Sowkhee L.M. v Bayport Management Ltd

2023 IND 45

Cause Number 150/20

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Lovena Malina Sowkhee

Plaintiff

v.

Bayport Management Ltd

Defendant

Judgment

In this plaint, Plaintiff has averred that she was in the continuous employment of Defendant from 2011 to December 2019. At the time of her dismissal, she was employed as legal Counsel.

She was last remunerated at a monthly interval at the rate of Rs 181,791.95/- as basic pay.

For the past twelve months [i.e. Dec 2018 to 9 Dec 2019], she drew Rs 2,830,908.19/- as yearly earning including the end of year bonus and medical contribution of the Defendant, therefore at the time of her dismissal, her average monthly remuneration amounted to Rs 235,909/- made up as follows:

(i) Yearly earning from December 2018 to December 2019(including end of year bonus for December 2019) = Rs 2,830,908.19.

(ii) Average monthly remuneration = Rs 235,909.

Plaintiff has further averred that –

(a) On 14th of November, by way of a letter signed by Hayley Van Heerden, Group Head, Human Capital, she was informed that she was suspended from work pending the completion of an investigation.

(b) On 21st of November at 18.16 hours, by way of an email sent by Mr. John Greeff, Senior Business Partner – Group Human Capital, she was convened to attend a Disciplinary Hearing to answer the following charges:

(1) Breach of Employment Contract

(a) Insubordination, in that you have failed to resume your duties as required by your employer. You willfully without cause withheld your services and in turn repudiated your employment agreement.

(b) Dual Employment, in that you have during this period been rendering services for another party. This has been done without consent from your employer.

(2) Dishonesty, in that when you were questioned in respect of your absence, you advised the company that the said absence was due to unforeseen circumstances and that you had received very short notice. However, later through communication when asked again about your absence, you informed the company that it was due to meetings pertaining to the preparation for the election.

(3) Absence without Leave, in that you have been absent from your employment between 14-18 October 2019 [periodically] and again from 21 October 2019 to 11 November 2019. This has been without authorisation and you have been duly informed of same.

(4) Failing to follow standing orders and procedures, in that the company's policies dictate that leave required for the period you requested needs to be submitted 30 days in advance. The company

is within its rights to decline any leave application for operational requirements, which was the case in this instance.

(5) Dereliction of duties.

- Your actions mentioned in charges 1 to 3 resulted in business-critical matters being left unattended. This unilateral action from your side has prejudiced the company.

- A task required of you from February 2019 has been left unattended to date. This in turn has as well prejudiced the company.

Plaintiff has alleged that the Disciplinary Hearing was held on the 28th of November at 10.30 a.m.

She has further alleged that on the 6th of December 2019, the Defendant has unfairly and unjustly terminated her employment without any good cause or justification and without notice.

Plaintiff has claimed from Defendant the sum of Rs 5,961,562.25 together with interest at the legal rate as from the day of entering the plaint up to that of final payment with costs made up as follows:

- 1 Month's wages as indemnity in lieu of notice: Rs 181,791.75.

- Severance Allowance for alleged unjustified termination of employment for 98 months [October 2011 to 9 December 2019] (Rs 235,909 x 98/12 years x 3 months: Rs 5,779,770.50.

Defendant in its plea has denied that Defendant has unfairly and unjustly terminated Plaintiff's employment without any good cause or justification and without notice. Defendant has denied being indebted in any sum whatsoever towards the Plaintiff and has moved that the plaint be dismissed with costs.

As regards the other averments of Plaintiff, Defendant has taken note without making any admission and has further averred that-

(i) By way of an email dated 20th October 2019, the Plaintiff made a request for leave, as she was to stand as candidate for the national legislative elections.

(ii) On the 21st October 2019, an email was sent to the Plaintiff enquiring as to what the candidacy would entail.

(iii) On the 31st October 2019, since the Plaintiff was not attending work nor had replied to the email sent to her on 21st October 2019, an email was sent to the Plaintiff requesting her to provide further information on her whereabouts and informing her that her absence from work had not been approved.

(iv) Plaintiff was requested to resume work on 4th November 2019.

(v) Plaintiff never resumed work on the said date and as such the Defendant was legally entitled to consider that the Plaintiff had abandoned her work amounting to a unilateral termination of her contract of employment with the Defendant.

(vi) In addition, as per her contract of employment, the Plaintiff was not entitled to be in dual employment.

(vii) Plaintiff was not attending work and acted in breach of her contract of employment by engaging herself in other activities, during office hours, to the prejudice of the Defendant.

(viii) Plaintiff was unable to give a reasonable explanation as to her absences from work; in fact, the Defendant was later informed that the Plaintiff was publicly involved in the electoral campaign of the last general elections.

(ix) Plaintiff was, therefore, absent from work without authorization and without any request for leave between 14th to 18th October 2019 and again from 21st October to 11th November 2019.

(x) The Plaintiff had failed to adhere to the procedure for request for leave as set out in the Employee Handbook. The Plaintiff put the Defendant before a *"fait accompli"* without any concern about the impact of the Plaintiff's unplanned leave on the business activities of the Defendant.

(xi) The Plaintiff had not attended to several pending duties albeit emails sent to her for the carrying out of the following duties:

(a) the Plaintiff failed to sign a Fee note dated 29th July 2019;

(b) the Plaintiff failed to furnish documents in the context of a "Know Your Client" procedure since 11th February 2019 and

(c) the Plaintiff failed to prepare a resolution for the setting up of Bayport Management 2 Ltd, despite being provided with all the particulars of same with a note of urgency, on 3rd October 2019.

Due the aforesaid acts and doings of Plaintiff as averred by Defendant, it has suffered tremendous prejudice and could not in good faith take any other course of action than to terminate the contract of employment of Plaintiff.

In the course of the trial, evidence was led on behalf of both Plaintiff and Defendant in Court. Plaintiff's contract of employment for an indeterminate duration starting as from 3.10.2011 viz. Doc. P1 and her pay slips were produced as per Docs. P2-P14. Her suspension letter dated 14.11.2019 with immediate effect as per Doc. P3 pending an internal investigation as well as the letter of charges in relation to her viz. Doc. P5 dated 21.11.2019 which was followed by an email to that effect also dated 21.11.2019 as per Doc. P4 have been produced. Her contract of employment was terminated on 9.12.2019 as per Doc. P7 with immediate effect following the findings of the Disciplinary Committee held on 28.11.2019 (although her hearing did not finish in that first session) in relation to the charges levelled against her. All the said documents have remained uncontested in Court in their form and tenor. For the purposes of the present case, the documents highlighted above would suffice although there were others produced, for the reasons which will become apparent later.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for Plaintiff and Defendant.

It is relevant to note that it is not contested that not all the charges levelled against Plaintiff as per her letter of charges (Doc.P5) were pressed at her hearing before the Disciplinary Committee of Defendant. Among the remaining charges pressed, some were not proved before that Committee and part of the rest were not

even subjected to cross-examination following the explanations given by Plaintiff in Court.

Indeed, following such a state of affairs, learned Counsel for Plaintiff has submitted on a compellingly imperative provision of the Workers' Rights Act 2019 as per its Section 64(2) which will dispose of the present case without the need for the Court to assess the merits or demerits of the cases already run by the parties before the Disciplinary Committee and those run in Court by the said parties, in order to infer whether the burden of proof that rested on Defendant has been discharged or not in the sense that following the findings of the Disciplinary Committee and the material of which Defendant was aware or ought to have been reasonably aware at the time it dismissed Plaintiff, it could not in good faith take any other course but to terminate her employment so that her dismissal was not unjustified(see- **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]).

The reason being that even if the Court finds that Defendant has discharged the said burden of proof laid upon it in that manner so that Plaintiff's dismissal was justified, yet Defendant would be deemed to have waived its right to invoke justified dismissal so that her dismissal would be deemed unjustified should there be a breach of the statutory delay imposed by Section 64(2) of the said Act.

In the same vein, on the other hand, an assessment of the evidence borne out by the record in order for the Court having for effect to eventually infer that Plaintiff's dismissal was unjustified will have no meaningful purpose should there be a breach of statutory delay under Section 64(2) of the said Act, because the end result will be deemed to be the same namely an inference that the dismissal was unjustified.

Thus, I find it significant to reproduce the provisions of Section 64 subsections (3) and 2 of the Workers' Rights Act 2019 which read as follows:

> "***64. Protection against termination of agreement***
>
> *(3) Before a charge of alleged misconduct is levelled against a worker, an employer may carry out an investigation into all the circumstances of the case and the period specified in subsection (2)(a)(i) or (b)(i) shall not commence to run until the completion of the investigation.*
>
> *(2) Subject to subsection (3), no employer shall terminate a worker's agreement –*

(a) for reasons related to the worker's alleged misconduct, unless-

(i) the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;

(ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his alleged misconduct;

(iii) *the worker has been given at least 7 days' notice to answer any charge made against him;* ***(emphasis added)***

(iv) the employer cannot in good faith take any other course of action; and

(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 the subject of an oral hearing, after the completion of such hearing;"

At this stage, the most important issue unlike others touched upon in the course of the submissions of learned Counsel for the Plaintiff is that Plaintiff was not given at least 7 days' notice to answer the charges made against her in breach of Section 64(2)(a)(iii) of the Act even if Defendant did act within 10 days it became aware of the charges leveled against her after completion of its internal investigation. Although learned Counsel appearing for the Defendant covered other issues in his submissions which cropped up in the course of the trial, he unfortunately failed to adequately challenge or disprove that most important one.

Now as per Doc. P5 namely Plaintiff's letter of charges, the letter was dated 21.11.2019 which means that at least on 21.11.2019, Defendant was aware of the charges levelled against her as revealed in that letter so that she was convened to attend a Disciplinary Committee to answer the said charges contained therein on 28.11.2019 (further supported by Docs. P4 and P7).

Thus, the point that I have to decide is whether from 21.11.2019 to 28.11.2019, there were 7 days or not pursuant to Section 64(2)(a)(iii) of the Act for the purposes of notification.

The interpretation and computation of such time limit have been highlighted in the following passage in the Supreme Court case of **High Security (Guards) Ltd v Fareedun S.M.H** [2009 SCJ 48]) which reads as follows:

"Learned Counsel for the appellant has urged before us that these provisions must be read in conjunction with those of section 38(1)(b) of the Interpretation and General Clauses Act which stipulate as follows-

38. Computation of time

(1) ……

(a) ……

(b) Where there is a reference to a number of days between two events, whether expressed by reference to a number of clear days of "at least" a number of days or otherwise, the days on which the events happen shall be excluded in calculating the number of days.

For the respondent, it has been contended that the matter is governed by section 38(1)(d) of the Interpretation and General Clauses Act which reads as follows-

38. Computation of time

(1) ……

(a) …….

(d) where there is a reference to a period of time specified to run from a given date, the period of time so specified shall be calculated so as to include the given day.

The above provisions have already been considered by this Court. In ***Moothen v The Queen*** *[1981 MR 374], the Supreme Court when dealing with the interpretation and computation of the time limit for an appeal under the District and Intermediate Courts (Criminal Jurisdiction) Act had this to say at p.375:*

"We have no doubt that it is section 38(1)(d) of the Interpretation and General Clauses Act 1974 which applies and not section 38(1)(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 6 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(1)(d) of the Interpretation and General Clauses Act 1974, the 6 March 1981, should be included in the fifteen days stipulated and the time limit then ended on the 20 March 1981."

And in ***Peeroo v Ghurburrun & Ors*** *[1984 MR 77] the Supreme Court observed as follows at p. 80:*

"We agree that since the passing of the new Interpretation and General Clauses Act, where a statute provides that something must be done within ……days from any event, the ***dies a quo*** *must now be counted."*

In the light of the above pronouncements we conclude that it is section 38(1)(d) of the Interpretation and General Clauses Act which finds its application in the present situation. In the circumstances, we take the view that the respondent worker has not been notified of his dismissal within the mandatory time limit of seven days from the completion of the hearing and that the Industrial Court properly so held."

Hence, in the present case, it is Section 38(1)(b) of the Interpretation and General Clauses Act 1974 which applies because there were 2 events which had taken place, namely the giving of at least 7 days' notice to answer the charges made against her on the 28.11.2019, and which should have been followed within ten days from that date when Defendant became aware of those charges viz. 21.11.2019.

Under the clear provisions of section 38(1)(b) of the Interpretation and General Clauses Act 1974, the 21.11.2019 should not be included in the seven days stipulated and the time limit then ended on the 29.11.2019 so that the Plaintiff employee was given only 6 days to answer the charges levelled against her by her Defendant employer in breach of Section 64(2)(a)(iii) of the Workers' Rights Act 2019.

At this stage, the relevant issue for me to decide is whether Defendant has waived its right to invoke that Plaintiff's dismissal was justified because she was not given at least 7 days' notice to answer the above charges of misconduct made against her in breach of Section 64(2)(a)(iii) of the Workers' Rights Act 2019.

It is appropriate to quote an extract from the Privy Council case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [2006 PRV 33]:

""15. Of course, 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] where the Supreme Court described the time-limit as being based on sound principles and added:

"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."

(…) The courts must respect the policy which lies behind the time-limits that the legislature has imposed. (…)

27. (…) 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." ***(emphasis added)***

Therefore, in the present case, in view of the underlying policy in line with the Recommendation of the ILO which lies behind the time-limits that the Legislature has imposed in order to ensure that both parties know as quickly as possible where they stand as propounded in **Mauvilac** (supra), the Defendant not having afforded the Plaintiff at least 7 days to answer the said charges of misconduct made against her before the Disciplinary Committee, her dismissal would be deemed to be unjustified upon a plain meaning of Section 64(2)(a)(iii) of the Workers' Rights Act 2019 because the time limit of 7 days was mandatory. Defendant *ex facie* its own letter namely Doc. P5 containing the charges levelled against Plaintiff, has acquiesced having breached the mandatory delay of 7 days by giving Plaintiff only 6 days to prepare her defence namely to give her explanations before Defendant's Disciplinary Committee.

Now, *the penalty prescribed by the Legislature to attach to such a failure to comply with that time-limit is a single, undifferentiated, sanction namely* the payment of severance allowance to Plaintiff pursuant to Section 70(1)(b) of the Act because of the breach of Section 64(2) of the Act.

Given that Plaintiff was given only 6 days' notice to answer the charges made against her as per her letter of charges viz. Doc. P5, the seven days mandatory time limit having been breached by Defendant is fatal in the teeth of the plain meaning of Section 64(2)(a)(iii) of the Act(see - **Mauvilac** (supra)) and thus, Defendant has waived its right to invoke justified dismissal so that Plaintiff's dismissal is deemed to be unjustified because she is entitled to severance allowance pursuant to Section 70(1)(b) of the Act as a result of a breach of Section 64(2) of the Act involving time limits which are thus compellingly mandatory.

At this stage, it is equally relevant to reproduce Section 70 of the Workers' Rights Act 2019 as follows:

*"**70. Amount of severance allowance***

(1) Where a worker has been in continuous employment for a period of at least 12 months with an employer, the Court may, where it finds that –

(b) the termination of agreement of the worker was in contravention of section 64(1), (1A), (2), (5), (6) or (9);

order that the worker be paid severance allowance –

(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months' remuneration; and

(ii) for any additional period of less than 12 months, a sum equal to one twelfth of the sum calculated under subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer.

(2) The Court may, where it thinks fit and, whether or not a claim to that effect has been made, order an employer to pay interest at a rate not exceeding 12 percent in a year on the amount of severance allowance payable from the date of the termination of the agreement to the date of payment.

(3) For the purpose of this section, a month's remuneration shall be –

(a) the remuneration drawn by the worker for the last complete month of his employment; or

*(b) an amount computed in the manner as is best calculated to give the rate per month at which the worker was remunerated over a period of 12 months before the termination of his agreement, including payment for extra work, productivity bonus, attendance bonus, commission in return for services and any other regular payment, whichever is higher." (**all the above underlining is mine)***

Plaintiff has produced her pay slips as from December 2018 to December 2019 as per Docs. P2- P14. However, for December 2019, she was not paid a complete month's salary as per her pay slip as she was dismissed on 9th of December 2019 by Defendant. Thus, the Court can only rely on the last full salary as per her pay slip of November 2019 in the sum of Rs 181,791.75 or an average of the past 12 months prior to her dismissal namely in the sum of Rs 213,210.325. The Court will consider the latter sum of Rs 213,210.325 which is higher for the computation of severance allowance by virtue of Section 70(3)(b) of the Act. Thus, the amount of severance allowance due to Plaintiff for 98 months' continuous employment with Defendant as per Docs. P1(her contract of employment) and P7(her termination letter) is in the sum of (Rs 213,210.325 x 98/12 x3): Rs 5,223,652.96.

For all the reasons given above, I find that Defendant has waived its right to invoke justified dismissal of Plaintiff in view of a breach of the mandatory statutory delay of 7 days pursuant to Section 64(2)(a)(iii) of the Workers' Rights Act 2019 as qualified by Section 70(1)(b) of the said Act so that her dismissal is deemed to be unjustified.

Therefore, I order Defendant to pay to Plaintiff the sum of Rs 5,405,444.71/- representing one month's wages in lieu of notice in the amount of Rs 181,791.75/- and severance allowance for 98 months' continuous service (Rs 213,210.325 x 98/12 x3): Rs 5,223,652.96/- with interest at the rate of 12% per annum on the amount of severance allowance payable from the date of termination of employment to the date of final payment. With Costs

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

14.6.2023