IN THE SUPREME COURT OF SEYCHELLES

Le Refuge du Pecheur Limited,
Rep. by its HRD Manager

Mr. Nicolas Zagraphos **Petitioner**

Vs

Minister for Employment and Human

Resources Development of

Independence House, Victoria **Respondent**

Civil Side 317 of 2008

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Mr. F. Ally for the petitioner

Ms. F. Laporte for the respondent

D. Karunakaran, J.

JUDGMENT

The petitioner in this matter seeks the Court for a writ of *certiorari to* quash the decision of the Respondent - the Minister for Employment and Human Resources Development - dated 7th October 2008, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by article 125(1) (c) of the Constitution.

At all material times, the Petitioner was and is a company owning and managing a hotel known as "Lemuria Resort" on Ste. Anne Island. In the year 2008, the Petitioner - hereinafter referred to as the "employer" - had employed one Ms. Vicky Adela - hereinafter referred to as the "worker" - as the Concierge and Transport Manager under a written contract of employment dated 3rd December 2007, with a condition inter alia, therein that the worker would undergo a probation-period of three months before being confirmed for the post. During the said probation- period, the employer by a letter dated 2nd February 2008 terminated her employment by giving seven days' notice, on the ground that the worker's performance was unsatisfactory during probation. The worker, being aggrieved by the said termination, initiated the *"grievance procedure"* before the Competent Officer of the Ministry of Employment, under the provisions of the Employment Act 1995 - hereinafter referred to as the Act - alleging that the termination was unjustified. Upon conclusion of the said "grievance procedure", the Competent Officer, in his determination dated 6th May 2008, held thus:

> *"Following the review of the above case held on 1st April 2008, the employer could not prove before the Competent Officer that the worker performed unsatisfactorily during her probationary period. The competent Officer has therefore determined that the termination of the Applicant's contract of employment is deemed not justified in accordance with Section 61 (2) (a) (iii) of the Employment Act 1995. The Competent officer has also determined on the basis of evidence that the Applicant is entitled to be paid 3 months notice instead of 7 days as per her contract of employment. The applicant is therefore entitled to be paid the following up to 1st April 2008, date considered as the date of lawful termination in accordance with 46(i) of the Employment Act 1995*

(i) 3 month's notice	*Rs. 19,500.00*
(ii) 2 days Public Holiday	*Rs. 500. 00*
(iii) 10 days accrued leave	*Rs. 2136. 99*
(iv) Salary from 1st February- 1st April 2008	*Rs. 13,500. 00*
(v) 4 days compensation	*Rs. 1000. 00*
Total	***Rs.36637.51***
Less 2. 5% social security	*(Rs. 915.94)*
To be paid	***Rs.35,721.57***

The employer, being dissatisfied with the said determination of the Competent Officer, appealed against it to the Respondent, the Minister for Employment, pursuant to Section 65 of the Employment Act. After having consultation with the Employment Advisory Board (EAB) that heard the appeal, the respondent in her decision dated 7th October 2008 - hereinafter called the impugned decision - dismissed the said appeal, upheld the determination of the Competent Officer and directed the employer to pay the said sum to the worker as determined by the Competent Officer. The reason given by the respondent for the decision reads thus: "*The employer had not discharged the requisite burden of proof showing that the worker had performed unsatisfactorily during her probationary period"*. Be that as it may.

The employer, being dissatisfied with the impugned decision of the respondent, has now come before this Court for a "Judicial Review" of that decision challenging on two limbs, which are in essence, as follows:-

1. the impugned "decision" is ***unreasonable*** because it is based on an erroneous finding to wit: "*the employer had not discharged the requisite burden of proof on the issue of unsatisfactory performance during her probationary period"* whilst there was indeed, sufficient evidence on record to justify the termination; and

2. the incidental relief granted by the respondent of awarding compensation to the worker for 3 months' notice pay in the sum of *Rs. 19,500.00* and a s*alary for the period 1st February- 1st April 2008 in the sum of Rs. 13,500. 00 is* ***illegal*** because the respondent unlawfully awarded those compensations without considering the fact that the worker was simply a probationer at the time of such termination and as such she was not legally entitled to three months' notice. The three-month notice period is applicable to the worker, if and only if she had been confirmed for the post after a successful completion of the probationary period as per the condition of the contract of employment.

The respondent on the other hand, denied all the allegations made by the petitioner in this matter. According to the respondent, the impugned decision is neither *unreasonable* nor is the award of compensation *illegal*. The Minister has reached a reasonable decision based on evidence or the lack of it, within her power and in accordance with law, which any other reasonable Tribunal could have reached in the given matrix of facts and circumstances surrounding

the instant case. Hence, the respondent seeks dismissal of the instant petition.

The petitioner's counsel Mr. F. Ally however, submitted that there is sufficient evidence on record to justify the termination of the worker. According to counsel, if the employer is not satisfied with the performance of the worker on probation, he can terminate that worker at any time during the probationary period. In the instant case, there is evidence on record to show that the employer was not satisfied with the performance of the worker during probation. Hence, Mr. Ally submitted that the employer has discharged the required burden of proof on the issue of unsatisfactory performance by the worker. In the circumstances, the impugned "decision" of the respondent in this respect, is ***unreasonable.*** Furthermore, Mr. Ally submitted that it is also an agreed term of the contract of employment that if the employer is not satisfied with the performance of the worker during the probation- period of three months, it could terminate the contract of employment at any time during such probation by giving impliedly 7 days' notice to the worker, which period is logical and reasonable in the light of Section 57 (2) of the Act, though such notice period is not expressly stated in the contract of employment. He also contended that a three months' notice period is required, only if the worker had been confirmed for the post after a successful completion of the said probationary period. Since the performance of the worker in the instant case was not satisfactory and she did not successfully complete the probationary period, it was perfectly lawful and justified for the employer to terminate her employment by giving 7 days' notice. Therefore, according to Mr. Ally the worker was not entitled to three months' notice in such termination. Thus Mr. Ally argued that the decision of the respondent awarding compensation to the worker for 3

months' notice pay and s*alary for the period 1st February- 1st April 2008 is* ***illegal*** and unjustified. For these reasons, the petitioner contended that the impugned decision is **unreasonable** on the first limb and **illegal and unjustified** on the second limb as to the award of compensation in the given circumstances of the case.

I meticulously perused the entire record received from the Ministry of Employment in this matter. I gave a careful thought to the entire arguments advanced by both counsel touching on points of law as well as facts. From the substance of their arguments, arise two fundamental questions for determination in this case. They are:

1. *Is the decision of the respondent* ***unreasonable*** *on the issue of termination since it was based on her finding that the employer had not discharged the requisite burden of proof as to unsatisfactory performance during probation? and*

2. *Is the decision of the respondent on the issue of compensation illegal since she awarded* compensation to the worker for 3 months' notice pay and s*alary for the period 1st February- 1st April 2008 confirming the determination of the Competent Officer on this issue?*

I believe it is pertinent to restate herein, what this Court has stated earlier in the case of ***Cousine Island Company Ltd Vs Mr. William Herminie, Minister for Employment and Social Affairs and Others - Civil Side No. 248 of 2000.*** Whatever is the nature of the issue factual or legal that arises for determination following the arguments advanced by counsel, the fact remains that in a matter of judicial review, this Court is not sitting on appeal to examine the facts and

merits of the case heard by the Competent Officer or the Minister on appeal. Strictly speaking, the system of *judicial review* is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative decision or act or order to judicial review, the Court is concerned only with the **"legality"**, **"rationality" (reasonableness)** and **"propriety"** of the decision in question ***vide the landmark dictum of Lord Diplock in Council of Civil Service Union Vs Minister for the Civil Service (1985) AC 374.*** On an appeal the question is **"right or wrong"?** - Whereas on a judicial review, the question is **Lawful or unlawful? - Reasonable or "unreasonable? - Rational or irrational?**

As I see it, the entity of **"reasonableness"** or **"rationality"** cannot be defined, ascertained and brought within the parameters of law; we have no *litmus test* to apply, for it requires *a subjective assessment* of the entire facts and circumstances of the case under consideration and such assessment ought to be made applying the yardstick of human reasoning and rationale. However, the entity of **"legality"** can always be defined, ascertained, identified, for the facts of the case under adjudication can be sieved through the parameters of law. Therefore, the court may without much ado determine the issue of **"legality"** of any administrative decision. This also includes the issue whether the decision-maker had acted in accordance with law. Thus, the question of **legality** can easily be resolved by applying the *litmus test,* based on *an objective assessment* of the facts involved in the case.

I will now, turn to the first question as to the alleged **"unreasonableness"** of the impugned decision in this matter. What is

the test the Courts apply in determining the reasonableness of the impugned decision in matters of judicial review?

First of all, it is pertinent to note that in determining the reasonableness of a decision one has to invariably go into its merits, as formulated in ***Associated Provincial Picture Houses V Wednessbury Corporation [1948] 1 KB 223.*** Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan, Administrative Law, 3 Edition, 2001). Applying this test, the court ought to examine whether the decision in question is an unreasonable one.

At the same time, in such determination one should be cautious in that, the "Judicial review" is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer." ***Per Lord Fraser Re Amin. [1983] ZAC 818 at 829, [1983] 2 All E R 864 at 868, HL.***

Indeed, in determining the issue of reasonableness of the decision in the present case, the court has to make *a subjective assessment* of the entire facts and circumstances of the case and consider whether the decision of the respondent is reasonable or not. In considering reasonableness, the duty of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account ***per Lord Green in Cumming Vs. Jansen (1942) 2 All ELR at p656.***

Having thus gone through the entire record of proceedings in this matter, I find that the respondent has given due consideration to the evidence on record as well as to all relevant facts and circumstances of the case before arriving at the decision. Obviously, the petitioner's contention to the contrary, stating that respondent has acted without examining the evidence on record is highly farfetched. For instance, the employer, who alleged "unsatisfactory performance" by the worker, obviously, had the *evidential burden* to prove the fact that the worker was inefficient or incapable of performance of any duty assigned to her in the course her employment as Concierge and Transport Manager or performed below the required standard or committed any dereliction of duty or any serious act or omission to the detriment or against the interest of the employer to such an extent that warranted an immediate termination before the completion of her probation period. In any event,

as rightly held by the respondent, the employer has failed to discharge that burden to establish the alleged "unsatisfactory performance of duties" by the worker. It is in the circumstances, reasonable for the respondent to verify the accuracy and correctness of the reasons given by employer for terminating the worker during probation. In this exercise, I find that the employer has failed to discharge the said evidential burden to establish the alleged "unsatisfactory performance of duties" by the worker. Whatever be the employment status of a worker whether probationer or confirmed/regular worker, to my mind, no employer has unfettered discretion to terminate the worker arbitrarily at will, for no valid reason. A bald allegation of a mere "unsatisfactory performance" without valid reason/s in my judgment cannot on its own constitute a lawful ground for an employer to terminate a worker during probation. Such allegation should be true, correct, accurate, and substantiated on factual grounds. A person employed under a contract of employment with a probationary period, also has equal rights and protection - like any other worker in the regular employment - against any arbitrary dismissal by the employer for no valid reason. Although the assessment by the employer as to *"satisfactory or unsatisfactory performance"* is subjective in nature, the respondent has the power to verify the accuracy or correctness of such assessment objectively. Justice demands that no employer should be allowed to enjoy an unfettered discretion to terminate a probationer at will, without a good cause. In any event, the worker in this case has neither signed any ***At-Will Agreement*** with the employer for being hired and fired *at will*, nor such a policy on employment has been adopted in Seychelles as found elsewhere in the USA. For these reasons, I conclude that *the decision of the respondent is* ***reasonable*** *since it was based on the correct finding on evidential burden stating that the employer had not discharged the required burden of proof as to*

unsatisfactory performance during probation. This answers the first question.

Coming back to the second question, admittedly, the employer has terminated the worker during her probationary period by giving 7 days' notice. As rightly submitted by Mr. Ally, a three months' notice period is required, if and only if the worker had been confirmed for the post after a successful completion of the probationary period. Since the performance of the worker in the instant case was allegedly unsatisfactory and she did not successfully complete the probationary period, it was perfectly lawful, proper and justified for the employer to give 7 days' notice, regardless of the fact whether such termination is subsequently found to be justified or unjustified by the Competent Officer or the Minister on appeal. Obviously, the worker was not entitled to three months' notice in such termination. Therefore, I quite agree with the contention of Mr. Ally that the incidental relief granted by the respondent of awarding compensation to the worker for 3 months' notice period in the sum of *Rs. 19,500.00* and s*alary for the period 1st February- 1st April 2008 in the sum of Rs. 13,500. 00 is* ***illegal***. Needless to say, the respondent has unlawfully awarded those compensations having no regard to the crucial fact that the worker was simply a probationer at the time of such termination and as such she was not legally entitled to three months' notice. In fact, the employer is under no contractual obligation to give the benefit of three months notice pay to a probationer, whereas such benefit has been provided only for the worker, who is confirmed after a successful completion of the probationary period. In any event, as rightly submitted by Mr. Ally, it is illogical to expect an employer to give three months notice to a probationer, whose probationary period itself is only three months. If I were I to accept the interpretation of the respondent in this respect, then the employer ought to have give the notice of intended termination

on the very first day, the probationer started employment or joined duty. This situation would obviously, lead to absurdity, let alone illegality.

Having considered all and for reasons stated hereinbefore, I conclude

(i) that the first limb of the respondent's decision dated 7th October 2008 - upholding the determination of the Competent Officer- on the issue of termination is reasonable; in that, the termination by the employer was not justified as the employer had not discharged the requisite burden of proof showing that the worker had indeed, performed unsatisfactorily during her probationary period; therefore, I decline to grant the writ in this respect; and

(ii) that however, the second limb of the respondent's decision awarding compensation to the worker for 3 months' notice period in the sum of *Rs. 19,500.00* and s*alary for the period 1st February- 1st April 2008 in the sum of Rs. 13,500. 00 is* ***illegal*** *and hence I quash that part of the decision granting a writ of certiorari in this respect.*

The petitioner's prayer is accordingly allowed *to the extent* specified hereinbefore and I make no order as to costs.

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D. Karunakaran

Judge

Dated this 26th day of February 2010