IN THE SUPREME COURT OF SEYCHELLES

Cap Lazare
Herein represented by its

General Manager Mrs. A. Albert **Petitioner**

Vs

Ministry of Employment and Social Affairs of

Herein represented by Minister Marie-Pierre Lloyd

Of Victoria House, Victoria **Respondent**

Civil Side 18 of 2007

Mr. F. Bonte for the petitioner

Ms. E. Carollus 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 23rd November 2007, exercising the supervisory jurisdiction of this Court over subordinate courts, tribunals, and adjudicating authority conferred by article 125(1) (c) of the Constitution.

At all material times, the Petitioner was and is a hotelier running a restaurant business. In 2005 and 2006 and the Petitioner - hereinafter referred to as the "employer" - had employed one Mr. Godfrey Barrack - hereinafter referred to as the "worker" - as Pastry Cook. Consequent upon an allegation involving serious disciplinary offences leveled against the worker, the petitioner on the 9th August 2006 terminated his employment without notice and without paying his salary dues and other legal benefits payable upon such termination. Hence, the worker 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 - alleging that the termination was unjustified. Upon conclusion of the said "grievance procedure", the Competent Officer, in his determination dated 1st June 2007, held thus:

"Following the review of the above case, it has been determined that on the basis of evidence the applicant (worker) did not self-terminate his contract of Employment, rather terminated by the employer. Since the respondent has not brought forth any evidence of a serious disciplinary offence having been committed

(i) *Willfully disobeying a reasonable order of the superior on 16th December 2004; and*

(ii) *Deliberately disrespecting and insulting the superior and other workers on 16th December 2004;*

Therefore, termination of the Applicant's contract of employment was not justified pursuant to Section 61 (2) (a) (iii) of the Employment Act 1995. In view that the relationship between both parties has irretrievably broken down, reinstatement is not being honored. The applicant is instead awarded payment of the following legal benefits:-

One month's notice	*Rs. 4,500.00*
17 days compensation	*Rs.2942.30*

3 days Public Holiday *Rs. 519.00*

Total Rs.7,961.00

Less 5% social security *(Rs. 398.06)*

Balance to be paid ***Rs.7,563.24***

The employer 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 25th November 2005, dismissed the said appeal, confirmed the determination of the Competent Officer and directed the petitioner to pay the sum Rs.11, 779. 27 to the worker including salary for 30 days of accrued leave, which sum had not been awarded by the Competent Officer in his determination. Accordingly, the Minister directed the employer to pay the said sum Rs.11, 779. 27 to the worker.

The employer, being dissatisfied with the Ruling of the Minister, has now come before this Court for a "Judicial Review" of it, alleging that the said "Ruling" is ***illegal*** and ***unreasonable.*** It is illegal because the Minister, in the absence of any evidence to support, awarded salary for 30 days of accrued leave and for 3 days of public holidays. Moreover, it is ***unreasonable*** because the Minister in making that Ruling failed to consider the conduct, behavior and the act of insubordination of the worker in the light of the relevant circumstances of the case, which necessitated termination, as the employer had no other alternative.

On the other hand, the respondent denied all the allegations made by the petitioner in this matter. According to the respondent, the decision of the Minister is neither illegal nor unreasonable. The Minister has reached a reasonable decision

within his power and in accordance with law, which any other reasonable Tribunal could have reached in the given matrix of facts and circumstances surrounding the instant case. Hence, the respondent seeks dismissal of the instant petition.

Before I proceed to determine the issues in this matter, I believe, it is important to appreciate the background facts of the case, which are as follows:

The employer, although had its hotel at Sainte Anne Island, it had organized the end of year party for all of its staff, on the 16th December 2004, choosing "Le Reef Golf Club" in Mahe as the venue for the occasion. Mr. Bernard Monnaie, the Human Resource Manager of the employer was the one in charge of all arrangements and supervising the party and taking care of the staff members attending the function. The "worker" Mr. Esparon was also attending the party as a staff-member of the employer. After dinner, some of their staff went to "Katiolo Discotheque" for entertainments. Soon after midnight, most of the staff had left "Katiolo". Mr. Monnaie went inside to ensure that all the rubbish had been removed before they left. Inside the discotheque, he saw one his staff Mr. Dixon Juliette. He was visibly drunk and could not walk properly. The "worker" was also inside the discotheque talking to one of his coworkers next to the bar. Mr. Monnaie asked the "worker" to assist Mr. Juliette so that he could walk him outside to get into the transport. The worker replied in a rude tone that he should leave Mr. Juliette alone and that everything was under control.

Subsequently, after the party was over, Mr. Monnaie was arranging for the transportation of the staff from Le Reef to their respective place of residence in Mahe. One of the staff Mr. Fanchette was dropping off the staff living in the North. Hence, Mr. Monnaie told the worker that Mr. Fanchette would drop him as well at Copolia. However, the worker said that he was not going anywhere. Later, there was some commotion at Le Reef caused by two groups within the members of the staff. So, Mr. Monnaie asked the staffs to disperse and board the bus to go home. Everybody refused. Mr. Monnaie again went up to the worker and asked him to board the bus. The worker replied that he should not give him orders. Then Mr.

Monnaie asked another staff, who was around, to escort the worker to the bus. Again the worker, who was presumably under the influence of drinks refused to board the bus. Finally, with the assistance of two other members of the staff, the worker was almost forced to get into the bus. As he was escorted by his coworkers the worker shouted at them *"Liki ou manman, mwa sef sekirete"* As he boarded the bus, he again shouted you are all *"Bull-shit/stupid"* and *"Langet ou manman"* and then got in.

Two days after this incident the employer terminated the worker from employment alleging that the worker had committed serious disciplinary offences under the Act on two counts as follows:

(i) *Willfully disobeying a reasonable order of the superior on 16th December 2004; and*

(ii) *Deliberately disrespecting and insulting the superior and other workers on 16th December 2004;*

Petitioner's counsel Mr. F. Ally submitted - in essence - that the termination of the worker from employment is lawful as the acts and conducts of the worker in the entire episode evidently constitute disciplinary offences under the Act. Hence, the decision of the Minister finding otherwise is illegal, as it is contrary to law and evidence on record. Moreover, Mr. Ally argued that the decision of the Minister is unreasonable and irrational since he has failed to give due consideration to the entire circumstances surrounding the commission of the disciplinary offences by the worker and has awarded compensation without evidence to substantiate the claim for 30 days of accrued leave and for three days of public holidays.

For these reasons, according to the petitioner, the Ruling of the Minister dated 25th November 2006, is illegal and unreasonable. Therefore, the petitioner seeks the Court for a writ of *certiorari* to quash the said Ruling and render justice.

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 the decision of the Minister illegal, when he concluded that the conduct and behaviour of the worker on the alleged night did not constitute any serious disciplinary offence under the Act and as such did not warrant termination of his employment? and*

(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 be the issue factual or legal that may arise for determination following 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 decision or 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?" - "reasonable" or "unreasonable"? - rational or irrational?

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 in accordance with law, 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 and such assessment ought to be made applying the yardstick of human reasoning and rationale.

Since, the first question (supra) relates to the issue of "legality" of the impugned decision, one should examine what constitutes a serious disciplinary offence under the Act and what does not. Has it been considered and rightly applied by the Minister in his decision of the case?

The starting point in this exercise is the interpretation of the words used in the particular section of the Act, which empowers the employer to terminate a worker without notice. In this regard, Section 57 (4) of the Act reads thus:

> *"Notwithstanding section 47, an employer may terminate a contract of employment without notice where the worker has committed a serious disciplinary offence within the meaning of that expression in section 52(2)"*

Section 52 (2) of the Act inter alia, defines the "serious disciplinary offence" thus:

> *"Any-*
> *(a) Disciplinary offence listed in Part II of Schedule 2 and*
> (b) *Minor disciplinary offence, which is preceded by 2 or more disciplinary offences, whether of the same nature or not, in respect of which some disciplinary measure has been taken, is a* serious disciplinary offence"

Part II of Schedule 2 paragraphs (c) and (l) which are relevant to the instant case reads thus:

> *"A worker commits a serious disciplinary offence, wherever, without a valid reason, the worker causes serious prejudice to the employer or employer's undertaking and more particularly, inter alia, where the worker-*
> *(c) Fails repeatedly to obey reasonable orders or instructions given by the employer or representative of the employer;*
> *(l) shows lack of respect to insults or threatens a client of the employer or another worker whether it be a superior, a subordinate or a colleague"*

In the proceedings below, the Minister has obviously, examined the facts of the case in the light of the above provisions of law and has come to the right conclusion that the alleged conduct of the defendant did not satisfy and fall within the legal definition of "*serious disciplinary offence"* stipulated in the Act and so I find. Obviously, the worker was not on duty on the night in question. He was not present at Le Reef on any assignment of duty. He was out of his employment-premises. He was attending a social gathering on invitation by the employer and was drunk to say the least, had consumed alcoholic beverages with the implied consent of his employer, who had hosted the party that night. In the circumstances, I hold that the Ruling of the Minister in this respect is legal, when he concluded that the conduct of the worker on the alleged night did not constitute any serious disciplinary offence under the Act and did not warrant termination of his employment. Thus, I find answer to the first fundamental question in the negative.

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 R 864 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 evidence on record and the relevant facts and circumstances of the case in arriving at his decision. Obviously, the petitioner's contention to the contrary, stating that he has acted without evidence is highly farfetched. For instance, it was not an issue either before the

competent officer or before the Minister that the worker commenced employment with the employer since 12th July 2003 and was terminated on 18th December 2004. In law he is therefore, entitled to 1.75 days for every completed month of service. Hence, the Minister has rightly computed his accrued leave for a period of 18 months, which comes to 30 days. As regards public holidays, it is common knowledge for any reasonable tribunal to compute how many public holidays fall in a year. Hence, the submission of the petitioner's counsel that the Minister acted without evidence on the computation of public holidays and accrued leave did not appeal to me in the least.

In any event, in the absence of any evidence to ascertain the leave and holidays it is indeed, lawful for any adjudicating authority to apply its common knowledge and take judicial notice of matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary. In passing, it is interesting to note that Stephen in his first two Editions of the DIGEST described these as facts, which need not be proved but in later editions calls them "facts proved otherwise than by evidence"

Having said that, I find the Minister in his consideration rightly and lawfully confirmed compensation for 3 days of Public Holidays at Rs. 519.00 and for 30 days of accrued leave at Rs 4438. 36.

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 the worker salary for the months of his service. 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 as any reasonable tribunal would and should do.

For the reasons stated hereinbefore, I hold that that the "Ruling" of the Minister dated 25th November 2005 in this matter, is neither *illegal* 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 September 2007