Denis G. v The Ministry of Youth & Sports

2020 IND 2

Cause Number 464/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:

Gerard Denis

Plaintiff

v.

The Ministry of Youth & Sports

Defendant

Ruling

The averments of Plaintiff in this Plaint with Summons are as follows:

1. The Plaintiff has been in continuous employment with the Defendant since 26 August 2003 till 28 February 2015 and was at all material times employed as Adviser/Coach.

2. The Plaintiff was drawing a terminal monthly salary of Rs. 14,763.

3. By letter dated 29 January 2015, Defendant terminated Plaintiff's employment as from 28 February 2015 and this, unlawfully, without justification, summarily and in breach of the provisions of the Employment Rights Act.

4. Plaintiff avers that such termination was to all intents and purposes unlawful, unjustified and not made according to law.

5. A Notice, *mise en demeure,* was served upon the Defendant on 27 June 2016 claiming the sum of Rs. 497,001, but the latter has failed to comply with the requirements thereof.

6. The Plaintiff now claims from Defendant the sum of Rs. 497,001 made up as follows namely severance allowance: Rs. 494,560 and unpaid bonus: Rs. 2,441.

7. The Plaintiff is therefore praying for judgment ordering Defendant to pay to him the said sum with interest and costs.

Defendant, for its part, has raised a plea in *limine* to the effect that the present case be set aside with costs inasmuch as Plaintiff is not entitled to any severance allowance given that his appointment which was effected under Section 89(3)(h) of the Constitution, was terminated under Section 113(3) of the Constitution.

Plaintiff has thereafter, sought to amend the plaint in order to add that Plaintiff was at all material times employed as Adviser/ Coach, but at all material times he carried out the duties of a coach. An attempt in that regard was also made to increase his terminal monthly salary from Rs. 14,763 to Rs. 17,205 so that as per the *mise en demeure* served upon the Defendant on 27 June 2016, the sum claimed was changed to Rs. 596,013 instead of Rs. 497,001 in relation to which there was no compliance by the Defendant so that the sum claimed by Plaintiff by virtue of the proposed amendment is Rs. 596,013.

Learned Counsel for Defendant has objected to the proposed amendment at the first paragraph of the plaint given that the proposed amendment is ambiguous and uncertain and is drafted in such a way in order to embarrass and mislead the Defendant and it also contradicts the other averments contained in the third paragraph. Secondly, the proposed amendment seeks to defeat the plea in *limine* raised by Defendant and thirdly the proposed amendment seeks to introduce a new cause of action without notice having been given to Defendant. Arguments were heard accordingly.

The Plaintiff was called as a witness solely for the purposes of producing the *mise en demeure*, notice, served on Defendant on 27 June 2016 wherein the sum claimed as per the said notice was Rs. 497,001(Doc. A) and to which there was no objection and there was no cross-examination.

The main thrust of the argument of learned Counsel for Defendant was that one month's notice is a condition precedent before entering an action in the present case and the contents of the notice should reflect the cause of action prayed and as such the purported amendment will create ambiguity and is an attempt to defeat the plea in *limine* and cannot be condoned. She relied on Section 4 subsections (1), (2(a)), (2(b)) and (2(c)) of the Public Officers Protection Act.

The main contention of learned Counsel for Plaintiff was that the proposed amendment was to bring clarity to the cause of action and to avoid multiplicity of actions so that the requirements of notice and statutory delay did not find their application here.

I have given due consideration to the arguments of both learned Counsel in relation to the proposed amendment. The amendment of pleadings is governed by **Rule 48 of the District, Industrial and Intermediate Court Rules 1992** as follows:

*"**48.** The District Magistrate may, at all times, amend all defects and errors, both of substance and of form, in any proceedings in civil matters, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; all such amendments may be made with or without costs, as to the Magistrate may seem fit, and also such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties shall be so made."(**emphasis added**)*

Furthermore, **Rule 1** of the said Rules provides:

*"**1.** These rules –*

(a) may be cited as the District, Industrial and Intermediate Court Rules;

(b) shall regulate the practice and proceedings of District Courts in the exercise of their civil jurisdiction and, where appropriate, the practice of Industrial and Intermediate Courts in similar matters."

The cursus of our case law shows that the Court will exercise its discretion under Rule 48 (which is Rule 17 in its Supreme Court counterpart) judiciously whilst taking into account – (a) the nature of the proposed amendment; (b) the stage at which the motion to amend is made; (c) the purpose for which it is made; and (d) whether it is likely to cause any prejudice to the other party so that it may not be

compensated by an order for costs. (see - **Earl Seymour S. v Hassamal S.M.** [2014 SCJ 291], **Tive Hive & Ors. v Kam Tim**[1953 MR 80], **Bronsema v Mascareigne Shipping & Trading Co.Ltd.**[1985 MR 79], **Soobhany & Ors. v Soobhany & Ors** [1989 MR 191], **Unmar v Lagesse**[1994 MR 183], **Rambujoo & Co.Ltd. v Hicons Co.Ltd.[2003 SCJ65], Badain v ICAC**[2004 SCJ 33], **ABC Motors and Ors. v Ngan Hoy Khen Ngan Chee Wang & Ors.**[2008 SCJ 25a] and **Best Luck (Mauritius) Ltd. v Murden N. & Anor.**[2013 SCJ 335].)

It is of relevance to quote the following extract from **Maxo Products v Swan Insurance Co. Ltd.** [1996 MR 41]:-

"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings."(see - per Jenkins L.J. in G.L. Baker v. Medway Building & Supplies Ltd[1958] 1 W.L.R. 1216, p.1231;[1958] 3 All E.R. 540, p.546).

"It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights…. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace…It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."(per Bowen L.J. in Copper v. Smith (1883) 26 Ch. D 700, pp.710-711, with which observations A.I. Smith L.J. expressed "emphatic agreement" in Shoe Machinery Co. v. Cultam[1896] 1 Ch. 108, p.112)."

Hence, an amendment is to be allowed in order to determine the real question in controversy between the parties in order to decide their rights and not to punish them for the errors or mistakes found in their pleadings so that the Court is not here for the sake of discipline but for the overriding cause of dispensing justice but with the rider that no irreparable prejudice is being caused to the other party and that it can be adequately compensated by an order for costs.

In the present case, the stage at which the proposed amendment is sought is tantamount to a breach of Section 4 (2) of the Public Officers Protection Act and as such the statutory delay of one month's notice which is mandatory and the contents of the notice which is reflected by the Doc. A. is in relation to a different sum claimed and in relation to a different nature of work performed by Plaintiff namely adviser cum coach. Furthermore, by the proposed amendment the employment of Plaintiff as adviser is being simply reduced to an unnecessary prolix averment which obviously will have a bearing on the forthcoming arguments on the Supreme law rather than the general law in place as regards his termination of contract of employment as part of the plea in *limine* of Defendant. This kind of error or mistake in the plaint can be construed as being one that the Court ought not to correct as it cannot be done without injustice to the other party. At this stage, I find it appropriate to quote an excerpt from the case of **China International Water and Electrical Corporation v The State of Mauritius & Anor.** [2017 SCJ 3] on the express statutory provisions of **Section 4(2)(a)(b) and (c) of the Public Officers Protection Act** as follows:

"It is clear from the provisions of section 4(2)(a)(b) and (c) above, that the service of the notice must mandatorily be in the terms prescribed both as regards the nature of the action and its subject matter. These are not mere technical requirements but constitute a precondition for instituting civil proceedings against the State and its preposes."

Section 4(2) of the Public Officers Protection Act provides as follows:

"(2) (a) No civil action, suit or proceeding shall be instituted, unless one month's previous written notice of the action, suit, proceeding and of the subject matter of the complaint, has been given to the defendant.

(b)No evidence shall be produced at the trial except of the cause of action as specified in the notice.

(c) In default of proof at the trial that the notice under paragraph (a) has been duly given, the defendant shall be entitled to judgment with costs."

In fact the discretion to be exercised by the Court lies in its assessment as to where justice lies as illustrated in the cases of **Soobhany and Ors v Soobhany and Ors** [1989 SCJ 428] and **Joomun v Kissoondharry** [1977 MR 256] and I take the view that irreparable prejudice will be caused to Defendant by such amendment as the said Defendant cannot be adequately compensated by an order for costs bearing in mind the stage at which the amendment is sought thereby affecting its rights which existed prior to the proposed amendment and which is tantamount to changing the nature of the proceedings (see- **Phoenix Knitting Ltd v The Development Bank of Mauritius Ltd & Ors** [2018 SCJ 428]). This is because the amendment sought would have for effect to change the action into one of a substantially different character which could more conveniently be the subject of a new action (see- **Bhadain v ICAC** [2004 SCJ 33] and **Beeharry S.S. v Bojnanun A.P. & Ors** [2009 SCJ 358]). Moreover, as rightly pointed out by learned Counsel for the State that the peremptory nature of the requirement of Section 4(2) of the said Act militates against the proposed amendment [see- **Gunesh v The National Transport Corporation and Ors** [2010 MR 70] and endorsed in **Bhoonah J. v Mauritius Revenue Authority**[2017 SCJ 53] an extract of which is as follows: *" (…) the*

requirements of section 4(2)(a) of the Act which are quite specific: it enjoins the plaintiff to notify the defendant of the actual action, suit or proceeding that it will take against the defendant.

The notice must set out the claim in similar terms to those in the plaint with summons, covering the same subject matters. It is clear from the case of ***Gunesh v The National Transport Corporation & Ors*** *(supra), with which I respectfully agree, that although there the main issue was compliance with the delay to enter the case, it was clearly stated that the notice should mirror the plaint, the more so that the law clearly and unequivocally provides that the plaintiff will not be allowed to adduce evidence of what has not been averred in the notice, and that would include the items of damages claimed (vide also* ***Hemraz Gobin v The Registrar General*** [2006 SCJ 128]*, in the same sense)"*] and as such would interfere with the state of fair play between the parties as clearly illustrated in **Monroe J. v The State Bank of Mauritius** [2008 SCJ 73] namely:

"Fair play demands that rules should not only be fair, be applied fairly and be seen by the parties to the dispute having been applied fairly. While strategy and counter – strategy may be inevitable in a procedure involved in the determination of a dispute between parties to a case, account should be taken of the fact that a case moves from stage to stage and each stage on a given state of play and having thereby assumed its own integrity. A sense of propriety demands that that state of play and integrity be at every stage of proceedings." and which is in line with the reasoning in **Tildesley v Harper (1878) 10 Ch D 393** and **Ketteman v Hansel Properties Ltd [1987] AC 189** namely that the Court will not allow an amendment which will prejudice the rights of the opposite party **as existing at the time of the amendment.**

Hence, in line with my assessment of where justice of the present case lies, I do not allow the amendment as it will cause prejudice to the rights of Defendant as existing at the time of the amendment because it will interfere with the given state of

play and integrity that goes with the next stage of the procedural process and which to all intents and purposes cannot be cured by an award of costs.

The matter is accordingly fixed *proforma* to 6 March 2020 for both learned Counsel to suggest common dates for arguments on the plea in *limine*.

S.D. Bonomally (Mrs.) *(Acting Vice President)*
24.2.2020