Andre E.R. v Sotravic Ltee

2022 IND 43

Cause Number 985/17

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Emmanuel Rene Andre

Plaintiff

v.

Sotravic Ltee

Defendant

Ruling

The averments of this plaint are to the following effect. Plaintiff is qualified in Management and Finance after a long and successful professional career both in mainland France and Reunion island (where he last held the position of Deputy CEO for the last two years with the Orange Group), was employed as Executive Head at Orange Mauritius Telecom between 2008 and 2012 before being recruited by Defendant by virtue of a contract of employment dated 18 June 2012 "the Contract".

The Contract was subject to Plaintiff obtaining from the Board of investment an Occupational Permit as a Professional and, from the Passport and Immigration Office (PIO), a Visa to stay and work in Mauritius. Plaintiff currently holds a Permanent Resident Permit issued by the Mauritian authorities.

According to the contract which is governed by the provisions of the Employment Rights Act and which took effect from 1 August 2012, the period of

employment was to run for an initial period of three years, renewable by mutual consent at its expiry.

Plaintiff was thus appointed as “Chief Executive Officer Designate” with particular agreed terms and conditions subscribed both by Plaintiff and Defendant.

Defendant has been essentially involved in pipeline construction initially but has diversified its activities as a civil and construction company, its Executive Chairman is Mr. Pierre Ah Sue, who is assisted by a Board of directors, “the Board” which administers and manages the affairs of the Company.

The mission imparted to Plaintiff was to implement strategic goals and objectives, provide assistance to the Board to fulfil its governance functions, and, give direction and leadership towards the achievement of the Company’s philosophy, mission, strategy, annual goal and objectives. His major functions included the Board’s administration and support, Operations and Revenue Generation, Business Development, Financial Management, Human Resources Management, Community and Public Relations.

In line with his functions, duties and responsibilities, he was on a yearly remuneration package as follows:

	Per Annum (PA)
a. Basic salary, inclusive of 13th month	Rs.5,365,000
b. Housing allowance	Rs.996,000
c. Medical Insurance	Rs. 36,000
d. School fees allowance for children	Rs. 450,000
e. Air tickets	Rs. 400,000
f. Children’s nanny	Rs. 260,000
g. Car (AUDI Q 5) and fuel allowance	Rs. 960,000

Plaintiff discharged his duties and functions, honestly in good faith in the best interests of Defendant and at all times; when the initial contract period of 3 years was

over, at its expiration by mutual consent, Plaintiff remained in continuous employment with Defendant and he continued to benefit from the same terms and conditions of employment.

As from 22 August 2017, the Executive Chairman excluded him from the main business decisions of Defendant Company by presenting a new business organigram.

On 22 September 2017, Plaintiff requested a meeting with the Executive Chairman as he understood that the Executive Chairman wanted to get rid of him and he proposed a financial accommodation be agreed for him to part company with Defendant. The Executive Chairman agreed and remarked that Plaintiff would be given a 'golden handshake' and that the terms of the settlement would be negotiated and finalized. Plaintiff agreed to this upon the assurance and condition that a fair settlement be reached. On the same day, that is, 22 September 2017, the Executive Chairman directed Plaintiff that his presence was no longer required at the offices of Defendant.

Defendant, before any agreement being reached in terms of a compensation, proceeded instead with the implementation of its unilateral decision to terminate Plaintiff's employment without justification and for no valid reasons around October 2017 and such termination was therefore unlawful.

Thus, Plaintiff has claimed severance allowance and other items of remuneration from Defendant to the tune of Rs 13,103,717.30.

Defendant in its amended plea raised a plea *in limine* as follows:

1. The Defendant avers that the Plaintiff's action is misconceived and should be set aside inasmuch as:

   (a) *ex facie* the Plaint, the Plaintiff was, for the purposes of the law, a migrant worker being a French National, so that it was not open for him to sue for severance allowance in the light of the provisions of Section 46(1)(b) of the Employment Rights Act 2008(as amended); and

   (b) *ex facie* the Plaint, the Plaintiff was an employee earning in excess of Rs. 360,000 per annum, so that he is debarred from claiming severance allowance and this notwithstanding the fact that he was under a contract of determinate duration which had exceeded 24 months, in line with the

provisions of Section 46(1A) (c) of the Employment Rights Act (as amended).

2. The Defendant therefore moves that the Plaintiff's action be set aside with costs.

The plea *in limine* was resisted and arguments were heard.

The main thrust of the argument of learned Senior Counsel appearing for Defendant is that Plaintiff has averred in his plaint that Defendant has unilaterally terminated his contract of employment without valid reasons and there is a claim for severance allowance on the basis that the whole period for which Plaintiff says he worked for Defendant is to be reckoned with as a period of indeterminate duration notwithstanding the fact that he was first employed upon a contract of determinate duration which admittedly was renewed.

Plaintiff has averred that his right to work in Mauritius was subject to permits being obtained from the then Board of Investment and it is averred that he obtained the permit and visa. Plaintiff is thus a foreign national for the purposes of this case.

The question which arises is whether it is open to Plaintiff to avail himself of the provisions of the then Employment Rights Act 2008 as amended in 2013 to claim severance allowance given the circumstances in which he was employed. Plaintiff was to all intents and purposes a foreigner for the purposes of the Act, was an employee earning in excess of Rs.360,000 a year and was on a *contrat à durée determinée.* Plaintiff claims that notwithstanding these facts, he is entitled to claim severance allowance for unjustified termination of employment. As per his own averments in his plaint, he was thus a migrant worker for the purposes of the Employment Rights Act.

Since he was a migrant worker, it was not open to him to initiate an action to sue for severance allowance in the light of the provisions of Section 46(1)(b) of the Employment Rights Act as amended thereafter. It was submitted that in view of the fact that Plaintiff was on a *contrat à durée determinée* and was earning an excess of Rs 360,000 a year that he could avail himself of the provisions of Section 46(1A) (c) of the Employment Rights Act so that his *contrat à durée determinée* would not be deemed to be a *contrat à durée indeterminée.* Learned Senior Counsel referred to the **Migration for Employment Convention** ratified by Mauritius as a signatory on 2 December 1969 wherein under **the International Labour Organisation under**

Article 11(1) it is stated that: *"For the purpose of this Convention, the term **migrant for employment** means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."*

Thus, Plaintiff was a migrant worker at the time of his termination which he avers as he was a non-citizen in the country for the purposes of seeking employment and therefore, he cannot claim severance allowance based on the averments of the plaint which for the purpose of the plea *in limine* must obviously be deemed to be admitted.

The main thrust of the argument of learned Senior Counsel for Plaintiff is that there is no exclusionary rule that debars Plaintiff from being paid severance allowance for unjustified dismissal. As per the averments in the plaint, after the expiry of 3 years in relation to a contract of determinate duration, Plaintiff remained in employment after mutual consent and as such his contract was for an indeterminate duration by way of *tacite reconduction* in view of the nature of the contract of employment namely a *contrat de louage*. There was no written contract to show that the contract for which Plaintiff has remained in employment was for a determinate duration and on the same terms by mutual consent. The case for Plaintiff is that he was employed as Chief Executive Officer under a fixed term contract of determinate duration by Defendant company between 2012 to 2015. At the expiry of his original contract, he continued performing the same duties and received the same remuneration.

Since Plaintiff has continued to remain in employment, his contract is deemed to be for an indeterminate duration by way of *tacite reconduction* and which has a consequence on the operation of the law. Indeed, Plaintiff carried on his job until September 2017 when all of a sudden, abruptly he was informed by the Executive Chairman that his services were no longer required. Even foreigners and migrant workers are entitled to the protection of the law in this country. The procedures envisaged by the Legislator to protect an employee from wrongful termination of his employment were completely disregarded by Defendant. That in itself renders the termination unjustified and entitles Plaintiff to come before a Court to seek redress.

The Civil Code since 1975 defers the regulating of employment contracts to the labour laws enacted by Parliament. Article 1780 reads as follows:

"Les contrats de louage des gens de travail qui s'engagent au service de quelqu'un seront regis par le Labour Act". "Les contrats de louage des gens de travail". No distinction is being made in our Civil Code between '*des gens de travail qui sont des étrangers'.* Before, it was the Civil Code that would regulate the employer-employee relationship in this country. Then when specific laws were enacted, the Civil Code was no longer applied but the Labour Act in 1975, the Employment Rights Act of 2008 and now since October 2019, we have the Workers' Rights Act. By virtue of Section 46(1A) (c), a claim for severance allowance by an employee earning more than Rs 360,000 a year and who is in the situation of a contract of indeterminate duration can certainly claim severance allowance.

The contract was signed in 2012 and that was to run to 2015. It expired by mutual consent in 2015. It had run its course, but Plaintiff remained in continuous employment. No new contract was signed. He remained doing his job as CEO, he earned the same money and did the same duties.

According to Defendant, therefore, it would appear that the second contract was also one for a fixed duration and it would in effect oust the jurisdiction of this Court since no severance allowance would be payable under the Employment Rights Act. The case for Plaintiff is that there was no contract that was signed, there was no second contract that was agreed in writing. Things continued, there was continuity, Plaintiff stayed in employment, he worked every day and his contract was *tacitement reconduit* and by operation of the law it turned into a new contract of indeterminate duration. Thus, the issue of migrant worker will not apply as we are not in the situation of fixed term contracts *ex facie* the *proecipe*. Section 46(9) simply limits the amount of severance allowance payable to a migrant worker and it does so only when economic, technological, structural or other reasons similar are advanced at the time of termination. This in itself defeats the plea *in limine* raised as it clearly shows that the migrant workers are entitled to severance allowance. The reduced rate applies when specific conditions are made.

Learned Senior Counsel for Defendant has replied that Section 46(9) is to provide protection in case of economic distress of Defendant, of the employer, so that the migrant worker or the foreign worker, the non-citizen is not left over. That section is important because the law says that they are entitled to severance allowance. The case for Plaintiff is that his employment was terminated for no reasons whatsoever.

I have given due consideration to the arguments of both learned Senior Counsel. It has remained uncontested that Plaintiff was a migrant worker for the purposes of the Employment Rights Act 2008 as amended.

I shall now quote the authority referred to by learned Senior Counsel for Defendant which I endorse namely the **Migration for Employment Convention** ratified by Mauritius as a signatory on 2 December 1969 wherein under **the International Labour Organisation under Article 11(1)** it is stipulated that:

*"For the purpose of this Convention, the term **migrant for employment** means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."*

Hence, I have no difficulty in holding that Plaintiff was a migrant worker for the purposes of the present case albeit as clearly amply averred in the plaint.

Sections 5 of the Employment Rights Act 2008 as amended reads as follows:

"***5. Agreements***

(1) Subject to subsection (3), no person shall enter into an agreement where remuneration is to be paid at intervals of more than one month.

(2) Any agreement which contains a provision inconsistent with subsection (1) shall, to the extent of the inconsistency, be void.

(3) Subject to subsections (3A) and (3B), where a worker, other than a migrant worker, has been in the continuous employment of an employer under one or more determinate agreements for more than 24 months, in a position which is of a permanent nature, the agreement shall, with effect from the date of the first agreement, be deemed to be of indeterminate duration.

(3A) An employer may enter into an agreement with a worker for a specified period of time –

(a) in respect of a specified piece of work;

(b) in replacement of another worker who is on approved leave or suspended from work;

(c) in respect of work and activity which are of a temporary, seasonal or short-term nature;

(d) for the purposes of providing training to the workforce;

(e) for a specific training contract; or

(f) in accordance with a specific scheme set up by the Government or a statutory corporation.

(3B) An agreement under subsections (3) and (3A) shall be in writing".

Thus, the provisions of Section 5(3) of the Act do not apply to a migrant worker so that a renewal of a contract (of a fixed duration of more than 24 months) by mutual consent will not be deemed to be a contract of indeterminate duration for the purposes of the Act.

Therefore, the exigencies of subsections (3A) and (3B) will equally not apply to a migrant worker by virtue of subsection (3).

Now given that neither subsection 3 nor subsection 3B apply to a migrant worker, there is no need to have a written contract in relation to either the first one or the second one as the latter will be deemed to be for a fixed duration as well for more than 24 months under the same terms as the first one, with the same salary and other benefits by mutual agreement reached by the parties at the end of the first contract *ex facie* the averments of the plaint.

Thus, it is clear that the intention of the Legislator is that for a migrant worker, there is no need to have a written contract for one or more determinate agreements for a period of more than 24 months.

Furthermore, pursuant to Section 2 of the Act, an *"agreement"* means a contract of employment or contract of service between an employer and a worker, whether oral, written, implied or express.

It is useful to reproduce Sections 36(1), 46(1) 46(1A) of the Act which read as follows:

*" **PART VIII – TERMINATION OF AGREEMENT***

36. Termination of agreement

(1) Subject to subsections (3), (4) and (5) –

(a) every determinate agreement of which the duration does not exceed 24 months; or

(b) every agreement entered into under section 5(3A),

shall terminate on the last day of the period agreed upon by the employer and the worker."

" ***PART X – COMPENSATION***

46. Payment of severance allowance

(1) Subject to subsection(1A), an employer shall pay severance allowance to a worker *as specified in subsection (5) where the worker has been in continuous employment with the employer –*

(a) for a period of not less than 12 months on a contract of indeterminate duration and that employer terminates his agreement, or

(b) for a period of more than 24 months under one or more determinate agreements in respect of a position of a permanent nature and that employer terminates the agreement of the worker other than a migrant worker."

(1A) Unless otherwise agreed by the parties, no severance allowance shall be payable where –

(a) a worker and an employer enter into an agreement under section 5(3A) and the agreement comes to an end.

(b) a worker and an employer enter into one or more determinate agreements for a total period of less than 24 continuous months in respect of a position of a permanent nature and the agreement comes to an end, or

(c) a worker, whose basic wage or salary is at a rate in excess of 360,000 rupees per annum, and an employer enter into a determinate agreement and that agreement comes to an end."

Thus, the combined effect of Sections 36(1), 46(1) 46(1A) of the Act shows that in the present plaint, the first contract of employment of Plaintiff was a determinate agreement of which the duration exceeds 24 months viz. 3 years and it was not an agreement entered into under Section 5(3A) of the Act so that the first determinate contract of 3 years shall not terminate on the last day of the period of 3 years agreed upon by the Defendant and the Plaintiff. That is why, the migrant worker will not receive severance allowance as the issue of termination of his contract of employment by his employer does not apply to him. Hence, the contract of employment of Plaintiff could not have been renewed by *tacite reconduction*.

Subject to subsection (1A), Section 46(1)(b) will have for effect that unless agreed by the parties, no severance allowance shall be payable by an employer to a worker whose basic wage or salary is at a rate in excess of 360,000 rupees per annum, and an employer enters into a determinate agreement and that agreement comes to an end. Now subject to that provision, where a worker has been in continuous employment for a period of more than 24 months under one or more determinate agreements in respect of a position of a permanent nature, no termination of the agreement can be construed in relation to a migrant worker and as such cannot be paid severance allowance.

At this stage as per Section 2, the interpretation section, a *" "worker", subject to section 33 or 40 –*

(c) does not include –

(ii) except in relation to sections 4,20,30,31 and Parts VIII, VIIIA, IX, X and XI, a person whose basic wage or salary is at a rate in excess of 360,000 rupees per annum;".

I deem it proper to refer to section 40 and (not Section 33 as it deals with the sugar Industry) of the Act which forms part of Part IX dealing with workfare programme and which contains the same definition in relation to *"basic wage or salary"* in relation to a worker as the one contained in Section 2 of the interpretation section of the Act save and except that at subsection (b) same has been added *"but shall not exceed the maximum basic wage or salary as specified in the Second Schedule to the National Savings Fund(Collection of Contributions) Regulations 1997"* in addition to other provisions one of which is that a *"worker"* does not include *" a migrant worker or a non-citizen".*

Therefore, subject to Section 40, it means that a migrant worker which is the case for the Plaintiff *ex facie* the averments of the plaint, earning a yearly salary or basic wage which exceeds Rs 360,000 and who does not fall within the scope of sections 4,20,30,31 and Parts VIII, VIIIA, IX, X and XI of the Act is not a worker for the purpose of the Act. Thus, he is not entitled to severance allowance as he is not a worker for the purposes of the Act and as such the Court has no jurisdiction to hear the present matter.

But the migrant worker can seek redress before other fora for an action in damages for breach of contract. In the context of Section 46(9) of the Act, no mention has been made in that provision as to whether the continuous employment of the migrant worker was meant to be for a contract of determinate duration or an indeterminate duration and Plaintiff has averred that Defendant was sound financially at the time he claimed his contract was terminated by Defendant for no valid reasons or justification, as it is now clear that his contract of employment can never be for an indeterminate duration and no mention has been made as regards the monthly salary of the worker in Section 46(9) namely whether it exceeded Rs.30,000 per month.

For all the reasons given above, I hold that Plaintiff is a migrant worker *ex facie* the averments of the plaint, earning a yearly salary or basic wage which exceeds Rs 360,000 and who does not fall within the scope of sections 4,20,30,31 and Parts VIII, VIIIA, IX, X and XI of the Act and thus, he is not a worker for the purposes of the Employment Rights Act 2008 as amended. Thus, he is not only not entitled to severance allowance but also, he is not qualified as a worker for the purposes of the Act and as such the Court has no jurisdiction to hear the present matter.

The plea *in limine* accordingly succeeds and the plaint is set aside with costs.

S.D. Bonomally (Mrs.) *(Vice President)*

12.8.2022