Madub v MT Services Ltd

2022 IND 44

CN509/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Nandeswarnath Madub

Plaintiff

v/s

MT Services Ltd

Defendant

JUDGMENT

By way of Amended Proecipe, the Plaintiff is claiming from the Defendant Company **the sum of Rs 1 441 644. 23/- representing Severance Allowance for the summary and unjustified termination of his employment, together with Interests from the date of Termination and Costs**.

The Defendant Company denied the said Claim in its Amended Plea.

Each Party was assisted by Learned Counsel, and the Proceedings were held in English.

At the outset, Learned Counsel for the Defendant Company stated that whilst the Defendant Company was denying the Claim for Severance Allowance made at paragraph 10 of the Amended Proecipe, the Defendant Company was agreeable to pay to the Plaintiff the sum of Rs401 652.13/-

as Severance Allowance for his employment for the period 10-03-17 to 18-05-18, but the Plaintiff did not accept the said offer.

The matter was therefore heard on the Merits.

Case For The Plaintiff

It was the case for the Plaintiff that he had been in the continuous employment with the Defendant Company in respect of a position of a permanent nature between 10-03-14 and 18-05-18, although there had been 02 Contracts of Employment, i.e. a first Contract starting on 10-03-14 and expiring on 09-03-17, and a second Contract starting on 10-03-17 and due to expire on 09-03-2020 (hereinafter referred to as the 01st and 02nd Contracts respectively), and that the 02nd Contract had been terminated by the Defendant Company on 18-05-18.

The Plaintiff therefore contended that he was entitled to Severance Allowance for the period 10-03-14 to 18-05-18.

Case For The Defendant Company

It was the case for the Defendant Company that the Plaintiff's 01st Contract expired on 09-03-17 and that the Plaintiff "was offered another written contract of employment dated 05 April 2017, for an additional duration of 3 years, starting on 10 March 2017, and that Plaintiff was asked to remain in employment of Defendant during the two contracts".

And given it was not mentioned in the 02nd Contract that the 01st Contract was being renewed, it meant that the 01st Contract had come to an end, and that there was in effect a break in the continuous employment of the Plaintiff with the Defendant Company at that time, although a 02nd Contract was offered to the Plaintiff on 05-04-17, taking effect as from 10-03-17.

In the circumstances, the Plaintiff was entitled to Severance Allowance only for the period 10-03-17 to 18-05-18, which the Defendant Company was agreeable to pay to the Plaintiff.

Analysis

<u>Applicable Law</u>

Given the Plaintiff's employment was terminated on 18-05-18, the applicable Law at the relevant time was the **Employment Rights Act** (hereinafter referred to as **ERA**).

Not In Dispute

It was not in dispute that:

1) By virtue of the 01st Contract, the Plaintiff joined the Defendant Company on 10-03-14 as Business Development Officer;
2) The Plaintiff's said 01st Contract expired on 09-03-17;
3) The Plaintiff was offered a 02nd Contract of Employment dated 05-04-17 as Business Development Officer for an additional period of 03 years, starting on 10-03-17;
4) The Plaintiff was asked to remain in the Employment of the Defendant Company during the said 02 Contracts; and
5) At a meeting on 18-05-18, the Plaintiff was handed a Termination Letter (Doc. P4) dated 18-05-18, whereby the Plaintiff's Employment was terminated with immediate effect pursuant to Clause 13(ii) of the 02nd Contract, and the Plaintiff was there and then informed that his job profile was no longer being required.

In Dispute

Continuous Employment

It was the contention of the Plaintiff that although there were 02 Contracts of fixed terms, he considered himself to have been in the continuous employment of the Defendant Company between 10-03-14 and 18-05-18, and that his 01st Contract was in effect renewed by the 02nd Contract.

It was the contention of the Defendant Company, that the Plaintiff was employed under 02 different fixed term Contracts, the 01st Contract expiring on 09-03-17, and the 02nd Contract starting on 10-03-17, and that the Plaintiff's 01st Contract was not renewed by the 02nd Contract.

Although it is not mentioned in the said 02nd Contract (Doc. P3) that the Plaintiff's 01st Contract was being renewed, this does not necessarily mean this was not the case.

The Court is to assess all the evidence on Record in order to determine what the intention of the Parties was at the relevant time.

The **ERA** defines "continuous employment" as "the employment of a worker under an agreement or under more than one agreement where the interval between an agreement and the next does not exceed 28 days".

The following extract from Dr. Fok Kan's *Introduction Au Droit Du Travail Mauricien – 1/ Les relations individuelles de travail, 2ème édition*, at page 97, is found of particular relevance :

> Selon cette définition le critère essentiel pour permettre à un employé de cumuler son 'continuous employment' est l'existence d'un lien contractuel entre celui-ci et son employeur (sous-section 1). A cette condition il faut rajouter une condition par rapport à l'existence d'un 'employment relationship' (sous-section 2). Si généralement le 'continuous employment' est cumulé avec un seul employeur, sous certaines conditions il peut l'être avec plusieurs employeurs successivement (sous-section 3). Finalement le législateur éclaircit le point par rapport à la question du nombre de jour pendant lequel un employé doit travailler pour cumuler son 'continous employment'.

In the present matter, it was admitted by the Defendant Company that the 01st Contract expired on 09-03-17, and that the Plaintiff was offered the 02nd Contract on 05-04-17, starting on 10-03-17 (paragraph 2 of the Amended Plea).

By the said admission, it is established that there was a *lien contractuel* between the Plaintiff and the Defendant Company during the said 02 Contracts.

Further, by the Defendant Company admitting that it had asked the Plaintiff to remain in its employment during the said 02 Contracts (paragraph 2 of the Amended Plea), the Defendant Company was in effect admitting its employment relationship with the Plaintiff during the said 02 Contracts.

Now, the case for the Defendant Company is to the effect that pursuant to **s. 46(1A)(c)** of the **ERA**, the Plaintiff is not entitled to any Severance Allowance in relation to the 01st Contract.

The said section deals with "a determinate agreement and that agreement comes to an end" (emphasis added), i.e. the situation envisaged is one where there is a single agreement which is entered into by the Parties.

It is trite Law that "having regard to principles underlying statutory interpretation, when the words used are unambiguous the clear intention of the legislator must be put into effect for the legislator does not legislate in vain" (**Curpen v The State** [2008 SCJ 305]).

In light of all the above, the Court is of the considered view that by the clear and unambiguous wording of **s. 46(1A)(c)** of the **ERA**, Severance Allowance will not be payable, unless otherwise agreed by the Parties, in the case where there is a single agreement entered into by the Parties, and the said agreement comes to an end by the common will of the Parties.

In the present matter, given there was more than one agreement, the Court is of the considered view that the said **s. 46(1A)(c)** of the **ERA** would not apply to the Plaintiff.

The Court finds the following principles set out in the Authority of **Beldiam Co. Ltd b Peeters** [2014 SCJ 434] pertinent:

> […] with regard to "continuous employment" […] [t]he Legislator in 1975, by enacting these new provisions contained in Section 2 of the Labour Act, afforded additional protection to workers, who are employed on successive contracts of fixed duration, provided there is no break of more than 28 days. This was obviously meant to foil any attempt by employers, who may be minded to resort to using the stratagem of successive contracts of fixed duration, in order to subvert the protective provisions generally afforded under the Act to workers who are employed for a period of indeterminate duration.

The Court is alive to the fact that the said principles were enunciated in relation to the **Labour Act 1975** (hereinafter referred to as **LA**), which has been repealed. Nonetheless, the Court is of the considered view that the philosophy and the provisions of the **ERA**, are akin to the philosophy and the provisions of the **LA**, and that the said principles apply *mutatis mutandis* to the **ERA**, the more so as the definition of "continuous employment" in the said two Acts is almost identical.

It was also the contention of the Defendant Company that given **s. 46(1A)(c)** of the **ERA**, the Plaintiff was not entitled to any Severance Allowance under the 01st Contract, in the absence of any agreement to that effect with the Defendant Company, as the Plaintiff was earning more than Rs360 000/- per annum.

"Worker" is defined in **s. 2** of the **ERA** as follows:

> "worker", subject to s. 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.

Ex facie the Proecipe, the Court is of the considered view that **ss. 33** and **40** of the **ERA**, which relate to the Entitlement of Workers in the Sugar Industry and the Workfare Programme respectively, are not relevant in relation to the present matter.

And "basic wage or salary" is defined in **s. 2** of the **ERA** as:

> "basic wage or salary", in relation to a worker, means-
>
> (a) where the terms and conditions of employment of the worker are governed by Remuneration Regulations, an arbitral award or an agreement, whether oral or written, express or implied, the basic wage or salary prescribed in the Remuneration Regulations, award or agreement, or where the employer pays a higher wage or salary, the higher wage or salary so paid, but does not include any allowance by any name called, and whether paid in cash or in kind;
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> (b) in any other case, all the emoluments received by the worker, excluding bonus or overtime.

The Court has duly considered the Pleadings in the present matter, and the Plaintiff averred at paragraph 9 of the Amended Proecipe that his basic salary was Rs67 350/- per month.

The Plaintiff would therefore be earning well in excess of the prescribed amount of Rs360 000/- per annum as basic wage or salary (Rs 67 350/- x 12 months = Rs808 200/-).

Now, in the 01st Contract (Doc. P1), the Plaintiff's basic salary was mentioned as Rs64 000/-, and the Plaintiff would still be earning in excess of the prescribed amount of Rs360 000/- per annum (Rs64000/- x 12 = Rs768 000/-).

In the 02nd Contract (Doc. P3) and the Payslip (Doc. P2), the Plaintiff's basic salary is mentioned as Rs66 990/-, and the Plaintiff would still be earning in excess of the prescribed amount of Rs360 000/- per annum (Rs66 990/- x 12 = Rs803 880/-).

So, whether taking the Plaintiff's monthly basic salary as averred in the Amended Proecipe (paragraph 9), mentioned in the 01st Contract (Doc. P1), or in the 02nd Contract (Doc. P3) and the Payslip (Doc. P2), the Plaintiff would not *a priori* fall within the definition of "Worker" as per **s. 2** of the **ERA**.

That being said, the Court is of the considered view that the absence of any agreement for the payment of Severance Allowance as per the terms of the 02nd Contract (Doc. P3), and the fact that the Plaintiff was earning in excess of the prescribed amount, as highlighted above, are irrelevant in the present matter in relation to **s. 46(1A)(c)** of the **ERA**, which in the Court's considered view and for the reasons given above, would not apply to the Plaintiff in the present matter.

Now, the sections and Parts of the **ERA** which apply to a Worker, regardless of his / her basic wage or salary, are exhaustively set out in the definition of "Worker" in **s. 2** of the **ERA**, and include **Part X** of the **ERA**, which contains **s. 46** of the **ERA**.

The Legislator has not only set out the Parts of the **ERA** which apply to Workers, regardless of their basic wage or salary, but has also set out the sections of the **ERA** which likewise apply to Workers regardless of their basic wage or salary.

This clearly illustrates the intention of the Legislator and it is trite Law that the "legislator does not legislate in vain" (**Curpen (supra)**).

The Court is therefore of the considered view that **Part X** of the **ERA** is clearly an exception, and applies to a Worker, irrespective of her / his salary, and applies to the Plaintiff in the present matter, regardless of his basic salary.

Now, as regards the quantum, the Court bears in mind **s. 46(12)** of the **ERA**, and the Court has noted the various figures as highlighted above, in relation for instance to the Plaintiff's Basic

Salary as averred in the Amended Proecipe (paragraph 9), and in the 02nd Contract (Doc. P3) and the Payslip (Doc. P2).

It is to be noted that, although the Plaintiff's Claim as per paragraph 10 has been denied by the Defendant in the Amended Plea, paragraphs 5 and 9 of the Amended Proecipe have not been specifically mentioned in the Amended Plea.

The Court finds the following extract from **Dayal v Jugnauth & Ors** [2021 SCJ 178] of particular relevance:

> It is appropriate here to refer to the function of pleadings from **Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice, Twenty-Second Edition (1981)**, at pages 88 and 146:
>
> The function of pleadings then is to ascertain with precision the matters in which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object, it is necessary that the pleadings interchanged between the parties should be conducted according to certain fixed rules,…. The main purpose of these rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial, and then to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him. By this method they must speedily arrive at an issue. Neither party need disclose in his pleadings the evidence by which he proposes to establish his case at the trial. But each must give his opponent a sufficient outline of his case.
>
> … … …
>
> … though it is in general unnecessary to allege a matter of law, yet it is sometimes convenient to do so, and it may make the statements of facts more intelligible and show their connection with each other. There is no harm in this, if the facts are also stated on which the proposition of law is based."

Applying the abovementioned principles to the present matter, the Court is of the considered view that given the Defendant Company chose not to mention paragraphs 5 and 9 of the Amended

Proecipe in its Amended Plea, the Defendant Company has therefore not “frankly admitt[ed] or explicitly den[ied] every material matter alleged against [it]”.

Further, the figure of Rs67 350/- was averred at paragraph 3.b. of the Amended Plea as ”One month salary in lieu of notice”.

It therefore follows that the Defendant Company was not disputing that the Plaintiff’s basic salary at the time of termination of his employment was Rs67 350/-.

Now, from a simple mathematical calculation, it is clear that the Defendant Company calculated the amount of Rs401 652. 13/- as the Severance Allowance it is agreeable to pay to the Plaintiff for the period 10-03-17 to 18-05-18 on the basis of all the figures averred in the Amended Proecipe at paragraph 9:

$$\text{Rs114 757. 75/- x 03 months x } \frac{14}{12} = \text{Rs401 652. 13/-}$$

In light of all the above, the Court is of the considered view that the averments of the Plaintiff made at paragraphs 5 and 9, and all the figures averred at paragraph 9, of the Amended Proecipe are not disputed by the Defendant Company, and are therefore, as per established principles, taken to be admitted by the Defendant Company.

Now, despite there being no agreement in the 02nd Contract (Doc. P3) as to the payment of Severance Allowance, the Defendant Company agreed from the outset to pay to the Plaintiff the sum of Rs401 652. 13/- as Severance Allowance for the period 10-03-17 to 18-05-18.

This is clearly contrary to the averment made by the Defendant Company at paragraphs 3.f. and 3.g. of the Amended Plea to the effect that no Severance Allowance was due to the Plaintiff by the Defendant Company.

This contradiction undermines the Defendant Company’s case.

Further, the Court has noted that the Plaintiff's 01st Contract expired on 09-03-17, and as averred at paragraph 2 of the Amended Plea, the Plaintiff was offered the 02nd Contract on 05 April 2017, "for an additional duration of 3 years, starting on 10 March 2017".

From a literal interpretation of the definition of "continuous employment" (supra), it would appear that the Plaintiff was indeed in the continuous employment of the Defendant Company between 10-03-14 and 18-05-18, there being in effect no break, or at best, a break of only 01 day, i.e. not more than 28 days, between the 01st and 02nd Contracts.

And the Court is of the considered view that the very use of the word "additional" clearly indicates that the said 02nd period of employment covered by the 02nd Contract was added to the 01st period of employment covered by the 01st Contract.

The Court is comforted in reaching the said conclusion as the Defendant Company itself averred at paragraph 3.h.3 of the Amended Plea that the Plaintiff was paid inter alia "Telephone Allowance due since October 2014 (44 months)".

It is to be noted that the period October 2014 to 09-03-17 was in relation to the 01st Contract, and that the Plaintiff was paid the said Telephone Allowance upon his employment being terminated on 18-05-18.

Further, the very fact that the Defendant Company mentioned the period of "44 month" in relation to the said Telephone Allowance clearly shows that the Defendant Company was treating the Plaintiff's period of employment under both said Contracts as a single period of employment.

It is also very telling that the Plaintiff was paid his basic salary as per the 02nd Contract (Doc. P3), i.e. Rs66 990/-, for the month of March 2017 (Doc. P2).

There is no indication that the Plaintiff was paid his basic salary pro rated as per the 01st Contract (Doc. P1) from 01-03-17 to 09-03-17, and his basic salary pro rated as per the 02nd Contract (Doc. P3) from 10-03-17 to 31-03-17.

The fact that the Plaintiff was paid his full salary for the month of March 2017 (Doc. P2), coupled with the fact that the 02nd Contract was effective as from 10-03-17, albeit dated 05-04-17, clearly

leads to the conclusion there was a *lien contractuel* and an employment relationship between the Plaintiff and the Defendant Company, for the whole month of March 2017.

In addition, the Defendant Company itself stated in the Certificate of Service (Doc. P5) that the Plaintiff had been "employed as Business Development Officer on a fixed term contract at MT Services Ltd, a subsidiary of Mauritius Telecom from 10 March 2014 to 18 May 2018".

In Court, the Defendant Company attempted to qualify the contents of the said Certificate of Service (Doc. P5) by stating that "for the purpose of certifiable service it [i.e. (Doc. P5)] mentioned that the contract, fixed term contract was from 10th March to 18th May".

Now, although the years have not been mentioned by the Defendant Company in Court, as highlighted above, it is clear that the Defendant Company was referring to the said Certificate of Service (Doc. P5), which mentions the dates 10-03-14 and 18-05-18.

Be that as it may, the fact remains that in the said Certificate of Service (Doc. P5), the Defendant Company itself stated that the Plaintiff had been in its employment from "10 March 2014 to 18 May 2018".

It is also to be borne in mind that the Plaintiff was employed in the same capacity, i.e. Business Development Officer, for both said Contracts.

Also, there is no evidence on Record to the effect that the Plaintiff did not perform his duties as Business Development Officer during any period covered by the said 02 Contracts, and / or during the period between the said 02 Contracts.

Now, the Court is of the considered view that the Defendant Company's contention that the said 02 Contracts were stand alone, i.e. were in relation to two distinct periods of employment, is further weakened by the fact that although the Plaintiff was requested to provide a Certificate of Character and undergo a medical examination in relation to the 01st Contract (Doc. P1), there were no such requirements in the 02nd Contract (Doc. P3).

By not requesting the Plaintiff to meet the said requirements in relation to the 02nd Contract, it would appear that the Defendant Company was treating the Plaintiff as continuing to be in its

employment, and viewed the said requirements as superfluous in relation to the 02nd Contract, given the Defendant Company was already in possession of the said requested information.

In light of all the above, the Court is of the considered view that the Plaintiff was, for all intents and purposes, in the continuous employment of the Defendant Company during the month of March 2017, i.e. including during the period between the 01st and 02nd Contracts, and the Court is further of the considered view that the Plaintiff therefore was in the continuous employment of the Defendant Company from 10-03-14 to 18-05-18.

Position Occupied By The Plaintiff Was Of A Permanent Nature

It was the contention of the Plaintiff that the position he was occupying was of a permanent nature, as he would act just like any other Employee, and the type of activity he was doing, was ingrained in the fabric of the business.

In Court, the Plaintiff confirmed that at the said meeting of 18-05-18, he was informed verbally that his job profile was no longer being required.

The Defendant Company's contention was that at the said meeting of 18-05-18, the Plaintiff was informed that "his job profile was no longer being required" (paragraph 4.b. of the Amended Plea).

And in Court, the Defendant Company deponed to the effect that whether the Plaintiff was occupying a post of a permanent nature or not had no incidence on the present matter, given there were 02 fixed term Contracts.

Now, although it was not specifically spelt out in the Amended Plea that the Defendant Company had relied on the reason that the Plaintiff's job profile was no longer being required as a ground for terminating the Plaintiff's employment on 18-05-18, it is to be noted that paragraph 4.b. of the Amended Plea is in response to paragraphs 6 and 7 of the Amended Proecipe, which relate to the issues inter alia of the Plaintiff having been given no reason for the termination of his employment (paragraph 6) and of the Plaintiff's termination of employment being summary without any cause and unjustified (paragraph 7).

The Court is therefore of the considered view that the Defendant Company was in effect asking the Court to consider the said reason as a ground for the Plaintiff's employment being terminated.

The Court finds the following passage from the Authority of **Lateral Holdings Ltd v Murdamootoo [2021 SCJ 19]** pertinent:

> The reason given by the appellant for the summary dismissal in the letter of termination assumes all its importance when one bears in mind that the burden is on the employer to show that the termination was justified. Indeed, when notifying the worker of the termination of his employment, the employer was, under the obligation, pursuant to **section 37(2) of the Employment Rights Act 2008**, to state the reason of termination (see also **Berlinwasser International AG Mauritius v Benydin** [2017 SCJ 120]). In the present case, the letter of termination not only did not state that the reason of the termination was misconduct, but also expressly referred to the fact that the disciplinary committee had given the benefit of the doubt to the respondent with regard to the charge of being under the influence of alcohol on hotel premises (which can be said to amount to a charge of misconduct).
>
> We therefore agree with learned Senior Counsel for the respondent that it was not open to the appellant to aver in its plea and seek to establish at the trial that the termination of the respondent's appointment was justified on the ground of "*misconduct and a breach of his responsibilities as a senior employee of the company*", none of which had been invoked in the letter of termination. The appellant's averment in its plea with regard to termination of the respondent's employment being justified on ground of misconduct is not supported by the evidence on record, namely, the letter of termination. […]
>
> Further it is not in order for the employer to ask the Court to determine whether dismissal was justified for any reason other than that specified in the letter of termination. As the Judicial Committee stated in **Mauvilac Industries Ltd v Ragoobeer [2007] UKPC 43**, it would not be legitimate "*to allow the employer to avoid the penalty prescribed by the legislature by, in effect, ignoring what he actually did and asking whether he might have had some other reason for terminating his employee's contract in a different way – and then treating him as if he had done so"*.

Applying the abovementioned principle to the present matter, the Letter of Termination (Doc. P4) only refers to Clause 13(ii) of the Plaintiff's Contract of Employment (Doc. P3) as the reason for

the Plaintiff's employment being terminated with immediate effect, and it was therefore not open to the Defendant Company to aver in its Amended Plea (paragraph 4.b.), as a reason for the Plaintiff's employment being terminated, that the Plaintiff had been informed at the said meeting of 18-05-18 that his job profile was no longer being required.

In light of the above, there is no need for the Court to determine the issue of whether the Plaintiff was occupying a position of a permanent nature, and if so, its incidence on the present matter.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court finds that the Plaintiff has established his case on the Balance Of Probabilities, and the **Defendant Company is therefore ordered to pay to the Plaintiff the sum of Rs1 441 644. 23/- as Severance Allowance for the period 10-03-14 to 18-05-18**.

Pursuant to **s. 46(11)** of the **ERA**, the Court has a discretion as to any award for Interest on the amount of Severance Allowance payable (**Ramnarain v International Financial Services Ltd [2021 SCJ 35]**).

The Court is of the considered view, given all the circumstances of the present matter, that Interest at the rate of 05% per annum on the said amount of Severance Allowance from the date of Judgment would be fair and reasonable, and **the Defendant Company is therefore ordered to pay to the Plaintiff Interest at the rate of 05% per annum on the amount of Severance Allowance only, from the date of the present Judgment to the date of final payment**.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 17 August 2022]