SUPREME COURT OF SEYCHELLES

Reportable
[2021] SCSC 554
CA03/20

In the matter between:

AIRTEL SEYCHELLES LIMITED **Appellant**
(rep. by Mr. Kieran Shah)

and

NIGRINI BARRA **Respondent**
(rep. by Leslie Boniface)

Neutral Citation:	*Airtel Seychelles v Barra* (CA03/2020) [2021] SCSC 554(27th August 2021)
Before:	Burhan J
Summary:	Employment Act. Reinstatement upheld. Termination unlawful. Compensation order upheld.
Heard:	20th October 2020 and 10th May 2021
Delivered:	27th August 2021

ORDER

Appeal dismissed with costs

JUDGMENT

BURHAN J

[1] This is an appeal against a decision of the Employment Tribunal. The Appellant is Airtel Seychelles Ltd (who was the employer and Respondent in the application before the Employment Tribunal). The Respondent is Nigrini Barra (who was the Applicant (employee) before the Employment Tribunal.

[2] The Tribunal gave judgment in favour of the Respondent as follows:

i) It ordered that the Respondent be reinstated in post with immediate effect.

ii) In respect of his loss of earnings, it was not found fair to the Appellant to award loss of earnings from July 2014 until date of reinstatement due to the unacceptable delay it took to complete the case. However, since the Respondent gave evidence that he was terminated on 9th July 2014 and took up employment as a fisherman in the year 2016 until the year 2018, the tribunal ordered that the Respondent be paid his salary from the date of unlawful termination (i.e. 9th July 2014) until the year 2016 when he took up employment as a fisherman and from 9th July 2018 until the date of his reinstatement (i.e. date of judgment).

iii) In addition, the Respondent was further awarded six months' salary as a compensatory award.

[3] Being aggrieved by the Tribunal's Ruling, the Appellant filed an Appeal before this Court raising a number of grounds as per notice and memorandum of appeal which read as follows:

a. The Employment Tribunal was in error to order the reinstatement of the Respondent with no loss of earnings as such decision is unreasonable and irrational in that it is plain and obvious that it is not practical to reintegrate him in the post after a lapse of 5 ½ years due to the delay of the proceedings.

b. The award for payment of salaries from 9th July 2014 to July 2016 (2 years) and from July 2018 to February 2020 (20months) is contrary to the fundamental principle of the law on damages that an aggrieved person has a duty to mitigate his loss by obtaining another source of income promptly.

c. There was no justification to award compensatory award of 6 months' salary.

d. That the total sum awarded to the Respondent is manifestly high.

[4] The background facts of the case are that the Respondent was employed by the Appellant Company as a Senior Credit Controller. The Respondent commenced work on 19th March 2007 on a six-month contract and became employed on a continuous contract of employment in 2011 until his employment was terminated on 9th July 2014.

[5] The Respondent had received a final warning letter dated 27th June 2014, as a result of an incident which accorded the day prior, whereby the Respondent, being upset with his appraisal rating, allegedly used abusive language and was overheard by employees. The Respondent claimed that he was not given the opportunity to defend himself prior to the decision to issue him the said warning. The Appellant deemed that the alleged behavior warranted the issuance of a final warning due to the seriousness of the issue and warned that should there be any repetition of such behavior, chances would be that his employment with the Appellant Company would be terminated. After having requested to be heard, the Respondent was given the opportunity to appear before a grievance committee on 4th July 2014 to explain himself. The Committee later advised him to bring more witnesses other than the one brought, Danny Pierre on Monday 7th July 2014, in order to arrive at a decision. To his surprise, two additional persons gave evidence and on the 9th July 2014 the Committee concluded, by way of a letter from the Human Resources, that after going through the statements they found the allegations made against him to be accurate and as such they were taking the decision to terminate his employment.

[6] According to the Tribunal, after hearing the evidence of all witnesses, it was apparent that the Respondent was issued with a warning letter on 27th June 2014 as a result of his alleged disciplinary offence committed on the 26th June 2014. He was aggrieved by this letter and initiated an internal grievance procedure. A panel was set up and he was under the assumption that he was being given the opportunity to be heard. The purpose of the hearing according to the Respondent, the witnesses and even the letter of subsequent termination, was to consider the Respondent's appeal to the issuing of the said warning. However, after the hearing the Appellant Company did not take any decision on the Appellant's appeal but instead decided to terminate the Respondent's employment. According to the termination letter, the Respondent was terminated on the grounds of disrespect to a colleague and using abusive language at the workplace. The Tribunal was of the opinion that the Respondent had the right to challenge the said disciplinary measure. The failure of the Appellant Company to advise the Applicant that alternate action was being considered against him is a clear breach of their obligations under section 53 (1), (2) and (3) to inform the Respondent the purpose of the hearing so as to give himself the opportunity to be adequately prepared and/or represented to defend his alleged

actions, for which his termination of employment was being strongly considered. The Panel was expected to take a decision as to whether uphold the warning or revoke it and the decision to hand out further disciplinary measures instead wholly disproportionate and unlawful. As such, the Tribunal found the termination was not justified and found in favour of the now Respondent (then Applicant).

[7] Both the Appellant's and Respondent's learned Counsel have thereafter filed written submissions in support of their respective stance with regards to the Appeal of which contents have been duly considered for the purpose of this Judgment.

Appellant's submission

[8] The Appellant submits that the order of reinstatement should be reversed and instead allow termination under section 61 (2) (a) (iii) of the Employment Act. That the sum of R421,791.90 be reduced to the date the Respondent should have obtained alternative income, namely 6 months from the date he ceased employment with the Appellant or such other date as the court feels to be just, fair and equitable. The Appellant argues further that the order to pay 6 months' salary as compensatory award should be reversed on the basis that there is no concomitant delict committed with the termination of employment and that the total sum award should be reduced.

Respondent's submission

[9] The Respondent submits that the decision to reinstate him with no loss of earning as reasonable and rational. The Appellant did not discharge the burden to prove impracticability of reinstatement, which is on the employer, before the Employment Tribunal and cannot rely on that very fact to have the decision of the Employment Tribunal overturned.

[10] It is the submission of the Respondent that the Tribunal award payments of salaries from 9th July 2014 to July 2016 was in accordance with the law. The Tribunal considered the issue of

mitigation of loss and the Appellant brought no evidence to show that the Respondent had not mitigated his loss.

[11] The Respondent argues that the payment of compensation or cost is found in the Employment Amendment Act, 2008 in which Schedule 6 under 73A which states that '*at the conclusion of every proceedings the Tribunal shall in addition to any other remedies provided under the Act, award compensation or costs or make any other order as it thinks fit*'. This remedy, existent in other jurisdiction, is subject to the discretion of the Employment Tribunal. In addition to being punitive in nature and in favour of the worker, it is also a provision which takes into account costs incurred by the worker in the course of fighting for his/her hard earned dues, amongst other things.

[12] Finally, that the total sum awarded by the Tribunal is not manifestly high and is simply a tabulation of what the law requires the Appellant to pay.

LAW AND ANALYSIS

[13] 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.

[14] 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;

(...)

(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;

[15] Once an employee initiates a grievance procedure, 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 lays with the Appellant.

Ground 1 of the appeal

[16] It is to be observed that learned Counsel for the Appellant in appeal has not challenged the reasoning and findings of the Tribunal in respect of unlawful termination. He has only challenged the reinstatement order and the amount of compensation awarded by the Tribunal. This Court will therefore proceed to deal only with these matters.

[17] In his submission in support of this ground of appeal, learned Counsel for the Appellant submitted that reinstatement is a discretionary remedy and that after a lapse of 5 ½ years, it is plain and obvious that it would not be reasonable nor practicable to reinstate the Respondent. The Appellant has cited the case of ***Dominique Guichard v Sandrine Matombe*** **[2018] SCSC 910,** where it was held that as a long time had passed since the Respondent last worked at the Appellant's establishment and that he may by now have hired a replacement.

[18] The Appellant claims further that since the Respondent was setting up his business when he testified before the Tribunal, reinstatement is no longer an option and that case law has determined that in such instances reinstatement would be not be justified.

[19] The Tribunal should instead have applied section 61 (2)(a)(iii) of the Employment Act, which states :

"That termination 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 termination."

[20] Careful consideration was given to the arguments put forward in support of the grounds of appeal. The Tribunal in its decision found that the termination was not justified and found in favour of the Respondent and it was the wish of the Respondent to be reinstated. The Appellant did not contest this claim for reinstatement and the Tribunal heard no evidence to challenge this possibility.

[21] 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) (ii) of the Employment Act and not S61 (2)(a)(iii) of the said Act. The former provision which is referred to by the Tribunal in their decision relates to a situation where determination is not justified and the worker is ordered to be reinstated in the post or offered other suitable employment. S61 (2)(a)(iii) is the only provision that relates to a finding of unjustified termination of employment where the reinstatement is impractical or inconvenient.

[22] The Appellant at the Tribunal inquiry failed to give reasons as to why it found reinstatement of the Respondent impractical even though in his application to the Tribunal the Respondent had specifically sought reinstatement as a ground of relief. Had there been a challenge from the Appellant, the Tribunal would have been compelled to make findings as to the impracticability and inconvenience of reinstatement. In the case of ***Dominique Guichard v Sandrine Matombe* [2018] SCSC 910 *(supra)*** it was held that *"employers must know that when they terminate contracts, they run the risk of a challenge, which may result in an order to reinstate."*

[23] In ***Equity Aviation Services (Pty) Ltd v CCMA & Others,*** the Constitutional Court held that the purposes of reinstatement was to place an employee in the position in which he or she would have been had the dismissal not occurred. Nkabinde J held as follows:

> *"The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have*

been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal ... The fact that the dismissed employee has been without income during the period since his or her dismissal must, amongst other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."

[24] In ***National Union of Metalworkers of South Africa obo Fohlisa and others v Hendor Mining Supplies,*** the Court held:

"*What is the legal context in this matter? What Equity Aviation tells us is certainly central to that context, Reinstatement may be, but is not always, retrospective. To state the axiomatic, reinstatement means the resuscitation of the employment agreement with all the attendant reciprocal rights and obligations. Again, to state the obvious, the element of retrospectivity in the reinstatement does not entail the rendering of services for the back-dated period of reinstatement. That is an impossibility. Perhaps that makes the very notion of "retrospective reinstatement" a bit of a misnomer, if not a legal fiction. What then is the practical value of retrospective reinstatement? It is the reinstatement of all the employee's benefits in terms of the contract of employment from the date specified in the order so as to "plac[e] an employee in the position he or she would have been but for the unfair dismissal". Obviously, if the employer may be able to demonstrate that – for one reason or another – an employee would not have been able to render services, the employee concerned would not be entitled to retrospective remuneration. That much is illustrated by the total obliteration or reduction of benefits in respect of*

employees who died either before 1 January 2007 or on or after that date but before the date of reinstatement."

[25] Accordingly, the first ground of appeal should not succeed, to the extent that the Employment Tribunal did not err to order the reinstatement of the Respondent with no loss of earnings.

Ground 2 of the appeal

[26] On the second ground of appeal (b), namely that the Tribunal erred in law when it awarded for payment of salaries from 9th July 2014 to July 2016 (2 years) and from July 2018 to February 2020 (20 months), in contrary to the fundamental principle of the law on damages that an aggrieved person has a duty to mitigate his loss by obtaining another source of income promptly, the parties have cited case laws in support of their positions.

[27] In determining the payment of salary to the Respondent following the unlawful termination, the Tribunal considered the case of ***Mervin Belle v Kempinski* [2018] SCSC 837.** 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***, 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.

[28] In ***European Hotel Resort v Nourrice* (SCA 23/2013) [2015] SCCA 6 (17 April 2015)**, the Court of Appeal held that –

"The Supreme Court in its judgment had pronounced 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."

[29] In light of the above, this Court therefore must find in favour of the Respondent in this regard.

[30] The Appellant, on the other hand, claims that the Respondent did not work immediately after he was no longer working at the Appellant. That he had a duty to mitigate his loss by obtaining another source of income promptly. The Appellant cited the case of ***Berta (Proprietary) Ltd v Panagary (*CS 111/2014 [2017] SCSC 1039*)*** which cited the case of ***Fisherman's Cove Ltd v Petit & Dumbelton Ltd* (1979) SLR 40**, where it was held that :

> *"all reasonable steps must be taken to mitigate loss. Therefore, one cannot claim damages for loss which he ought reasonably to have avoided"*

[31] The Appellant also cited the case of ***Mervin Belle v Kempinski Seychelles Resort* [2018] SCSC 837 (supra)**, where it was held that if the Appellant had taken up employment, the calculation of salary and terminal benefits should be up to the date the Appellant took employment. The Respondent had a contract of employment and as such, like all breaches of contract, one has the duty to mitigate one's loss.

[32] The argument that the Respondent mitigated any loss if at all any after he commenced his 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 his application, not knowing for certain what that outcome would be. Furthermore, at the time of the hearing at the Tribunal, the Respondent was in the process of setting up his own

business but it was not yet operational and as such, he was not earning money. The entitlement of an employee who has been unlawfully dismissed to wages up until the date of lawful termination, being the date of the determination by the Tribunal, is not punitive in nature. The Appellant has cited case law stating that in calculating the award, the court must not allow the claimant to be put in a better position than they would have been had the unlawful termination not occurred. Had the unlawful termination not occurred, the employee would have remained in employment and earned the salary. They would not have had to seek other employment. Therefore, it can be argued that in awarding payment of salary up to the date of lawful termination, the court is placing the claimant in the position that they would have been had the unlawful termination not occurred. Therefore, this Court proceeds to dismiss this ground of appeal.

[33] On the remaining grounds of appeal, namely that:
c). there was no justification to award compensatory award of 6 months' salary and;
d). the total sum awarded to the Respondent is manifestly high.

[34] The payment of compensation or cost is found in the Employment Amendment Act, 2008 in which Schedule 6 under 73A which states that '*at the conclusion of every proceedings the Tribunal shall in addition to any other remedies provided under the Act, award compensation or costs or make any other order as it thinks fit.*' The compensatory award of 6 months' salary sought is not for length of service and does not take into account any remedies such as the terminal benefits, which are ordered by virtue of the Act when reinstatement is not possible. As to the total sum awarded by the Tribunal, this Court finds that it falls within the ambit of reasonableness required. The appeal on this ground dismissed.

[35] The Appellant is of the opinion that the actions of the Respondent amounted to a serious disciplinary offence warranting dismissal. However, their own actions following the incidents in question do not support their arguments as to the severity of the alleged disciplinary offence.

[36] In the case of ***Servina v Naval Services Ltd* (CA 33/2014) [2016] SCSC 113 (26 February 2016)**, which also involved the legality of a dismissal decision, the court considered the provisions in the law relating to disciplinary measures and held that –

> *"it is a cardinal principle that when meting out punishment for any breach of the law, the penalty must commensurate with the seriousness of the offence bearing in mind all the circumstances of the offence as well as the offender, and any sentence must be seen to be fair and reasonable in all the circumstances."*

[37] This Court is of the view that the award made by the Tribunal was not disproportionate to the nature of the grievance before it and were well founded in law. In its decision, 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.

[38] I therefore proceed to dismiss the appeal in its entirety with costs.

Signed, dated and delivered at Ile du Port on 27th August 2021.

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M Burhan J