Cheung v MITD

2022 IND 51

CN607/15

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Yean Tching Lam Kin CHEUNG

Plaintiff

v/s

Mauritius Institute of Training and Development

Defendant

RULING (NO. 2) (PLEA IN LIMINE LITIS)

By way of Amended Proecipe, **the Plaintiff is claiming from the Defendant the total sum of Rs771 289. 59/- representing Remuneration As Indemnity In Lieu Of Notice and Severance Allowance for Unjustified Termination of her Employment by the Defendant, together with Interest at the rate of 12% per annum on the amount of Severance Allowance payable from the date of termination of the agreement to the date of payment, and such amount by way of compensation for Wages lost and expenses incurred in attending Court**.

The Defendant denied the said Claim in its Amended Plea.

Each Party was assisted by Learned Counsel.

The Proceedings were held in English for the purposes of the Arguments.

The case was fixed for Arguments on the *Plea In Limine Litis*, which reads as follows:

> Defendant avers that Plaintiff is, through the present action before the Industrial Court, seeking to re-litigate the issues already canvassed and finally settled by the Employment Relations Tribunal in its award dated 28 June 2012. Such collateral attack on the award of the Employment Relations Tribunal dated 28 June 2012 constitutes an abuse of the Court's process and the present action should be set aside with costs.

Case For The Defendant

At the outset, Mr Kamaraj Nauseeb, Acting Training Centre Manager (hereinafter referred to as the Witness) at the Mauritius Institute Of Training And Development (hereinafter referred to as MITD) Hotel School produced the Award (Doc. Arg 1) of the Employment Relations Tribunal (hereinafter referred to as ERT) and inter alia confirmed that the said Award (Doc. Arg 1) had not been challenged by the Plaintiff by way of Judicial Review.

Learned Counsel for the Defendant then proceeded to offer Submissions to the effect that although the remedies sought by the Plaintiff before the ERT were not the same as the ones sought before the Industrial Court, the substance of the Plaintiff's Claim before the ERT was the same as that before the Industrial Court. And allowing the Plaintiff to proceed with the present Action would amount to allowing the Plaintiff to re-litigate issues which have already been finally determined by the ERT in its Award (Doc. Arg 1), which would amount to an Abuse of Process.

Learned Counsel for the Defendant went on to refer to several parts of the Amended Proecipe and that of the Award (Doc. Arg 1) to highlight the similarities in the substance of the Plaintiff's Claims before the ERT and the Industrial Court, and referred to extracts of the **Employment Relations Act** (hereinafter referred to as **ERA**) and Authorities in support of her Submissions:

1) **ERA** (Docs. Arg 2 and Arg 3);
2) **Goojrah v Seni** [2007 SCJ 148];
3) **Ouvertures Et Profilage Plastiques Ltee v De Launay** [2012 SCJ 184];
4) **Chady v Habib Bank** [2018 SCJ 363];
5) **Toorbuth v Habib Bank** [2020 SCJ 42]; and .
6) **Modaykhan & Ors v SBM Bank (Mauritius) Ltd** [2021 SCJ 416].

Case For The Plaintiff

Learned Counsel for the Plaintiff submitted to the effect that the present Court had Jurisdiction to determine the issues raised in the Amended Proecipe, and that the Plaintiff had a Constitutional Right to seek redress before the Industrial Court as regards her unfair dismissal.

Learned Counsel for the Plaintiff went on to submit that it was the first time the Plaintiff had entered a case before the Industrial Court, and that the issues were therefore not being re-litigated, relying on the Authority of **Modaykhan (supra)**.

Learned Counsel for the Plaintiff also submitted that the present Court had delivered a Ruling allowing the Plaintiff to amend the Proecipe, and that the present *Plea In Limine Litis* was "wrongly taken […] and should fail inasmuch as the issues of relitigating does not arise".

In Reply

In Reply, Learned Counsel for the Defendant submitted that the issue of whether the Plaintiff was working on a Contract of indeterminate duration with the Defendant from May 2000 was the very issue adjudicated upon by the ERT based on its Award (Doc. Arg 1).

Learned Counsel for the Defendant reiterated that the remedies have no impact on the *Plea In Limine Litis* on Abuse of Process, that the substance of the issues before the Industrial Court was the same as what had been determined by the ERT, and that the Plaintiff could not by changing the form of the Proceedings, re-litigate the same issues, relying on the Authorities of **Ouvertures Et Profilage (supra)** and **Chady (supra)**.

Learned Counsel for the Defendant confirmed that there was no dispute as to the Industrial Court's Jurisdiction, but that the question was whether the Proceedings were abusive and should not be allowed to stand.

Learned Counsel for the Defendant concluded her Reply by submitting that given the Plaintiff did not challenge the decision of the ERT, the said decision was final and conclusive, and that the Ruling delivered by the present Court had no impact on the present *Plea In Limine Litis* and should not be referred to in deciding the present issue.

Analysis

The Court has duly considered all the evidence on Record, and has given due consideration to the Submissions of each Learned Counsel and to the enactments and Authorities referred to by each Learned Counsel in the course of the Submissions.

As is apparent from the Submissions offered by each Learned Counsel, the Jurisdiction of the Industrial Court is not disputed by the Parties in the present matter.

Re-litigation?

From the Award (Doc. Arg 1) of the ERT, the Plaintiff's case was as follows:

1) The Plaintiff's employment was "unilaterally terminated consequential to verbal, psychological and sexual harassment at work" (page 02);
2) The Plaintiff "was never told about the shortcomings in her performance" (page 02);
3) Mr Abeelack, who "assumed a position of supervising" the Plaintiff "drew up appraisal report that was fundamentally flawed, according to" the Plaintiff (page 02); and
4) The Plaintiff's "dismissal amounted to victimization" (page 03).

Before the present Court, the Plaintiff's case, as per the Amended Proecipe is to the effect that:

1) The Plaintiff's uninterrupted full time employment was terminated with only 04's days prior Notice and without any justification because she had been the object of harassment of a sexual and derogatory nature from Mr Aubeelack who was working as supervisor at the relevant time (paragraph 1. i));
2) The Plaintiff verily believed that the sexual harassment incident which she reported to the Police and thereafter to the Sex Discrimination Commission, "was a prime, if not the only reason, for the unfair termination of her employment with the Defendant" (paragraph 1. i) VI); and
3) The Plaintiff considered that her continuous and uninterrupted full time employment with the Defendant was unfairly and wrongfully terminated (paragraph 2);

The Court notes that the Plaintiff before the Industrial Court is not claiming that her employment was "unilaterally terminated consequential to verbal [and] psychological […] harassment at work", and is focusing her averments on her employment having been terminated by the Defendant because, or principally because, of the sexual harassment she was subjected to in June and July 2005 (paragraphs 1. i) I. and VI. of the Amended Proecipe).

In so doing, the Plaintiff is limiting the timeframe of the harassment she claims she was subjected to, and is not raising issues relating inter alia to her having never been told about the shortcomings in her performance" (page 02), relating to Mr Abeelack, who "assumed a position of supervising" the Plaintiff, having drawn up an "appraisal report that was fundamentally flawed, and relating to her "dismissal amount[ing]" to victimization".

Further, the remedy sought before the ERT was Reinstatement (page 02 of Doc. Arg 1), whereas before the Industrial Court, the Plaintiff is claiming Remuneration As Indemnity In Lieu Of Notice and Severance Allowance (paragraph 2 of the Amended Proecipe).

It would appear *ex facie* the Award (Doc. Arg 1) of the ERT and the Amended Proecipe in the present matter, that the remedies sought are not the same, the Plaintiff having sought reinstatement before the ERT, and seeking Severance Allowance before the Industrial Court.

Be that as it may, in light of the Authority of **Ouvertures Et Profilage (supra)**, although the "*chose demandée* also appears to be different", the determining factor is not the *chose demandée* but rather whether the substance of the action is the same.

The ERT was asked to consider the issue of reinstating the Plaintiff to her post (page 02 of Doc. Arg 1), and found that the Defendant was entitled not to renew the Plaintiff's Contract of Employment, and that the question of dismissal or termination of employment did not arise in the circumstances of the case (page 17 of Doc. Arg 1).

The Plaintiff's Claim in the present matter is that her employment was terminated without justification.

Now, although it would appear, on the face of it, that the nature of the Plaintiff's Claim is different from the one before the ERT, the Court is of the considered view that despite the said apparent tweaking in her case, the Plaintiff is in essence asking the Court to consider the question of whether her employment was un/lawfully terminated by the Defendant Company, which question, in essence, has already been determined by the ERT.

It is clear from the above that the Plaintiff is trying to have a second bite at the cherry, as it were, by bringing the present action before the Industrial Court, when the substance of her Claim has been determined already by the ERT.

The Plaintiff elected to go before the ERT, and obtained an Award (Doc. Arg. 1).

It was open to the Plaintiff to challenge the said Award by way of Judicial Review/Appeal (**Central Electricity Board v The Employment Relations Tribunal** [2019 SCJ 307]), but as confirmed by the Witness (whose testimony remained unchallenged), there was no challenge to the said Award (Doc. Arg 1).

There is therefore, for all intents and purposes, a final determination of the ERT by way of its Award (Doc. Arg. 1), which remained unchallenged and became binding on the Parties (**s. 72(1)(c)** of the **ERA**).

At no point in time was it disputed that the Parties before the ERT and before the Industrial Court were the same, and that the said Award (Doc. Arg 1) applied to the said Parties.

The Court is alive to the fact that in the present matter, there is an Award of the ERT, as opposed to a Judgment of a Court.

Be that as it may, the Court is of the considered view that the said principles as to binding decisions, finality of decisions, and "finality of litigation" (**Modaykhan (supra)**), would apply to the Award of the ERT *mutatis mutandis*.

Having obtained a final determination by the ERT, the Plaintiff is precluded from proceeding before the Industrial Court on essentially the same issues, as this would amount to re-litigating issues already finally determined by the ERT.

Abuse Of Process?

As regards the principles applicable in determining the issue of Abuse of Process, the Court bears in mind the following principles authoritatively set out in **Modaykhan (supra)**:

The rule is not based on *res judicata*, it is rather a rule of public policy aimed at ensuring that the process of the court is used *bona fide*, properly, not to oppress or vex and for the purposes of ensuring finality in litigation:

> "*The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*" (**Barrow v Bankside Agency Ltd [1996] 1 WLR 257, 260**)

Abuse of process is thus not restricted to the relitigation of an issue which has already been determined but also extends to issues which are part of the subject matter of the litigation and could have been raised in the previous proceedings.

This was explained in **Henderson v. Henderson (1843) 3 Hare 100** as follows:

> "*Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to relitigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell L. J. put it in Greenhalgh v Mallard [1947] 2 All E.R. 255 at 257) may cover issues or facts which are so clearly part of the subjectmatter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*"

Further in **Yat Tung Investment Co. Ltd. V. Dao Heng Bank Ltd. [1975] A.C. 581)** the Judicial Committee reiterated that "… it becomes an abuse of

> process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings".

Whilst bearing in mind the Plaintiff's Constitutional Rights, the Court is of the considered view that the Submissions of Learned Counsel to the effect that the Plaintiff was coming to the Industrial Court for redress for the first time is unduly limitative and untenable.

In light of the principles set out above, the consideration is not whether the Party is coming to a specific Court/Tribunal for the first time, but rather whether it is the first time the issues are being determined.

Although the Plaintiff is seeking redress before the Industrial Court for the first time, the fact remains that the Plaintiff had chosen to go to the ERT, as she was entitled to, for a determination of her Rights, and had obtained such determination, on substantially the same issues being raised before the Industrial Court.

It is not in order for the Plaintiff to simply make some changes to her Claim, and ask the Court to re-litigate issues which have in substance already been finally determined by a competent Court/Tribunal.

It is to be noted that the Plaintiff was duly assisted by Learned Counsel before the ERT.

Now, even if the Court were to take the view that there has been no final determination on <u>all</u> the issues raised by the Plaintiff in the present Amended Proecipe, the Court is of the considered view that it would not be in order to allow the Plaintiff to proceed with the present Claim, as the substance of the Plaintiff's Claim in the present matter is the same as that before the ERT, and it would have been in the public interest and in the Interests of Justice for the Plaintiff to raise all the issues she considered relevant to her Claim before the ERT.

It would appear that by bringing piecemeal actions in relation to substantially the same issues, the Plaintiff is seeking to subject the Defendant to successive suits when one would have done, and this is precisely "the abuse at which the rule is directed" (**Barrow v Bankside (supra)** cited with approval in **Modaykhan (supra)**).

Further, it would be contrary to the principle of "finality of litigation" (**Modaykhan (supra)**) to allow the Plaintiff to proceed with the present Claim.

The Court is of the considered view, in all the circumstances of the present matter, that were the Court to allow the Plaintiff to proceed with the present Claim, the Court would be allowing its Process to be abused, which the Court cannot do.

The Court having adopted a "broad merits-based approach" (**Modaykhan (supra)**) ""*which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before …"* **[Lord Bingham** in **Johnson (supra)]**" [1] (**Modaykhan (supra)**), in light of all the evidence on Record, of all the circumstances of the present matter, of all the factors highlighted above, and of the Plaintiff's overall conduct (**Modaykhan (supra)**), the Court finds that the present Claim of the Plaintiff does amount to an Abuse of Process.

Miscellaneous

The Court has noted that the name of Mr Abeelack is mentioned in the Award (Doc. Arg. 1), whereas the name of Mr Aubeelack is mentioned in the Amended Proecipe.

This difference in name was however not made a live issue by the Parties.

As regards the Court's previous Ruling in the present matter, the Court is of the considered view that the said Ruling was in relation to the *mise en état* of the present matter, and not the substance of the Claim, and has therefore no bearing on the determination of the present *Plea In Limine Litis*.

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 upholds the *Plea In Limine Litis* raised by the Defendant, and the present matter is therefore set aside with Costs**.

[1] **Johnson v Gore Wood & Co (No 1) [2002] 2 AC 1** cited with approval in **Modaykhan (supra)**

[Delivered by: D. Gayan, Ag. President]

[Intermediate Court (Financial Crimes Division)]

[Date: 21 September 2022]