

Veerasamy S. v Mauritius Educational Development Co Ltd

2021 IND 7

Cause Number 247/17

IN THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:

Mrs. Soopamah Veerasamy

Plaintiff

v.

Mauritius Educational Development Co Ltd

Defendant

Ruling

The averments of Plaintiff in this plaint are as follows:

1. Plaintiff was in the continuous employment of Defendant as Educator since January 1970. She was employed on a 5 - day week basis.

2. Her remuneration was at monthly intervals at the terminal rate of Rs. 44,170/- a month. She retired on 11.07.11 upon attaining her retirement age, her date of birth being 11.01.50.
3. She was a member of the Profit – Making Private Secondary Schools Teaching Staff Pension Scheme which commenced on 1.1.87 and which was as from 1.7.03, merged under the Private Secondary Schools Staff Pension Scheme (PSSSPS), managed by the State Insurance Company of Mauritius Ltd (SICOM).
4. She joined the PSSSPS as from December 1989. For period December 1989 to June 2011, out of the total contributions made to the PSSSPS, her share of contributions amounted to Rs. 308,257.85 whilst that of the PSSA, on behalf of Defendant, was Rs.687,540.38. For pension purposes, as per the rules of the PSSSPS, the reckoned pensionable service prior to 1 January 1987 equals to half of service as from age 27 whilst as from 1 January 1987 till date of retirement, full service is reckoned.
5. At her retirement she was, therefore, paid by SICOM a gratuity of Rs.977,262 and a reduced monthly pension of Rs. 15,859.25. In accordance with Section 49(2) of the Employment Rights Act, she was entitled to be paid by Defendant a Gratuity on Retirement calculated on the basis of 15 days' remuneration for every period of 12 months' continuous employment less the statutory deductions allowed under Section 49(3), that is, half the amount of the gratuity paid and five times the amount of the annual pension granted, computed by reference only to the employer's share of contributions.
6. Defendant failed to pay her the balance due on Gratuity on Retirement.
7. Plaintiff is, therefore, claiming from Defendant the sum of Rs. 63,227.32 representing balance of Gratuity on Retirement.

Learned Counsel Q.C. appearing for the Defendant has put in a plea in *limine* which is as follows:

- (a) The claim of the Plaintiff is time barred.
- (b) The claim cannot be entertained as the Plaintiff's conditions of employment are governed by the Pay Research Bureau.

- (c) The Employment Rights Act does not apply to employments before the commencement of the Act.

The plea in *limine* was resisted. The matter was fixed for arguments and in the course of which the first limb was dropped meaning the issue of time bar by learned Counsel Q.C. appearing for the Defendant.

The main thrust of the argument of learned Counsel Q.C. for the Defendant is that the present claim cannot be entertained as the conditions of employment of Plaintiff being a retired teacher working for Defendant were governed by the PRB report. Therefore, for that purpose, Plaintiff will have to show that under the PRB Report that she is entitled to the claim. The answer is no because the claim is based on its statutory provision which is not part of the PRB Report. Moreover, the Employment Rights Act 2008 under which this claim is brought does not apply to the case of the Plaintiff, as she was employed before the commencement of the Act and there is a provision in the Employment Rights Act to that effect namely Section 71(1) where it says that the terms and conditions on which a person was employed immediately before the commencement of this Act, shall continue unless the worker and the employer agree otherwise. The conditions were agreed before the commencement of this Act and it does not apply unless the Plaintiff can prove that there has been an agreement specifically to the effect that it shall be binding on Defendant and there is nothing like that. So, in the circumstances, he has moved that the case be dismissed as it is legally not possible to carry on with it.

The main thrust of the argument of learned Counsel for the Plaintiff is that it is common ground that the Plaintiff's conditions of employment are governed by the PRB report and the Plaintiff has admitted in her answer to question 3 of Defendant's demand of particulars. It is nonetheless submitted that Section 49 of the Employment Rights Act 2008 on gratuity on retirement is applicable as Section 3(2)(a) of the Act is not applicable. According to Section 49(1), Section 49 establishes a statutory requirement to pay gratuity on retirement. That is not a term and condition of the Plaintiff's contract, but it is a statutory liability on the Defendant. It cannot be said that because Plaintiff was employed before the coming into operation of the Employment Rights Act 2008, gratuity on retirement was not part of Plaintiff's terms and conditions of employment, it should not be applicable now. This is not a claim for remuneration, this is a claim for a statutory liability which is owed to the Plaintiff, that is, gratuity on retirement. Plaintiff retired on 11 July 2011 and Section 3(2)(a) of the Employment Rights Act 2008 does not apply as Defendant is not a statutory

body, it is not a body created by statute. Section 3(2)(a) of the Act being inapplicable, this provision does not operate to oust the applicability of the general provisions of the Act and it follows from there that Section 49 on gratuity on retirement is applicable. Section 71 of the Act contains only transitional provisions. He contended that according to Section 16(4) of the Private Secondary Education Authority Act (and that Section being the same as the then PSSA Act) that although the emoluments were paid directly to the Plaintiff by the Authority, the latter shall not be regarded as the employer of Plaintiff by reason of the payment of the emoluments to her but the secondary or pre - vocational school shall always remain the employer of Plaintiff and shall in relation to the Plaintiff be responsible for matters of promotion and supervision. So, Defendant remains the employer and is not a statutory body. Section 3 (2)(a) being inapplicable, therefore, Section 49 in relation to gratuity on retirement is applicable. The relevant date is not the date of commencement of the employment but it is the date on which the Plaintiff retired. Plaintiff retired in 2011 after the commencement of the Act and, therefore, as at the date Plaintiff retired, Section 49 was applicable and the employer is liable for gratuity on retirement.

I have given due consideration to the arguments of both learned Counsel put forward before me. It is common ground that the Plaintiff's conditions of employment are governed by the report of the Pay Research Bureau meaning the PRB report which is supported by Plaintiff's admission in her answer to question 3 of Defendant's demand of particulars. I find it relevant to reproduce question 3 of the demand of particulars and its corresponding answer as follows:

“Q.3. Was the Plaintiff's terms and conditions of employment governed by the Pay Research Bureau?”

A.3. Yes.”

This leads me to consider the important issue as to whether the Employment Rights Act 2008 applies in the present case. Pursuant to Section 3(2)(b) of the Employment Rights Act 2008, this Act shall not apply to *“a worker of a statutory body who is governed by the recommendations made by the Pay Research Bureau, (...)”* except for the other Parts which are not our concern for the purposes of the present case.

As rightly pointed out by learned Counsel for the Plaintiff, the Defendant is not a statutory body meaning a body created by statute. Therefore, it is clear that the present matter does not fall within the prohibition of Section 3(2)(b) of the Employment Rights Act 2008 so that Section 49 of the Act would find its application.

Now, the question which calls for consideration is whether the Employment Rights Act 2008 applies given that at the time the Plaintiff was employed, the Act was not in operation. It is imperative to note that in the present case, it is not a claim for a balance of items of remuneration but of a balance of gratuity on retirement. Had it been a claim for a balance of items of remuneration, then the relevant date would have been the time of employment of Plaintiff and in that respect, Section 71(1) of the Employment Rights Act 2008 which is a transitional provision would have been applicable which reads as follows:

“71. Transitional Provisions

(1) The terms and conditions on which a person was employed immediately before 2 February 2009 shall continue, unless the worker and the employer agree otherwise.”

At this stage, I deem it appropriate to reproduce the provisions of Section 49 of the Act which renders the employer liable to pay gratuity to the Plaintiff on retirement. The right of the Plaintiff to that payment is at the time of retirement given the operating words under Section 49 are “*Gratuity on retirement*” so that in the present case, the relevant date is the date of retirement namely 11 July 2011 and on which date the Employment Rights Act 2008 was in force.

Section 49 of the Employment Rights Act 2008 reads as follows:

“49. Gratuity on retirement

(1) An employer shall pay a gratuity to a worker who has been in continuous employment with him for a period of 12 months or more where –

(a) the worker, on or after attaining the age of 60, retires voluntarily.

(b) (...)

(c) The worker, on or after attaining the retirement age, retires at the request of the employer.”

Therefore, it is plain enough that for the purposes of a gratuity on retirement which is a statutory obligation imposed on the employer at the time of retirement of the employee by virtue of Section 49(1) of the Act, the proposition that because Plaintiff was employed before the coming into operation of that Act, gratuity on retirement was not part of Plaintiff's terms and conditions of employment cannot be

successfully invoked. Indeed, I endorse what learned Counsel for the Plaintiff submitted because, it would mean then that all workers who have started working before the coming into operation of the Employment Rights Act 2008, they would not be entitled to gratuity on retirement and which is not the intention of the Legislator. Obviously, this interpretation would lead to an absurd result and cannot stand. The plain literal meaning of the provisions of Section 49 is to be applied namely "*Gratuity on retirement*" in the present case and gratuity on retirement is payable from the moment Plaintiff retires which is on 11 July 2011 and at that particular point in time, the Employment Rights Act 2008 was in force and is to be applied.

Now, Plaintiff in spite of being a teacher meaning an educator who was paid by the Private Secondary Education Authority, Defendant is regarded as employer of Plaintiff pursuant to Section 16(4) of the Private Secondary Education Authority Act which is the same as the former Section 16(4) of Private Secondary Schools Authority Act (PSSA Act) and which reads as follows:

"16. Emoluments to teachers

(4) Notwithstanding any other enactment, where the emoluments of a member of the staff are paid directly to him by the Authority –

(a) the Authority shall not be regarded as the employer of that person by reason of the payment of the emoluments to him;

(b) the secondary or pre-vocational school shall always remain the employer of that person and shall, in relation to that person, be responsible for matters of promotion and supervision;"

Therefore, the secondary or pre-vocational school shall always remain the employer of that person and shall in relation to that person be responsible for matters of promotion and supervision as rightly pointed out by learned Counsel for the Plaintiff so that as per statute, the Defendant is the employer of the Plaintiff although that Defendant is not a statutory body.

For all the reasons given above, I do not uphold the plea in *limine* which is set aside.

This case is fixed *proforma* on 29 December 2021 for both learned Counsel to suggest common dates for trial.

S.D. Bonomally (Mrs.) (*Vice President of Industrial Court*)

15.12.21