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The Law Of Professional Negligence In Maldives: Duty Of Care & Causation

Afzam Zuhury

Procedural and Substantive Fairness in the Dismissal, Termination or Redundancy of Employees under Maldivian Law

Ismail Wisham

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THE LAW OF PROFESSIONAL NEGLIGENCE IN MALDIVES: DUTY OF CARE & CAUSATION

Mohamed Afzam Zuhury ⁽¹⁾

This article examines the rules governing professional duty of care, breach of such duty and the causal link between such breach and loss suffered. In so doing, this article will examine primarily the recent decision of the High Court in *Ihsan v Ministry of Health* (High Court case no. 2009/HC-A/368, concluded on 10 September 2015). In this case, the High Court established that a duty of care comes into existence the moment a person becomes registered as a patient. The High Court explained that in giving care, a healthcare professional must do so in light of his or her training, education and experience. This is reflective of the language in Law no 13/2015 (Section 27 of the Law on Professional Services in the Health Services). These are more fully discussed below.

Aishath Ayaan Ihsan was brought to the GDh. Thinadhoo island Regional Hospital on 14 July 2007, after suffering from a fever and a painful swelling in her left hand for about 10 days. She was 3 years old at the time. The physician at the hospital concluded that the patient had a bacterial stain. She was also referred to the surgeon at the hospital due to a suspected abscess. Both doctors conferred and began to administer an antibiotic used to treat gram positive and gram negative bacteria. They carried out minor surgeries to drain the abscess. On 18 July, 3 to 4 days after an antibiotic (Gentamicin) course was started the patient's mother complained of problems with the patient's hearing, noting that she was unresponsive to sound and had difficulty balancing herself. Upon receiving this complaint, the doctors examined the patient and noted that there were no problems with her hearing. However, the physician did prescribe ear drops for the patient upon noticing a wax build up in her ear. While the doctors contend that they immediately stopped giving Gentamicin, the claimant disagrees and contends with evidence that the doctors did not stop Gentamicin, and that they continued giving Gentamicin to the patient until 20th July 2007. On 23 July 2007 the patient was released from the hospital, after being advised of her condition (cellulites (bacterial infection)) and advised to see an ENT (ears, nose and throat) doctor.

Aishath Ayaan Ihsan's father, acting on her behalf, filed a claim against the Ministry of Health. He claims that the negligence of the doctors at GDh. Thinadhoo Regional Hospital caused his daughter to permanently lose her hearing. Her father contends that the doctors did not measure her weight before administering Gentamicin as required, and had administered an excessive dosage of Gentamicin. Her father had filed this claim against the Ministry of Health for breach of duty of care on their part

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by negligently administering Gentamicin to the patient while knowing of the type of antibiotic Gentamicin is, and its risks, resulting in permanent hearing loss in the patient (Civil Court case no. 523/MC/2008). On 29 September 2009, the Civil Court dismissed Ihsan's case and ruled in favour of the Ministry of Health.

The State in this case has maintained that the patient was given 4.1 mg Gentamicin per kg for 3.5 days, based on her weight of 14.5 kg, which did not exceed the recommended dosage according to the 'British National Formulary for Children'. The Civil Court was of the opinion that the claimant's allegation that the doctor did not check the weight of the patient before administering Gentamicin is contradicted by the fact that the records sheet (on which the child's medicine and dosage are noted) states that the patient's weight is 14.5 kg, and took this as evidence of the weight being recorded before the drug was given (the High Court has since acknowledged that some of these documents have been tampered with). In doing so, the Court relied on evidence given by the defendant doctors from GDh. Thinadhoo Regional Hospital, and the Civil Court concluded that Gentamicin would be considered to have been given for an excessive period if dosage had exceeded a week. The Civil Court decided that the doctors cannot be considered to have acted negligently in this case as the dosage in this case did not exceed a week. However, it is noted that even if Gentamicin is given for less than a week, it can still cause hearing loss if the dosage was incorrect. This is supported by the written opinions of doctors which have examined the patient and submitted by the claimant. Additionally, it is noted that

"Gentamicin ...has produced ototoxicity in experimental animals and man. This adverse reaction, which may be delayed in onset, is manifested primarily by damage to vestibular function. The reversibility of this adverse reaction is frequently contingent upon early recognition of potential ototoxicity. In all patients developing tinnitus, dizziness or loss of hearing, the attending physician should strongly consider discontinuing this antibiotic except in those cases where Gentamicin appears to be the only proven course of therapy. Complete damage has occurred mainly in patients who were uremic, had renal dysfunction, had prior therapy with ototoxic drugs or received higher doses and longer courses of therapy than those recommended."⁽²⁾

See also Product Monograph for Gentamicin published by Baxter Corporation (Canada)⁽³⁾. In fact, it was never the claimant's case that Gentamicin should not have been prescribed. Rather, their contention was that the dosage given was incorrect because the proper dosage was not calculated as the child was not weighed, and that this in turn caused the loss of hearing.

There are some important developments when the case was concluded at the High

2 Product Monograph "Gentamicin", Sandoz Canada Inc, Canada, 16 November 2015, p 4.

3 Product Monograph "Gentamicin", Baxter Corporation (Canada), 28 August 2012, p 6.

Court. When the time came to identifying whether the doctors were negligent, the High Court proposed the following questions:

1. is there a duty of care owed by the medical service provider to the patient?
and
2. did they breach that duty of care? and
3. was there a loss caused by such breach? or
4. is it likely that such loss may be caused?

The High Court is of the opinion that from the moment a person becomes registered as a patient, a duty of care comes into existence. The High Court further explained that, in giving care, a healthcare professional must do so in light of his or her training, education and experience, with due care, caution and kindness and comply with the relevant regulations and standards. Although not specifically mentioned in the High Court verdict, this is reflective of the language in Law No. 13/2015 (Law on Professional Services in Health Services, see section 27).

Next, the High Court examined the admission form of the patient and determined that the duty of care was not breached. Despite finding that some hospital documents were tampered with, the High Court noted that the admission form had the child's weight written down on it as 14.5 kilograms, and that [this weight] showed that Gentamicin was given within the recommended dosages, and that it had been given for only 3.5 days, which is not considered an excessive period of time. The High Court also noted that the expert witnesses agreed that a dosage given for less than 7 days would not cause hearing loss. It also recognised the Bolam test, and ruled that the Bolam test was satisfied in that there is a responsible body of opinion that recommends Gentamicin in such situations. It is noted above that there is a professional body of opinion that states that Gentamicin can be harmful if it is given in incorrect dosages, even if given for a period of less than 7 days.

The High Court went on to state that even though they do not expect doctors to explain side effects of a drug (or treatment) at all times, doctors are expected to explain side effects to the patient where the likelihood of such effects are very clear. The High Court noted that hearing loss was very unlikely where Gentamicin was prescribed for less than a week. The High Court also noted that 17% of patients with the preexisting gene that cause deafness will permanently lose hearing even if Gentamicin is administered correctly. The High Court did not address the question of whether Gentamicin can cause adverse side effects it is given in the wrong dosage, even if prescribed for less than a week.

The decision of the High Court was appealed, and the case is currently being heard by the Supreme Court.

What is interesting about *Ihsan v Ministry of Health* is that the High Court has

discussed in detail the rules to apply to identify whether medical (i.e. professional) negligence has taken place (see above). The High Court also established that there is a requirement to inform patients of risks involved in certain treatments, by stating that even though they do not expect doctors to explain side effects of a drug at all times, doctors are expected to explain side effects to the patient where the likelihood of such effects are patently clear. Currently, in English law (considered here as the Civil Court and the High Court have both referred to it), the law regarding informing patients of risks involved is substantially different from the view of the Civil Court in this matter and more similar to the thinking of the High Court (see the UK Supreme Court decision in *Montgomery v Lanarkshire Health Board* ([2015] UKSC 11). Paragraph 87 of *Montgomery v Lanarkshire Health Board* says that

“An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.”

Some might find this relevant to the recent decision of the Civil Court in *Shareefa Haanee v Male’ Health Services Corporation Ltd* and others (case no. 267/Cv-C/2013, concluded on 31 March 2016). The facts of *Montgomery v Lanarkshire Health Board* and *Shareefa Haanee v Male’ Health Services Corporation* are similar. Both *Montgomery* and *Haanee* were diabetic pregnant women that suffered complications during delivery. In *Montgomery*, the infant suffered serious injury at birth due to shoulder dystocia. The claimant argued first that she ought to have been given advise about the risk of shoulder dystocia (the inability of the baby’s shoulders to pass through the pelvis) and of the alternative possibility of delivery by elective caesarian section. The second branch of the claim concerned the management of labour. It was contended that the doctor had negligently failed to perform a caesarian section in response to abnormalities indicated by cartiotopograph (CTG scans). In *Montgomery*, the Supreme Court found that there was a duty to disclose the risk of shoulder dystocia and found the health board liable.

In *Haanee*, the claimant was referred to Indira Gandhi Memorial Hospital (IGMH) in Male’ island by the L. Gan island Regional Hospital as they thought it probable that the infant may be too large for a vaginal birth. In Male’ she was again advised by a private clinic to get admitted at IGMH after getting an obstetric scan to monitor sugar levels and to prepare for early induction labour. Although *Haanee* had done the

obstetric scan, she alleges that the doctors at IGMH had not looked at it. The doctors admit that they never checked the weight of the infant, and argued that there was no reason to check the weight of the infant. However, it was noted by the Human Rights Commission of Maldives in its report on the matter (and filed at court in this case) that Dr. Cherian, one of the defendant doctors, had stated on record that a scan should have been carried out not more than a week before the birth, and that a scan that was taken 2 or 3 weeks before birth cannot be considered as a recent scan for a person in Haanee's situation. The Maldives Medical Council in its report concluded that the doctors had acted properly. The infant died during childbirth due to complications caused by shoulder dystocia. The mother survived.

The Civil Court issued judgment against the claimant and ruled in favour of the Ministry of Health. The Civil Court was of the opinion that the claimant had not proved to a standard acceptable to it that the duty of care that existed in this case had been breached. However, there is ample medical evidence to show that shoulder dystocia is a likely possibility where the mother is diabetic⁽⁴⁾,⁽⁵⁾. This decision was not appealed.

The Civil Court in *Shareefa Haanee v Male' Health Services Corporation Ltd* unfortunately did not examine the four questions formulated by the High Court in *Ihsan v Ministry of Health* to identify whether medical negligence had taken place. Application of those medical negligence rules to the facts in *Shareefa Haanee* may have led to a different outcome. Additionally, the rule set forth in *Ihsan v Ministry of Health* which states that doctors are expected to explain side effects to the patient where the likelihood of such effects are patently clear, was not examined in this case, where the risk of shoulder dystocia was present. The doctors at L. Gan Island Regional Hospital foresaw the risk. However, the doctors at IGMH did not treat the patient as a risk, depriving Shareefa Haanee of the option to choose a caesarian section.

The Maldives Supreme Court has also addressed the laws of professional negligence in *Haifal Construction Pvt. Ltd v M.M.I. Bamboo Pvt. Ltd* (Case no. 2012/SC-A/20, concluded on 29 November 2016). This case concerned professional standards in building construction. Here the Supreme Court noted that the tort of negligence was a civil responsibility made up of fault, the damage caused by that fault and the causal link between the fault and the damage. The Supreme Court noted that these 3 factors must be present to successfully claim negligence and that it is not necessary to show that the damage was done intentionally. And the Supreme Court stated that in deciding whether the defendant must bear delictual responsibility, it must be

4 "Risk factors for recurrent shoulder dystocia " Hillary M. Moore, MD, MPH; Susan D. Reed, MD, MPH; Maneesh Batra, MD, MPH; Melissa A. Schiff, MD, MPH (2008, Washington state, 1987-2004, *American Journal of Obstetrics & Gynecology*).

5 'Shoulder Dystocia in Diabetic and Non-diabetic Pregnancies', Aneta Malinowska-Polubiec, Ewa Romejko-Wolniewicz, Oksana Szostak, Agnieszka Dobrowolska-Redo, Justyna Tolloczko, Julia Zaręba-Szczudlik, Roman Smolarczyk and Krzysztof Czajkowski (2014), *Neuroendocrinology Letters*, Volume 35 No. 8, p. 1.

tested whether the defendant's actions met the standards of care in such situation of a reasonable person of that profession. In this case, Haifal Construction was found to have acted negligently.

In conclusion, it appears that the law regarding medical (and, by extension, professional) negligence has developed rapidly over the last few years, with the High Court in *Ihsan v Ministry of Health* identifying the basic rules governing medical negligence, and even endorsing the right of the patient to know of serious risks in treatment, which is very similar to the modern concept of "informed consent" set forth in *Montgomery v Lanarkshire Health Board*. The Supreme Court also appears to have supported these rules to some degree in *Haifal Construction Pvt. Ltd v M.M.I. Bamboo Pvt. Ltd*, by recognising the tort of negligence as a delictual responsibility, and identifying the 3 factors that must be proven (fault, damage caused [intentionally or not] and causation). The Supreme Court has not mentioned the fourth question posed by the High Court in *Ihsan* in determining negligence. In contrast, the Supreme Court states that it is not necessary to show that the damage caused was done intentionally. The Supreme Court has stated that in determining whether a person's actions met with the standards of care in such situation, it is to be measured against the standards of care in such situation of a reasonable person of that profession. If this rule is to be applied in medical negligence cases in Maldives, it would be a departure from reliance on the Bolam test in Maldivian courts. By virtue of the Supreme Court in *Haifal Construction Pvt. Ltd v M.M.I. Bamboo Pvt. Ltd*, Maldivian courts can now accept testimony from a single responsible person from the [medical] profession as the standard for providing medical care, as opposed to the Bolam test which requires that the courts only accept a responsible body of medical opinion.

PROCEDURAL AND SUBSTANTIVE FAIRNESS IN THE DISMISSAL, TERMINATION OR REDUNDANCY OF EMPLOYEES UNDER MALDIVIAN LAW

Ismail Wisham⁽¹⁾

INTRODUCTION

Maldives had ratified the eight fundamental International Labor Organization (ILO) Conventions dealing with four categories of principles and rights at work. ILO Conventions have been readily referred to in numerous employment law related cases at the country's High Court. In 2008, the Parliament passed the Employment Act 2008 (Act No.: 2/2008, *'the Act'*) wholly changing the landscape of employment relations in the Maldives, introducing a regime that did not exist prior in the country⁽²⁾. The Act also established the *Labor Relations Authority and the Employment Tribunal* in the country for the very first time; the former as regulator of employment and labor issues and the latter the specialized complaints tribunal.

Sections 21 to 23 of the Act talks of dismissal or termination of employment. The notion attached to the term *'dismissal'* according to employment law carries different connotations to the word *'termination'*. A dismissal usually carries implications of a dishonorable discharge from service resulting from usually a breach of work ethics or contract⁽³⁾. For our discussion, and as envisioned under the Act, we will not regard it as one and the same thing. An employee may be terminated with notice or an employee may be terminated at the expiry of his definite term contract where such employment did not result in more than two continuous years in employment⁽⁴⁾. Employees that are dishonorably discharged notwithstanding the notice period or term of contract is regarded in our discussion as *dismissed*.

1 Ismail Wisham, LLB (hons), MCL, Attorney at law, Former Assistant Attorney-General

2 Sections 1 and 2 of the *Employment Act (the 'Act')* outlines that the purpose of the Act is to prescribe the fundamental principles regarding employment, setting out the rights and responsibilities of employers and employees with protections and procedures related.

3 Dismissal without notice is only allowed only *"when an employee's work ethic is deemed unacceptable and further continuation of employment is on reasonable grounds seen by the employer as unworkable"*. See section 23 of the Act. Subsection 21(b) creates grounds whereby no employee may be dismissed within the meaning of subsection (a) i.e. those which are hardly recognized as failure to maintain work ethics. They include the employee's race, color, nationality, social standing, religion, political opinion and affiliations with any political party, sex, marital status etc. This is in line with the no discrimination policy outlined under section 4 of the Act.

4 The Act provides that either party to an employment agreement may terminate such agreement, where it does not provide a defined notice period for resigning or termination from employment³. Section 25 grants the employer the right to terminate any employment after due pay is offered proportionate to the notice period, in lieu of the notice. This is so notwithstanding the provisions under section 22, governing the notice period afforded to contracts of indefinite terms, under which two week's notice has to be afforded to any person in employment from six months to one year. The period is extended to one month's notice for any person in employment for more than one year but less than five years and an additional month for any person in employment for more than five years.

Under the Act, no employee can be dismissed from employment without showing “*appropriate cause as to failure to maintain work ethics, inability to carry out employment duties and responsibilities related to the proper functioning of his place of work*” and imposes a strict prerequisite that measures be taken to discipline the employee⁽⁵⁾. Unlike countries such as South Africa, the local legislation does not specifically speak of substantive and procedural fairness explicitly.⁽⁶⁾ Of course the burden on establishing a cause for fair dismissal rests solely on the employer. Where the employer is unable to prove that dismissal of the employee was for just cause, it shall be deemed that dismissal was *without appropriate cause*.⁽⁷⁾ This means that if required, the employer has to necessarily show that; there were reasonable concerns that the employee had been detrimental to the company⁽⁸⁾, the employee was given the chance to explain himself and to propose remedial actions on his own part to rectify the issue and that the decision was made finally based on all tangible evidence and the decision does not seem excessive.

DISMISSAL AND TERMINATION

If an employer wishes to dismiss a staff with payment in lieu of notice, there are certain thresholds you have to fulfill. In *Reethi Rah Resort v Ali Muaz*⁽⁹⁾ the High Court decided, possibly for the first time in the Maldives, that an employee should follow the requirements in Section 23 of the Act (dismissal without notice) when dismissing a staff with payment in lieu of notice, and that in cases of dismissal, the employer need necessarily substantiate that *substantive and procedural justice* had been established in the grounds and manner of the dismissal. This means the substantive grounds for dismissal as well as the way or procedure in which the employee was dismissed is important and needs to be proved to be fair and just.

In *Reethi Rah* the facts were that on 13 April 2009, nine employees working at the employer’s tourist resort were dismissed on accusation that the employees were involved in physically and grievously assaulting the general manager on April 11, two days prior, at the employer’s tourist resort. The employees were arrested on the day of the incident by the Maldives Police Service. Among those dismissed was the respondent employee who complained at the Employment Tribunal that his dismissal was against the provisions of section 23. The Tribunal agreed and ordered the employee re-instated and compensated for loss of income. The decision, of course, was appealed by the employer to the High Court on grounds that the police criminal

5 Section 23, *Ibid*.

6 Labor Relations Act (Act 66 of 1995 as amended), South Africa, Schedule 8, Section 2; “*a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment.*”

7 Section 27, *Supra*.

8 Simple under performance will not be enough and in such cases, employers have to show remedial steps taken to increase employee performance.

9 24/HC-A/2010.

investigation was still pending against the aggrieved employees, and that in cases of employment the employer need not wait for a Court's decision beyond reasonable doubt to establish guilt. The Court noted;

"...In addition to the right to earn and to be engaged in an employment of his choice being a constitutional right under Article 37 of the Constitution, without a doubt the effects of unfair termination is felt not only by the employee but also his family as well as the whole society. For this purpose, safeguards have been placed as provided for under the laws followed by civilized open democratic states on procedures and grounds in dismissal of an employee from employment. Even though section 23 of the Employment Act allows dismissal of an employee without notice provided the employer deems detriment to him or the place of employment if the employment is continued, the provision does not allow dismissal just because the employer sees it fit. The grounds provided by the employer needs to be assessed on whether such grounds amount to being reasonable in standard. It has to be ascertained whether the dismissal of employees so terminated on such allegations was necessarily just, and whether the employer followed certain measures substantially and procedurally. Reasonable assessments need to be made before such an action is imposed upon an employee, following procedural fairness or due process."⁽¹⁰⁾

The High Court noted that the termination letter issued to the employee talks only of the basis that the employee was placed in police custody on charge that he had allegedly partaken in the assault upon a senior staff member. The Court also noted that the employee was not remanded in custody, released before the expiry of the constitutional twenty four hours, and meanwhile, the employer before termination, had even failed to ascertain from the Police on the findings of the investigation conducted that implicated the employee's involvement in the incident. The Court emphasized that the employer had failed to duly determine the respondent employee's involvement, if any, in an incident that involved a large number of people, and that the employer had failed to allow any recourse to defend himself to the employee, when he was dismissed two days later to the incident, based solely on the consideration that he was among the employees that were arrested. The Judges endorsed the decision of the Tribunal and dismissed the appeal.

In the case of *Maldive Gas Pvt. Ltd. v Umar Waheed* the High Court⁽¹¹⁾ pointed out that comparative perspectives to what may amount to substantive and procedural fairness may be derived from;

"laws applied in open democratic states such as the United Kingdom, Australia and New Zealand, as well as international treaties such as the International

10 *Ibid*, at page 10.

11 166/HC-A/2013

Labor Organization (ILO) Convention on Termination of Employment 1982 (No.: 152) and the ILO Recommendations on the Termination of Employment 1982 (No.: 166)”.

Comparatively, substantive and procedural fairness as prerequisites to termination or dismissal has been established as a rule statutorily in, for instance, the United Kingdom since 1996 under their Employment Rights Act⁽¹²⁾, which necessitates fair and just treatment of employees when they are terminated or dismissed by their employers. Similarly to the threshold followed in the Maldives, this protection is afforded to employees who has completed two continuous years of service⁽¹³⁾. In the UK, the standard of reasonableness is measured by considering if “*no reasonable employer would have handled it the same or the dismissal was not based on an honest and genuine decision*” as established by *St Anne’s Board Mill Co Ltd v Brien*⁽¹⁴⁾.

In the case of *the Dhiraagu PLC v Ahmed Yoosuf*⁽¹⁵⁾, the local High Court, provided an illustration of what amounted to substantive justice in dismissal. The facts of the case were that the employee was accused of breaching the leave policy, using foul language addressing colleagues, dishonesty and failure to duly follow instructions. This High Court was of the opinion that breaches of the leave policy without due excuse or justification or prior notification amounts to gross misconduct under the purview of section 23 of the Act. The employee made no attempts to justify his extra days of leave even upon return and when questioned, turned hostile and used foul language defensively. While the Employment Tribunal deemed that the employer failed to ensure that substantive fairness was established, the High Court disagreed and overturned the decision awarded in favor of the employee. The High Court felt that when reasons for dismissal were so blatant and clear-cut the employer is justified in resorting to dismissal substantially. Procedurally, the employer in this case established that the employer was given ample opportunity to respond to which the employee seemed to have conducted himself unscrupulously.

What we’ve seen is that a dismissal is only advised if continuation of the employment poses as detrimental to the company or its business. The accusation against such employee needs to be serious. This is ever more applicable in cases of dismissal without notice pursuant to section 23(a) and (b) of the Act, which stipulates that dismissal without notice can only be resorted to in instances where continuation of employment is regarded ill-advised, atop of inept discipline justifying dismissal. These two concepts need to be conjunctively satisfied. Continuation of employment is ill advised when such continuation is regarded as detrimental to the employer or

12 1996 c. 18. The legislation complimented the old common law standards of wrongful termination.

13 The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

14 [1973] ICR 444. See also *Orr v Milton Keynes Council* [2011] EWCA Civ 62, where it was said that reasonable means asking what a “hypothetical reasonable employer” would do.

15 77/HC-A/2013.

place of business, or in instances where the employee had committed breach of trust against the employer as provided for under section 23(b)(i) and (ii). The fact that this needs to be established on reasonable grounds was also established prior by the High Court in the earlier mentioned case of *Reethi Rah Resort*¹⁶.

To illustrate further on *procedural fairness*, consider the case of *Blue Lagoon Investments Pvt. Ltd. v Iyaz Naseer*¹⁷. The facts were that the employee, the Food and Beverage Manager at the employer company's tourist resort was terminated without notice for failing to comply with instructions, when the employee was placed under suspension and subjected disciplinary measures. The employee was asked to remove himself from the resort pending investigation to which the employee failed to comply. The company proceeded to terminate the employment and the employee complained at the Employment Tribunal and won on grounds that the employer had failed to substantiate the termination on subjective fairness and procedural fairness.

On appeal though the High Court disagreed noting that the employee had failed to comply with directions issued to him by the employer pursuant to section 20.1 of the employment agreement made between employer Blue Lagoon Investments and employee Iyaz Naseer, alongside other considerations such as purpose behind the contractual provision, the employee's designation, place of work and function at the company, the events that happened at the resort running up to the dismissal and the nature of the allegations made against the employee all contribute to show that the employee's conduct was of unacceptable discipline and as such, the employer may determine that continuation of the employment in that circumstance would prove detrimental to the employer or place of employment. The employment agreement made between employer and employee stipulated that the employer may place the employee on suspension pending investigation of any allegation and that the employer may ask the employee to leave the resort premises for that duration. The Judges noted that;

"If the contractual provision is not enforced against the (employee) it may open the door for the employee to disrupt the investigation of the allegation made against him by the company and disallow reasonable circumstances for employers to conduct due investigations for allegations made against employees. Furthermore, if such contractual provisions are not enforced against an employee of such standing, employees may be indiscriminately encouraged to disregard contractual obligations, increasing instances of breach of contract by employees. Such causes will create an uneasy work environment and disharmony between the employer and employees, and this will in turn allow employees to unduly influence the company in many ways, eventually hurting the business of the

16 Note that employees dismissed may still re-apply for the position and retain the right to fair consideration for employment provided the reason for dismissal, subjectively, is reasonably sufficient to disregard the application. See *Abdul Jaleel Ismail v Civil Service Commission* 290/HC-A/2014

17 146/HC-A/2014.

employer.”⁽¹⁸⁾

The High Court noted that both substantial fairness and procedural fairness was in fact established in this case, in favor of the employer. The Judges noted that the employer in this case was not bound to hear the employee’s rebuttals to the allegations in this situation and despite which, the employer had satisfied procedural fairness as the employer had in writing warned the employee that ‘legal action’ may be taken should the employee fail to comply with the instructions. This case serves as the exception to the general rule that every employee should be afforded reasonable opportunity to defend themselves against any claim or allegation made against them on a disciplinary measure. The Court noted that it “*was not compulsory upon the employer*” to do so, if the actions complained of amount to the prescribed notions under section 23. Of course the conditions surrounding the incident, the employee’s conduct at the face of company measures and all such facts circumstantial will be taken to light, before the exception can come into play.⁽¹⁹⁾

The Act is silent on provisions governing severance agreements, its legality and operation when employees are terminated. However, peculiar positions have been inferred in the Maldives over the procedural justice a severance agreement entails. In *Ahmat Aidaneez Maldives Pvt. Ltd. v Hussein Shareef* ⁽²⁰⁾the High Court decided that if the severance was signed and the employee awarded his compensation thereby, he may not retain any more rights of recourse alleging wrongful termination.

“The Employment Act does not explicitly disallow waiver of an employee’s rights in cases of termination... and (in such cases) mostly or often an agreement may be made between the employer and the employee detailing their rights and responsibilities (Severance Agreement). Such agreements should be made whenever the employee knowingly and intentionally waives a right bestowed upon him and to make sure of this consideration”

The High Court dismissed the complaint of the employee in this instance on consideration that all the criterion⁽²¹⁾ established in the above case has been fully assessed to have been met by the Employment Tribunal and saw no need to change

18 *Supra*, page 11.

19 See also *Blue Lagoon Investment Pvt. Ltd. v Abdulla Rilwan* 147/HC-A/2014; *Blue Lagoon Investment Pvt. Ltd. v Abdulla Salih* 148/HC-A/2014; and *Blue Lagoon Investment Pvt. Ltd. v Arshard Rasheed Hussein* 149/HC-A/2014.

20 *Supra*, see note 12.

21 “Courts and Tribunals are to necessarily ascertain ... whether, (a) the language of the agreement is clear comprehensible by the employee with regard to his education and experience, (b) in having the employee sign the agreement, the employer is cleared of any coercion, undue influence or fraud, (c) the employee was given the opportunity to read the agreement and whether the employee was given ample time to consider the option of signing it with regard to numerous waivers of rights enumerated therein, (d) the employee was afforded ample opportunity to consult a legal representative or any other person of his choice with regard to the content, (e) the employee was afforded ample opportunity to discuss with the employer with regards to the contents and to suggest amendments of his choice, (f) The agreement enumerated any consideration for the benefit of the employee in return for his waiver of rights, especially rights such as that of legal recourse...”

the their decision that decided not to hear the complaint of the employee on basis that the severance agreement signed between the parties. Therefore as it stands, severance agreements are enforceable in the Maldives and if governed by its own measures of procedural justice, provided the employer is wary of fulfilling the criterion established.

REDUNDANCY

Much like severance agreements, termination of employees on basis of redundancy is also not explicitly regulated under the Act. On matters of redundancy, reliance can only be made on whether such termination on grounds of redundancy was ‘with sufficient basis’ as required by section 21. However, since 2011, the High Court has allowed employers to let employees go on grounds of redundancy, basically provided the criterion set by case law is fulfilled.

We start our discussion here in the 2011 decision of the High Court in case of *Maldives Airports Company PLC v Ali Adam Manik*⁽²²⁾ where the employer sought to reduce the number of employees at the company (by way of redundancy) in a bid to ‘strengthen the financial management of the company’ in 2010. The employer announced in a company-wide circular prior that all personnel will be evaluated and that the lowest scoring four employees would be let go. The complainant employee sought recourse at the Employment Tribunal when he unfortunately got selected amongst the previously mentioned four employees and was let go with notice despite the fact that the employee was offered a redundancy severance package which he accepted on his own volition. In the first instance, the Tribunal decided that the termination was against the provisions under section 21 of the Act⁽²³⁾. On appeal, the High Court, overturning the decision, noted the following;

“... Companies run with aim to attain business profit will be faced with situations where employees are terminated for purposes of company restructuring or strengthening the management of the company, with view to increase profit (instances of redundancy). If employers are not afforded this opportunity, it will affect the businesses of such employers, with profits taking a turn for the worst. Despite the fact that the Employment Act or any of its subsidiary regulations do not enumerate provisions on redundancy, it can be sufficient basis when employees are terminated by companies towards strengthening the financial management of the company, with view to increase profit. However even in such instances it has to be ascertained whether; [1] such a need for the company had in fact arisen, [2] there is good faith on part of the employer, [3] the move by the company is not carried out for purposes of targeting a specific employee or a group of employees, and whether [4] substantive fairness and procedural

22 89/HC-A/2011.

23 See discussion on dismissal and termination.

fairness was established by the employer in the process⁽²⁴⁾

In the earlier mentioned case of *Umar Waheed*, the Court made reference to the case of *Maldives Transport and Contracting Company PLC v Ahmed Mohamed*⁽²⁵⁾ when it explained that “*substantive fairness is established when the grounds or basis of termination is proven to be just and fair and procedural fairness is established when the procedure used prior to the termination of an employee is just and fair*”. The Judges went on to resolve that substantive fairness will be established when the company can satisfy that the decision to restructure the company and terminate employees on redundancy was made, in good faith, with view of economic or financial reasons⁽²⁶⁾.

In the same case, the High Court also determined what may amount to procedural fairness in principle in cases of redundancy i.e., when employees are given prior notice of company restructuring and possible redundancy, based on a process that was notified to all employees that may be potentially made redundant, with notice or payment in lieu provided, and where all employees that may be potentially made redundant have been notified prior of any redundancy packages or severance packages that may be offered to them.

The employer in this case furnished to Court a resolution of the company’s Board of Directors which resolved to; restructure with view to strengthen the financial management of the company, make the employee’s position in the company, and create a new parallel position with stricter eligibility criterion. They justified the decision saying that the company had undergone the restructuring to bring the company abreast with modern developments, on basis of the worldwide economic downturn. The Court determined that the employer had successfully discharged the burden of proving that the redundancy was substantially fair, but at the same time determined that procedural fairness was not established as the employee was not informed prior of the possible redundancy. The High Court established that where only procedural fairness is not established in redundancy matters but substantive fairness had been, the employee cannot be required to be reinstated, but rather, where only procedural fairness is not established, a fair compensation is to be awarded.

To determine further what factually may amount to substantive and procedural fairness we see the 2013 decision of the High Court in case of *Maldives National University v Aminath Shafia*⁽²⁷⁾ where the employee was terminated on basis of redundancy while she was studying on an employer approved no-pay leave pursuant

24 *Ibid*, pages 7-9.

25 134/HC-A/2011.

26 *Ibid*, page 9

27 166/HC-A/2013.

to a scholarship. The High Court agreed on point that an employee on an extended no-pay leave may be terminated on basis of redundancy as allowed under Regulation 178(h) of the Civil Service Regulations but did go on to qualify that even in such instances, the employer has to show a basic necessity to do so, if redundancy is the basis on which the employee is being terminated. The Court in this case reiterated the principle that *“in cases of redundancy, substantive fairness is established by showing that the basis for termination is both just and reasonable, and procedural fairness is established by showing that the procedure followed in declaring the employee as terminated on grounds of redundancy was equitable.”*⁽²⁸⁾

The Employer declared that the annual budget as approved by the Ministry of Finance required them to terminate four employees on no-pay, owing to the great number of employees released by the employer on such basis. Deciding the matter though the High Court determined, *inter alia*, that the employer had failed to establish both substantial and procedural fairness in failing to satisfy both the actual basis and the procedure for selecting the specific employee to terminate on redundancy followed by the employer. Accordingly the Employment Tribunal's decision to compel the employer to reinstate the employee was upheld.

In the case of *Donna Andrea v Reethi Rah Resort Pvt. Ltd.*⁽²⁹⁾ once again the employee was terminated on basis of redundancy. The facts of this case were that the employee was working as a clinic nurse at the employer's tourist resort. At the Employment Tribunal the employer established that they had reviewed the changes in the incoming clientele structure of the resort, at the same time, conducted a review of the resort clinic and its functions. Accordingly the employer had decided that the post of clinic nurse need to be abolished and consequently, to terminate the employee, on basis of redundancy pursuant to such assessments.

What is important to note in this decision is that the employer had successfully established that the redundancy was substantially fair, while failing to establish that the procedure used was just. It was noted that the employee was not informed prior of her termination on grounds of redundancy, nor was she given an opportunity to transfer or seek alternatives. The High Court reiterated the principle established in 2011 that where only procedural fairness is not established in redundancy matters but substantive fairness had been, the employee cannot be required to be reinstated, but rather, a fair compensation is to be awarded.

Comparatively in redundancy under English law, employers have to necessarily prove that there exists reasonable basis for redundancy and a mere reshuffling or business reorganization would not amount to sufficient basis.⁽³⁰⁾ English law is a bit developed

28 *Ibid*, see pages 9-10.

29 256/HC-A/2013.

30 *Aylward v Glamorgan Holiday Hotel* [2003] All ER (D) 249

in terms of case law and statute, also requiring proper warnings to employees before the ultimate termination is effected,⁽³¹⁾ details of the allegation to be comprehensive⁽³²⁾ and provided at dismissal proceedings⁽³³⁾, and that investigations must result in notes being kept and given to the employee⁽³⁴⁾ etc.

31 *Tower Hamlets Health Authority v Anthony* [1989] ICR 656

32 *Coxon v Rank Xerox (UK) Ltd* [2003] ICR 628

33 Section 10, Employment Rights Act 1999.

34 *Vauxhall Motors Ltd v Ghafoor* [1993] ICR 376



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סודי דברי

הנשואים הנזכרים

על פי סודות הנזכרים, המצויים בספרותנו, נראה כי המושגים הנזכרים הם מושגים שונים, ויש להבחין ביניהם. המושגים הנזכרים הם מושגים שונים, ויש להבחין ביניהם. המושגים הנזכרים הם מושגים שונים, ויש להבחין ביניהם.

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