Munusami v Palmar

2023 IND 5

CN763/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mrs. Rajni MUNUSAMI

Plaintiff

v/s

Palmar Limitée (In Receivership)

Defendant

JUDGMENT

By way of Amended Plaint dated 23-07-19, the Plaintiff is claiming from the Defendant Company **the total sum of Rs941 102. 50/- as Severance Allowance for the termination of her employment without justification by the Defendant Company**, together with Interest at the rate of 12% per annum on the amount of Severance Allowance payable from the date of termination of employment to the date of payment, and such amount by way of compensation for wages lost and expenses incurred in attending Court.

The Defendant Company denied the said Claim in its Plea.

The Proceedings were held partly in English and partly in Creole.

The Case For The Plaintiff

It was the case for the Plaintiff that she was in the continuous employment of the Defendant Company between 07-06-99 and 06-08-18, when she was informed by the Defendant Company that her employment was being terminated on economic ground.

Her request for some time to consider her options was declined, and she was compelled to accept the offer of Rs144 491/- representing Compensation, Refund of Annual Leave, Notice, Bonus Pro Rata and Outstanding Wages, and to sign a *Quittance*.

The Plaintiff considered that she was made to sign the *Quittance* under duress, and that hence the Defendant Company had terminated her employment without justification, and the Plaintiff was thus claiming the total sum of Rs941 102. 50/- as Severance Allowance, together with Interest.

The Plaintiff did not insist on Compensation for wages lost and expenses incurred in attending Court.

Case For The Defendant Company

The Defendant Company's case was to the effect that the Plaintiff's employment was terminated on 06-08-18 on economic ground, and that the Human Resource (hereinafter referred to as HR) Manager and Financial & Administrative Manager of the Defendant Company gave the Plaintiff the reason for the termination of her employment and further informed the Plaintiff that there would be no recruitment at Middle Managerial or Managerial Levels, which included the Supervisory Level of the Plaintiff.

The Defendant Company denied that the Plaintiff had been subjected to any form of duress and/or that the Plaintiff's employment was terminated without justification, and added that the Plaintiff signed the *Quittance* without any indication of protest from her and/or without any duress being exerted on her on behalf of the Defendant Company.

The Defendant Company denied being indebted to the Plaintiff and moved for the Amended Plaint to be set aside with Costs.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the Authority submitted to the Court by the Labour Officer on behalf of the Plaintiff, and to the Submissions and to the Written Submissions made on behalf of the Defendant Company, and to the Caselaw and Materials referred to by Learned Counsel for the Defendant Company.

At the outset, the Court places it on Record that the Judgments of **Rodati v Verenda Leisure & Hospitality Ltd [2020 IND 21]** and **Goder v Sagar Hotels and Resorts Limited [2015 IND 30]** are Judgments of the Industrial Court, are not binding on the present Court, and are of persuasive value only.

The Court notes that the Plaintiff's name as per the Amended Plaint dated 23-07-19 is Rajni Munusami, whereas the following names appear on the following documents:

1) Rajni Munusami on (Docs. P4 and P5) ;
2) Rajini Munusami on the 07 payslips collectively marked (Doc. P1), on both pages collectively marked (Doc. P2), and on (Doc. P3); and
3) Rajni Munisami on the Computation of Average Earnings prepared by Mrs Conhye on 11-10-18 (not marked).

Be that as it may, given the Identity of the Plaintiff was not put in issue in the course of the Proceedings, the Court acts on the basis that Rajni Munusami, Rajini Munusami, and Rajni Munisami are one and the same person, and that all documents produced in the course of the Proceedings relate to the Plaintiff.

The Court has duly considered all the documents produced in the course of the Proceedings:

1) 07 payslips of the Plaintiff collectively marked (Doc. P1);
2) Letter of Termination and *Quittance* (Doc. P2);
3) A Table of the Total Earnings of the Plaintiff (Doc. P3);
4) 01 page of the Register of Complaints (Inspection and Enforcement Section) (Doc. P4);
5) The Employer's Version (Doc. P5 made up of 02 pages); and
6) Computation of Average Earnings of the Plaintiff (not marked).

Applicable Law

The Plaintiff averred that her employment was terminated on 06-08-18, and the applicable Law at the relevant time was the **Employment Rights Act 2008 [Act No. 33 of 2008] as amended (hereinafter referred to as the ERA)**.

Not In Dispute

The following was not in dispute:

1) the Plaintiff was in the continuous employment of the Defendant Company as from 07-06-99;
2) the Plaintiff was working on a 05-day week basis;
3) the Plaintiff was remunerated at monthly intervals at the basic rate of Rs12 410/-;
4) the Plaintiff's employment was terminated on 06-08-18 on economic ground (first page of Doc. P2); and
5) the Plaintiff was paid Rs144 491/- representing Compensation, Refund of Annual Leave, Notice, Bonus Pro Rata and Outstanding Wages, and signed a *Quittance* on 06-08-18 (second page of Doc. P2).

Was The Plaintiff's Employment Terminated Without Justification?

In the present matter, it was common ground between the Parties that the Plaintiff's employment was terminated not due to the Plaintiff's "faute" or misconduct, but on economic ground, that means that *le motif "de licenciement […] [est] non inhérent à la personne de l'employé licencié. Aucune faute ne lui est reprochée, son licenciement est dû à une suppression de son poste pour des motifs* "economic, technological, structural or of a similar nature" (***Introduction Au Droit Du Travail Mauricien – 1/ Les Relations Individuelles De Travail, 2ème édition, Dr. D Fok Kan***).

The relevant provisions as to the Reduction of Workforce are found in **s. 39B of the ERA**, the relevant parts of which are reproduced below:

> **39B. Reduction of workforce**
>
> (1) In this section, "employer" means an employer of not less than 20 workers.
>
> (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.

(3) Notwithstanding this section, an employer shall not reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise unless he has —

(a) in consultation with the trade union recognised under section 38 of the Employment Relations Act, explored the possibility of avoiding the reduction of workforce or closing down by means of—

(i) restrictions on recruitment;
(ii) retirement of workers who are beyond the retirement age;
(iii) reduction in overtime;
(iv) shorter working hours to cover temporary fluctuations in manpower needs; or
(v) providing training for other work within the same enterprise;

(b) where redundancy has become inevitable —

(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and
(ii) give the written notice required under subsection (2).

S. 39B of the ERA therefore placed a statutory duty on an Employer of not less than 20 workers, who intended to reduce the number of workers in his employment either temporarily or permanently or close down his enterprise, to 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.

And where redundancy was inevitable, a list of workers to be made redundant on the basis of the principle of last in first out, was to be submitted to the Permanent Secretary, together the written notice as mentioned above.

In the present matter, the Defendant Company confirmed it had 60 employees in its employment in the Plaintiff's department (Doc. P5) at the relevant time, and in Court, Mr Kirendra Sowanber (hereinafter referred to as the Defendant Company's Representative) confirmed that there were 03 Supervisors (including the Plaintiff) for 50 Employees.

In light of all the above and all the evidence on Record, it has been established that the Defendant Company was an employer for the purposes of **s. 39B(1) of the ERA**, it having more than 20 employees in its employment at the relevant time.

The reason invoked by the Defendant Company for terminating the Plaintiff's employment was "on economic ground" (first page of Doc. P2), and the Defendant Company therefore, in effect, was not only intending to reduce its workforce, but in fact did reduce its workforce by terminating the Plaintiff's employment.

And the Defendant Company admitted from the outset that it had not complied with **s. 39B of the ERA** (Doc. P5).

In light of all the above, all the evidence on Record, and the said unequivocal admission of the Defendant Company, it has been established that the Defendant Company gave no written notice of its intention to reduce its workforce to the Permanent Secretary as statutorily required.

The Defendant Company explained in Court that it had not complied with the Law as the procedure was a lengthy one, taking about 02 to 03 months, that the Ministry would ask for a Financial Status, and that the expenses would keep accruing.

The Court is of the considered view that the reason invoked by the Defendant Company for its said failure is untenable and cannot amount to reasonable cause, for the reasons given below.

First, the requirement for a written notice is understandable in view of the drastic consequences termination of employment entails for any employee, whose livelihood is directly impacted thereby.

"Having regard to principles underlying statutory interpretation, when the words used are unambiguous the clear intention of the legislator must be put into effect for the legislator does not legislate in vain." (**Curpen v The State** [2008 SCJ 305])

The word "shall" has been used in **s. 39B(2)(3) of the ERA**, and the said word may be read as imperative, pursuant to **s. 5(4)(a) of the Interpretation And General Clauses Act (hereinafter referred to as IGCA)**.

The Court is of the considered view that the words use in **s. 39B of the ERA** are clear and unambiguous, and indicate clearly the intention of the Legislator to make such procedure mandatory.

The importance of such procedure is spelt out in no uncertain terms in the following extract from the Authority of **COPRIM Ltée v Menagé** [2006 PRV 42]:

> 21. First, the Board recalls that the notification requirement in section 39(2) is no mere formality, but is the key to the system under which the Termination of Contracts of Employment Board considers the proposals of an employer to reduce the size of his workforce. If the Termination Board finds that the reduction is not justified, the employer is then bound to pay a sum equal to 6 times the severance allowance or to reinstate the worker in his former employment: section 39(6). That whole system would be rendered ineffective, if a failure to notify the Minister did not carry with it a sanction that was potentially as onerous for the employer as the possible outcome of any consideration by the Termination Board of his proposed reduction in his workforce. The exception, "unless good cause is shown," must therefore be interpreted and applied in such a way as not to undermine that important sanction in section 39(5).

The Court is alive to the fact that the said Authority of **COPRIM (supra)** related to the now repealed **Labour Act**, whereas the present matter is under the **ERA**, but the Court is of the considered view that the philosophy and rationale underlying the **Labour Act** are similar to the ones underlying the **ERA**, and that the wording of **s. 39 of the Labour Act** is close to the wording to the wording of **s. 39B of the ERA**, and that hence the principles set out in the said Authority of **COPRIM (supra)** apply *mutatis mutandis* to the present matter under the **ERA**.

True it is that the Plaintiff confirmed that she was the Junior most at the Supervisor level, and hence was the last in, and ought to be the first out, and it may be that redundancy had become inevitable, but the Defendant Company was still under an obligation to comply with the Law, and was under a statutory obligation to establish the list of worker/s who was/were to be made redundant and the order of discharge on the basis of the principle of last in first out and give the written notice as required by Statute.

Second, although the Defendant Company invoked "economic ground" as the reason for terminating the Plaintiff's employment, by its own admission, it recruited other workers at the relevant time (Doc. P5), albeit not at the same level as the Plaintiff.

And third, the Plaintiff signing the *Quittance* (Doc. P2) cannot avail the Defendant Company, as the procedure adopted by the Defendant to terminate the Plaintiff's employment was defective *ab initio*.

In light of the above, there is no need for the Court to address the issue of whether the Plaintiff signed the said *Quittance* under duress or not.

In light of all the above and all the evidence on Record, the Court is of the considered view that it has been established that the Defendant Company did not comply with **s. 39B of the ERA**, has shown no reasonable cause to justify such failure to comply with the said section, and has thus reduced the number of workers in its employment permanently in breach of **s. 39B(2)(3) of the ERA**.

In light of all the above and all the evidence on Record, pursuant to **s. 39B(11) of the ERA**, the Defendant Company is to pay to the Plaintiff a sum equal to 30 days' remuneration in lieu of notice together with Severance Allowance as per **s. 46(5)(d)(i)(ii) of the ERA**, as follows:

1) a sum equivalent to 03 months' remuneration for the period 07-06-99 to 06-06-18 (i.e. 19 years of continuous employment); and
2) a sum equal to one twelfth of the sum above multiplied by 02 months (i.e. 07-06-18 to 06-08-18),

less Rs144 491/- (Doc. P2).

s. 2 of the ERA defines "remuneration" as follows:

> "remuneration" –
>
> (a) Means all emoluments, in cash or in kind, earned by a worker under an agreement;
> (b) Includes –
> (i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work;
> (ii) any money to be paid to a job contractor, for work, by the person employing the job contractor; and
> (iii) any money due as a share of profits.

And in the **ERA**, "emoluments" is not specifically defined in the Interpretation section, but in relation to **Part IX of the ERA**, emoluments received by the worker exclude any bonus or overtime as per **s. 40(a) of the ERA**.

The Court is alive to the fact that the present matter is not concerned with **Part IX of the ERA**, but is also of the considered view that had it been the intention of the Legislator for "emoluments" to include any bonus or overtime for the **ERA** generally, this would have been clearly spelt out (**Curpen (supra)**).

In the present matter, the Plaintiff produced 07 payslips (collectively marked as (Doc. P1), and the Court has noted the Computation of Average Earnings (not marked) produced by the Plaintiff's Witness.

It would not be in order for the Court to compute the emoluments of the Plaintiff for the last year of employment in the absence of all the payslips for the relevant period, and cannot act on the basis of the Computation of Average Earnings (not marked) produced by the Plaintiff's Witness, in the absence of any documentary evidence in support thereof, for the months August 2017 to December 2017.

Now, the basic monthly salary of the Plaintiff is not in dispute, and has been established by the payslips (Doc. P1) produced by the Plaintiff herself, and the Court acts on the basis that the Plaintiff's basic monthly salary was Rs12 410/- (Doc. P1).

In view of the Court's observations above as to the meaning of "emoluments", the Court is of the considered view that overtime and bonuses, whether special or otherwise, cannot be considered as forming part of the "emoluments" of the Plaintiff.

The Court therefore does not take into consideration for the calculation of the Plaintiff's remuneration, the amount of Rs620. 50/- paid to the Plaintiff between January and July 2018 (all payslips of Doc. P1).

Further, this amount varies for August, September, and October 2017 and does not appear for December 2017.

In the circumstances, it has not been established that the said amount formed an integral part of the Plaintiff's monthly emoluments.

The Court notes that the Refund of Local Leaves, Public Holiday, Cyclone, the Travelling, and a payment described in the payslips (Doc. P1) as "065 Pay adj+ve", and the Meal Allowance, only appear randomly.

In light of all the above, the Court is of the considered view that it has not been established that the said items of payment formed an integral part of the Plaintiff's monthly remuneration.

In light of all the above, the Court only takes into consideration the Plaintiff's basic salary as remuneration for the calculation of the Severance Allowance payable in the present matter, as this is the only amount which has been substantiated (Doc. P1) and was not in dispute.

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 finds that the Plaintiff's employment was terminated in breach of

s. 39B(2)(3) of the ERA, and pursuant to **s. 39B(11) of the ERA**, **the Defendant Company is ordered to pay to the Plaintiff:**

1) a sum equal to 30 days' remuneration in lieu of notice

Rs12 410/-

2) together with Severance Allowance as per **s. 46(5)(d)(i)(ii) of the ERA**, as follows:
   a) a sum equivalent to 03 months' remuneration for the period 07-06-99 to 06-06-18 (i.e. 19 years of continuous employment equivalent to 228)

Rs12 410/- x 03 months x 228/12 = Rs707 310/-

   b) a sum equal to one twelfth of the sum above multiplied by 02 months (i.e. 07-06-18 to 06-08-18)

+ Rs707 310/- / 12 = 58942.5 x 02 months = 117 885/-

Rs837 605/-

(Rs144 491/-) (Doc. P2)

Rs693 114/-

Pursuant to **s. 46(11)** of the **ERA**, the Court has a discretion as to any award for Interest on the amount of Severance Allowance payable (**Ramnarain v International Financial Services Ltd [2021 SCJ 35]**).

The Court is of the considered view that in the circumstances of the present matter, Interest at the rate of 05% per annum on the said amount of Severance Allowance would be fair, and **the Defendant Company is therefore ordered to pay to the Plaintiff 05% Interest per annum on the amount of Severance Allowance only (i.e. Rs825 195/- only), payable from the date of the present Judgment to the date of final payment**.

The Plaintiff not having insisted in the loss of wages and expenses incurred in attending Court as per paragraph 4(b) of the Amended Plaint, the Court makes no Order in relation to same.

With Costs.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 24 January 2023]