

Bogun S.K. v The Gambling Regulatory Authority

2020 IND 4

Cause Number 28/19

**IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)**

In the matter of:

Sailesh Kumar Bogun

Plaintiff

v.

The Gambling Regulatory Authority

Defendant

Ruling

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

1. The Plaintiff was continuously employed as Office Assistant by the then known as Horse Racing Board since 1st July 2004 and now known as Gambling Regulatory Authority.
2. By way of a letter dated 31st July 2018, the Defendant informed the Plaintiff of an alleged act of gross misconduct and insubordination which had been reported against him. The Plaintiff was asked for his written explanations and was interdicted from his duty "with immediate effect and until further notice".
3. The Plaintiff was also informed in the same letter that he would need to seek the Defendant's prior approval before leaving Mauritius.

4. By way of a letter dated 16th October 2018, the Plaintiff was convened to a Disciplinary Committee and the hearing was on 24th and 29th October 2018.
5. On 29th November 2018, the Plaintiff's employment was terminated more than seven days after he had answered the charge(s) against him.
6. The Plaintiff avers that he was informed by the Defendant that following the termination of his employment, he would *inter alia* be paid a severance allowance equivalent to fifteen days' remuneration for every period of twelve months' continuous employment together with other benefits as applicable.
7. At the time of termination, the Plaintiff was earning a monthly remuneration of Rs. 19,999/-.
8. By way of a letter dated 3rd December 2018, the Defendant informed the Plaintiff that the sum of Rs. 333,007.02 was payable to him following the termination of his employment as Office Assistant.
9. The Plaintiff avers that according to the Defendant's computation, the sum of Rs. 333,007.02 consisted of 3 months' salary in lieu of notice, severance allowance, sick leave refund, passage benefits as at 31st July 2018 and end of year bonus.
10. The Plaintiff further avers that out of the said sum of Rs. 333,007.02/-, the Defendant computed his severance allowance to be in the sum of Rs. 139,993/- for fourteen periods of twelve months' continuous service from 1st July 2004 to 31st July 2018.
11. The Plaintiff avers that the computation used by the Defendant for the payment of severance allowance is in breach of 46(5) of the Employment Rights Act 2008. The Plaintiff avers that he is entitled to severance allowance equivalent to: (i) three months' remuneration for every period of twelve months' continuous employment; and (ii) one twelfth of the severance allowance at paragraph 11(i) multiplied by the number of months during which he has been in continuous employment.
12. The Plaintiff avers that he is entitled to severance allowance equal to Rs. 859,957/- which is computed as follows: severance allowance for 14 periods of 12 months' continuous employment from 1st July 2004 to 1st July 2018 (Rs.19,999 x 3 = Rs. 59,997 x 14): Rs. 839,958; severance allowance for 4

months' continuous employment from 1st July 2018 to 29th November 2018 (Rs. 59,997/12 = Rs. 4,999.75 x 4): Rs.19,999 giving a total of Rs. 859,957.

13. On 5th December 2018, the Plaintiff sent a letter contesting the severance allowance of Rs. 139,993 which the Defendant said was payable, and claiming severance allowance in the sum of Rs. 859,957/- instead from the Defendant as computed at paragraph 12 above.
14. The Plaintiff avers that the severance allowance claim set out in his letter of 5th December 2018 was disregarded by the Defendant which on 14th December 2018 informed the Plaintiff that his bank account had been credited with the same initial figure of Rs. 333,007.02/-.
15. The Plaintiff avers that since the Defendant has only paid him the sum of Rs. 139,993/- as severance allowance, he is owed the sum of Rs. 719,964/-.
16. The Plaintiff accordingly prays for a judgment ordering the Defendant to pay to him the sum of Rs. 719,964/- which is still due and demandable as severance allowance following the Defendant's termination of his employment.

Defendant, for its part, has raised a plea *in limine* to the effect that the present case be dismissed with costs inasmuch as – (a) Plaintiff has failed to comply with the requirements of section 162(1) of the Gambling Regulatory Authority Act; and (b) *ex facie the proecipe*, the action is misconceived as Plaintiff has wrongly invoked section 46(5) of the Employment Rights Act.

The Plaintiff was called as a witness solely for the purposes of the first limb of the plea *in limine* and to which there was no objection. He stated that he was working for the Defendant as Office Assistant and that he had entered a case for severance allowance against the Defendant and a certain point of law was taken by the said Defendant. With the aim of solving the problem raised by Defendant, he produced a letter dated 5.12.18 which was the letter he sent to the Chief Executive of the Defendant deposited by him as per his signature as per Doc. ARG 1 on the same day and to which there was no objection and there was no cross-examination.

The main thrust of the argument of learned Counsel for Defendant as regards the first limb was that the Plaintiff has failed to comply with the requirements of Section 162(1) of the Gambling Regulatory Authority Act which provides: “*No action*

shall be commenced against the Authority before the expiry of one month after written notice of an intention to do so has been served on the Authority by or on behalf of the plaintiff" as per Doc. ARG 1. The reason for his saying so was to be found in Section 162(2) "A notice under subsection 1 shall clearly state - (a) the particulars of the claim; (b) the name, address and occupation of the plaintiff, and (c) the relief claimed." Nowhere on the said document does it set in the amount of detail laid out in the *proeclipe*, the particulars of the claim as the document is couched in a very general term and the sum is unspecified. He has contended that Section 162 subsections (1) & (2) are the equivalent of Section 4 subsections (1), (2(a)), (2(b)) and (2(c)) of the Public Officers Protection Act where one month's notice is mandatory before entering an action in the present case and the contents of the notice should reflect the cause of action prayed. As regards the second limb, Plaintiff has relied on Section 46(5) of the Employment Rights Act but has not made any averments that would fulfill any of the subsections (a) to (e) as none of such subsections has been invoked.

The main contention of learned Counsel for Plaintiff was that the delay of one month has been respected in relation to the first limb as the plaint was lodged on the 9th of January 2019, the letter (Doc. ARG 1) was received by Defendant on 5 December 2018 itself and that the provisions of Section 162(2) of the Act have been fulfilled. As regards the second paragraph of the notice, the law on which Plaintiff has relied upon has been given namely Section 38(2)(a)(v) of the Employment Rights Act 2008. As per paragraph 5 of the Doc. ARG 1, Plaintiff has clearly stipulated the section on which he is relying to say that the termination was unjustified and unlawful. He has proceeded by narrating the dates on which the Disciplinary Committee was held, that is, on the 24th of October 2018 and the 29th of October 2018. The termination occurred or was notified seven days after the Disciplinary Committee ended. So, whether the termination was effective on the 29th of November 2018 or the 30th of November 2018, still the delay of seven days was not respected for the termination of employment of Plaintiff. Therefore, the termination was unjustified and is in breach of Section 38 of the Employment Rights Act 2008 and accordingly, he is entitled to severance allowance under Section 46(5)(e) of the same Act as the notice of termination was given outside the delay of seven days. The particulars of the claim have clearly been set out in the notice and the computation method of the severance allowance which was still due to him. The Defendant has paid a sum which represents severance allowance which is itself an admission that the termination of employment by the Defendant was unjustified

otherwise it would not have paid any severance allowance to the Plaintiff. But what the Plaintiff is saying is that the severance allowance which has been paid to him has been wrongly calculated. He is also of the view that the sum unspecified left to be paid was a matter for the merits. Thus, Section 162(2) of the GRA Act has been satisfied.

Learned Counsel for the Defendant has replied that there is no admission that the termination was unjustified but that the bond of trust has been undermined as well as the good working relations.

Learned Counsel for the Plaintiff has further replied that Section 162 of the GRA Act does not say that the figures have to be mentioned, the particulars of the claim.

I have given due consideration to the arguments of both learned Counsel. At this particular stage, I find it apposite to reproduce Section 159(2) of the Gambling Regulatory Authority Act 2007 hereinafter referred to as (GRA Act):

“159. Protection from liability

(1) No action shall lie against the Authority, the Board or any member, the Chief Executive, or any employee, any member of, or person employed by, the Lottery Committee, in respect of any act done or omitted to be done by the Authority, the Board or any member of the Board, the Chief Executive or any employee, any member of, or person employed by, the Lottery Committee, in the execution in good faith, of its or his functions under the Act.

(2) This section shall be in addition to and not in derogation from the Public Officers’ Protection Act, and for the purposes of that Act, every member or employee of the Authority or every member of, or person employed by, the Lottery Committee, shall be deemed to be a public officer or a person engaged or employed in the performance of a public duty.”

Section 2 of the GRA Act has defined “Authority” as follows:

“2. Interpretation

In this Act –

(...)

“Authority” means the Gambling Regulatory Authority established under section 3;”

Now Section 3 of the GRA Act provides:

“PART II – THE GAMBLING REGULATORY AUTHORITY

3. Establishment of Authority

(1) There is established for the purposes of this Act, the Gambling Regulatory Authority which shall be a body corporate.”

As per Section 5 of the said Act, the “Authority” shall be administered and managed by a Gambling Regulatory Board.

Section 4 of the Public Officers’ Protection Act 1957 provides:

“4. Limitations of actions

(1) Every civil or criminal action, suit, or proceeding, by a person, other than the State, for any fact, act or omission, against a –

- (a) public officer in the execution of his duty;*
- (b) person engaged or employed in the performance of any public duty; or*
- (c) person acting in aid or assistance of the public officer or person mentioned in paragraphs (a) and (b),*

shall, under pain of nullity, be instituted within 2 years from the date of the fact, act or omission which has given rise to the action, suit, or other proceeding.

(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.”

Thus, it is abundantly clear that in view of the above provisions, The Gambling Regulatory Authority hereinafter referred to as “GRA” necessarily operates as a body corporate through its Board pursuant to the GRA Act 2007 so that is

deemed to be a natural person/ Public Officer and that Section 162 of the GRA Act 2007 should be read in conjunction with Sections 4(1) & 4(2) (a) of the Public Officers' Protection Act 1957 hereinafter referred to as "P.O.P.A." given that those two provisions have to be interpreted in such a manner so as to be in harmony with each other in *pari materia*.

It is significant to quote the headnote in the Supreme Court case of **Regina v Shummoogum [1977 MR 1]** which reads as follows:

*"When we borrow a piece of legislation from a foreign country, it ceases to be foreign law and becomes Mauritian law; it should be interpreted in the light of the general principles applicable to other statutes **in pari materia** and in such a way that it does not destroy the coherence of our law".*

It is appropriate to quote an extract from the case of **D S A Company Ltd v The Ministry of Public Infrastructure & Anor and Super Construction Co Ltd v State of Mauritius [2013 SCJ 485]** which is reproduced below:

*"17.7 Our law does neither prohibit nor inhibit a citizen from bringing an action against the State. It simply ensures that he does so within the framework laid down in the law. The legal framework is explicit in the Civil Code, the Public Officer's Protection Act and the State Proceedings Act which are interpreted in the light of our constitutional provisions: see **Chadien v The Commissioner of Police and The State [2013 SCJ 351]**."*

Be it as it may, it is apposite to quote an extract from the words of Lord Rodger in the Privy Council decision in **Mauvilac Industries Ltd. v Ragoobeer [2006 PRV 33]** –

"The Courts must respect the policy which lies behind the time-limits that the legislature has imposed."

True it is that as per the testimony of Plaintiff, the statutory delay of one month has been complied with as regards the written notice (Doc. ARG 1) being served on the Defendant prior to the present action being instituted.

Now, Section 162 of the GRA Act 2007 reads as follows:

"162. Legal proceedings

- (1) *No action shall be commenced against the Authority before the expiry of one month after written notice of an intention to do so has been served on the Authority by or on behalf of the Plaintiff.*
- (2) *A notice under subsection (1) shall clearly state –*
 - (a) *the particulars of the claim;*
 - (b) *the name, address and occupation of the plaintiff; and*
 - (c) *the relief claimed.*
- (3) *Any summons, notice or other document required or authorised to be served on the Authority may be served by delivery to the Chief Executive at the office of the Authority.*
- (4) *Service of any process by or on behalf of the Authority may be effected by or on behalf of the Chief Executive.*

(S. 162 came into operation on 6 December 2007)".

Therefore, it is abundantly clear that a breach of Section 162 of the GRA ACT 2007 is equally 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. ARG 1. is in relation to no specified sum claimed. 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 préposés."

Moreover, as rightly pointed out by learned Counsel for the State that the requirement of Section 4(2) of the P.O.P.A. is peremptory in nature as stressed in **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)].*

Now the notice (Doc. ARG 1.) provides no information as to since when Plaintiff was employed by the Defendant namely the GRA and what was his monthly remuneration at the time of his termination, what was the sum expected as severance allowance which has not been paid to him and nor the following paragraphs 8,9,10,11,12,13,14 and 15 have been mentioned in the said notice explaining his claim:

8. *By way of a letter dated 3rd December 2018, the Defendant informed the Plaintiff that the sum of Rs. 333,007.02 was payable to him following the termination of his employment as Office Assistant.*

9. *The Plaintiff avers that according to the Defendant's computation, the sum of Rs. 333,007.02 consisted of 3 months' salary in lieu of notice, severance allowance, sick leave refund, passage benefits as at 31st July 2018 and end of year bonus.*

10. *The Plaintiff further avers that out of the said sum of Rs. 333,007.02/-, the Defendant computed his severance allowance to be the sum of Rs. 139,993/- for fourteen periods of twelve months' continuous service from 1st July 2004 to 31st July 2018.*

11. *The Plaintiff avers that the computation used by the Defendant for the payment of severance allowance is in breach of 46(5) of the Employment Rights Act 2008. The Plaintiff avers that he is entitled to severance allowance equivalent to: (i) three months' remuneration for every period of twelve months' continuous employment; and (ii) one twelfth of the severance allowance at paragraph 11(i) multiplied by the number of months during which he has been in continuous employment.*

12. *The Plaintiff avers that he is entitled to severance allowance equal to Rs. 859,957/- which is computed as follows: severance allowance for 14 periods of 12 months' continuous employment from 1st July 2004 to 1st July 2018 (Rs.19,999 x 3 = Rs. 59,997 x 14): Rs. 839,958; severance allowance for 4 months' continuous employment from 1st July 2018 to 29th November 2018 (Rs. 59,997/12 = Rs. 4,999.75 x 4): Rs.19,999 giving a total of Rs. 859,957.*

13. *On 5th December 2018, the Plaintiff sent a letter contesting the severance allowance of Rs. 139,993 which the Defendant said was payable, and claiming severance allowance in the sum of Rs. 859,957/- instead from the Defendant as computed at paragraph 12 above.*

14. *The Plaintiff avers that the severance allowance claim set out in his letter of 5th December 2018 was disregarded by the Defendant which on 14th December 2018 informed the Plaintiff that his bank account had been credited with the same initial figure of Rs. 333,007.02/-.*

15. *The Plaintiff avers that since the Defendant has only paid him the sum of Rs. 139,993/- as severance allowance, he is owed the sum of Rs. 719,964/-.*

Now, the notice (Doc. ARG 1.) although it gives an idea of the subject matter of the Plaintiff's complaint and that the contents of that document are to a good extent echoed in the plaint with summons cannot detract from the fact that the document ARG 1 has to satisfy the statutory requirements of Section 4(2)(a) of the P.O.P.A. enjoining the provisions of Section 162(2) of the GRA Act 2007 "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." as it might as well be construed as a possibility in the event that a negotiation for a settlement would have failed (see- **J. Bhoonah v Mauritius Revenue Authority** [[2018 SCJ 103](#)]). Indeed, a close examination of Doc. ARG 1. reveals the following essential features:-

1. it is a letter dated 5 December 2018 in reply to Defendant's letter dated 30 November 2018 wherein he was informed that the Board has decided to terminate his employment with immediate effect and consequently he was offered a severance allowance together with other benefits applicable;
2. it then proceeds to remind Defendant of the provisions of Section 38(2)(a)(v) of the Employment Rights Act 2008 and that since his termination of employment was effected later than seven days after the oral hearing, he was entitled severance allowance under section 46(5) of the Employment Rights Act 2008;
3. it is a request to the Defendant to pay him severance allowance in accordance with Section 46(5) of that Act 2008;
4. it ends up by saying the following:

"I therefore request the GRA to pay me the above-mentioned severance allowance in line with section 46(5) of the Employment Rights Act 2008 within a delay of 7 days, failing which I shall have no alternative than to take legal action against the GRA.

Yours sincerely,"

For the reasons given above, the Defendant having been successful as regards the first limb as Plaintiff has failed to give notice of his action under Section 162(1) of the GRA Act 2007 as qualified in Section 162(2) of the same Act, there is no need for me to adjudicate on the second one. Accordingly, I uphold the plea *in limine* and dismiss the plaint with summons.

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

4.3.2020