

Babooa D. v Mauritius Tourism Promotion Authority

2022 IND 5

Cause Number 406/18

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

In the matter of:-

Mr. Devendra Babooa

Plaintiff

v.

Mauritius Tourism Promotion Authority

Defendant

Judgment

This is a plaint where Plaintiff has averred that he was in the continuous employment of Defendant as Research and Development Manager on successive determinate contracts since 4.2. 2010.

It is common ground that he was working on a 5-day week basis and was remunerated at monthly intervals at the terminal rate of Rs 77,175 a month. His latest contract was to end on 3.4.2017. By way of a letter dated 30.3.2017, Defendant terminated his employment as from 31.3.2017 with payment of one month's salary in lieu of notice, following a decision taken by the Board of the Mauritius Tourism Promotion Authority hereinafter referred to as "MTPA".

Plaintiff has considered the termination of his employment to be without any justification inasmuch as he was not given any reason for such decision as alleged.

Plaintiff is, therefore, claiming from Defendant the sum of Rs 1,639,968.75 representing severance allowance for 85 months continuous employment.

Defendant in its plea has denied liability and has averred that Plaintiff was employed on contracts of determinate duration from 4.2.2010. It has denied that the termination of Plaintiff's employment was made without any justification inasmuch as he was not given any reason for such decision by making the following averments:

1. Plaintiff was employed by Defendant on a contract of determinate duration of one year from 4.2. 2010 to 3.2. 2011.
2. The contract was renewed on a month to month basis until further notice.
3. Plaintiff made a request "for his contract of employment to be converted into one of fixed duration of one year as from 4.2.2013 and agreed to declare the prevailing contract on a month to month basis null and void for all intents and purposes".
4. A new contract of one year's duration was drawn up for period 1.9.2013 to 31.8.2014 and renewed on a yearly basis until 3.2.2017.
5. The said contract was extended for a period of one month as from 4.2. 2017 on the same terms and conditions until the 3.3.2017 and was again extended for a further period of one month until 3.4.2017.
6. By a letter dated 30.3.2017, Plaintiff was informed by Defendant that his employment was being terminated on 31.3.2017 under Clause 8 of his contract of employment namely "*both parties have agreed that either party may terminate the present agreement by giving one month notice or pay to either party the equivalent of one month's salary*".
7. On 10.4.2017, Plaintiff was paid one month's salary in lieu of notice: Rs 77,715.00, and all his dues under his contract till date of termination.
8. Plaintiff duly accepted payments without any reservation as they were in strict compliance with the terms and conditions of his contract of employment.

Hence, Defendant has averred that the termination was made in accordance with the terms and conditions of the contract of employment. Defendant has denied being liable to the Plaintiff in any sum whatsoever and has moved that the plaint be dismissed.

Plaintiff gave in Court. He stated that he was in the continuous employment of Defendant as Research and Development Manager on successive contracts of determinate duration as from 4 February 2010. The first contract was for a determinate duration of one year starting from 4 February 2010 as per Doc. P1. There was a second contract as from 4 February 2011 but was on a month to month basis until further notice as per Doc.P2. There was a third contract as from 1 September 2013 to end on 31 October 2014 as per Doc. P3. But that contract was never signed by him. He replied to the Defendant that he would have preferred to continue on a month to month basis as per his letter as per Doc. P4. He signed another contract which came into effect on 4 February 2014 and to end on 3 February 2015 as per Doc. P5. There was another contract of determinate duration again starting from 4 February 2015 to end on 3 February 2016 which he signed as per Doc. P6. There was another contract which came into effect on 4 February 2016 to end on 3 February 2017 which he signed as per Doc.P7. Then, there was a letter dated 30 January 2017 which was addressed to him by the Defendant. He had a contract of employment where it was mentioned that his contract would end on 3 February 2017 and the renewal of his contract would be considered by the HR Committee. But meanwhile, his contract was being extended for a period of one month, that is, until 3 March 2017 on same terms and conditions as per Doc. P8. Thereafter, he received another letter dated 2 March 2017 which said that his renewal of contract had not yet been examined by Defendant and that his contract was being extended for an additional period of one month, that is, until 3 April 2017 on the same terms and conditions as per Doc. P9. Since he joined the Defendant on the 4 February 2010, he had been in continuous employment till the end and his contract was terminated. There had never been any break between the different contracts be it on his side or on the Defendant's side. He was remunerated at monthly intervals and his terminal rate of pay was Rs. 77,175 per month. His last contract was to end on 3 April 2017. By way of a letter dated 30 March 2017, Defendant terminated his employment as from 31 March 2017 with payment of one month's salary in lieu of notice following a decision taken by the Board of the Defendant as per Doc. P10. He considered his termination of employment to be unjustified as Defendant did not give him any valid reason for terminating his

employment before the end of the contract and it did not follow the provisions of the Employment Rights Act as per his understanding although it had followed Clause 8 of his contract of employment namely:

"Both parties have agreed that either party may terminate the present agreement by giving one month notice or pay to either party the equivalent of one month's salary".

He received payments as per the terms of his contract but he was still not satisfied that it was as per the law. He was not agreeable with the termination of his employment and he was claiming from the Defendant the sum of Rs 1,639,968.75 which represents severance allowance for 85 months' continuous employment.

In cross-examination, he conceded that the contracts were of a determinate duration and had an expiry date except for contracts of monthly durations meaning the second one. His claim started from 2010 up to 2017. But he said that he did not sign the agreement between 2013 and 2014 and there was no contract between them. But there was a contract on a month to month basis without an expiry date. Although he did not sign the contract starting 1 September 2013 and ending on 31 August 2014, he continued to work under the previous terms and conditions. He did not agree that a reason for termination was given to him according to law by Defendant namely: *"I am directed by the MTPA Board to inform you that your employment with us is being terminated on 31 March 2017 by enforcing Clause 8 of your contract".*

Mr. Nizam Udhin Condor, in his capacity as Human Resource Officer, deponed on behalf of Defendant in Court. He did not agree that the Plaintiff was in continuous employment with Defendant as from the year 2010. He was under contracts of determinate duration. At some stage, there was no contract between them as Plaintiff did not sign it. Then, there were yearly contracts with dates of expiry. Plaintiff was given all his dues as per his contracts of determinate duration as per Doc. D1. In cross-examination, he accepted that Plaintiff continued to work during the time there was no contract signed between them. He accepted that the last contract was to end on 3 April 2017 according to Defendant and that Plaintiff stopped working on 31 March 2017.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel. The unchallenged evidence on record reveals the following:

1. There was an original contract of determinate duration for one year.
2. It was followed by a contract on a month to month basis until further notice.
3. There was again a contract of one year which was not signed by Plaintiff and he agreed that there was no contract between them. But he continued to work and was remunerated monthly as per the terms of the unsigned contract in the monthly salary bracket of about Rs 70,000 as per Doc.D1 and not Rs. 58,000 as per that of the month to month contract under which he claimed he continued to work; Thus, it fortifies the plea of Defendant that Plaintiff intended that the month to month contract be declared null and void in the light of the one year's contract and not as per Doc. P4 wherein he mentioned that he preferred to continue to work on a month to month basis.
4. Indeed, then, there were 3 successive contracts of one year's duration signed by Plaintiff viz. Docs. P5, P6 & P7;
5. Thereafter, he was given a letter as to what course to adopt after the expiry of the last contract on 3 February 2017 as per a letter dated 30 January 2017 viz. Doc.P8 from Defendant as follows:

"The renewal of your contract will be considered at the next HR Committee which will be scheduled once a substantive Chairperson is appointed at MTPA. Meanwhile, please note that your contract is being extended for a period of one month, i.e. until 3 March 2017 on same terms and conditions."
6. Then, there was another letter dated 2 March 2017 namely Doc. P9 from Defendant where reference was made to the previous letter dated 30 January 2017 viz. Doc.P8 as follows:

"Kindly note that the renewal of your contract has not yet been examined by MTPA HR Committee.

You are therefore informed that your contract is being extended for an additional period of one month, i.e. until 3 April 2017 on same terms and conditions, pending the next HR Committee".

7. There was a last letter dated 30 March 2017 from Defendant as per Doc. P10 as follows:

"I am directed by the MTPA Board to inform you that your employment with us is being terminated on 31 March 2017 by enforcing Clause 8 of your contract. You will be paid the equivalent of one month's salary in lieu of notice and all sums due under the present contract.

You are hereby requested to make a proper handing over of MTPA assets which are in your possession to the IT Officer and the Deputy Director".

Therefore, it is plain enough that there was one contract of one year and then a contract on a month to month basis until further notice. There was some opposition as regards that month to month contract, but Plaintiff continued to work on the salary scale of the contract of one year although it was unsigned by him and then signed 3 contracts of a determinate duration of one year.

Thereafter, his contract was extended on a month to month basis under the same terms until the question of whether to renew his contract or not would have been considered at the next HR Committee which would have been scheduled once a substantive Chairperson was appointed at MTPA. Thus, the contract continued on a month to month basis until such a decision was taken as regards the renewal of his contract which was agreed by the parties. Therefore, it is clear from the intention of the parties that the contract would not have been renewed automatically so that Plaintiff could claim severance allowance as it depended on an event meaning the decision of the HR Committee. As per the last letter emanating from Defendant viz. Doc.P10, a decision was taken by the HR Committee and the Board accordingly terminated his employment on 31 March 2017 by enforcing Clause 8 of his contract. He was paid the equivalent of one month's salary in lieu of notice and all sums due under the present contract.

The question that calls for consideration is whether the Defendant has unilaterally terminated Plaintiff's contract of employment by applying Clause 8 of the contract when there was still a couple of days left before the expiry of the contract.

At this juncture, I find it most relevant to quote an extract from the leading Supreme Court case of **Mauritius Steam Navigation Co. Ltd. v Roussety [1977 MR 25]** which reads as follows:

"The substantial question which arises for our decision is whether the provisions of the Ordinance relating to the payment of severance allowance will apply in the case of agreements of determinate duration, that is to say, agreements the end of which is determined by reference to some future event, certain in its nature, and the cancellation of which does not depend exclusively on the will of one of the parties.

(...)

It is thus quite evident that the Ordinance does not find its application in the case of a contract of determinate duration which comes to an end by the happening of the event predetermined and agreed upon by the parties. Such end does not come through the agency of the employer, but by the common will of the parties.

(...)

*The learned Magistrate's reasoning takes no account of the distinction which we have held it is essential to draw between the two kinds of situation arising out of the implementation of contracts of fixed duration, namely, the contract ending with the expiry of the stipulated term or with the happening of the stipulated event and the contract being terminated by the employer before such term or event".**(emphasis added)***

In the present case, the future event deciding whether the contract of employment of Plaintiff would be renewed or not was dependent on the HR Committee chaired by a Chairman being appointed in a substantive capacity in order to have a Board decision in that respect and Plaintiff agreed to have his contract extended on a month basis awaiting that event. But that future event, certain in its nature, which happened 2 days before the expiry of his contract, cannot be held to be a unilateral termination by Defendant of Plaintiff's contract of employment before its expiry date as the event which happened namely the decision taken to renew his contract of determinate duration or not did not depend exclusively on the will of the Defendant. Moreover, there has been no evidence adduced that the relations between the Plaintiff and Defendant under the individual agreements of determinate duration (let alone that one of them was not signed) leading to the last one were such as to establish an intention on the part of the parties that they would continue for an indeterminate period. Plaintiff admitted that he had been paid all his dues under his contract.

Had that event not happened yet and the Defendant terminated his contract before the expiry date meaning on 31 March 2017 when the expiry date was 3 April

2017, then the whole question of severance allowance would have been relevant for our purposes. In that respect by relying on Clause 8 of the contract only would not have been a reason to justify a unilateral termination of Plaintiff's contract of employment depriving him of severance allowance subject to the provisions of Section 46 of the Employment Rights Act 2008 having been met as Plaintiff would then have been deemed to have been in continuous employment.

Clause 8 of the contract is reproduced below:

"8. TERMINATION OF CONTRACT

Both parties have agreed that either party may terminate the present agreement by giving one month notice or pay to either party the equivalent of one month's salary."

Such a clause on its own would not have been a valid ground to be invoked by Defendant for non-payment of severance allowance when there has been a unilateral termination of Plaintiff's contract by simply relying on this clause (see - **Mauritius Steam Navigation Co. Ltd.**(supra) applied in the case of **Lutchmeenaraidoo L. v Maubank Ltd**[\[2019 SCJ 94\]](#) wherein both the cases of **De La Haye L.G. v Air Mauritius Ltd**[\[2015 SCJ 244\]](#) and that of **De La Haye L.G. v Air Mauritius Ltd** [\[2018\] UKPC 14](#) were cited).

An extract of **Lutchmeenaraidoo L.** (supra) reads as follows:

*"More recently, in **De La Haye L.G. v Air Mauritius Ltd** [\[2015 SCJ 244\]](#), the appellate Court took the view, on the facts of the case, that the appellant's contract was one of fixed duration; that by virtue of an express clause contained therein the parties had unequivocally agreed that the fixed term contract could be terminated by either party before the date on which the contract was due to terminate, by either party giving 6 months advance notice in writing; and that such agreement falls within the ambit of section 36(1) of the Employment Rights Act in respect of a contract of fixed duration. "*

Then, **Lutchmeenaraidoo L.** (supra) has referred to **De La Haye L.G. v Air Mauritius Ltd** [\[2018\] UKPC 14](#) as follows:

"The Law Lords were, however, in disagreement with the views expressed by the learned Judges of the Supreme Court, namely that the contract being one of fixed duration, it was lawfully terminated in conformity with the common will of the parties

as expressed in their agreement, and, therefore, there had been no unilateral termination of the contract.

Their Lordships expressed their disagreement in the following terms:

"The Board is satisfied that the notice sent by the defendant to the plaintiff was a termination by it of his contract. The fact that it was a termination permitted by the freely agreed terms of the contract does not alter the fact that it brought the contract to an end, nor that it was undertaken by one party only. The Supreme Court fell into error in holding that what happened was not a unilateral act of the defendant. It was indeed a unilateral act, and the fact that it was anticipated and permitted by the contract does not make it any the less so. Subject to meeting the other requirements of Section 46, therefore, this termination was perfectly capable of triggering entitlement to severance allowance. ""

In the present situation, the cumulative effect of all the contracts of determinate duration leading to the last two ones namely Docs.P8 and P9 leading to his letter of termination viz. Doc.P10 clearly shows that we are not in a situation where Clause 8 was applied by the Defendant in isolation but in addition to the happening of a future and certain event viz. the decision taken by the Board of the HR Committee of the MTPA chaired by its chairman in a substantive capacity meaning holding a substantive post as to whether to renew Plaintiff's contract or not. That event happened 3 days prior to the date the contract was to come to an end cannot be construed that there has been a unilateral termination of Plaintiff's contract of employment by Defendant without a reason given, but purely and simply that the contract has come to an end by the happening of the event according to the will of the parties and that decision taken is unfortunately not to renew his contract.

Now, learned Counsel for the Plaintiff has in the course of his submissions touched upon the fact that Plaintiff was not a worker covered by the Employment Rights Act 2008 in force at the time as his basic wage or salary was at a rate in excess of 360,000 rupees per annum. But it is worthy of note that such a provision does not apply when the issue concerns the termination of a work agreement covered by Part VIII of the Act as per Section 2 of that Act.

For all the reasons given above, the case for the Plaintiff should fail. I, accordingly dismiss the plaint.

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

25.1.22