Kelly v Funtastic Drive & Racing Ltd

2022 IND 48

CN200/19

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr Lloyd Alexander Kelly

Plaintiff

v/s

Funtastic Drive & Racing Ltd

Defendant

RULING (NO. 1) (PLEA IN LIMINE LITIS)

The Plaintiff is claiming from the Defendant Company, by way of Proecipe, **the total sum Rs542 500/- representing Unpaid Salary and Severance Allowance, together with Costs and Interests at the prevailing Bank rate and / or as the Law provides as from the date of the constructive dismissal until final payment**.

The Defendant Company has denied the said Claim in its Plea.

The Plaintiff and the Defendant Company were respectively assisted by Learned Counsel.

The Proceedings were held in English.

The matter was fixed for Arguments on the two points raised in the Plea In Limine Litis, which read as follows:

1. *Ex Facie* the Proecipe, the Industrial Court has no jurisdiction to grant the prayer in respect of unpaid salary inasmuch as the Plaintiff is not a worker for the purposes of the Employment Rights Act.
2. The Plaintiff is making an abuse of the process of the Judicial System and is wasting the resources of the Courts and of the parties themselves inasmuch as the Plaintiff had lodged a similar case before the Industrial Court of Mauritius vide case bearing number CN240/17 which was withdrawn on the 18th of March 2019 following a *Plea in limine litis* raised by the Defendant.

- In the circumstances, the Defendant moves that the Proecipe be set aside with Costs.

Case For The Defendant Company

Learned Counsel for the Defendant Company submitted inter alia that the Industrial Court has no jurisdiction to grant the Prayer, since the Plaintiff was not a Worker for the purposes of the **Employment Rights Act** (hereinafter referred to as **ERA**), inasmuch as the Plaintiff has averred:

1) At paragraph 3 of the Proecipe, that his salary was Rs50 000/-;
2) At paragraphs 10-15, that his salary was reduced;
3) At paragraph 16, that the Defendant Company has failed to refund the unpaid remuneration amounts to him, and bring back his salary to Rs50 000/-; and
4) At paragraph 19, i.e. the Prayer, that the Defendant Company is indebted to him in the sum of Rs542 500/- for Unpaid Salary.

And as per **s. 2** of the **ERA** as amended, “worker” is defined as a person whose basic wage or salary is at a rate not in excess of Rs360 000/- per annum, which means Rs30 000/- per month, whereas the Plaintiff has averred that he was earning Rs50 000/- per month.

Further, as per **s. 25(1)**, “every employer shall pay any remuneration due to a worker”, and a Worker is someone not earning more than Rs30 000/- per month.

Learned Counsel for the Defendant Company referred to, and filed, two Rulings delivered by the then President of the Industrial Court.

Learned Counsel further submitted that other than one line at paragraph 18, there is no mention of any unjustified termination, and that the Prayers (a) and (b) could not be allowed, their not falling under this Court's Jurisdiction.

Learned Counsel for the Defendant Company went on to submit that this was an Abuse of Process of the Court, as there was a previous case which was entered based on the same facts, and the same Plea In Limine Litis was raised, and the Plaintiff withdrew the said Claim, and entered it again on the same facts and almost the same Prayers, with one line of the Prayer added for Severance Allowance.

The Head Clerk of the Industrial Court produced a copy of the Court Record vide case bearing CN240/17 – Industrial Court (Doc. A).

Learned Senior Counsel offered Further Submissions at the request of the Court, and confirmed that there was no binding Authority on the issue of Jurisdiction, and submitted inter alia that the Rulings delivered by the then President of the Industrial Court were based "on solid rational from the case of" **Maxo Products v P.S Ministry Of Labour and Industrial Relations [1991 SCJ 225]**.

Learned Senior Counsel further submitted inter alia in effect that the Plaintiff had to elect whether he had been constructively dismissed the day he was not paid his salary, in which case the Plaintiff might be entitled to Severance Allowance, or whether the non-payment of the salary is itself a reason to consider that one has been dismissed, thus triggering the liability to pay Severance Allowance, or if the Claim is for salary, then it must be assumed that one is still in employment to earn the salary.

Learned Counsel went on to submit that the Claim for unpaid salary could not be entertained as it was outside the Jurisdiction, it being under **s. 25**, which only applies to a "Worker", and if the Plaintiff's case was that even a non-Worker can invoke non-payment or under-payment of salary as a ground for Constructive Dismissal, then the Claim must clearly state the date of the effective dismissal, for the Severance Allowance to be calculated, and to be clear as to the date at which the salary was being claimed.

Learned Senior Counsel filed Written Submissions, Authorities, and Rulings on behalf of the Defendant Company.

Case For The Plaintiff

In relation to the first limb of the Plea In Limine Litis, Learned Counsel for the Plaintiff referred to, and submitted on the basis of, a Ruling delivered by the Vice-President of the Industrial Court, that the Industrial Court has exclusive Jurisdiction to hear the present matter, and that **s. 25** of the **ERA** was to be read in conjunction with **s. 36(4)** of the **ERA**, which section fell under **Part VIII** of the **ERA**, which in effect applied to a Worker, irrespective of his Salary, as per **s. 2** of the **ERA**.

In relation to the second limb of the Plea In Limine Litis, Learned Counsel for the Plaintiff submitted inter alia that although the previous case was withdrawn, it was through oversight that Severance Allowance had not been claimed in the previous case, and Severance Allowance had been added in the present case.

Learned Counsel for the Plaintiff further submitted that in the Interests of Justice, the Plaintiff was entitled to seek redress before the Industrial Court as regards the payment of Severance Allowance.

Learned Counsel for the Plaintiff prayed that both Pleas In Limine Litis be set aside.

Learned Counsel for the Plaintiff offered Further Submissions at the request of the Court, and filed Written Submissions on behalf of the Plaintiff.

Learned Counsel for the Plaintiff conceded there was no binding Authority on the issue of Jurisdiction, and also conceded that the Plaintiff's Claim was under **s. 25** of the **ERA**, which section was not listed as an exception in the definition of "Worker", but which ought to be read in conjunction with **s. 36(4)** of the **ERA**, which forms part of **Part VIII** of the **ERA** and which applies to persons earning more than Rs360 000/-, in light of the definition of "Worker" in **s. 2** of the **ERA**.

Learned Counsel for the Plaintiff further submitted that the Claims for Remuneration and Severance Allowance were so intrinsically linked that they must be decided in the same Plaint,

as should the Plaintiff claim for Severance Allowance before the Industrial Court and Unpaid Salary and Unpaid Remuneration before another Court, this could lead to conflicting Judgments.

In relation to the issue of Abuse of Process, Learned Counsel for the Plaintiff submitted inter alia that there was no *male fide* on the part of the Plaintiff, and that it was in the Interests Justice for the Plaintiff to claim his dues.

As to the date of termination of the Plaintiff's employment, Learned Counsel for the Plaintiff submitted inter alia that the Defendant Company, despite its promises, failed to match and increase the Plaintiff's salary, still the Plaintiff waited, but had to have recourse to a Notice *Mise en Demeure*, which remained unreplied, and hence the Plaintiff considered himself as having been constructively dismissed.

Learned Counsel for the Plaintiff added that as per paragraph 11 of the Proecipe in the previous case, the Claim was always one for Constructive Dismissal, with only the Severance Allowance having been added in the present Proecipe.

Learned Counsel for the Plaintiff moved for the Plea In Limine Litis to be set aside based on his Submissions.

Reply

In Reply, Learned Senior Counsel for the Defendant Company submitted inter alia that the Plaintiff had rightly conceded that the Claim was always one of Constructive Dismissal, and that it was only when confronted with the issue of Jurisdiction, that the case was removed, and a new Claim entered with Severance Allowance to justify his presence in Court, instead of claiming for Breach of Promise to pay a shortfall in salary, which in Learned Senior Counsel's opinion, constituted the Abuse of Process.

Analysis

The Court has duly considered all the Submissions of both Learned Counsel, as well as the Authorities, Rulings, Extracts from Dr. Fok Kan's *Introduction Au Droit Du Travail – 1/ Les Relations Individuelles De Travail*, referred to.

The Court has duly considered the Rulings of **Gerard v Air Mauritius Ltd [2016 IND 23]**, **Mukerjee v The Habitat Development Co. Ltd [2017 IND 4]** (submitted and referred to by Learned Senior Counsel for the Defendant Company), and of **Van Hok Hen v Africa Technical Services Ltd [2019 IND 5]** (referred to by Learned Counsel for the Plaintiff).

These Rulings are, however, of persuasive value only.

Jurisdiction

Under the first limb of the Plea In Limine Litis, it was the contention of the Defendant Company that "*Ex Facie* the Proecipe, the Industrial Court has no jurisdiction to grant the prayer in respect of unpaid salary inasmuch as the Plaintiff is not a worker for the purposes of the Employment Rights Act."

Learned Counsel for the Plaintiff conceded that the Plaintiff's action was based on **s. 25** of the **ERA**, and submitted that the Plaintiff's said Claim was to be read in conjunction with **s. 36(4)** of the **ERA**.

Now, **s. 25(1)** of the **ERA** reads as follows:

> Every employer shall pay any remuneration due to a worker on the termination of the worker's agreement.

There is therefore a statutory obligation placed on an Employer to pay any remuneration due to a Worker, when the Worker's agreement is terminated.

S. 25 of the **ERA** applies to a "Worker", which is defined in **s. 2** of the **ERA** as follows:

> "worker", subject to s. 33 or 40 –
> […]
> (c) does not include –
> […]
> (ii) except in relation to sections 4, 20, 30, 31 and Parts VIII, VIIIA, IX, X and XI, a person whose basic wage or salary is at a rate in excess of 360,000 rupees per annum.

Ex facie the Proecipe, the Court is of the considered view that **ss. 33** and **40** of the **ERA**, which relate to the Entitlement of Workers in the Sugar Industry and the Workfare Programme respectively, do not apply to the Plaintiff in the present matter.

The Court has duly considered the Pleadings in the present matter, and the Plaintiff averred inter alia at paragraph 3.a. of the Proecipe that his monthly basic salary was Rs50 000/-, and at paragraph 15 of the Proecipe, that his basic monthly salary was Rs35 000/-, whereas the Plaintiff also mentioned his salary, remuneration, and monthly remuneration in other paragraphs of the Proecipe.

It is clear therefore that ex facie the Pleadings, the Plaintiff's basic monthly salary was in excess of the prescribed amount of Rs360 000/- per annum (Rs50 000/- x 12 months = Rs600 000/- or Rs35 000/- x 12 months = Rs420 000/-), and did not hence fall within the definition of "Worker" as per **s. 2** of the **ERA**.

That being said, the sections and Parts of the **ERA** which apply to a Worker, regardless of his/her basic wage or salary, are exhaustively set out in the definition of "Worker" in **s. 2** of the **ERA**, and they are:

1) **S. 4**;
2) **S. 20**;
3) **S. 30**;
4) **S. 31**;
5) **Part VIII**;
6) **Part VIIIA**;
7) **Part IX**;
8) **Part X**; and
9) **Part XI**.

No mention of **s. 25** or of **Part V** of the **ERA** is made in the said list of exceptions, and this was also conceded by Learned Counsel for the Plaintiff.

The Legislator not only set out the Parts of the **ERA** which apply to Workers, regardless of their basic wage or salary, but also set out the sections of the **ERA** which likewise apply to Workers regardless of the basic wage or salary.

This clearly illustrates the intention of the Legislator, and it is trite Law that the "legislator does not legislate in vain" (**Curpen v The State [2008 SCJ 305]**).

The Court is of the considered view that had the Legislator intended for **s. 25** of the **ERA** to apply to Workers, regardless of their basic wage or salary, the said section and / or the said **Part V** would have been included in the said exhaustive list set out in **s. 2** of the **ERA** as regards the definition of "Worker".

The Court is further of the considered view that it would not be in order for the Court to read **s. 25** of the **ERA** in conjunction with **s. 36(4)** of the **ERA**, in the absence of any justification for singling out the said **s. 36(4)** of the **ERA** to link it to **s. 25** of the **ERA**.

In light of all the above, the Court is of the considered view that the Court's Jurisdiction is ousted, in relation to Claims pursuant to **s. 25** of the **ERA**, once the Employee's basic wage or salary exceeds the prescribed amount of Rs360 000/- per annum.

And the Court is further of the considered view that the Plaintiff, who himself averred that he was earning a basic monthly salary of Rs35 000/- and Rs50 000/-, cannot therefore base his Claim on **s. 25** of the **ERA**, his not falling within the definition of Worker for the purposes of the said section.

Abuse Of Process

Under the second limb of the Plea In Limine Litis, it was the contention of the Defendant Company that the "Plaintiff is making an abuse of the process of the Judicial System and is wasting the resources of the Courts and of the parties themselves inasmuch as the Plaintiff had lodged a similar case before the Industrial Court of Mauritius vide case bearing number CN240/17 which was withdrawn on the 18th of March 2019 following a *Plea in limine litis* raised by the Defendant.

Learned Counsel for the Plaintiff submitted that it was through oversight that Severance Allowance was not claimed in the case bearing CN240/17 – Industrial Court, and that the Plaintiff's

case was always one of Constructive Dismissal, even in case bearing CN240/17 – Industrial Court.

The Court however notes the following.

In case CN240/17 – Industrial Court, the essence of the Plaintiff's Claim, as per paragraphs 4, 7, 8, 9, 10, 11, and 12 of the Proecipe dated 10-04-17, relates to Unpaid Salary.

There was an exchange of Pleadings between 13-07-17 and 17-05-18 (Questions 16, 19, and 21 of the Demand of Particulars dated 10-07-17, which relate specifically to the issue of Quantum and Constructive Dismissal, were answered in the Answer to Particulars dated 07-11-17), and the Plea dated 04-07-18 was filed on 05-07-18. And it is only upon the Proposed Amended Plea containing a Plea In Limine Litis as to Jurisdiction dated 04-02-19 being filed in Court, that the Plaintiff's case was withdrawn.

It is very telling that the Plaintiff only withdrew his case on 18-03-19, following the Plea In Limine Litis raised in the Proposed Amended Plea dated 04-02-19. This is even more so, in view of the fact that the Plaintiff's Proecipe dated 10-04-17 contained no Prayer for Severance Allowance despite spelling out that the Plaintiff considered he had been constructively dismissed at paragraph 11 of the said Proecipe.

Be that as it may, in the present action, the Proecipe dated April 2019 is almost identical to the Proecipe in case bearing CN240/17 – Industrial Court, save that it contains a Prayer for Severance Allowance. The Court has also borne in mind Learned Counsel for the Plaintiff's Submissions that it was through oversight that the said Claim for Severance Allowance was not made in the case bearing CN240/17 -Industrial Court.

The Court notes that the Plaintiff chose to withdraw the case bearing CN240/17 – Industrial Court, and lodge a fresh action with a Claim for Severance Allowance.

This is not a situation of "splitting of action" (**Mauritius Turf Club v Lagesse** [1993 SCJ 9]), of instituting "two parallel actions when all the issues raised can be thrashed out in one single case (**Mauritius Turf Club (supra)**), of "successive suits when one would do" (**Goojrah v Seni** [2011

SCJ 150] and **Mauritius Turf Club (supra)**), or of "re-litigation of a case which has already been decided upon" (**Goojrah (supra)**).

In fact, the Plaintiff acted in line with the Authority of **Mauritius Turf Club (supra)** by withdrawing "his claim in the previous suit before judgment with a view to entering an action to include the fresh claim as well".

In light of all the above, the Court is of the considered view that there is nothing on Record to suggest *male fides* on the part of the Plaintiff, and / or that the Plaintiff's conduct constitutes an Abuse of Process of the Court, such that the present matter should not be allowed to proceed.

Conclusion

In light of all the circumstances of the present matter, all the factors highlighted above, and for all the reasons given above, **the Court finds no Merit in Limb 2 of the Plea In Limine Litis, which is therefore not upheld, and the Court upholds Limb 1 of the Plea In Limine Litis, and the present Claim is set therefore aside.**

With Costs.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 06th September 2022]