IN THE SEYCHELLES COURT OF SEYCHELLES

Reportable
[2021] SCCA 79 (17 December 2021)
SCA 10/2021 SCSC 152 (arising in CA 11/2020)

In the matter between

SAVOY DEVELOPMENT LIMITED **Applicant**
(rep. by Serge Rouillon)

and

SHARIFA SALUM **Respondent**
(rep. by Somasundaram Rajasundaram and Ryan Laporte)

Neutral citation:	*Savoy Development Limited v Salum* (MA 16/2021 (Arising in SCA 10/2021 [2021] SCCA 79 (17 December 2021).
Before:	Twomey JA, Robinson JA, Adeline JA
Summary:	unjustified dismissal-proceedings of disciplinary investigation committee under Employment Act-computation of "employment benefits when employee who is unjustifiably terminated obtains alternative employment
Heard:	7 December 2021
Delivered:	17 December 2021

ORDER

1. This matter is remitted to the Employment Tribunal for the purpose of computing benefits due to Mrs. Salum. The computation shall take into account salaries she has earned at Fisherman's Cove Hotel and deduct these from salaries she would have earned at Savoy Hotel between the date of her unjustified dismissal and the date of lawful termination, that is 21 August 2018 to 1 September 2020. Thereafter the Appellant is ordered to pay the salaries due to the Respondent as computed by the Employment Tribunal.
2. The Appellant is ordered to pay the Respondent compensation for length of service from 1 June 2017 to 1 September 2020 in the sum of SR 62,838.53
3. The Appellant is ordered to pay the Respondent one-months' notice in the sum of SR 50,270.82
4. The Appellant is ordered to strike out and remove the warning letter issued on 24 July 2018 from the Respondent' employment record.
5. The whole with interest and costs.

JUDGMENT

TWOMEY JA

Background

[1] The Respondent, Sharifa Salum (Mrs. Salum) was employed as the front office manager at the Savoy Hotel, a hotel operated by the Appellant, Savoy Development Limited (Savoy). She filed a case before the Employment Tribunal claiming that her employment had been unjustly terminated.

[2] The Tribunal ruled in her favour, finding that Savoy issuing a direction to her to refuse a guest by deceptively advising him that the hotel was at full capacity was not a reasonable order and that Savoy had brought no evidence to support their decision to issue a warning letter in respect of her alleged insubordination. It ordered Savoy to pay her salary from the date of unjustified dismissal until the lawful date of termination, compensation for length of service, one month's salary in lieu of notice and an order that a warning it had issued to her be expunged from her employment record.

[3] Dissatisfied with the finding of the Tribunal, Savoy appealed its decision to the Supreme Court. The court dismissed the appeal, finding that the said warning letter was arbitrarily issued and should be set aside and removed from Mrs. Salum's employment record. It affirmed the decision of the Tribunal.

[4] With regard to the suspension of Mrs. Salum and the three incidents referred to by Savoy occasioning the same, namely replacing money in a co-worker's float, two separate incidents of accepting money from other co-workers when the co-workers had taken money from their cash floats, the court accepted the finding of the Tribunal within the context of the incidents and found Mrs. Salum blameless.

[5] It further found that the decision of Savoy's Disciplinary Investigation Committee was flawed in its findings of dishonesty and breach of trust on the part of Mrs. Salum. Further, it found that in notifying Mrs. Salum only twenty-four hours before the disciplinary inquiry, Savoy had not given her enough time to prepare for the inquiry and

had breached her fair trial rights. Her fair trial rights had been further breached when she was excluded from proceedings when other evidence was taken and she was not allowed to challenge the witnesses.

The appeal

[6] Dissatisfied with the decision, the Appellant has filed a notice of appeal before this court on 6 grounds namely:

> *(1) The learned judge erred in law and on evidence by not finding the Employment Tribunal erred when demonstrating bias in its considerations of the facts and on the findings in favour of the Respondent.*
>
> *(2) The learned judge erred in law and on evidence in finding that the Appellant unfairly dismissed the Respondent.*
>
> *(3) The learned judge erred in law and on facts when awarding compensation to the Respondent up to the date of the Employment Tribunal order.*
>
> *(4) The learned judge erred in law and on the facts when failing to consider that the Respondent had commenced new employment and therefore should not have received any further compensation.*
>
> *(5) The Tribunal erred in failing to consider facts and arguments brought by the Appellants.*
>
> *(6) The Tribunal erred in law when holding the Appellant to high internal procedural standards.*

Ground 1 -Bias

[7] At the hearing of the appeal, Counsel for Savoy, Mr. Rouillon conceded the ground on the allegation of bias against the Tribunal. There is therefore no need for this Court to consider the first ground of appeal.

Grounds 2, and 5, 6 – Serious disciplinary offences and inquiries

[8] Grounds 2, 5 and 6 as argued at the hearing seem to crystallise into the following contentions: first, the court *a quo* erred in its assessment of what constituted a serious disciplinary offence warranting Mrs Salum's dismissal and secondly, the sanction by the

Tribunal and the court with regard to the procedures adopted by Savoy for disciplinary inquiries was flawed.

Savoy's submissions

[9] Mr. Rouillon has submitted that the court *a quo* did not consider that Mrs. Salum's action was a serious breach of trust by a senior employee in a trusted management position, that economic crimes by employees in high positions had a negative effect on efficiency and productivity generally and the fact that an employer would not normally take an action without just cause against an employee.

[10] In respect of the actual incidents that had taken place it was Mr. Rouillon's submission that by using the cash float for one's personal needs and using junior staff to cover her misdeeds, Mrs. Salum set a bad example for the whole team. He also submitted that the breaches of trust, misappropriation of funds and Mrs. Salum's failure to follow her employer's instructions in this respect were not properly considered as both the Tribunal and the Supreme Court delved too deeply into evidentiary considerations for proof that the offences had been committed instead.

[11] With regard to the procedures adopted by Savoy for its disciplinary inquiry, it is Mr. Rouillon's submission that no time limit is exacted by the Employment Act for beginning investigations. In any case, Savoy is a large company, instructions needed to be obtained from different departments and thirty-nine days was not an excessive amount of time from the date of the incident to the inquiry.

[12] With respect to the fairness of the investigation procedure and fair trial rights of Mrs. Salum, Mr. Rouillon has relied on the cases of *Germain v Creole Travel Services*[1] and *Barclays Bank v Moustache*[2] and has submitted that section 53 of the Employment Act was simply aimed at giving an employee a chance to answer simple allegations and not a second chance to explain the offences committed. It was not meant to be equated to judicial proceedings. Again in this context, several foreign authorities are relied on with respect to the fact that rules of procedure are "the handmaids of justice and not the

[1] (CA17/2016) [2017] SCSC 128
[2] (1993 -1994) SCAR 134

mistresses of justice." Mr. Rouillon has added that disciplinary proceedings in employment law are of a fundamentally different nature to criminal and civil proceedings as constraints and economies of and employer in running a business has to be recognised.

Mrs. Salum's submissions

[13] Mr. Laporte, for the Respondent has on the other hand submitted that careful consideration and the weighing of evidence are important in disciplinary proceedings in order to arrive at the truth. He further submits that Savoy brought no evidence to show that money was missing from the float or that there had been fraudulent practice by Mrs. Salum.

[14] Mr. Laporte further submits that the Tribunal being the court of first instance had the opportunity to hear the parties and observe their demeanour and its finding cannot be faulted unless it can be shown that it committed serious breaches of judgment. With respect to Savoy's allegation that serious disciplinary offences had been committed, both the Tribunal and the Supreme Court found that Savoy had failed to discharge its burden of proof to establish the accusations and as the process for the internal hearing was rife with procedural unfairness further questions were raised with regard to the Mrs. Salum's termination of employment. Both Savoy and Mrs. Salum were bound by internal policies and Savoy could not nit-pick which ones it would follow. Sections 23 and 24 of Savoy's policy set guidelines for the investigation of discrepancies in cash float amounts and these were not followed.

[15] With regard to Savoy's submission regarding section 53 of the Employment Act, that is, that it is there only to give the employee a chance to answer simple allegations and not a second chance to explain offences committed, Mr. Laporte submits that this is misconceived. Section 53 places a worker aggrieved by a disciplinary procedure on equal footing as that of the employer who is in a position of power in contract to the employee.

The law with regard to serious disciplinary offences in employment

[16] A serious disciplinary offence is defined in section 52(2) of the Employment Act as follows:

52. (1) A disciplinary offence listed in Part 1 of Schedule 2 is a minor disciplinary offence.
(2) 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

[17] Part II of Schedule 2 provides in relevant part:

> *"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*
> …
> *(g) commits any offence involving dishonesty, robbery, breach of trust, deception or other fraudulent practice within the undertaking or during the performance of the work of the worker*
> …"

[18] Mrs. Salum's termination letter states that the termination was as a result of a serious disciplinary offence involving dishonesty, breach of trust, deception or other fraudulent practices within the undertaking or during the performance of her work and failure to obey reasonable instructions. As I have already stated, in the present appeal, the issue of failure to obey a reasonable instruction, a minor disciplinary offence under Part I (d) schedule 2 of the Employment Act, has not been pursued. I need not therefore say any more about it.

[19] In their appreciation of the definition of serious disciplinary offence and their consideration of the facts in the present matter, both the Tribunal and the Supreme Court found that no serious disciplinary offence was committed by Mrs. Salum. Their findings were based on the appreciation of the evidence tendered and the applicable law. They both considered the provisions of section 52 as set out above. They both found the evidence of such an offence lacking. Their findings were made objectively and no submissions have been tendered as to why they were at fault. It seems to me that Savoy

seems to want to impose their subjective appreciation of what constitutes a serious disciplinary offence on the Tribunal but apart from their submissions on the effects of breach of trust by a senior employee in a trusted management position, and economic crimes tit has failed to adduce evidence of the same or seriously challenge the explanation given regarding money taken from the cash floats.

[20] In this regard, I have struggled to make sense of Savoy's submission. It appears that from their perspective the fact that workers under the supervision of Ms. Salum were seen using money from their cash floats inappropriately is enough to constitute a serious disciplinary offence by Mrs. Salum. I would agree that stealing from the cash float is a serious disciplinary offence. But each instance has been explained to the satisfaction of the Tribunal and the court. There was no theft and there was no money missing from the cash floats. In the incident relating to 24 July 2018 involving Jelina Havelock and that of 20 August 2018 involving Babelle Barker, the evidence is that the workers were not equipped with a separate bag in which to put their tips. They put them in their floats and later retrieved them. They then used their tip money for personal purposes – in one instance for reimbursing Mrs. Salum for paying a telephone bill on Jelina Havelock's behalf and in another instance for repaying Mrs. Salum for a personal loan taken from her by Babelle Barker. Perhaps the simple provision by Savoy of a tip bag might resolve similar issues – but they are not serious disciplinary offences or evidence of dishonest behaviour as alleged.

[21] The incident that Savoy seems to have made heavy weather of is the one that occurred on 12 July 2018, directly involving Mrs. Salum. She was accused of taking money out of Babelle Barker's cash float and putting it into her float. She did not deny this but said she had taken the money from Babelle Barker's float to replace money in her float as she had taken money from her float to give a loan to another employee, Lisette Bastienne. Subsequently, when her float tallied she had sent money through a trainee to be given to Babelle Barker in order that her float tallied. Although this was against internal company policy it certainly was not a serious disciplinary offence meriting instant suspension and subsequent termination. I agree with the Supreme Court that a written warning would have sufficed for such conduct at the maximum.

[22] Several cases are referred to by Mr. Rouillon in his skeleton heads of argument including at least fifteen foreign authorities in which a definition of serious disciplinary offence is given. I need not reiterate them simply because I have had difficulty seeing their relevance to the circumstances of this case and the very specific provisions of the Employment Act. I see no reason to disagree with the finding of the Tribunal or that the Supreme Court on this issue.

[23] With regard to the fairness of the procedure adopted for the disciplinary hearing, I am somewhat baffled by the submissions of Mr. Rouillon. The bold assertion that section 53 of the Employment Act was for the purpose of giving an employee a chance to answer simple allegations and not a second chance to explain the offences committed is without any basis and is dismissed out of hand. Section 53 clearly establishes that investigations are conducted fairly. It even permits the representation of the employee by a colleague or a Union representative. The assertion by Savoy that the proceedings are not a second chance to explain the offence committee is a Freudian slip - it reveals Savoy's misconception that Mrs. Salum was guilty of the offence and had to prove her innocence. That is a complete inversion of the provisions of the Employment Act which makes it clear that the burden of proving the offence lies on the employer. The reliance on the cases of *Germain* and *Moustache (*supra) are also misconceived. These cases are only authorities for the proposition that section 53 not having been pleaded at the hearing before the tribunal cannot be relied upon by a party at appeal stage.

[24] Further, the submissions of Savoy that disciplinary hearings by an employer cannot be equated with judicial proceedings while holding water to some extent cannot ignore the fact that fairness in investigation hearings as exacted by section 53 of the Act, for tribunal hearings demands the observance of at least the rules of "natural justice."(See in that respect "Schedule 6 (S 73A): Employment Tribunal)[3]. The handmaid procedural argument is of no assistance in this respect as the issue here is a breach of substantive justice and not mere procedural irregularity. Similarly, Savoy's contention that thirty-nine

[3] The Tribunal shall before making any decision- (a) afford the parties the opportunity to be heard; (b) generally observe the rules of natural justice.

days elapsing after the incident before it took action against Mrs. Salum were reasonable is not acceptable given that it breached its own internal protocols.

[25] These grounds are misconceived and are dismissed.

Grounds 3 and 4 - Compensation awarded

[26] At the hearing of the grievance before the Employment Tribunal, Mrs. Salum testified that she had moved on and was working for Fisherman's Cove Hotel. Savoy has submitted that although the provisions of section 46 of the Employment Act state that workers under contracts of employment are entitled to all employment benefits from the date of employment until lawful termination of the contract, when as in the present case the worker obtained alternative employment and earned a salary during the period of unfair dismissal, that money ought to be taken into account for the computation of salaries due to Mrs. Salum. It submits that to ignore this fact would result in the unjust enrichment of Mrs. Salum to the detriment of Savoy.

[27] It has relied on the authority of *Wells v Beau Vallon Properties t/a Coral Strand Hotel & Ors*[4] for the proposition that the claimant must not be put in a better position than he would have been, had a breach of the contract not occurred. It has also submitted that in line with *Alcindor v Plantation Club Resort & Casino,*[5] damages should not be awarded outside the provisions of the Employment Act. Finally, it has submitted that in line with the case of *Mahe Builders Co Ltd v Madeleine*[6], a worker is not entitled to wages it has not earned.

[28] Mrs. Salum has submitted that the cases of *Cap Lazare v Ministry of Employment and Social Affairs*[7], *Nourrice v European Resort Ltd*[8] upheld on appeal (*European Resort Ltd v Nourrice)*[9] and *Chang-Time v Four Seasons Resort*[10] are *jurisprudence constante* that the calculation of benefits should be made until the lawful termination pronounced by the

[4] (7 of 2010) [2010] SCSC 25 (26 August 2010)
[5] (2000) SLR 155
[6] (CA 29/2018) [2019] SCSC 292 (05 April 2019)
[7](8 of 2008) [2009] SCSC 68 (29 March 2009);
[8] (2013) SLR 233
[9] (SCA 23/2013) [2015] SCCA 6 (17 April 2015)
[10] (CA24/2019) [2019] SCSC 904 (11 October 2019);

Tribunal and that it makes no difference in law that the worker has managed to secure employment between the unjustified dismissal all and the decision of the Tribunal.

The law regarding the payment of salaries due when a worker is unfairly dismissed

[29] Section 46 of the Employment Act provides in relevant part:

> *"46. (1) Workers under contract of continuous employment <u>are entitled to all employment benefits under this Act from the date of employment until lawful termination of the contracts.</u>" (emphasis added)*

[30] I am in agreement with the authorities cited for the proposition that the date of lawful termination pronounced by the Tribunal or Court is the actual date of lawful termination for the calculation of entitlements to salaries and terminal benefits.

[31] *Wells* concerned a fixed term contract and the Tribunal order that the employee be paid his benefits up until the date of lawful termination was set aside as his contract would have ended well before that date. The court found that section 46 of the Employment Act is to the effect that workers who are under a fixed term contract are entitled to their benefits up to the day that the fixed term contract expires.

[32] The rest of the authorities cited by both parties apart from *Chang-Time* concern cases where the employees had been suspended and remained without employment whilst engaged in the grievance procedure including the final determination by the courts where appeals had been filed.

[33] Although *Chang-Time* did not concern new employment, a pronouncement was made by the court on this issue. It is my view that the *obiter dicta* with regard to the fact that salaries paid under new employment should not be taken into account when computing salaries due from the date of the unjustified dismissal until the date of lawful termination with the old employer was made *per incuriam*.

[34] It is my view that the Employment Act protects the payment of salaries under contracts of employment even when the employed is unjustifiably dismissed. Section 46 ensures that if a worker is unjustly dismissed, he is entitled to his salary from the date of the unjustified dismissal until the date of lawful termination. However, I agree with the finding in *Madeleine* that section 46 of the Employment Act is axiomatic. One is only paid for work done under a contract of employment.

[35] By way of example, if Mrs. Salum had not been unjustly dismissed, she would presumably have continued working for Savoy and obtained her salary as agreed in her contract. Had she of her own free will chosen to leave Savoy and to work for Fisherman's Cove Hotel, she would have been entitled to her salary with Fisherman's Cove Hotel and not with Savoy. Section 46 operates only to secure the salary she would have been entitled to had she not been dismissed. It is not for the purpose of allowing a worker to profit from her unfair dismissal and claim two salaries. In seeking alternative employment to mitigate her losses, Mrs. Salum has to be commended but she cannot benefit from simultaneous salaries from two different employers - any emoluments in excess of what would have been paid by the employer who unjustifiably dismissed her cannot be construed to be "employment benefits" under section 46 of the Act. To that extent, these grounds of appeal succeed.

Order

1. *This matter is remitted to the Employment Tribunal for the purpose of computing benefits due to Mrs. Salum. The computation shall take into account salaries she has earned at Fisherman's Cove Hotel and deduct these from salaries she would have earned at Savoy Hotel between the date of her unjustified dismissal and the date of lawful termination, that is 21 August 2018 to 1 September 2020. Thereafter the Appellant is ordered to pay the salaries due to the Respondent as computed by the Employment Tribunal.*

2. *The Appellant is ordered to pay the Respondent compensation for length of service from 1 June 2017 to 1 September 2020 in the sum of SR 62,838.53*

3. *The Appellant is ordered to pay the Respondent one month's notice in the sum of SR 50,270.82*

4. *The Appellant is ordered to strike out and remove the warning letter issued on 24 July 2018 from the Respondent' employment record.*

5. *The whole with interest and costs.*

Signed, dated and delivered at Ile du Port on 17 December 2021

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Dr. M Twomey JA

I concur Fiona Robinson, JA

I concur Brassel Adeline, JA