

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 410
CA 26/2021

In the matter between:

SEYCHELLES PORT AUTHORITY
(rep. Mr. Joel Camille)

Appellant

and

HERBERT HOUAREAU
(rep. Ms. Karen Domingue)

Respondent

Neutral Citation: *Seychelles Port Authority v Houareau* (CA 26/2021) [2023] SCSC 410 (29 May 2023)

Before: Esparon J

Summary: Appeal against the decision of the Employment Tribunal

Heard: 24 November 2022

Delivered: 29 May 2023

ORDER

Appeal against the decision of the Employment Tribunal- Appeal dismissed with cost.

JUDGMENT

ESPARON J

[1] This is an Appeal against the decision of the Employment Tribunal in ET/129/18 whereby the Employment Tribunal had held that the Appellants termination of employment of the Respondent was not justified nor was it carried out fairly in accordance with the law of which the said Tribunal had awarded the total sum of SCR1 ,890,265 of which the award included the following;

- (i) Salary from the date of unjustified dismissal until the date of lawful termination- 28th September 2021 in the sum of SR 1,680,906.04/-
- (ii) Compensation for length of service (totality of Employment period therefore until lawful termination) 1st November 2016 - 28th September 2021 in the sum of SR 105,662.91/-;
- (iii) Two months' notice in the sum of SR 79,926/-;
- (iv) 7.75 days of annual leave in the sum of SR 10,183.35-and
- (v) End of year performance bonus at 34 percent of a basic salary in the sum of 13,587.42.

[2] The Appellant namely the Seychelles Ports Authority Appealed against the said decision of the Employment Tribunal on the following grounds;

- (i) The Employment Tribunal erred in law and on the facts in concluding that the investigation concluded by the Appellant pertaining to the Respondent's refusal to sign his contract of Employment with the Appellant was not conducted fairly as per the law.
- (ii) The Employment tribunal erred in law in concluding that no proper advice as to disciplinary offence, with which the Respondent was being investigated, was given by the Appellant to the Respondent, in its letter dated 9th march 2018.
- (iii) The Employment Tribunal erred in law and on the facts in concluding that the refusal of the Respondent to sign the contract of Employment at the instructions of the Appellant, on three occasions did not amount to serious disciplinary offence in law which merited the termination of the Respondent's employment in law.
- (iv) In the premises of the above and /or in the alternative to ground 3 above, the Employment tribunal erred in law in concluding that the Respondent's termination by the Appellant, was unlawful in law.

- (v) The Employment Tribunal erred in law in coming to the awards Rs 1,890,265.90 as terminal benefits for the Respondent, in all circumstances of the case.

Submissions of Counsel

- [3] Counsel for the Appellant submitted as regards to ground 1 of Appeal that by the Tribunal concluding that the Respondent has not been given sufficient notice of the alleged disciplinary offence, the Tribunal have failed to consider the evidence of Marcus Didon who testified for the Appellant that the Respondent was advised that he needed to sign a contract in order for his terms and conditions to be established by the SPA, before an investigation could be carried out into his work performance following negative appraisal.
- [4] As regard to ground 3 of Appeal, Counsel for the Appellant relied on Schedule 2 part III and Schedule 2 part II(c) of the Employment Act. He submitted to the Court that the evidence establishes that the Respondent disobeyed the instructions of his employer in refusing to sign his contract of employment in February 2018 and again on the 13th and 14th march 2018 upon the request and directive of the Board of investigation.
- [5] The Appellant further submitted that the same act cannot be faulted and unjustified in law of which the Tribunal was hence in error. Furthermore the explanations put forward by the Respondent as to why he had not signed the contract is neither here nor there and hence the Respondent was in breach of schedule 2 part II .
- [6] On the other hand counsel for the Respondent submitted to the Court as regards to ground 1 of Appeal that the Respondent in his evidence clearly stated that he was never told that he was being investigated for any disciplinary offence in respect to not following instructions given by his employer to sign the contract of employment and that he was not given the opportunity to explain during the meeting as to why he had reservations in signing the document provided to him and that furthermore the Respondent always queried about the contract of employment but was consistently told that the contract is with the board and/ or the HR.

- [7] Counsel for the Respondent further submitted to the Court that the pressure on the Respondent to sign the Contract of employment only came about after the Respondent had reported the Appellant to the Anti-Victimisation committee of the National Assembly and that prior to that the Respondent had worked for 17 months without being provided with a contract of Employment by the Appellant.
- [8] The Respondent relied on section 53 of the Employment Act which lays down clearly the procedure to terminate an Employee for a serious disciplinary offence and submitted to the Court that the procedure as laid out in section 53 of the Act was not followed by the Appellant and neither did the Appellant discharge its burden as it is required under section 53(5) of the Act as no member of the board was called by the Appellant to refute the allegation of the Respondent.
- [9] As to ground 3 of Appeal, counsel for the Respondent submitted to the Court that no evidence of disobedience was brought forth by the Appellant who had the burden to prove this assertion. Furthermore, counsel for the Respondent further submitted that the Respondent who remained steadfast in his evidence stated that he had asked for his contract of employment on numerous occasions but was always given excuses. The Respondent testified that initially there were mistakes in the contract and subsequently he wanted to clarify certain matters on the terms and conditions of his contract but he was never given the opportunity to do so.

The Law

- [10] This Court hereby reproduces Section 53 of the Employment Act;
- (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 a 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 investigation pursuant to subsection (1) even where it consist 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 representative of the union, if any, and of 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 such a copy to the union if any.
- (5) A worker aggrieved by a disciplinary measure taken by the employer against the worker may initiate the grievance procedure and under that procedure the burden of proving the disciplinary offence lies on the employer.

Schedule 2 part II of the employment act provides that' 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) willfully 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) willfully, 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.

Analysis and determination

[11] At this stage it is important to note that Counsel for the Appellant in his written submissions only made submissions as regards to ground 1 and ground 3 of Appeal. It is this Court's view that failure of the Appellant to make submissions on other grounds of appeal, the Appellant is deemed to have abandoned the other grounds of Appeal and hence this Court will only deal with grounds 1 and 3 of the grounds of Appeal of the Appellant as regards to the present Appeal.

[12] The 1st ground of Appeal of the Appellant is that the Employment Tribunal erred in law and on the facts in concluding that the investigation concluded by the Appellant pertaining to the Respondent's refusal to sign his contract of Employment with the Appellant was not conducted fairly as per the law.

[13] In the case of *Letshego Bank of Namibia V/S Bahm (HC)-MD- Lab AAP 11/2021* the Court stated;

“the test for a fair dismissal is therefore twofold and both requirements of substantive and procedural fairness must be met. If an employer fails to satisfy one leg of the test, he fails the test of fairness and the dismissal is liable to be held as an unfair dismissal.”

[14] In the case of *Batwatala V Madhvan Group, Labour dispute reference 146 of 2019 (2021 UGIC 7)*, the industrial Court of Uganda relied on the case of *Ebiju James V/S Umeme LTD HCCS 0133/2012* which provides guidelines of what constitute fair hearing as follows;

- (i) Notice of allegations against the Plaintiff was served on him and sufficient time allowed for Plaintiff to prepare a defence.

(ii) The notice should set out clearly what is the allegation against the plaintiff and his right at the oral hearing were. Such rights would include the right to respond to the allegation against him orally and /or in writing, the right to be accompanied at the hearing and the right to cross examine the defendant's witnesses or call witnesses of his own.

(iii) The Plaintiff should be given a chance to appear and present his case before the impartial committee in charge of the disciplinary issues of the defendant.

[15] In the case of Batwala (supra) the Court held that "it is our finding that the disciplinary proceedings having not complied with the guidelines as prescribed in the case of Ebiju James (supra) and section 66 of the employment Act, the claimant was unlawfully and unfairly terminated."

[16] In the case of Savoy development Limited V/S Sharifa Salum SCA 10 of 2021, Twomey Justice of Appeal stated;

"Further, the submissions of Savoy that disciplinary hearings by an employer cannot be equated with judicial proceedings while holding water to some extent cannot ignore the fact that fairness in investigation hearings as exacted by section 53 of the Act, for tribunal hearings demands the observance of at least the rules of "natural justice."(See in that respect "Schedule 6 (S 73A): Employment Tribunal)[3]. The handmaid procedural argument is of no assistance in this respect as the issue here is a breach of substantive justice and not mere procedural irregularity."

[17] This Court has taken into consideration the submissions of Counsel for the Appellant and Counsel for the Respondent as well as the authorities cited above and is of the view that section 53(2) of the Employment Act imposes an obligation on employer where the disciplinary offence relates to a serious disciplinary offence, to inform the worker in writing of the nature of the offence as soon as possible after it is alleged to have been committed. In my view this is one of the basic procedural fairness afforded to the

employee under section 53 of the employment Act in order to allow the said employee to prepare his defence.

[18] In the present matter, from the evidence available on record, it is clear that the employee was asked to sign his contract of employment and was never informed either in writing or orally the nature of the offence as soon as possible after it was alleged to have been committed and hence the said Respondent's contract of employment was terminated after he had refused to sign his contract of employment after being asked to sign. This Court finds that in the present matter the employer had breached the rules of procedural fairness in terminating the contract of employment of the employee when there is an alleged serious disciplinary offence as provided for under section 53(2) of the employment Act.

[19] Furthermore, section 53(1) of the Employment Act provides that 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. It is the finding of this Court that even that we were to have held that the Act is a self-evident Act, the failure of the Appellant to hold a hearing of the matter or allow the Employee to explain the reason why he has not signed the contract of employment is in breach of the rules of procedural fairness as provided for under section 53(1) of the Employment Act.

[20] For the above reasons, this Court finds that that the Employment Tribunal did not erred in its findings since the Appellant had breached the rules of procedural fairness in dismissing the Respondent which is tantamount to an unfair dismissal of the Respondent as a result of which I accordingly dismiss the 1st ground of Appeal of the Appellant.

[21] The 3rd Ground of Appeal of the Appellant is that the Employment Tribunal erred in law and on the facts in concluding that the refusal of the Respondent to sign the contract of Employment at the instructions of the Appellant, on three occasions did not amount to serious disciplinary offence in law which merited the termination of the Respondent's employment in law.

[22] Schedule 2 part II of the employment act provides that ' 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—

(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;

[23] The Circumstances of the case from the evidence of the Respondent on record is that he had asked for his contract of employment on numerous occasions but was always given excuses. The Respondent testified that initially there were mistakes in the contract and subsequently he wanted to clarify certain matters on the terms and conditions of his contract but he was never given the opportunity to do so. It is also evident that the issue of the Appellant signing his contract of employment only came about when the Respondent reported the Appellant to the Anti-Victimisation committee that the issue of the Respondent being asked to sign his contract of employment arose, and that previously he was working for 17 months without a written contract of employment, a fact that this Court cannot ignore in making its determination.

[24] Furthermore, it is evident that the Appellant on the last occasion had insisted through one of its officers that the Respondent signs the contract of employment without allowing the Respondent to give an explanation as to why he is refusing to sign his contract of employment.

[25] As a result of the facts as narrated in the above paragraphs 23 and 24 of this Judgment, this court finds that the Appellant had failed to discharge its burden of proof before the Employment Tribunal under section 53(5) of the Employment Act that the Respondent had committed a serious disciplinary offence warranting dismissal from his Employment.

[26] Furthermore, this Court finds that failure to sign a contract of employment does not amount to serious disciplinary offence under schedule 2 part II (c) of the employment Act

since the signing of a contract implies an offer by one party and the acceptance of the other party of which there must be the consent of both parties and hence it cannot be said that on 3 occasions the employee failing to sign the Contract of employment amounts to a serious disciplinary offence.

[27] Hence this Court finds that the Employment Tribunal did not erred in law and on the facts in concluding that the refusal of the Respondent to sign the contract of Employment at the instructions of the Appellant on three occasions does not amount to serious disciplinary offence in law which merited the termination of the Respondent's employment in law and I accordingly dismiss ground 3 of Appeal of the Appellant.

[28] As a result of the above findings, I accordingly dismiss the Appeal with cost.

Signed, dated and delivered at Ile du Port on 29th May 2023.

D. Esparon Judge