BOHOLAH VS HEVIAMOURINA-GRAND PAUL MARIE

2023 IND 32

THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:-

DAYANAND BOHOLAH

Plaintiff

VS

CHRISTINE CARMELINA HEVIAMOURINA-GRAND PAUL MARIE

Defendant

Judgment

Introduction

The Defendant was in the continuous employment of the Plaintiff as a babysitter since July 2022 for and in consideration of a monthly terminal salary of Rs 10,000. By virtue of a claim backed by the Plaintiff's testimony in Court, the Plaintiff is praying from the Court for a judgment condemning and ordering the Defendant to pay to him the sum of Rs 10,000 with interests and costs.

The facts

The case for the Plaintiff is that on the 3rd August 2022, the Defendant left his employment without having given the required notice as provided by law. He sent a letter to the Defendant on the 6th August 2022, giving the latter a delay of 24 hours to come back to her employment, failing which he would have no option but to take legal action against her and to request her to pay the one-month notice with accrued fees and costs.

The Defendant in this case left default despite having been present in Court on earlier occasion to deny the claim.

Observations

I have assessed the evidence on record as well as the documents produced. It is to be remembered that *"making out a case does not mean that one has got to jump both feet all over the principles of evidence and all the matters required in order to make out a case…"*. **(VELVINDRON VS NOORDALLY (1979) MR 243).**

I have taken note that, in this case, the Defendant was employed by the Plaintiff by virtue of a written contract for a definite period between the 25th July 2022 to 24th July 2023, renewable at expiry. It is undisputed that the Defendant stopped working for the Plaintiff from the 3rd August 2022.

It is clear that when the Defendant stopped her employment with the Plaintiff on the 3rd August 2022, she unilaterally put an end to her contract of employment. **(RE: OMNI PROJECTS v SEETOHUL DR. S (2008) SCJ 31)**. She did so because she was presumably absent on more than 3 consecutive days without good and sufficient cause. The Defendant was the one to put an end to her contract despite having been invited by the Plaintiff to resume work. **(RE: VARMA Y N v KMPG & ORS (2022) SCJ 163)**. In the circumstances, the Defendant was duty bound to give one month notice to the Plaintiff, failing which she would have to pay the one month remuneration to the Plaintiff. This is in line with section 63(5) of **THE WORKERS' RIGHTS ACT** and Clause 9 of the contract of employment binding the Plaintiff and the Defendant in this case.

However, having said that, I have noted some disturbing features in this case. First, the contract entered by the Plaintiff and the Defendant is dated the 25th July 2022. The terms and obligations of this contract should be governed by **THE WORKERS' RIGHTS ACT** which came in force in 2019. However, I have perused the contract ratified by the parties in this case and I find that it reflects the provisions of the repealed **EMPLOYMENT RIGHTS ACT**, more specifically section 36(5), which is the subject matter of this case.

Indeed, the subject matter of this case is that the Defendant brought an end to her contract of employment by being absent from work without good and sufficient cause shown. This is apparent from the letter which the Plaintiff sent to the Defendant. However, it should be remembered that the Defendant was entitled to 3 consecutive days of absence under section 61(3) of **THE WORKERS' RIGHTS ACT**. Surprisingly, the contract between the Plaintiff and the

Defendant prohibited the Plaintiff from being absent for more than 2 days without a medical certificate. In fact, the contract stipulated that "If a medical is not received on the 3rd day of the absence of the staff, it will be considered as a breach of contract and that person will have to pay their one-month notice or else legal action can be taken against that person".

Also, in the letter sent by the Plaintiff to the Defendant, the former averred that as per Employment Act 2019 and the agreement signed, the Defendant should have presented a medical certificate on the 3rd day of absence. This, in Law, cannot stand. The Plaintiff was clearly confused about the applicable law in relation to the contract and the present case, such that, the basis for the rupture of the contract, is not legally founded.

I deem fit, at this juncture, to refer to the case of **PIRK M. G. D. v. H&G ENGINEERING & CRAFTS LTD (2018) SCJ 261** where Her Ladyship referred to the case of **HURNAM D V. BHOLAH K B & ANOR [2009 SCJ 265]** to establish the important dicta that:

> *:"... As fundamental is the principle of constitutionality to the formulation of law, so fundamental is the principle of legality to the pronouncement of a judgment. A court of law is under a positive obligation to ensure that any judgment given is soundly grounded both in law and on the facts of the case before it. This obligation is not in any manner reduced by the fact that the judgment is a judgment by default. On the contrary, that obligation assumes all its importance by that fact inasmuch as the absence of pleadings and enlightenment in law puts a burden on the court to ensure that as a court of law, any judgment may only be firmly grounded in law. ..."*

It is therefore imperative that the judgment, though by default of the Defendant, should be grounded on the correctness of the facts and the soundness of the Law.

Conclusion

In view of the above, although I find that the Defendant has brought an end to her contract of employment, I do not find the present case an apt one to be made out against the Defendant. There are legal and procedural flaws. I find that the Plaintiff has not established its case on a balance of probabilities. In the circumstances, I find the best course of action would be to non-suit the Plaintiff. I, therefore, non-suit the Plaintiff.

Judgment delivered by: M.GAYAN-JAULIMSING, Ag President, Industrial Court

Judgment delivered on: 25th May 2023