Henri F.N. v Petite Coupee Ltee

2022 IND 10

Cause Number 1091/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

François Noël Henri

Plaintiff

v.

Petite Coupée Ltée

Defendant

Ruling

This is a plaint where it has been averred by Plaintiff that he was in the continuous employment of Defendant as "Boat House Manager" since 16 July 2012.

He was employed on a 6-day week basis and was last remunerated at monthly intervals at the basic rate of Rs.26,435 per month with an average monthly remuneration of Rs. 31,002.28.

On 24 January 2018, he was informed that his employment was terminated with immediate effect for structural reasons.

He considers that the termination of his employment was unjustified inasmuch as -

(i) Defendant, being an employer of not less than 20 workers, has failed to comply with Section 39B (2) of the Employment Rights Act by not giving the proper written notice of its intention to reduce the number of workers in its employment to the Permanent Secretary, Ministry of Labour, Industrial Relations, Employment and Training;

(ii) his discharge from employment was not based on the principle of "last in first out" as a Boat House Manager who joined Defendant's service on 8 July 2013 was still in employment on 24 January 2018.

Thus, Plaintiff is claiming from Defendant the sum of Rs 511,537.62/- representing Severance Allowance for 66 months' continuous employment.

Defendant, for its part, has raised a plea in *limine* to the effect that the Industrial Court has no jurisdiction to hear the present claim because the Permanent Secretary had no power to lodge the present matter before the Industrial Court pursuant to Section 39B(6)(a) of the Employment Rights Act 2008 (as amended). Defendant has therefore moved that the plaint be set aside with costs. Arguments were accordingly heard.

The main thrust of the argument of learned Counsel for Defendant is that the matter ought to have been referred or lodged before the Employment Relations Tribunal and not the Industrial Court. This action has been instituted by the Permanent Secretary on behalf of Plaintiff who is the worker pursuant to Section 15 of the Industrial Court Act 1973. Given that the Permanent Secretary has instituted proceedings, it is clear that there has been a complaint made by the Plaintiff who is the worker.

As per Section 39B(5)(b)(i) of the Employment Rights Act, a worker shall register his complaint with the Permanent Secretary within 14 days of the termination of his employment. As per Section 39B(5)(c), the Permanent Secretary shall enquire into the complaint with a view to promoting a settlement between the parties. Thus, there is a complaint and the Permanent Secretary enquires into the complaint. At subsection (6)(a) where no settlement is reached under subsection (5), the Permanent Secretary shall subject to subsection (7)(a), refer the matter to the Tribunal, if he is of the opinion that the worker has a *bona fide* case. Thus, he is saying that the Permanent Secretary instead of referring the matter to this Court should have

referred it to the Employment Relations Tribunal but not to the Employment Promotion and Protection Division pursuant to Section 39A (3) of the Employment Rights Act. This is a mandatory requirement. Where a worker institutes proceedings himself, although he has lodged a complaint with the Permanent Secretary, but then chooses to proceed on his own without the assistance of the latter, this is possible as per subsection(7)(b).

The main contention of learned Counsel for Plaintiff is that Section 39A (3) says that the Employment Promotion and Protection Division shall deal with all cases referred to the Tribunal under that Part other than Section 39B (11). Sections 39B (6) &39B (5) have to be read with the first requirement that there has been a written notice to the Permanent Secretary which cannot be assessed at this stage as per the plaint. Plaintiff is claiming that the termination was unjustified as main reason is the lack of notice which is a statutory requirement for any case of reduction of workforce. As per subsection 7(a) there is no reference made to the worker instituting and the Permanent Secretary instituting proceedings on behalf of the worker. It can be proceedings instituted on behalf of the worker by the Permanent Secretary. If we go literally, the worker will be left with no remedy. There has been no compliance with Section 39B (11) meaning where there is a breach, the worker cannot go to the Tribunal but the worker is eligible for payment of severance allowance and the forum is the Industrial Court.

Learned Counsel for Defendant replied that as per Section 39B (11) that all cases under that provision should go to the Tribunal itself but not that division.

I have given due consideration to the arguments of both learned Counsel. I deem it appropriate to reproduce the following provisions of the Employment Rights Act 2008 – Act 33 of 2008 below:

*"**PART VIIIA – REDUCTION OF WORKFORCE AND CLOSING DOWN OF ENTERPRISE***

39A. Employment Promotion and Protection Division

(1) *There shall be for the purposes of this Act a division of the Tribunal which shall be known as the Employment Promotion and Protection Division.*

(2) (…)

(3) <u>The Employment Promotion and Protection Division shall deal with all cases referred to the Tribunal under this Part, other than section 39B (11).</u>

39B. Reduction of workforce

(5) (a) Where there has not been any settlement for payment of compensation, a worker, as defined in section 40, may –

(i) join the Workfare Programme in accordance with Part IX; or

(ii) register a complaint with the Permanent Secretary.

(…)

(c) The Permanent Secretary shall enquire into the complaint with a view to promoting a settlement between the parties.

(6) Where no settlement is reached under subsection (5), the Permanent Secretary-

(a) shall, subject to subsection (7)(a), refer the matter to the Tribunal, if he is of the opinion that the worker has a bona fide case and thereupon the worker as defined in section 40 shall be entitled to join the Workfare Programme;

(b) may, subject to subsection(7)(b), not refer the matter to the Tribunal, if he is of the opinion that the worker does not have a bona fide case and shall advise the worker as defined in section 40 that he may apply for admission to the Workfare Programme.

(7) (a) Where a worker referred to in subsection (6)(a) institutes proceedings before the Court to claim severance allowance under section 46(5), the Permanent Secretary shall not refer his case to the Tribunal but the worker shall be entitled to be admitted to the Workfare Programme if he is a worker as defined in section 40.

(b) Where a worker referred to in subsection (6)(b) institutes proceedings on his own before the Court and the Court gives judgment in favour of the worker under section 46(5), that worker shall, as from the date of judgment, be eligible to be admitted to the Workfare Programme, if he is a worker as defined in section 40.

(…)

(11) <u>Where an employer reduces the number of workers in his employment either temporarily or permanently, or closes down his enterprise, in breach of subsections (2)</u>

and (3), he shall, unless reasonable cause is shown, pay to the worker whose employment is terminated a sum equal to 30 days' remuneration in lieu of notice together with severance allowance, wherever applicable, as specified in section 46(5)."

Section 15(1) of the Industrial Court Act 1973 reads as follows:

"***15. Institution of proceedings by Permanent Secretary***

15-(1) The Permanent Secretary may institute such civil or criminal proceedings as he thinks necessary and conduct such proceedings in the Court, for or in the name of a worker."

Hence, in the present plaint, the claim of Plaintiff is based on Section 39B (11) of the Employment Rights Act 2008 given that as averred above, Defendant, being an employer of not less than 20 workers, has breached Section 39B (2) of the Employment Rights Act by not giving the proper written notice of its intention to reduce the number of workers in its employment to the Permanent Secretary. Section 39B (2) reads as follows:

"***39B. Reduction of workforce***

"(2) An employer who intends to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise shall give written notice of his intention to the Permanent Secretary, together with a statement of the reasons for the reduction of workforce or closing down, at least 30 days before the reduction or closing down, as the case may be."

Now it is clear that the Permanent Secretary shall subject to subsection 7(a) of Section 39B refer the matter to the Tribunal if he is of the opinion that the worker has a *bona fide* case viz. under subsection 6(a) of that section. This means that he cannot just refer the matter to the Tribunal without ascertaining whether the worker has instituted proceedings before the Industrial Court and the possibility of the Permanent Secretary having instituted such proceedings before the Industrial Court, for or in the name of that worker pursuant to Section 15(1) of the Industrial Court Act 1973 has not been excluded by subsection 7(a) unlike subsection 7(b) under subsection 6(b) which caters for the situation where the worker institutes proceedings on his own before the Court.

That is precisely why by virtue of Section 39A (3) of the Employment Rights Act 2008, the Employment Promotion and Protection Division shall deal with all cases referred to the

Tribunal under this *PART VIIIA – REDUCTION OF WORKFORCE AND CLOSING DOWN OF ENTERPRISE*, other than section 39B (11) because the latter is being dealt with by the Industrial Court and not by the Employment Relations Tribunal otherwise subsection 7(a) and subsection 7(b) would have stipulated where a worker referred to in subsections 6(a) and 6(b) institutes proceedings before the Employment Relations Tribunal and not the Court.

Therefore, it is plain enough that the power to have a worker who has lost his job in the course of the reduction of workforce exercise, to have his case referred to the Tribunal, is vested solely in the Permanent Secretary who is going to act according to his own opinion which is purely subjective in nature. Should that opinion not be in favour of that worker, the only remedy that would have been left to him would be to join the Workfare Programme.

That is why a worker after having registered a complaint with the Permanent Secretary under subsection 5(a) where no settlement has been reached for payment of compensation, is not bound to rely on the subjective decision of the Permanent Secretary whether to refer him or not to the Tribunal, because the Permanent Secretary has to ascertain first as stipulated in subsections 6(a) & 6(b) whether that worker has instituted proceedings before the Industrial Court for redress in the form of severance allowance.

This is precisely why the present case has been instituted before the Industrial Court by the alleged aggrieved worker namely the Plaintiff in order to claim severance allowance from Defendant pursuant to Section 39B (11) of the Act. Thus, I take the view that the jurisdiction of the Industrial Court has not been ousted in the present matter as the Permanent Secretary has not *stricto sensu* referred the matter to the Industrial Court thereby infringing the provision of Section 39B(6)(a) of the Act, but has only pursuant to Section 15(1) of the Industrial Court Act 1973 instituted proceedings for and in the name of the Plaintiff.

For the reasons given above, the plea in *limine* has not been acceded to.

The matter is being fixed *proforma* to 28 February 2022 for both learned Counsel to suggest common dates for trial.

S.D. Bonomally (Mrs.) *(Vice President)*
23.2.2022