employment Tribunal is that the Appellant did not state which serious disciplinary offence under the 2nd Schedule of the Employment Act the suspension and termination were being effected. Indeed both letters above never referred to any provision in the Part II of the 2nd schedule of the Act. Learned counsel for the Appellant argues that even if such a reference was lacking, the Respondent was acutely aware that his employment was being terminated for operating the Appellant's

vehicle under the influence of alcohol and that such act is prejudicial to the employer's enterprise.

[18] Part II of Schedule 2 of the Employment Act provides for the following serious disciplinary offences:

“SERIOUS DISCIPLINARY OFFENCES

A worker commits 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-

(a) fails repeatedly to observe working hours or is absent from work without authorization on 3 or more occasions within a period of 12 months.

(b) is absent from work without justification for a whole day on 3 or more occasions within a period of 12 months;

(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 of care of protective equipment; and

(d) fails to keep a secret connected with the work of the worker, the production of goods or the provision of services, where the failure results in serious prejudice to the undertaking or the general interests of the Republic;

(e) wilfully or intentionally damages the property of the undertaking thereby causing a reduction or stoppage of production or serious prejudice to the undertaking;

(f) is unable to carry out the duties of the worker due to the effect of alcohol or dangerous drugs or refuses to comply with a requirement of an employer under section 53A;

(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 worker;

(h) in the course of the employment of the worker assaults, or inflicts bodily injury upon a client of the employer or another worker;

(i) commits any active or passive bribery or corruption;

(j) commits an offence under this Act whereby the worker causes serious prejudice to the employer or employer's undertaking;

(k) does any act, not necessarily related to the work of the worker, which reflects seriously upon the loyalty or integrity of the worker and causes serious prejudice to the employer's undertaking;

(l) shows a lack of respect to, insults or threatens a client of the employer or another worker whether it be a superior, a subordinate or a colleague.

(m) wilfully, repeatedly and without justification fails to achieve a normal output as fixed in accordance with standards applicable to the worker's work;

(n) knowingly makes false statements in an application for special leave under the Employment (Coronavirus Special Leave) (Temporary Measures) Regulations, 2020."

[19] The Employment Tribunal is of the view that the Appellant should have stated which provision of Schedule 2 Part II the Respondent had violated by being under the influence of alcohol whilst performing his duty. It appears to be the considered opinion of the Employment Tribunal that it should not be left to an employee to ascertain under which provision of Schedule 2 Part II his employment is being terminated although it would appear to the world that the act under investigation is so serious that it warrants termination.

[20] I do not find the reasoning of the Employment Tribunal to be unreasonable considering that the lawmakers had found it necessary to draw up the list of offences under Schedule 2 Part II that would consist serious offences warranting termination of employment.

[21] I therefore find no reason to interfere with the determination of the Employment Tribunal on all 3 grounds of appeal.

[22] The appeal is dismissed with cost to the Respondent.

Signed, dated and delivered at Ile du Port on 13th day of May 2021.

Dodin J