PENAL AND CIVIL LAW ASPECTS OF DISMISSAL WITHOUT CAUSE

GETACHEW BERHANE v. THE COMMERCIAL BANK OF ETHIOPIA (S.C.)[1]

*by Daniel Haile**

The plaintiff was dismissed from his job on October 28, 1964, by the respondent Bank on the ground that he and other employees of the Bank allegedly cashed and misappropriated a cheque of Eth. $ 12,000. In addition, the public prosecutor charged them under Articles 36 and 656(a), (b) of the Penal Code and instituted criminal proceedings against them.[2] Twenty-nine months after the criminal case was instituted, the Court decided that no case was established against the present Plaintiff and dismissed the case on the basis of Article 141 of the Criminal Procedure Code and acquitted him.

The Plaintiff then instituted this civil suit in the High Court and claimed a total of Eth. $ 11,468.50 as damages for loss of his back-pay for the whole period that he was dismissed, his annual leave, the moral damage he suffered and the legal costs he incurred. In addition, he petitioned the Court to order the respondent to reinstate him to his former post and to counteract publicly the defamatory effects of its allegations. After finding that the Plaintiff was dismissed without good cause, the court awarded him damages amounting to Eth. $ 1550, but rejected his claim for reinstatement.

The irony of this case leades us to two fundamental questions.

I. whether the Criminal Procedure Code provides sufficient pretrial remedies to protect people, like the present plaintiff, from undergoing the ordeal of a criminal proceeding?

II. Whether the labour laws of this country duly safeguard the rights of an aggrieved employee in cases of dismissal without good cause?

I. Pre-trial screening process under the Criminal Procedure Code

"The immediate efficiency and utility of any system of Criminal Procedure must be measured according to two goals, each equally important to society: The extent to which the system facilitates the enforcement of the penal law by bringing offenders to speedy justice by lawful means, and the extent which innocent citizens are left undisturbed."[3] Criminal procedure as a whole is basically a continuous process of reconciling these two apparently conflicting interests. In view of the fact that the present plaintiff was acquitted twenty-nine months after the case had been instituted

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1. Getachew Berhane v. The Commercial Bank of Ethiopia (S. C.) (High Court, Addis Ababa. 1967, Civil case 1604-59) (unpublished).
2. Public Prosecutor v. Seyoum Dagne *et al.* (High Court, Addis Ababa, 1967 criminal case 1112-57) (unpublished). Article 656 deals with fraudulent misrepresentation, while Article 36 talks about accomplices.
3. Stanley Z Fisher, *Ethiopian Criminal Procedure* (1969), p. 1.

against him, the theme of our comment will be the second goal of the system: The extent to which innocent citizens are left undisturbed.

A public prosecutor has the duty to institute proceedings[4] except when he is of the opinion that there is insufficient evidence to justify a conviction.[5] In principle, we do not disagree with the theory of granting some discretionary powers to public prosecutors or even to the police officers who prepare the diary of investigation in the decision of who should or should not be prosecuted. But once we grant them such authority the devising of a mechanism by which abuses can be curtailed becomes a must. Under our Criminal Procedure Code the opinion of the public prosecutor is the only criterion on the basis of which the decision to prosecute or not is made. Once the prosecutor decides to prosecute, his decision to prosecute and commit the suspected person immediately to trial is final except where the crime involved is first degree homicide or aggravated robbery.[6] But even here, since the preliminary or committing court does not have the right to discharge the accused,[7] the opinion of the public prosecutor is sufficient to commit the accused to trial. If the public prosecutor finds it to be befitting, even for purely sadistic motives, and decides to prosecute, the accused has no other remedy but to wait until the prosecutor's case is fully heard and the court dismisses the case on the ground that no case against the accused has been made.[8] Depending on the nature of the charges, the point in time when such a decision is made may or may not be at the early stages of the trial.

An examination of the record of the present case shows that the public prosecutor had insufficient evidence to prosecute the defendants. The crux of the prosecution's case was the cheque itself,[9] on the back of which appeared the following marks: "known to me," "Seyoum," "559/3" and a signature. At the request of the public prosecutor, the criminal investigations department administered a handwriting test to the defendants in 1964. However, the results of the test were not annexed as evidence in the charge that the public prosecutor filed almost nine months afterwards and when the handwriting expert finally testified on January 17, 1957 he stated that there was no resemblance between the handwriting of the defendants and the handwritings on the back of the cheque. Without showing a link between the handwritings, the prosecution did not have even a *prima facie* case against the defendants and defendents should not hve been forced to undergo the ritual of a criminal proceedings.

The fact that no other mechanism less than a full-fledged trial exists for the vindication of the rights of an innocent citizen who is improperly accused is a serious flaw in our pre-trial screening procedure.

This inequity becomes even more apparent when one looks at the other side of the coin - the public prosecutor's refusal to prosecute. The refusal by a public

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4. Cr. Pro. C., Art. 40
5. Cr. Pro. C., Art. 42(1)
6. Cr. Pro. C., Art. 80.
7. Cr. Pro. C., Art. 89
8. Cr. Pro. C., Art. 141
9. The prosecution could also produce five witnesses but their testimony only established that the cheque reached the Bank.

prosecutor entitles[10] the private complainant in complaint offences to conduct a private prosecution and in cases of non-complaint offences to challenge the prosecutor's decision in court.

Our Criminal Procedure Code, by adequately providing for pre-trial remedies in cases where the public prosecutor fails to prosecute, (Negative Abuses), does facilitate the enforcement of the penal law but the complete absence of such remedies in cases where the public prosecutor decides to prosecute without sufficient evidence (Positive Abuses) makes the innocent citizen susceptible to undue harassment. when one notes the fact that the public prosecutor's refusal to prosecute merely shifts the burden of prosecuting from the state to the private complainant and does not terminate the suit, while his decision to prosecute commits an individual to a criminal proceeding with all the social stigma associated with it and the attendant psychological effects the one-sided approach adopted by the Criminal Procedure Code becomes even more palpable.

True if the accused is under "restraint" he can file an application for habeas corpus in accordance to Articles 177-179 of the Civil Procedure Code. As the Amharic text of Art. 177(a) shows, the application of this remedy is limited to cases where the individual's right of movement is curtailed or where he is arrested or imprisoned. Since this may not always be the case the arguments for the right to challenge the prosecutor's decision still remain valid.

The absence of pre-trial remedies does not, of course, preclude other remedies. If a public prosecutor proceeds to prosecute when he should not have, the aggrieved party is certainly entitled to institute either a criminal case in accordance with Article 414 of the Penal Code or a civil suit on the basis of the extra-contractual liability provisions of the Civil Code.[11] A court proceeding by its very nature tends to be an arduous process and one can visualize how arduous it can turn out to be when the party to be judged is Mr. Prosecutor himself. Besides, the mere fact that the accused is found not guilty is not in itself sufficient to establish a case of abuse of powers. In addition one has to show beyond reasonable doubt or, in a civil suit, by preponderance of evidence that the public prosecutor acted with intent to procure an unlawful advantage or to do injury. These factors combined make such a remedy practically unenforceable.

In our opinion the Criminal Procedure Code should have provided a remedy that is prventive in orientation. Within the framework of the Criminal Procedure Code this could have been satisfied by making the right to challenge the public prosecutor's decision applicable not only in cases of refusal to prosecute but to cases where he decides to prosecute on insufficient ground.

We are fully aware of the problems that such a remedy may create - delay of justice and the harassment of the public prosecutor. However, such results can be

10. Art. 44 - Effect of refusal (1) Where the public prosecutor refuses to institute proceedings under Art. 42(1) (a) in relation to an offence punishable on complaint only, he *shall* authorise in writing the appropriate person mentioned in Art. 47 to conduct a private prosecution. A copy of such authorisation shall be sent to the court having jurisdiction. (emphasis added) (2) Where the public prosecutor refuses to institute proceedings under Art. 42(1) (a) in relation to an offence which is not punishable on complaint only, the appropriate person mentioned in Art. 47 may, within thrity days from having received the decision of the public prosecutor, apply for an order that the public prosecutor institute proceedings.

11. Civ. C., Arts. 2032, 2033.

avoided if the right to challenge the decision to prosecute is not granted automatically but after the accused first creates reasonable doubt that he is being prosecuted without serious grounds. In addition, the public prosecutor, at this stage, should be required to establish only a *prima facie* case and not to prove his case beyond a reasonable doubt. Once the court is satisfied of the existence of a sufficient ground it should permit the proceeding to continue in the normal fashion.

II. Dismissal without good cause: Sufficiency of remedies.

As already stated, once acquitted of the criminal charges against him, the plaintiff petitioned the High Court, *inter alia*, to order the respondent to pay him back-pay for the period during which he was dismissed and to reinstate him in his former post. The Court, basing its reasoning on Arts. 2570-74 of the Civil Code, stated that "the employee who is dismissed without good cause is entitled to three months salary as compensation but there is no legal ground that entitles him to be reinstated,"[12] and awarded the plaintiff damages amounting to Eth. $1,550.

Shocking as it may sound, this statement is not far from the correct statement of the law. Article 2573 of the Civil Code grants to an employer the right to dismiss an employee without good cause. In such case, the employee is entitled to fair compensation which under any circumstances cannot exceed one hundred and eighty (180) times the average daily wages.[13]

One may argue that a contract of employment being a special contract the remedies envisaged by the contracts section in general the remedy of specific performance in particular are available to an employee dismissed without cause. In order for specific performance to be granted, however, two elements must be fulfilled: The contract must be of special interest to the party requiring its performance and it must be one that can be enforced without affecting the personal liberty of the creditor.[14] An order of reinstatement undoubtedly affects the personal liberty of an employer and thus the argument fails on the facts.[15]

Of course, as long as the law through other means can duly and efficaciously protect the rights of the dismissed employee there is nothing sacred about the right of reinstatement. But when the remedy provided payment of a very low severance pay happens to be nothing but a token remedy, then it is a tragedy.

The rationale for requiring that the employer pay severance pay where he dismisses an employee without good cause is to deter the employer from engaging in such a practice. It is common knowledge that the cost of labour in Ethiopia, as in most other developing countries, is cheap. This situation is aggravated even more in this country by the total absence of legislation fixing minimum wages. This

12. But in cases involving discrimination by the employer under Art. 30 of the Labour Relations Proclamation (Proclamation No. 210 of 1963, *Neg. Gaz.*, year 23, No. 3), the Labour Relations Board had ordered reinstatement and its order was affirmed by the Supreme Imperial Court. See , Sera Mikael Brick Factory v. The Association of Demissie Eshete *et al.* (Sup. Imp. Ct., 1964), *J. Eth. L.*, vol. 3, p. 13.
13. Minimum Labour Conditions Regulations, 1964, Art. 9, Legal Notice No. 302, *Neg. Gaz.*, year 24, No. 5.
14. Civ. C., Art. 1776.
15. R. David, *Explanation and Commentary Ethiopian Civil Code Title XII* (1968, Kindred translation unpublished, Library, Faculty of Law, Haile Sellassie I University), p. 71.

being the naked truth, would then payment of a six month salary the maximum provided by law suffice to deter an employer from dismissing an employee without good cause? We are of the opinion that it will not. The very low wages coupled with the large labour reserve to replace a dismissed employee reduce the deterrence power of the remedy to a mere farce.

A review of labour laws of other developing countries will better illustrate our point. In Iran, for example, "A worker who believes he has been unfairly discharged and who has worked for the employer for 3 continuous months or intermittently for 6 months, may protest within 15 days of the discharge to the Factory Council. If he wins his case at this level, or by appeal to the Board for the settlement of Disputes, he may be awarded an amount up to *three years* wages in addition to the regular severance pay. However, the employer has the option of paying the compensation or reinstating the worker with pay for the days he was suspended from work."[16] (emphasis added).

Similarly in Mexico, "An employer who discharges a worker without just cause is obligated at the option of the worker to fulfil the contract or to pay him three months wage as compensation as well as full wages from the date of dismissal until a final decision is reached".[17]

Let alone by foreign standards even by our own Civil Code standards we find the remedy to be unsatisfactory. The employee who is dismissed without good cause is entitled to the meagre compensation presumably on the theory that the employer has failed to perform his contractual obligations. If this is so, should not the employee at least be entitled to damages equal to the damage which the non-performance would normally cause to him in the eyes of a reasonable pesorn,[18] as is generally the case in contracts? Unless one is to make the unrealistic proposition that in the eyes of a reasonable person the maximum length of time that a dismissed employee needs to find an equivalent job is one hundred and eighty (180) days, the remedy fails to meet even this test.

The primary aim of our labour-laws presumably is to maintain a harmoniuos relationship between the employer and the employee so as to facilitate economic growth. Thus the balance must be struck to achieve an optimum between the interests of the two parties. But as this case clearly demonstrates, the balance seems to have swayed in favour of the employer to the detriment of the employee. To abolish this imbalance the legislator should either always require a good cause for dismissing an employee, the solution preferred by us and recommended by the International Labour Organization[19] or should enact higher maximum limits of compensation for dismissal without good cause to be assessed in light of factors such as the bargaining power of the two parties, the level of industrial development, non-existence of unemployment insurance or benefits, etc.

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16. U. S. Department of *Labour, Labour Laws and Practice in Iran* (1964), p. 42.
17. U. S. Department of *Labour, Labour Laws and Practice in Mexico* (1963), p. 65.
18. Civ. C., Art. 1799.
19. Article 2(1) of International Labour Organization, *Recommendation Concerning Termination of Employment at the initiative of the Employer* (Recommendation No. 119 of June 5, 1963) provides that, "Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

It is worthy to note, however, that both the Labour Relations Proclamation[20] and the Minimum Labour Conditions Regulations[21] explicitly provide that where terms more favourable to the employee(s) than the ones provided by law are stipulated in an individual contract of employment, staff rule, collective agreement or any other legal arrangement the terms of the latter shall prevail over the law. Until the law catches up with the realities of life this can be used to serve as a stop-gap measure to minimize the existing imbalance. As a matter of fact, there is already a noticeable tendency, in some of the recently concluded collective agreements, to utilize this device to achieve the above-stated goals. For example, the collective agreement concluded between the Ethiopian Petroleum Refinery workers union provides that, "An employee shall not be dismissed, suspended, or transferred without good cause."[22] Similarly, in cases of dismissal without cause, the collective agreement concluded between the Ethiopian Airlines (S.C.) and the Ethiopian Airlines Employees Association, provides for the payment of severance pay that is higher than that provided by law".[23]

CONCLUSION

Within the framework of the case we have attempted to critically analyze our pre-trial screening methods and our labour laws dealing with termination of a contract of employment without good cause. The pre-trial screening methods we found to be adequate to facilitate the enforcement of the Penal Law but deficient when measured by the other equally important yardstick: The extent to which innocent citizens are left undisturbed. As a remedy we proposed that the right to challenge the pubic prosecutor's decision granted in cases of refusal to prosecute be made applicable also to cases where he improperly decides to prosecute.

Our labour laws dealing with termination without good cause we found to be lopsided in that they empower the employer to dismiss an employee at minimal expense. To sway back the balance of justice we proposed preferably to make the requirement of good cause a *sine qua non* for every termination. But failing that, if the laws purpose is to deter an employer from dismissing his employees without good cause and enhance the security and stability of the enmployee's position it should provide a more severe and stringent remedy than the six month's maximum severance pay that it grants. We do not venture to propose a specific figure because this would require a careful study of all the factors that affect the labour conditions in the country — a study that is so wide and so complex as to be beyond the coverage of this short case comment.

20. Labour Relations Proclamation, 1963, cited above at note 12, Art. 35.

21. Minimum Labour Conditions Regulations, 1964, cited above at note 12, Art. 10.

22. Collective Agreement concluded between the Ethiopian Petroleum Refinery (S. C.) and the Ethiopian Petroleum Refinery Workers' Union, January 1, 1971, Art. 4(a).

23. Collective Agreement concluded between the Ethiopian Airlines (S. C.) and the Ethiopian Airlines Employees Association, January 1, 1971, Art. X(e).