Charpentier v iQuera

2023 IND 29

CN375/17

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mandela Westland Jonathan Charpentier

Plaintiff

v/s

iQera Indian Ocean Ltd (formerly known as Theofinance Ltd)

Defendant

JUDGMENT

By way of his Second Amended *Proecipe* dated 18-10-21 (which ought to have been Amended *Proecipe* as confirmed by Learned Counsel for the Plaintiff), the Plaintiff is claiming from the Defendant Company the total sum of Rs413 547/- representing One Month's Salary In Lieu Of Notice, Severance Allowance "at punitive rate" and End Of Year Bonus, with Interest and Costs, for his dismissal, without any valid cause, reasons, and/or justification.

The Defendant Company denied the said Claim in its Plea dated 17-05-18.

Each Party was assisted by Learned Counsel.

The Proceedings were held partly in English, partly in French, and partly in Creole.

Case For The Plaintiff

The case for the Plaintiff was essentially that he was notified of the termination of his employment outside the statutory delay, as provided for by **s. 38(2)(a)(v) of the Employment Rights Act as amended (hereinafter referred to as ERA)**, as the Disciplinary Committee was held on 03-11-16, and he received the Termination Letter (Doc. P4) on 10-11-16.

Case For The Defendant

The case for the Defendant Company was in essence that the termination of the Plaintiff's employment was justified in light of the Plaintiff's actions and the conclusions of the Disciplinary Committee (Doc. D2), and that the Plaintiff was notified of the termination of his employment within the statutory delay provided by the **ERA**.

Analysis

The Court has duly considered all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the oral Submissions and Written Submissions of each Learned Counsel, and to the Authorities and extracts of enactments referred to, and put in, by each Learned Counsel.

At the outset, both Learned Counsel informed the Court that the only issue to be determined in the present matter was whether the Plaintiff was informed of the termination of his employment within the statutory delay or not.

It follows therefrom that there is no need for the Court to determine whether the dismissal of the Plaintiff was justified or not, and the Court therefore proceeds to determine the sole live issue of notification of termination.

Applicable Law

The Parties were in agreement as to the fact that the applicable Law was the **ERA**, which was in force at the relevant time.

And the Court is of the considered view that given the termination of the Plaintiff's employment occurred on 10-11-16, the applicable Law was indeed the **ERA**.

Not In Dispute

The following was not in dispute:

1) The Plaintiff had been in the continuous employment of the Defendant Company since 16-08-10 as Credit Controller;
2) By letter dated 20-10-16, the Plaintiff was convened to a Disciplinary Committee to be held on 03-11-16;
3) The Plaintiff attended the said Disciplinary Committee on 03-11-16; and
4) The Plaintiff was notified of the termination of his employment on 10-11-16 by way of letter of even date (Doc. P4).

By When, At Latest, Should The Plaintiff Have Been Informed Of The Termination Of His Employment?

The relevant part of **s. 38(2)(a)(v) of the ERA** provides as follows:

> (2) No employer shall terminate a worker's agreement –
>
> (a) for reasons related to the worker's misconduct, unless –
>
> […]
>
> (v) the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is subject of an oral hearing, after the completion of such hearing […].

As to the computation of time, Learned Counsel for the Plaintiff submitted that **s. 38(1)(d) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)** applied to the present matter, relying on the Authority of **High Security (Guards) Ltd v Fareedun [2009 SCJ 48]**, so that the Plaintiff ought to have been notified of the termination of his employment at latest on 09-11-16.

On the other hand, Learned Counsel for the Defendant Company submitted that it was **s. 38(1)(b) of the IGCA** which ought to apply, the more so as the Legislator could not have imposed a delay

of "7 days when a hearing is held since it would go against the whole concept of fairness towards the employee by forcing the Chairperson to deal with the matter expeditiously and not carefully" (paragraph 16 of the Written Submissions on behalf of the Defendant), such that the last day for the Plaintiff to be informed of the termination of his employment was 10-11-16.

The Authority of **Moothen v The Queen** [1981 SCJ 358], which was cited with approval in the Authority of **High Security (Guards) (supra)**, is found to be of particular relevance to the determination of the said question:

> We have no doubt that it is section 38(d) of the Interpretation and General Clauses Act, 1974 which applies and not section 38(b) which only finds application when two events are envisaged and one must determine whether a given lapse of time between the two has been observed. In the present instance there was only one event which had taken place, namely the lodging of the appeal with the clerk on the 6th March, 1981, and which should have been followed within fifteen days from that date with the prosecution of the appeal before the Supreme Court. Under the clear provisions of section 38(d) of the Interpretation and General Clauses Act, 1974, the 6th March, 1981, should be included in the fifteen days stipulated and the time limit then ended on the 20th March, 1981. (emphasis added)

Applying the above principles to the present matter, the Court is of the considered view that there was only one event which had taken place as at 03-11-16, that is the Disciplinary Committee, which was completed on the said date, and that hence the applicable section was **s. 38(1)(d) of the IGCA**.

It is also settled Law that the completion of the Disciplinary Hearing occurs "when the disciplinary body has heard all the evidence and any submissions made by Counsel" (**Happy World Marketing Ltd v Agathe 2005 MR 37**), irrespective of when the employer is communicated with the Findings of the Disciplinary Committee.

The Court is alive to the fact that the Authority of **Happy World (supra)** was decided under the now repealed **Labour Act** but is nevertheless of the considered view that the principles enunciated in **Happy World (supra)** apply *mutatis mutandis* to the present matter, as the rationale and philosophy underlying the **Labour Act** and the **ERA** are very similar (**Savanne Bus Service**

Co Ltd v Peerbaccus [1969 MR 139] cited with approval in **Mauvilac Industries Ltd v Ragoobeer (Privy Council Appeal No 33 of 2006]**).

The Court has noted the Submissions of Learned Counsel for the Defendant Company to the effect that as per the Authority of **Mauvilac Industries (supra) at paragraph 27**, the delay started to run from the day following the completion of the Disciplinary Committee, but finds that the Law Lords in the said case were not called upon to decide the specific question as to when the time started to run, but rather whether the dismissal was outside the statutory delay, as in the said case, whether the time started to run as from 30-05-11 or 31-05-11, the notification was effected outside the statutory delay of 07 days (**Mauvilac Industries (supra) at paragraph 9**).

In light of all the above, the Court is of the considered view that the date of completion of the Disciplinary Committee in the present matter was 03-11-16, that the said date is to be included in the computation of time as regards the notification of the termination of the Plaintiff's employment, and that hence the Plaintiff was to be notified of the decision of the Defendant Company as regards his employment not later than 07 days from 03-11-16, that is by 09-11-16 latest.

Was The Plaintiff Notified Of The Termination Of His Employment Within The Statutory Delay?

The following principles were authoritatively set out in **Mauvilac Industries (supra)**:

> '10. The first point to be decided is when the dismissal took effect. Clearly, dismissal is a unilateral act: to take effect, it does not require any action by the person who is dismissed. Some unilateral acts are effective without the person affected having to be told about them (actes non-réceptices), others only when the person affected is told about them (actes réceptices). See J Martin de la Moutte, *L'Acte juridique unilatéral* (1951), p 189, para 197: "l'acte réceptice atteint donc sa perfection lorsque la manifestation parvient à la connaissance du destinataire", cited with approval by the Supreme Court in *Happy World Marketing Ltd v Agathe* 2005 MR 37, 39. While the borderline between the two categories may not always be easy to determine, their Lordships have no doubt that dismissal of an employee is an acte réceptice, which takes effect only when the employee is notified.
> (emplasis added)

The Parties were in agreement that the Plaintiff was informed of the termination of his employment by the Defendant Company on 10-11-16. Further, the termination letter (Doc. P4) itself, in which the Plaintiff is notified of the termination of his employment by the Defendant Company, is dated 10-11-16 (Doc. P4).

In light of all the above and applying the abovementioned principles to the present matter, given an *acte réceptice atteint sa perfection lorsque la manifestation parvient à la connaissance du destinataire* (**Mauvilac Industries (supra)**), the Plaintiff was notified of the termination of his employment by the Defendant Company on 10-11-16.

In light of the Court's Findings above that the Defendant Company had until 09-11-16 to notify the Plaintiff as to its decision as regards his employment, and given the Plaintiff was notified of the termination of his employment by the Defendant Company on 10-11-16 (Doc. P4) as highlighted above, the Court is of the considered view that the said notification was effected outside the statutory delay as provided by the **ERA**.

As succinctly stated in the Authority of **High Security (Guards) (supra)**, "[i]t is now beyond dispute that, following the decision of this Court in **Happy World Marketing Ltd v J.P. Agathe** **[2004 MR 37]**, confirmed by the Judicial Committee of the Privy Council in **Mauvilac Industries Ltd v Ragoobeer** **[2007 MR 278]** **[2006 PRV 33]**, the dismissal of a worker following disciplinary proceedings brought against him must be effected within seven days following the completion of the disciplinary hearing, failing which the termination would be held to be unjustified."

As authoritatively held in **Happy World (supra)**, "[i]f an employer does not dismiss a worker within the mandatory statutory limit of seven days, he is deemed to have waived his right to dismiss the worker for serious misconduct and not to pay severance allowance (section 35(1) of the Act) so that any subsequent dismissal becomes unjustified and attracts severance allowance at the punitive rate, irrespective of whether he has or not a valid reason to discontinue with the employment of the worker, with or without payment of severance allowance at the normal rate – vide section 36(7) of the Act."

The mandatory nature of the said statutory time limit has been recognized in paragraph 15 of the Authority of **Mauvilac Industries (supra)**:

> "[…] it may seem strange to describe the termination of an employee's employment for established misconduct as "unjustified" merely because the necessary notice reaches the employee eight, rather than seven, days after the completion of the disciplinary hearing. Nevertheless, the legislature has adopted a policy of laying down a fixed time limit – clearly, with the Recommendation of the ILO in mind and with the aim of ensuring that both parties know where they stand as quickly as possible. See *Mahatma Gandhi Institute v Mungur P* 1989 SCJ 379 […]. (emphasis added).

And the Supreme Court held in **Mahatma Gandhi Institute (supra)**:

> "This is not a time limit which it is in the power of the courts to extend and it is based on sound principles. Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct."

As regards the unfairness to the employer resulting from such strict application of the statutory time limit, the Judicial Committee of the Privy Council held in **Mauvilac Industries (supra)** as follows:

> 27.Obviously, in a case like the present where the notice of dismissal is only a day late, the six-fold penalty can seem harsh and this doubtless explains why the Supreme Court was formerly prepared to adopt an interpretation of the legislation which mitigated this harshness. But the legislature was entitled not only to lay down a time-limit but - subject, of course, to any relevant provisions in the Constitution – to prescribe the penalty that is to attach to a failure to comply with that time-limit. In this case the legislature chose, as it was entitled to, a single, undifferentiated, sanction. Inevitably, those who just miss the deadline feel that it is unfair that they should be treated no differently from those whose failure is much worse. The particular impact of the sanction in a case like the present cannot, however, justify the courts in ignoring the plain meaning of section 36(7) of the Act.

In light of all the above, given the Plaintiff was notified of the termination of his employment on 10-11-16 (Doc. P4), that is outside the mandatory statutory limit of 07 days, the Defendant Company is deemed to have waived its Right to dismiss the Plaintiff for "gross misconduct" (Doc. P4), and hence the Plaintiff's dismissal is deemed to be unjustified, as a result of which the Plaintiff becomes entitled to Severance Allowance (**North Island Investments Ltd v Valamootoo [2010 SCJ 226]**).

Severance Allowance

As found above that the employment of the Plaintiff was terminated in breach of **s. 38(2) of the ERA**, the Plaintiff is entitled to Severance Allowance in accordance with **s. 46(5) of the ERA**.

It was not in dispute that the Plaintiff had been in the continuous employment of the Defendant Company since 16-08-10 and that the Defendant Company terminated the Plaintiff's employment (Doc. P4).

The Court is of the considered view that the contract of employment (Doc. P1) was to all intents and purposes a contract of indeterminate duration.

Hence, all the conditions of **s. 46(1)(a) of the ERA** have been satisfied.

Remuneration is defined in **s. 2 of the ERA** as follows, as far as relevant to the present matter:

> "remuneration" –
>
> (a) Means all emoluments, in cash or in kind, earned by a worker under an agreement […].

In the **ERA**, "emoluments" is not specifically defined in the Interpretation section, but in relation to **Part IX of the ERA**, emoluments received by the worker exclude any bonus or overtime as per **s. 40(a) of the ERA**.

The Plaintiff confirmed as per his pay slip (Doc. P2) that his salary was Rs19 300/- and admitted that his salary as per (Doc. P2) and the Second Amended *Proecipe* were not the same.

The “Refund public bus” of Rs630/- appears on the said pay slip (Doc. P2). But as per the pay slip (Doc. D1), the “Refund public bus” is only Rs30/-. This is perfectly understandable given the Plaintiff was suspended since 19-10-16 (Doc. P5), and hence would not have travelled to work for the complete month of November 2016 (Doc. D1).

That being said, the Plaintiff’s total emoluments in October 2016 were Rs19 930/- (Doc. P2), and were Rs19 330/- in November 2016 (Doc. D1).

As per **s. 46(12) of the ERA**, the remuneration to be taken into account is the one drawn by the Plaintiff for the last complete month of his employment, and as per **s. 2 of the IGCA**, ““month” means a calendar month”.

In the present matter, given the Plaintiff’s employment was terminated on 10-11-16 (Doc. P4), it stands to reason that the last complete month of his employment with the Defendant Company was October 2016, and hence it is in order for the Court to act on the basis of the pay slip (Doc. P2) for the month of October 2016 to determine the Plaintiff’s monthly remuneration.

In light of the said pay slip (Doc. P2), it is clear that the Plaintiff earned as total emoluments Rs19 300/- and Rs630/- as “Refund public bus”, such that his monthly remuneration as at October 2016 was Rs19 930/- as averred by the Plaintiff in the Second Amended *Proecipe*.

As regards the period of continuous employment, it was common ground between the Parties that the Plaintiff had been in the continuous employment of the Defendant Company from 16-08-10 to 10-11-16.

Given the computation is to be made on the basis of complete months, as highlighted above, the Plaintiff had been in the continuous employment of the Defendant Company for 74 complete months (i.e. 04 months in 2010 (i.e. September to December 2010), 60 months between 2011 and 2015 (i.e. whole year in 2011, 2012, 2013, 2014, and 2015), and 10 months in 2016 (i.e. January to October 2016)).

The amount of Severance Allowance payable to the Plaintiff is therefore as follows:

Rs19 930/- x 3 months x 74 months / 12 months = Rs368 705/-.

One Month's Notice

S. 37(4) of the ERA provides that subject to any provision of an agreement, the length of the notice to be given for the termination of an agreement shall be of 30 days.

As per paragraph 23 of the contract of employment (Doc. P1), the notice period is of 05 days.

It is settled Law that the Labour Laws are *d'ordre public* and cannot be derogated from (**Atchia v Air Mauritius Ltd [2021 SCJ 206]** citing with approval **Introduction au droit du travail mauricien 1/Les Relations Individuelles de Travail, Dr D. Fok Kan, 2ème edition (2009)** at pp.1, 2, and 5 and the Authority of **Jeetun v Sugar Investment Trust 2010 SCJ 116**).

The Court also bears in mind that "*le droit du travail lui par contre à (sic) une finalité précise, celle de "la protection du faible contre le fort"* ***[Droit du travail, J. Rivero et J. Savatier, Collection Thémis, 12ème ed. (1991)****, p. 32]*." (**Introduction au droit du travail mauricien (supra)**).

Further, the Court is of the considered view that the very wording of s**. 37(4) of the ERA**, with the word "shall" which as per **s. 5(4)(a) of the IGCA** may be read as imperative, gives a clear indication of the intention of the Legislator and "[....] 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 it was not open to the Parties to reduce the notice period to 05 days, and that the notice period ought to have been 30 days minimum.

Hence, the Court finds that the Plaintiff is entitled to one month's salary in lieu of notice, in the amount of Rs19 930/-.

End Of Year Bonus

As to the End Of Year Bonus, **s. 31A of the ERA** provides as follows:

> (1) Where a worker remains in continuous employment with the same employer in a year, the worker shall be entitled at-the end of that year to a bonus equivalent to one-twelfth of his earnings for that year.

And "year" means a calendar year as per **s. 2 of the IGCA**.

It is undisputed in the present matter, that the Plaintiff's employment was terminated on 10-11-16 (Doc. P4), and hence the Plaintiff cannot be said to have been in the continuous employment of the Defendant Company in the year 2016, that is for the whole calendar year of 2016.

The Plaintiff is therefore, in the Court's considered view, not entitled to any End Of Year Bonus.

Miscellaneous

Pleadings

As per the Second Amended *Proecipe*, the Defendant Company is "iQera Indian Ocean Ltd (formerly known as Theofinance Ltd)", whereas all the other Pleadings, i.e. the Demand Of Particulars dated 27-09-17, the Answer to Particulars dated 20-11-17, and the Plea dated 17-05-18, have as Defendant Company "Theofinance Ltd".

Further, as per the contract of employment (Doc. P1), the name of "TheoFinance Ltd" appears in the body of the said document, whereas "Theofinance Ltd" appears in the footer of the said document, and as per the letter of charge (Doc. P3), the name of "Theofinance Ltd" appears both in the body and the footer of the said document.

Be that as it may, no objection was taken to the *Proecipe* being amended for the Defendant Company's name to be as per the Second Amended *Proecipe*, and Learned Counsel for the Defendant Company informed the Court that since the amendment was only in relation to the name of the Defendant Company, the Plea would remain the same.

The Court is therefore of the considered view that it is to act on the basis that the Defendant Company in the present matter is as styled in the Second Amended *Proecipe*, as the identity of the Defendant Company was not made a live issue.

Findings of the Disciplinary Committee (Doc. D2)

The Findings of the Disciplinary Committee (Doc. D2) have been placed on Record, but in light of the authoritative pronouncement in **Calou v Sregh Ile Maurice Ltee [2017 SCJ 312]**, the Court does not act on the basis of the said Findings.

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 Claim on the Balance of Probabilities, and **the Defendant Company is therefore ordered to pay to the Plaintiff the total sum of Rs388 635/-, representing Rs19 930/- as One Month's Salary In Lieu Of Notice and Rs368 705/- as Severance Allowance**.

As per **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]**), irrespective of whether any Claim has been made in relation thereto or not.

In view of the circumstances of the present matter, the Court is of the considered view that Interest at the rate of 05% *per annum* on the amount of Severance Allowance only would be fair, and **the Defendant Company is therefore ordered to pay to the Plaintiff 05% Interest *per annum* on the said amount of Severance Allowance only (i.e. Rs368 705/-), payable from the date of the present Judgment to the date of final payment.**

With Costs.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 23 May 2023]