IN THE SUPREME COURT OF SEYCHELLES

Denis Island Development Limited,
Revolution Avenue, Victoria Petitioner
Vs
Minister for Employment and Social Affairs of

Unity House, Victoria Respondent

Civil Side 348 of 2002

Mr. B. Georges for the petitioner

Ms. F. Laporte for the respondent

D. Karunakaran, J.

JUDGMENT

The petitioner in this matter seeks this Court for a writ of *certiorari to* quash the decision of the Respondent - the Minister for Employment and Social Affairs - dated 24th September 2002, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by article 125(1) (c) of the Constitution.

The Petitioner Denis Island Development Limited is a company registered in Seychelles. It is the owner of Denis Island and running a hotel thereon. Besides, it is also engaged in agricultural activities on the Island. In 2001, the Petitioner had employed a Mauritian national one Mr. Michel Lindsay Bell to work as a gardener on the said Island on a two-year contract of employment commencing from 11th May 2001. His wife, Mrs. Marlene Bell, hereinafter referred to as the "claimant" also accompanied her husband to Seychelles as he took up his employment, and started residing with him on the Island. According to the claimant, during her stay on the Island, she had also been employed by the petitioner, as a Chambermaid in the hotel. However, the petitioner subsequently terminated her from employment without paying her the salary dues

and other legal benefits payable to her upon such termination. Hence, she initiated the "grievance procedure" before the Competent Officer of the Ministry of Employment, under the provisions of the Employment Act 1995, hereinafter referred to as the Act. Upon conclusion of the said "grievance procedure", the Competent Officer, in his determination dated 6 June 2002, held that:

(i) The claimant (Mrs. Marlene Bell) had been employed by the petitioner;

(ii) She was unfairly dismissed by her employer (the petitioner); and

(iii) Consequently, she was entitled to all legal benefits based on a salary scale of EP20; and

(iv) The Petitioner should therefore, pay her a total sum of Rs.22, 723.92, which sum is made up as follows:

One month's notice	*Rs. 2,000.00*
17.5 days accrued leave	*Rs. 1,150.00*
10 days compensation	*Rs. 769.00*
Salary from 18th June 2001 to 15th April 2002	*Rs.20,000.00*
Less 5% social security	*(Rs. 1 196.96)*
Balance to be paid	***Rs.22,723.27***

The Petitioner being aggrieved by the said determination of the Competent Officer appealed against it to the Respondent, the Minister for Employment, pursuant to Section 65 of the Employment Act. After having consultation with the Employment Advisory Board (EAB) that heard the appeal, the Minister in his Ruling dated 24 September 2002, dismissed the said appeal, confirmed the determination of the Competent Officer and directed the petitioner to pay the said sum Rs.22, 723. 27 to the claimant.

Now, the Petitioner being dissatisfied with the Ruling of the Minister, has come before this Court for a "Judicial Review" of it, alleging that the said "Ruling" is *ultra vires* and

unreasonable. It is *ultra virus* because the Minister, in the absence of any written contract of employment and Gainful Occupation Permit, made a de facto "contract of employment" for the parties exceeding the statutory powers conferred on him by the Act. Moreover, it is unreasonable because the Minister in making that Ruling considered the irrelevant facts and ignored the relevant ones from his consideration.

According to the petitioner, the irrelevant facts, which the Minister took into consideration, are these:

(i) The Minister in his decision considered the entry of the claimant's name in the duty roster as evidence of her employment whereas she was not an employee of the petitioner, but was simply working as a substitute to make up for her husband's inability to work as he was sick during that period.

(ii) In the absence of any evidence to ascertain the amount of salary the Minister in his consideration assumed the salary at Rs2, 000/- per month without any basis, and held that the claimant would be entitled to that amount of salary per month.

The petitioner has further averred in the petition that relevant facts, which the Minister ignored from his consideration, are these:

(i) There was no complaint by the worker that she had not been paid salary for ten consecutive months.

(ii) A worker, who was not paid any salary for several months' work, will not continue to work as the claimant allegedly did, after her returning from Mauritius.

Petitioner's counsel Mr. B. Georges submitted - in essence - that in the absence of any written contract of employment between the alleged employer and the claimant and in the absence of any Gainful Occupation Permit, the Minister in his decision, made on his own a de facto "contract of employment" for the parties. Furthermore, the Minister went ahead to fix the wages to the claimant under such contract that never existed. According to Mr. Georges, the Minister has no power under the Act to make any contract of employment for the parties. In this respect, therefore, he has acted *ultra vires* that is, gone beyond the appellate powers conferred on him

under the Act. Besides, Mr. Georges submitted that the statutory powers conferred on the competent officer and the Minister by the Act, are limited only to the granting of compensation or to the reinstatement of employment. If a person claims that he is entitled to damages because he had a de facto contract then, he must come before the Court of law for a suitable remedy. The Minister has no jurisdiction to determine the question of de facto contract of employment. Therefore, the Ruling given by the Minister relying on a "de facto contract" is *ultra vires*. Hence, he prayed the Court to quash the Ruling of the Minister.

Moreover, Mr. B. Georges argued that the decision of the Minister is unreasonable and irrational since he has - through EAB - not only considered the irrelevant factors, but also has ignored the relevant ones, which he ought to have taken into consideration.

Mr. B. Georges in support of his contention submitted that although it is logical to infer from the duty-roster that the claimant had worked as a chambermaid, however, it is wrong for the Minister to assume that Mrs Bell had a separate contract of employment with the petitioner, when there was none. The petitioner argued before the Minister that the claimant was working simply as a substitute for her husband. Nevertheless, the Minister rejected that argument taking two irrelevant factors into consideration, in this respect. They are (i) the claimant had worked with the petitioner-company (ii) her name appeared in the duty-roster. Having thus given irrelevant consideration, according to Mr. Georges the Minister used these two factors so as to reach a decision in favour of the claimant. Moreover, Mr. B. Georges submitted that the Minister also took another irrelevant factor into consideration namely, that the claimant was paid a monthly salary of Rs2000/- , whilst there was no evidence at all, plucking this figure out of the air and applied to the case awarding salary to the claimant.

Further, it is the contention of Mr. Georges that the Minister failed to take into consideration the fact that the claimant never demanded any salary for her ten months of service. According to Mr. George, the claimant basically claimed "I worked for 10 consecutive months, I was not paid and I never claimed any salary". Mr. Georges also contended that no worker whether a Seychellois or a Mauritian for that matter, will work for 10 months without claiming any salary or a pay slip, and without any complaint. Obviously, the claimant was not telling the truth in this respect. This,

counsel submitted is relevant factor, which the Minister failed to consider in reaching his decision.

For these reasons, according to the petitioner, the Ruling of the Minister dated 24 September 2002 is *ultra vires* and unreasonable. Therefore, the petitioner seeks the Court for a writ of *certiorari* to quash the said Ruling and render justice.

On the other hand, the respondent denies all the allegations made by the petitioner in this matter. According to the respondent, the decision of the Minister is neither *ultra vires* nor unreasonable. The Minister has reached a reasonable decision within his power, which any other reasonable Tribunal could have reached in the given set of facts and circumstances surrounding the instant case.

Ms. F. Laporte, learned counsel for the respondent submitted that the central issue before the competent officer as well the Minister that required determination was whether the claimant had been in employment or not. The existence or otherwise of a valid contract of employment was not in issue before them. Therefore, the competent officer as well as the Minister had jurisdiction and so rightly determined that issue of employment within the powers conferred on them by the Act. Further, Mrs. Laporte pointed out that from the record of the proceedings before the EAB - at page 1 paragraph 4 - that the petitioner has clearly admitted that Mrs. Bell was in employment and was working as chambermaid with the petitioner-company. Therefore, the Competent Officer undoubtedly, had jurisdiction to determine the case. On the question of substituting the wife for the job in the place of her husband, Ms. Laporte submitted thus (in verbatim)

> *"My Lord, also on that issue of substituting for her husband, who was employed as a gardener and from the roster the respondent was a chambermaid, I would fail to understand how one can substitute for someone else and then at the end of the day, still not paid"*

Further, Ms. Laporte contended that the claimant worked for 10 consecutive months, from 18th June 2001 to 15th April 2002. She worked consecutively, not on a casual basis because any worker even on a casual basis if employed exceeding 21 days in a month, then that worker is

deemed to be employed on a "consecutive employment". Therefore, the petitioner cannot even argue that she was employed as a casual labourer.

Moreover, Ms. Laporte argued that the petitioner being an employer is under an obligation to keep the record of payments of wages to any worker. If the employer is not able to produce those records of wages and the like, and if there is any doubt as to the terms of employment after the services have been rendered, and if such doubt cannot be resolved by evidence, then the parties shall be deemed in law, to have agreed upon reasonable terms, having regard to the surrounding circumstances of the case. Particularly, in the present case, the Competent Officer fixed and subsequently the Minister confirmed the salary at a reasonable figure of Rs2000/- per month, based on an indication given by the petitioner.

Further, the respondent contended that since the question as to employment and salary of the claimant was raised before the Competent Officer, it was a relevant issue in the appeal. Hence, the Minister rightly took them into consideration in his decision. In fact, there was evidence on record before the Minister to the effect that:-

(i) The employee had an agreement with the petitioner for her services and the fact that she was working to make up for her husband's inability to work was never made an issue before the Competent Officer. She worked in the house keeping department whereas her husband was employed as a gardener.

(ii) Rs 2000/- per month as salary is reasonable having regard to the surrounding circumstances and local practice and that issue was raised before the Competent Officer.

(iii) The employee made no complaint in respect of her salary because she thought that her salary was being transferred to her bank account in Mauritius. The Respondent further avered that there were no money transactions between the employee and the Petitioner.

In these circumstances, Ms. Laporte submitted that the Minister did not act *ultra vires* in making his decision, which is reasonable having regard to all the circumstances of the case. Hence, she urged the Court to dismiss the petition.

I meticulously perused the records received from the Ministry of Employment in this matter. I gave a careful thought to the arguments advanced by both counsel touching on points of law as well as facts. From the essence of their arguments arise two fundamental questions for determination in this case. They are:

(i) Is it *ultra vires* for the Minister to make a contract of employment with implied terms - in the absence of a written one - and assume jurisdiction under the Act basing upon "employer-employee relationship" between the parties?

(ii) Is the decision of the Minister confirming the determination of the Competent Officer in this matter, unreasonable having regard to all the circumstances of the case?

Firstly, I would like to restate here what I have stated in ***Cousine Island Company Ltd Vs Mr. William Herminie, Minister for Employment and Social Affairs and Others - Civil Side No. 248 of 2000.*** Whatever is the issue factual or legal that may arise for determination as a result of the arguments advanced by counsel, the fact remains that this Court is not sitting on appeal to examine the facts and merits of the case heard by the Competent Officer or the Minister on appeal. Indeed, the system of judicial review is radically different from the system of appeals. When hearing an appeal the Court is concerned with the merits of the case under appeal. However, when subjecting some administrative act or order to judicial review, the court is concerned only with the "legality", "rationality" (reasonableness) and "propriety" of the decision in question *vide the landmark dictum of Lord Diplock in Council of Civil Service Union Vs Minister for the Civil Service (1985) AC 374*. On an appeal the question is "right or wrong"? - Whereas on a judicial review the question is "lawful or unlawful?" or "reasonable" or "unreasonable"?

On the issue of legality, I note, the entity of law is always defined, certain, identifiable and directly applicable to the facts of the case under adjudication. Therefore, the court may without much ado determine the issue of "legality" of any administrative decision, which indeed, includes the issue whether the decision-maker had acted ***ultra vires*** the statutory powers, by applying the litmus test, based on *an objective assessment* of the facts involved in the case. On the contrary, the entity of "reasonableness" cannot be defined, ascertained and brought within the parameters of law; there is no litmus test to apply, for it requires *a subjective assessment* of the entire facts and circumstances of the case under consideration, made in the light of human reasoning and rationale.

Since, the first question (supra) as to *"ultra vires",* relates to the issue of "legality" of the impugned decision, one should examine what power or discretion has been conferred on the Minister or the Competent Officer under the Act and has it been exceeded?

The starting point in this exercise is the interpretation of the words used in the enabling legislation namely, the Act, which empowers the decision-maker and defines his jurisdiction. In this regard, Section 4(3) of the Act reads thus:

> *"Where provision is made under this Act for the hearing and determination of any matter in relation to a contract of employment of which this Act applies, any remedy or relief granted under the Act in respect of that matter shall, subject to the jurisdiction of the Supreme Court, be binding on the parties to the hearing or determination"*

Section 2 of the Act inter alia, defines the "employer" and the "worker" thus:

> *"Employer" means a person having a worker in the employ of that person; and*
> *"Worker" (employee) means a person of the age 15 years and above in employment in Seychelles or employed in Seychelles for service.*

Indeed, it is not in dispute that the petitioner-company was having the claimant in the employ of that company. The petitioner had been maintaining the claimant's name in its duty roster of its workers. The claimant had been performing services of chambermaid subject to the will and control of the petitioner, which admittedly obtained services from her. What else then, could be the nature of relationship between them, if not that of an employer-employee?

In fact, under the common law rules, every individual who performs services for another subject to the will and control of latter, both as to what shall be done and how it shall be done, is an employee of the latter. It does not matter that the employer allows the employee to work without a proper contract of employment or a GOP or takes that employee as a substitute for another, as long as the employer has the legal right to control both the method and the result of the services and as such obtains such services from that worker, then he is an employer and the one who perform services is the employee in the eye of law. In the instant case, the petitioner obviously, had that legal right and obtained the services of chambermaid from the claimant. If an employer-employee relationship exists in a case, it does not matter what the parties call that relationship contractual or otherwise. It does not matter whether it is called a *de facto* contractual relationship or *de jure* one. It does not matter if the employee is called as an agent, or a substitute for husband or wife. It does not matter how the pay is measured, how the individual is paid, or what the payments are called or where the payments are made. Nor does it matter whether the individual works full-time or part-time. Hence, as I see it, the Competent Officer as well as the Minister rightly found that the parties had "employer-employee" relationship and assumed jurisdiction to determine the grievance registered under the Act.

Having said that, section 4(3) of the Act quoted supra undoubtedly empowers the Competent Officer as well as the Minister for the *hearing and determination of <u>any matter in relation to a contract of employment</u> of which the Act applies.*

The issue as to "employer-employee relationship" is a matter, which obviously relates to a contract of employment to which the Act applies as contemplated under section 4(3) above. In the proceedings below, the Minister has therefore rightly examined the facts of the case as to his powers and jurisdiction and has determined the issues that fell well within his powers under the Act. In the circumstances, I hold that it is not *ultra vires* for the Minister to make a contract of employment with implied terms - in the absence of a written one - and assume jurisdiction under the Act, basing upon "employer-employee relationship", which he found between the parties. Thus, I find answer to the first fundamental question in the negative.

In my considered view, therefore, the only prerequisite for the Competent Officer or the Minister for that matter to assume jurisdiction on any employment dispute under the Act, is the existence of "employer-employee relationship" between the parties. Nothing less and nothing more is required. As I see it, the existence or non-existence of a proper "contract of employment" either written or oral between the parties is immaterial as far as the question of jurisdiction is concerned.

I will now, turn to the second issue as to "reasonableness" of the decision in question. What is the test the Court should apply in determining the reasonableness of the impugned decision in matters of judicial review?"

First of all, it is pertinent to note that in determining the reasonableness of a decision one has to invariably go into its merits, as formulated in ***Associated Provincial Picture Houses V Wednessbury Corporation [1948] 1 KB 223.*** Where judicial review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review. The merits and legality of the decision in such cases are intertwined. Unreasonableness is a stringent test, which leaves the ultimate discretion with the judge hearing the review application. To be unreasonable, an act must be of such a nature that no reasonable person would entertain such a thing; it is one outside the limit of reason (Michael Molan, Administrative Law, 3 Edition, 2001). Applying this test, as I see it, the court has to examine whether the decision in question is unreasonable or not.

At the same time, here one should be cautious in that, the "Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Thus, the judicial review is made effective by the court quashing an administrative decision without substituting its own decision and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer." ***Per Lord Fraser Re Amin. [1983] ZAC 818 at 829, [1983] 2 All E R864 at 868, HL.***

In determining the issue of reasonableness of the decision in the present case, the court has to make *a subjective assessment* of the entire facts and circumstances of the case and consider whether the decision of the Minister is reasonable or not. In considering reasonableness, the duty

of the decision-maker is to take into account all relevant circumstances as they exist at the date of the hearing that he must do in what I venture to call a broad commonsense way as a man of the world, and come to his conclusion giving such weight, as he thinks right to the various factors in the situation. Some factors may have little or no weight; others may be decisive but it is quite wrong for him to exclude from his consideration matters, which he ought to take into account ***per Lord Green in Cumming Vs. Jansen (1942) 2 All ELR at p656.***

In my considered view, the Minister in his decision has rightly considered the entry of the claimant's name in the duty roster as evidence of her employment with the petitioner-company. Obviously, the petitioner's contention to the contrary, stating that she was not an employee but was simply working as a substitute to make up for her husband's inability is highly farfetched, as her husband had been employed admittedly, as a gardener, whereas the claimant has been employed as a chambermaid. Besides, it is also unlawful, if not deplorable for an employer to do so as we no longer live in an age of bonded- family-labor and womanhood without status because of marriage to a man. Since the coming into force of the Status of Married Woman Act in 1948, no married woman in this land is under any legal obligation or otherwise to lose her identity as a *feme sole* and work as a substitute for her husband in the place of his work, whenever the man falls sick or to make up for her husband's inability. In fact, a married woman on her own as an individual shall be capable of entering into, and rendering herself and being rendered liable in respect of and to the extent of her separate property on any tort, contract, debt or obligation, and of suing and being sued either in contract or in tort or otherwise, in all respects as if she were a *feme sole*. ***See, Section 4(2) of the Status of Married Woman Act.***

In the absence of any evidence to ascertain the terms of any contract of employment, it is indeed, lawful for any adjudicating authority to imply terms that are reasonable having regard to the surrounding circumstances of the case and local practice. This is evidence from Article 1781 of the Civil Code of Seychelles reads thus:

> "*The terms upon which a person binds himself to give services shall be settled between the parties. If there is any doubt as to the terms after the services have been rendered and this doubt cannot be resolved by any evidence, the parties shall be deemed to have agreed to reasonable terms having regard to the surrounding circumstances and local practice.*

Hence, I find the Minister in his consideration rightly and lawfully confirmed the salary at Rs2, 000/- per month, which figure was actually, suggested by the petitioner in the proceedings before the Competent Officer in that Mr. Georges has stated a chambermaid's salary normally varies from Rs2000- to Rs 2500/- per month based on experience and qualifications.

As regards the claim of salary for 10 consecutive months, it is evident from the "Registration of Grievance Form" duly filled in and signed by the claimant, that she has made a claim of salary for a period of 10 months from 18th of June 2001 to 15th of March 2002. Hence, it is not correct for the petitioner to allege that there was no complaint by the worker before the Ministry, that she had not been paid salary for ten consecutive months. This is a relevant factor, which decision-maker has carefully considered in computing the salary dues.

Obviously, no tribunal can be expected to rely and act upon any surmise or conjecture speculating that a worker, if not paid salary for several months' work, will not continue to work as the claimant allegedly did in this case, after her return from Mauritius. Individuals differ in their response to the same type of situations. Especially, in this particular case, one has to take into account the entire circumstances of the claim made by the worker ion respect of her salary due. Firstly, the employer had been in the practice of depositing the salaries of the worker's husband in his bank account in another country. The worker had been employed and given accommodation on the Island. Besides, had the payments of salary been made to the worker, the employer in the normal course of business, should have produced the relevant documents or books of accounts to prove those payments, de hors the fact that the legal burden lies on the employer to prove the payments or the performance, which has extinguished its obligation in terms of Article 1315 of the Civil Code of Seychelles. In the absence of such proof, the Minister has rightly and reasonably awarded salary for 10 consecutive months as claimed by the worker. In the circumstances, I find that the Minister in his decision has taken into consideration all relevant factors, which he ought to take into account and has rightly excluded the irrelevant ones from his consideration.

For the reasons stated hereinbefore, I hold that that the "Ruling" of the Minister dated 24 September 2002 in this matter, is neither *ultra vires* nor *unreasonable.* Therefore, I decline to grant the writ of certiorari and dismiss the petition accordingly. I make no orders as to costs.

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D. Karunakaran

Judge

Dated this 28th day of November 2007