Hossenny J.L. v Hassen Taher Sea Foods (Mtius) Ltd

2022 IND 16

Cause Number 597/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Joseph Linslay Hossenny

Plaintiff

v.

Hassen Taher Sea Foods (Mtius) Ltd

Defendant

Judgment

Plaintiff has averred that he was in the continuous employment of Defendant as Mechanic since March 2004 and he was working on a 6-day week basis. He was remunerated at monthly intervals at the rate of Rs. 20,200.

Defendant terminated his employment on 5.1.16 on an alleged ground of absences and poor performance.

He considers the termination of his employment to be unjustified inasmuch as he was not afforded an opportunity to answer the alleged charge of poor performance made against him in accordance with Section 38(3)(b) of the Employment Rights Act 2008.

He is, therefore, claiming from Defendant the sum of Rs. 742,775 comprising of wages as indemnity in lieu of notice and severance allowance for 142 months' continuous service.

Defendant in its amended plea has averred that Plaintiff was employed by Defendant ever since 2004. Plaintiff would absent himself from work regularly without any justification and reasonable cause. In late December 2015, Plaintiff was working on one of the lorries belonging to Defendant. He did not report to work on 29, 30 and 31 December 2015 without informing Defendant and without giving any reason for such absences. On 31.12.2015, the lorry Plaintiff had been working thereon caught fire and was a total loss. When contacted on the phone, he would not answer and if ever he happened to answer he would say *"al faire foute"*. He has a record of regular absences and poor performance at work.

Plaintiff was informed by a letter dated 4.1.2016 to resume work after his absence since 29 December 2015 and failing which he will be considered to have abandoned his work. He failed to resume work and had thus abandoned his work at Defendant's company. Plaintiff has breached his contract of employment himself by not reporting at work and in a letter dated 5.1.2016 addressed to the Officer in Charge of the Labour Office, the Defendant informed the Labour Office of the absences, lateness and gross non-performance of duty of Plaintiff. Defendant denies being indebted to Plaintiff in the sum claimed or in any other sum whatsoever and reiterates that Plaintiff has himself breached his contract of employment by not reporting at work as from 29.12.2015 and has failed to resume work as requested by Defendant in a letter dated 4.1.2016 which was duly signed by him. Plaintiff is instead indebted to Defendant in the sum of Rs. 42,850 being advances taken by him on 15.12.2010 and 21.5.2013 and has failed to pay same despite frequent requests having been made to that effect by Defendant. The latter has entered a plaint (Cause No. 48/16) against Defendant before the District Court of Curepipe to claim the said sum of Rs. 42,850. Thus, it has moved that the case be dismissed.

In his evidence in Court, Plaintiff testified to the effect that he started employment with Defendant in March 2004 as Mechanic as per his contract of employment (vide - Doc. A) which is supported by his pay slips for the months of March 2004 and November 2015 viz. Docs. B & B1. He was working 6 days a week and his last basic salary was of the amount of Rs. 20,200 a month.

On 5.1.2016, he went to work and the Security Officer did not give him the key to open his garage as he used to and asked him to get in touch with the Direction. Then, he met Mr. Faizal Buctowar, an Accountant, who told him that he would receive a letter. So, he went directly to the Labour Office to make a complaint that he was not given the key to work and went to his place afterwards. Two days after, he received a letter from Mr. Buctowar wherein his contract was terminated on the ground of his absences and given that a lorry caught fire as per Doc. C. He denied same and said that he was not given a chance to explain.

He did not receive a letter dated 4.1.2016 from Defendant asking him to resume duty on 5.1.2016 and failing which he would be considered that he had abandoned his work because he had been absent on 29, 30 and 31 December 2015 without notification.

Around the end of November meaning on 30.11.2015, he informed Mr. Buctowar that he would take leave in December as he would undergo a surgical operation on 14.12.2015 but he did not say on which other dates. Mr. Buctowar told him that there were no problems.

On 29.12.2015, he did not go to work as he was on leave for medical reasons from 14.12.2015. On the latter day, he had an eye surgery and he was discharged from hospital on the following day. On 16.12.2015, he was given a medical certificate and he phoned Mr. Buctowar about his state of health which was supported by the medical certificate wherein he was to be on sick leave for 15 days. He had told Mr. Buctowar that may be on 3 or 4 January 2016 he would resume work depending on his state of health. He asked him to bring the medical certificate when he resumed work. He did not bring that medical certificate in Court and he admitted that he was not sure where he had kept it. His leave ended on 3.1.2016. When he went to work on 4.1.2016, his medical certificate was refused as there was no need to produce it. Then, he told Mr. Buctowar that he was not feeling well at his eyes and he asked him to go to his place and to take his medication.

He could not remember since 2004 how many times he had sent a medical certificate to cover his absences, but he was absent only when he was not in good health. He was not given any sick leave nor local leaves by the Defendant and there was no attendance book for him. He informed Defendant when he would not come to work, he was not a regular absentee and he was punctual. He performed well as in November 2015, he was the Mechanic for all the cars belonging to the Defendant.

He accepted that he received a letter dated 5.1.2016 (vide Doc. C) wherein it was stated that he did not follow the conditions of his work and that his contract was terminated but he said that his absences were justified as he had a medical certificate. He was not given work on 5.1.2016 and that was why he went to the Labour Office to make a complaint. He candidly admitted that he did not inform the Defendant that he would be absent on 29,30 and 31 of December 2015 as he had undergone the operation. On 4.1.2016, Mr. P. Taher did provide him with an official letter to come to work but he did not receive that letter and it did not bear his signature as per Doc. D. He did not work on the lorry that caught fire on 31.12.2015. Nor did he abandon his work. He did not take money from Defendant and did not attend Curepipe District Court in that respect so that although judgment was given against him, he did not pay any amount of money to Defendant as he did not owe it. In the year 2015 he was convened before a disciplinary committee as he was absent too often. Then, he decided that he did not agree that he was absent too often nor did he receive a letter dated 30.11.2015 wherein he was convened to attend before a disciplinary committee and it did not bear his signature as per Doc. E. He continued to work and then he did not receive the letter dated 4.1.2016 as per Doc. D and it did not bear his signature. He further decided that he did inform Defendant that he would not come to work on 29,30 and 31 December 2015. He did not call any witnesses.

The evidence adduced by Defendant was based on the testimony of its representative, Mr. Parvez Khan Taher, in his capacity as Director who stated that Plaintiff had a history of unauthorised absences in the year 2015, frequent lateness and poor performance. Plaintiff had unauthorised absences for at least 3 consecutive working days from work in the month of April 2015 and he did not produce any medical certificate. In May 2015, he absented himself again on 19 and 21 although he was given warnings for his lateness at work. He continued to have unauthorised absences for at least 3 consecutive working days in June and September 2015. That trend adopted by Plaintiff continued for the whole year of 2015 with frequent lateness and unauthorised absences although not necessarily for at least 3 consecutive working days as per Doc. F. The latter was prepared as per his records and Plaintiff's attendance was taken in an attendance book daily by Mr. Faizal Buctowar.

On 29, 30 and 31 of December 2015, Plaintiff did not come to work and did not inform Defendant of his absences and that fact was also reflected in the

attendance book an excel copy of which was reproduced as per Doc. F. Furthermore, Plaintiff did not come to work on 4.1.2016. Mr. P.K. Taher wrote a letter to the Labour Office to that effect as per Doc. C. on 5.1.2016 in which he revealed that Plaintiff had uninformed absences on 29,30 and 31 December 2015, lateness at work and non- performance when a lorry belonging to Defendant had caught fire on the 31.12.2015 as he was the Mechanic for Defendant and when contacted over the phone, he did not a give a positive response.

On 4.1.2016, Plaintiff was given a letter in person to resume work on 5.1.2016. He kept the letter and as from the 29.12.2015 onwards he did not come to work. Mr. P.K. Taher considered that he had abandoned his work and had broken his contract of employment. Plaintiff owed the Defendant company in the sum of Rs. 42,850 for advances taken and he made no payment so that the matter had to be taken before the District Court of Curepipe where he was ordered to pay the said sum to Defendant. Thus, he asked the Court to have his plaint dismissed.

Defendant also called Mr. Faizal Farid Buctowar as a witness who gave evidence in Court in his capacity as Accountant. He conceded that Plaintiff used to report duty to him when he came to work as Mechanic. But he maintained that Plaintiff did not come to work on 29, 30 and 31 December 2015 and from then onwards. It was not true that he reported for work on 4 .1. 2016 and 5.1.2016. There was an attendance book and his absences were reproduced from that book as per Doc. F. Plaintiff did not meet him on 4.1.2016 as he used to report duty to him. He never told him that it was not necessary for him to bring a medical certificate and that as soon as he found himself in good health to come back to work. He never brought a medical certificate to give him nor did he inform him in November 2015 that he would undergo a surgical intervention in December. When he was absent on 29,30 and 31 December 2015, he did not give him a medical certificate to cover those absences. He did not tell him that he was having problems with his eyes on the 4.1.2016 and he did not ask him to go back home to rest and to apply his medication and to come to work on 5.1.2016 as a result. He monitored his attendance which was recorded in an attendance book and from which he prepared his attendance as from December 2014 till December 2015 as per Doc F. Plaintiff did not come to work on both the 4.1.2016 and 5.1.2016. It was not true that on 5.1.2016 he was not provided with work.

Defendant called as a last witness, Mr. Nanjay Rugoonath, Senior Court Officer, who filed a certified copy of the case file bearing cause number 48/16 in

relation to a plaint lodged by Defendant against the Plaintiff regarding a claim before Curepipe District Court as per Doc. G.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel. Plaintiff candidly admitted that he did not inform Defendant that he would not come to work on 29,30 and 31 December 2015 for medical reasons let alone that he conceded that the date he provided was only 14.12.2015 and he did not produce a medical certificate in Court to cover those absences as he did not know where he had kept it meaning that it was still in his possession.

Now, I find it hard to believe that Mr. Buctowar would have accepted that Plaintiff would be absent in December 2015 without being given the dates and would not have insisted upon the production of a medical certificate to cover those absences but would on the contrary accept further extended absences for a period of 15 days as mentioned therein without finding it necessary to even have a look at that medical document. Again, I find it hard to believe that when as per his medical certificate his absences covered were up to 3.1.2016 as contended by Plaintiff, on the 4.1.2016 when he resumed work, he did not feel well again and Mr. Buctowar would have asked him to go to his place without any hesitation although he was supposed to be fit for work on that day.

In the same breath, Plaintiff candidly admitted that he was convened before a disciplinary committee in relation to his absences from work which were frequent. Then, he decided that he did not receive a letter wherein he was convened to attend before a disciplinary committee and that it did not bear his signature (vide- Doc. E). Likewise, the same trend was adopted namely when he admitted that he did not inform Defendant that he would not attend work on 29,30 and 31 December 2015, he later decided that he did inform it. Then, he admitted that Mr. Taher, representative of Defendant, did provide him with a letter dated 4.1.2016 to report duty on the following day and failing which it will be considered that he had abandoned his work as per Doc. D. But he did not receive that letter and it did not bear his signature.

Again, I find it quite farfetched that he went to work on 5.1.2016 although on the eve he claimed to have been unwell because of a problem at his eyes and when he was not given the key to his garage by the Security officer as he used to and when he was told to contact the Direction he would have contacted Mr. Buctowar only, and who would merely tell him that he would receive a letter. Furthermore, at

no point, he said in Court that he asked Mr. Buctowar why his garage was not being opened and the purport of that letter, as he was made aware all along of his absences which were supported by his medical certificate and why he was not provided with work. Instead of going then straight to the Labour Office to make a complaint, the more plausible thing for him to do was to have asked Mr. Buctowar to accompany him to see someone higher up straight away to make a complaint that he was not provided with work and Mr. Buctowar was the one who was kept informed of his absences and who did not insist upon the production of his medical certificate rather than waiting for the communication of a decision to be taken by Defendant by way of a letter. This he never did.

Indeed, this state of affairs lends support to the evidence of the representative of the Defendant namely Mr. Taher and Mr. Buctowar that he never turned up on 4.1.2016 and on 5.1.2016 and that he did not come to work at all as from 29.12.2015 onwards without informing them and without producing any medical certificate. It remained unchallenged that he was absent on other 3 consecutive working days in the year 2015 without authorization, that is, without a medical certificate to cover his absences in April, June and September 2015 which is in line with Doc. F.

Thus, I find that the version of the Defendant is more plausible in that Plaintiff did not come to work on 4 and 5 of January 2016. I also take the view that he knew he had to go to work on 5.1.2016 and that he did receive that letter dated 4.1.2016 personally although it did not bear his signature just like he knew he had to attend to a disciplinary committee although that letter again did not bear his signature as per Doc. E. That is why he went to the Labour Office on 5.1.2016 to make a complaint rather than making a complaint at his workplace itself to a superior officer than Mr. Buctowar. In the same manner, it is clear that he owed Defendant money and that was why he admitted that he did not go to Court to testify in his favour on the day of trial so that judgment was given against him (vide Doc. G).

Therefore, I am satisfied on a balance of probabilities that Plaintiff did not inform Defendant of his absences on the ground of illness on 29, 30 and 31 of December 2015 upon his own admission and that from then onwards he did not turn up for work although he was personally aware by way of a letter given to him personally dated 4.1.2016 that he had to come to work on 5.1.2016 meaning within a delay of 24 hours upon receipt of that letter viz. Doc. D and failing which it would be considered that he had abandoned his work. It is abundantly clear that the whole issue of Plaintiff having undergone a surgery at his eyes in December 2015 which

was supported by a medical certificate was merely a feigned story in order to avoid being queried personally about the lorry belonging to Defendant which caught fire on 31.12.2015 as he was the Mechanic of Defendant.

At this stage, I find it appropriate to reproduce Section 16(c) of The Employment Rights (Amendment) Act 2013 – Act No.6 of 2013 below:

*"**16. Section 36 of principal Act amended***

Section 36 - 1 the principal Act is amended –

(c) by repealing subsection (5) and replacing it by the following subsection –

(5) An agreement shall not be broken by a worker where he absents himself from work for more than 2 consecutive working days <u>without good and sufficient cause</u> for a first time unless the employer proves that the worker has, after having been given written notice –

(a) by post with advice of delivery, or

(b) by delivery at the residence of the worker,

requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from receipt of the notice."

The amended subsection 5 of the Employment Rights Act 2008 – Act 33 of 2008 reads as follows:

*"**36. Termination of agreement***

(5) An agreement <u>shall not be broken by a worker</u> where he absents himself from work for more than 2 consecutive working days without <u>good and sufficient cause for a first time</u> unless the employer proves that the worker has, after having been given written notice –

(a) by post with advice of delivery, or

(b) by delivery at the residence of the worker,

requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from receipt of the notice.

***Amended by** [Act No. 6 of 2013]."*

Now by virtue of Section 2 of the Employment Rights Act 2008, *"good and sufficient cause"* has been defined to include –

"(a) illness or injury certified by a medical practitioner;

(b) absence authorised by the employer"

True it is that as per the unrebutted evidence of the witnesses for the Defendant namely Mr. Taher and Mr. Buctowar and Plaintiff's own admission in line with Doc. F, it is clear that Plaintiff did not inform Defendant for the first time of his absences of 29,30 and 31 of December 2015 on the ground of illness leading to his feigned eye surgery as soon as was reasonably possible although he did have unauthorised absences in the same year on other 3 consecutive working days. Thus, he has committed a repudiatory breach of his contract of employment by absenting himself for more than 2 consecutive working days without notifying the Defendant of his illness within the required time limit as highlighted in the Supreme Court cases of **M.A.I.C.O. v Auckloo [1974 MR 34]** and **Noël Furniture Ltd v Khodeeram [1985 MR 12]** cited in **Beegun v Compagnie de Quincaillerie Specialisée Ltée [2015 SCJ 126]** given that The Employment Rights Act 2008 as far as Section 36(5) is concerned is a consolidating enactment of the repealed Labour Act 1975 based on Section 30(4)(a) because the *"connecting link between absence on the ground of illness and notification to the employer was meant to be retained"* (see- **Reega v Labourdonnais S.E. [1980 SCJ 265]**). Indeed Section 30(4)(a) of the then Labour Act 1975 read as follows:

"*Termination of Agreements*

30.(…)

(4) An agreement shall be broken –

(a) by the worker, where he is absent from work, exclusive of any day on which the employer is not bound to provide work, without good and sufficient cause for more than two consecutive working days;"

That provision had to be read together with Section 32(4) of the Labour Act 1975 which read as follows:

"32. (4) Where a matter is referred to an officer or to the Court under subsection (3), the employer may not set up as a defence that the worker has abandoned his employment unless he proves that the worker has, after having been given written notice-

(a) by post with advice of delivery, or

(b) by service at the residence of the worker,

requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from the receipt of the notice."

At this stage, I find it relevant to quote an extract from the Supreme Court case of **Dindoyal v Gourrege** [2015 SCJ 148] at page 7 which reads as follows:

"In ***Mauritius Agricultural and Industrial Co. Ltd v The Permanent Secretary, Ministry of Labour & Social Security on behalf of Auckloo*** *[1974 MR 34], which was cited with approval in the recent decision of* ***Seetohul v Omni Project Ltd (Mauritius)[2015 UKPC 5]****, there is a repudiatory breach under Section 30(4) of the Labour Act where the worker is absent from work "without good and sufficient cause for more than two consecutive days". He is deemed to have broken his contract as in the Auckloo case when he was absent through illness for more than 2 consecutive days but did not notify his employer. The Court in* ***Auckloo (Supra)*** *explained what is meant by abandonment of work in the following terms:*

"In our view, a distinction must be drawn between abandonment of work and absence from work. Absence is a mere fact independent of any mental element. Abandonment, on the contrary, implies a specific intent – viz. the intent of the worker not to resume work and to treat the agreement as dead. (…) To plead abandonment of work implies saying two things: first, the worker was absent from work, and second, he intended not to resume work. (…) the employer will not be allowed to

*prove that specific intent unless he has first taken steps to remove any possible controversy – viz. by calling on the worker to resume work" **(Emphasis added)***

*In **Seetohul (Supra)** the Judicial Committee of the Privy Council observed in that connection "that there should be a requirement for a statutory safeguard of a written ultimatum to the employee in such a case makes perfectly good sense" **[Para.9]**."*

Given that it is clear enough that Plaintiff in the present case was notified personally by way of a letter on 4.1.2016 from Defendant to resume work within a minimum delay of 24 hours upon receipt of that letter as per Doc. D, he failed to do so. Hence, Defendant was entitled to treat the Plaintiff's contract of employment as terminated on the ground that he was in breach of his contract because he had been absent from work without *"good and sufficient cause"* for more than 2 consecutive working days as per Doc. C. Furthermore, that specific intent has been further reinforced by the tenor of the evidence on record as closely considered above. Indeed, Plaintiff in his plaint although he has averred that the Defendant had terminated his employment on the ground of absences and poor performance, he lamentably claimed that the termination of his employment was unjustified on the ground that he was not afforded a hearing in relation to the poor performance only. It stands to reason that the termination of his employment on the ground of his absences was justified as they were tantamount to an abandonment of work and which is in line with the amended plea of Defendant that those absences were to be construed as an abandonment of work by Plaintiff and not misconduct which would have entailed a hearing.

This is further reinforced by the fact that *"good and sufficient cause"* would include *"absence authorised by the employer".* It is plain enough from the unchallenged testimony of Mr. Taher which is supported by that of Mr. Buctowar who was the one to whom Plaintiff reported for duty daily and in relation to which he kept an attendance book from which he prepared an excel version as produced in Court viz. Doc. F that Plaintiff did absent himself without authorisation for at least 3 consecutive working days in the months of April, June and September 2015.

Therefore, in the present case, the inescapable conclusion is that we are not in the situation where the Plaintiff has absented himself from work for more than 2 consecutive working days without *"good and sufficient cause"* for the first time pursuant to Section 36(5) of the Employment Rights Act 2008 in force at the time so

that the agreement would be broken irrespective of the fact that the worker had been notified by his employer or not to resume his employment.

Thus, it is plain enough that the requirement of written notice is dispensed with when the worker is not a first time absentee for more than 2 consecutive working days without *"good and sufficient cause"* in view of the clear and unambiguous language of Section 16(c) of The Employment Rights (Amendment) Act 2013 – Act No.6 of 2013 reflected in Section 36(5) of the Employment Rights Act 2008 amended by [Act No. 6 of 2013]**.**

Hence, I find that the contract of employment viz. Doc. A has been deemed to have been broken by Plaintiff who had absented himself from work for more than 2 consecutive working days without informing Defendant namely on 29, 30 and 31 December 2015 and from then onwards in line with the amended plea of Defendant without *"good and sufficient cause"* meaning without producing a medical certificate to cover his purported illness necessitating a surgical intervention and also his unauthorised absences on at least 3 occasions for more than 2 consecutive working days namely in April, June and September 2015 where no medical certificates were provided in line with Doc. F as per the provisions of Section 2 subsections (a) and (b) of the Employment Rights 2008 – Act 33 of 2008 as highlighted above in force at that time.

For all the reasons given above, I am unable to find that the case for the Plaintiff has been proved on a balance of probabilities. I, accordingly, dismiss the plaint.

S.D. Bonomally (Mrs.) *(Vice President)*
18.3.2022