SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 579
CA19/2021

In the matter between:

Yunas Nourice **Appellant**
(rep. by Mr Brian Julie)

and

Seychelles Port Authority **Respondent**
(represented by Mr Joel Camille)

Neutral Citation:	*Yunas Nourrice v Seychelles Port Authority (*CA19/2021) [2023] SCSC 579 (28 July 2023)
Before:	D. Esparon, J
Summary:	Appeal from the decision of the Employment Tribunal
Heard:	3 July 2023
Delivered:	28 July 2023

ORDER

Appeal from the decision of the Employment Tribunal-Appeal dismissed.

JUDGMENT

D. Esparon, J

Introduction

1. This is an Appeal against the Judgment of the Employment Tribunal in ET/12/2018, which held that the Applicant's conduct did amount to an offence under paragraph (K) of the Act and that the termination was lawful.

2. The Grounds of Appeal are as follows:

(1) The Employment Tribunal erred in law when it failed to specify the nature of the prejudice caused to the Employer.

(2) The Employment Tribunal erred by not identifying the party affected by the alleged disciplinary offence.

(3) The Tribunal failed to consider the following facts:

i. The Appellants were denied the assistance of a legal representative during the first disciplinary hearing;
ii. Allegation of coercing the employees was not proved;
iii. Coercing is not an offence.

(4) The Tribunal erred in law when it ruled that the act of signing a Petition was an offence.

(5) The Tribunal also failed to establish the fact that the petition was directed against an employee and not the employer.

(6) The Tribunal erred when it considered the signing of a Petition as a disciplinary offence and failed to acknowledge that 'Petition' is a lawful and peaceful form of protest.

(7) The Tribunal admits at paragraph 53 of the Judgment that 'we wish to make it clear that we are of the view that it is not automatic that all instances of signing of a petition to remove your superior would cause termination under sub paragraph (K) of the Act. For an employee with no other option nor redress, it is his right to sign a Petition to request that something is done.'

(8) Further in Paragraph 53, the Tribunal admits that '' petitions'' must be the last resort, implying that signing a petition is not a disciplinary offence.

(9) The Tribunal has failed to prove that the Applicants committed an offence.

Submissions of Counsel

3. Counsel for the Appellant submitted to the Court that the dismissal of the Appellants was unfair and that the burden is on the employer to prove on a balance of probabilities that there was a fair reason in law for the dismissal.

4. Counsel for the Appellant relied on the case of **British Home Stores Ltd V Burchell (1978) IRLR 379** and also further submitted to the Court that the Employment Tribunal should have ascertained whether the alleged offence (if any) caused any prejudice to the Respondent as opposed to the reputation of an employee of the Respondent. Furthermore, according to Counsel, the Employment Tribunal should have taken note of the fact that the Appellants were never given a chance to defend themselves in the presence of the complainants.

5. Counsel for the Appellants further submitted to the Court that the facts of the case revealed that the employer was not able to show a genuine belief of misconduct of which the employer should have grounds and that according to Counsel, the Applicants pursuant to their right to freedom of expression possess every right to express their opinion about the management of the Seychelles Ports Authority. Hence it is submitted that the Employer has failed to prove on a balance of probabilities that the Appellant had committed a disciplinary offence.

6. On the other hand, Counsel for the Respondent submitted to the Court as to ground 1 that the Tribunal's finding is justified in law as it is supported by the evidence before it. Counsel relied on scheduled 2, part II of the Employment Act and further referred to paragraphs 35 and 36 of the judgment of the Employment Tribunal. Counsel for the Respondent also relied on the evidence of Marcus Didon who gave evidence that the Respondent has an open door policy and that the Appellant would have had numerous opportunities to bring his issues to the Board of directors as he audiences with them and he could have also brought it to the human resources department. He further submitted that at page 13 of the records, under cross-examination the Appellant did confirm that he had not initiated any internal procedures in respect to any concerns that he had relating to his work. That he also confirmed in his evidence that he had signed the petition after the CEO had informed him that he had authorized for him not to get the information requested and that he signed the petition immediately thereafter for that very reason.

7. As regards to the issue that the Appellant was denied the assistance of a legal representative during the 1st disciplinary hearing, counsel for the Respondent submitted to the Court that the Tribunal rightly considered the provision of section 53(3) of the Employment Act and was satisfied that the requirement of an Attorney was not prescribed therein. Furthermore, according to Counsel, Mr. Didon clearly testified that the Appellant was advised as per the provisions of the law and on that basis he was never denied representation and that the Respondent had acted as per the law pursuant to the provisions contained in section 53(3) of the Employment Act.

The Law

8. 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

9. For the purpose of this Appeal, this Court shall first deal with grounds 4,6,7,8 and 9 of Appeal as they relate to the same issue. We have gone through the grounds of Appeal and the main issue to be determined by this Court is as to whether signing a petition to remove a CEO from office amounts to a serious disciplinary offence in terms of Schedule 2, part II (K) of the Employment Act.

As regards to this issue admittedly there is no case law locally on this issue which prompted this Court to search for Jurisprudence in foreign Jurisdictions.

10. The case of *National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10, the Constitutional Court of South Africa had to deal with a similar issue whereby the Employees had signed a petition to remove the CEO from office where the Constitutional Court of South Africa, Zondo J. stated the following;

"I have already found that, in saying what they said in the petition, the union and employees were engaging in a lawful activity of the union, were exercising their rights, and were taking part in conciliation proceedings and collective bargaining. Their dismissal for such conduct was contrary to section 5(2)(c) and fell within section 187(1)(d)(i) and that means that their dismissal was automatically unfair in terms of section 187(1) of the LRA. Once it is

accepted that the main or real or dominant reason for dismissal was, or related to, such conduct, there is no room for a conclusion that the dismissal was not automatically unfair but only substantively unfair. In other words, to reach the conclusion that the dismissal was only substantively unfair one would have to conclude that the dismissal had nothing or very little to do with legitimate union activities and the conciliation proceedings. In my view, both on the facts and the law that cannot be said.

A dismissal of employees for supporting the lawful activities of a union and for exercising their rights under the LRA is a very serious violation of workers "constitutional rights given effect to in the LRA that may be committed by an employer. The dismissal of employees for that conduct is even more serious when the employer is a public institution or an organ of state because government departments and other organs of state are expected to take a lead in the protection and promotion of these rights in our society".

11. It is obvious from the record of the proceedings in the present case that the concerned employee was not pursuing or engaging in the legitimate activities of his union, exercising his rights, nor was he taking part in conciliation proceedings and collective bargaining.as in the case **of *National Union of Public Service & Allied Workers and Others v National Lotteries Board* [2014] ZACC 10**. Furthermore, he was not following or engaging in any grievance procedure as provided for under the Employment Act. Hence the present matter should be distinguished from the case of ***National Union of Public Service & Allied Workers and Others (supra)***. In fact, the concerned employee had not resorted to any internal procedures of the said organization, such as bringing his grievance to the Board of Directors or to the HR as per the evidence of Mr Didon. Hence it is to be taken that the concerned employee wanted the instant removal of the CEO and had signed a Petition for the removal of the CEO from office without going through any internal processes available to the employee such as bringing his grievances to the Board of directors.

12. Counsel for the appellant has cited Article 22 of the Constitution which provides that 'Every person has a right to freedom of expression'. Although it is a cardinal principle of interpretation of the Constitution that the Court shall give a purposive interpretation to a provision of the Constitution, we disagree with Counsel for the Appellant that Article 22 of the Constitution relating to the freedom of expression can be used as a 'cart blanche' by an employee who decides to wake up one day and sign a Petition for the removal of a CEO

without going through the internal process to bring his grievances before the board, nor pursuing the grievance procedure under the Employment Act. I am in agreement with the Employment Tribunal when it stated at paragraph 36 of its Judgment that petitions must be of last resort, when it is clear that nothing else is working. This Court is of the view that if this was the case, there would be chaos at the work place whereby economic activities may come to a temporary halt of the business operations as a result of which surely this was not the intent of the legislator when they enacted the Employment Act thereby regulating the relationship between the Employer and Employee.

13. It is clear that signing a petition by such a senior employee reflects seriously on the loyalty of the employee and causes serious prejudice to the employer's undertaking especially when he has not avail himself of the internal procedures to bring his grievances of which such a senior officer should know better instead of dragging his employer into the mud at that length. This Court further holds that as a result and in view of the evidence on record, the Employer has discharged its burden of proof to the required standard namely on the balance of probabilities that the Appellants conduct did amount to an offence under paragraph (K) of the second schedule, part II of the Employment Act.

14. For the above reasons, this Court finds that the Employment Tribunal did not erred on the law and on the facts of the case when it held that 'having found that the Applicants' conduct did amount to an offence under paragraph K of the Act, we find that his termination was lawful' For these reasons, I accordingly dismiss ground 4,6,7,8 and 9 of Appeal.

15. As regards to ground 3 of Appeal namely that the Appellant was denied the assistance of a legal representative during the first disciplinary hearing, we hereby reproduce section 53(3) of the Employment Act which reads as follows;

"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".

16. This Court has meticulously considered section 53(3) of the Employment Act as well as submissions of both counsels and is of the view that since the said provision is silent on the issue of whether the employee has a right to be represented by a legal representative during the investigation but only mentions that 'the worker has if the worker so wishes, the assistance of a colleague or representative of the union if any, this Court shall not add anything to the wording of the said provision, since in the event that the Court does so, it shall be engaging itself in an area of judicial activism of which this Court is precluded to venture into. As a result, I accordingly dismiss ground 3 of Appeal.

17. As to ground 1 and 2, namely that:

i) The Employment Tribunal erred in law when it failed to specify the nature of the prejudice caused to the Employer.

ii) The Employment Tribunal erred by not identifying the party affected by the alleged disciplinary offence,

this Court finds no merits in both grounds of Appeal since it has already been decided in this ruling that by signing the Petition, the Employee was effectively causing serious prejudice to the employer's undertaking and hence I accordingly dismiss ground 1 and 2 of Appeal.

18. As regards to ground 5 of Appeal namely that the Petition was directed against the employee and not the employer, this Court is of the view that this ground of Appeal has no merits since it cannot be said that signing a Petition to remove the highest ranking officer in the organization being the CEO from his employment that the petition was not directed towards the employer but only an employee. Hence I accordingly dismiss ground 5 of Appeal.

19. As a result of the above, I accordingly dismiss the Appeal.

Signed, dated and delivered at Ile du Port on the 28th July 2023.

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D. Esparon J

DAVID ESPARON SUPREME COURT SEYCHELLES SUPREME COURT JUDGE