Mollye R. v Cranberry Management Ltd

2023 IND 24

Cause Number 36/18

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Rajeev Mollye

Plaintiff

v.

Cranberry Management Ltd

Defendant

Judgment

In this amended plaint, the salient averments are as follows:

Plaintiff was in the continuous employment of Defendant as "*Responsable de Salle"* since 1.8.2006.

He was employed on a 6-day week basis and was remunerated at monthly intervals at the basic rate of Rs 18,975 a month and his average monthly remuneration amounted to Rs 20,869.08. He last worked on 18.9.2017.

By way of a letter dated 18.9.2017, Defendant suspended him from duty and requested him to submit his explanation to the charges mentioned therein within a delay of 7 days.

By way of a letter dated 22.9.2017, he gave his explanation to Defendant in relation to the charges of alleged misconduct leveled against him.

By way of a letter dated 26.9.2017, Defendant terminated his employment on ground of misconduct.

He considers that his employment has been terminated without notice and without any justification inasmuch as the reasons for the termination of his employment do not constitute valid reasons and he has not been given at least 7 days' notice to answer the charges levelled against him.

Plaintiff is therefore claiming from Defendant the sum of Rs 714,765.98 representing one month's remuneration as indemnity in lieu of notice: Rs 20,869.08 and severance allowance for unjustified termination of employment for 133 months' continuous employment (Rs 20,869.08 x 3 x 133/12 years): Rs 693,896.90.

Defendant, on the other hand, in its plea which has remained unamended, has denied liability. It has averred that Plaintiff was employed with Elaura Limitée from 1.8.2010 till 31.7.2010. He was employed with Defendant from 1.8.2010 till 18.9.2017 as Senior Waiter.

It has admitted that he was earning a monthly basic salary of Rs 18,975 but has denied that his average monthly remuneration amounted to Rs 20,869.08.

It has also admitted that by way of a letter dated 18.9.2017, it suspended Plaintiff from duty and requested him to submit his explanation to the charges mentioned therein within a delay of 7 days and that he last worked on 18.9.2017. But it has averred that he refused to answer the specific charges laid down against him by it.

It further admitted that by way of a letter dated 26.9.2017, it terminated his employment on ground of misconduct. It could not do otherwise in the circumstances as per the charges laid down against him and has averred that on 18.8.2017, he committed a theft. In 2014, he failed to bank the sum of Rs 6,647. In April 2014, he took unauthorised absence. It had to terminate his employment with immediate effect and in its interest. It has denied being indebted to him in the sum of Rs 714,765.98 or in any other sum whatsoever and has averred that it did pay to him one month's salary in the sum of Rs 19,290 on 26.9.2017. It has moved that the amended plaint be dismissed with costs.

The case for the Plaintiff rested entirely on the evidence given by him in Court. He confirmed that he was employment with Defendant as from the year 2006 to 2017 as per Doc. P1. The latter document which was signed by Defendant's Manager, Mr. Gilbert Veerasamy, dated 26.9.2017 was to certify that Plaintiff was employed as waiter with Defendant company from 1.8.2006 to 31.7.2008 and as Senior Waiter with Defendant from 1.8.2010 up to 26.9.2017. He produced a letter emanating from the Director of Defendant, Mr. Hervé Leung, to the effect that the restaurant he was working was under the appellation of *"Le Courtyard"* and that his conditions of service has remained the same as per Doc. P2.

He had an average monthly remuneration in the sum of Rs 20,869.08 as per his pay slips collectively as per Doc. P3. On 18.9.2017, he received a letter from his Manager, Mr. Gilbert Veerasamy, as per Doc. P4 in that he was suspended by Management as a result of the following serious acts of misconduct as per the charges made against him -

1. *"You already had a warning on the 14th March 2014 concerning the amount of Rs 6647.00 which you failed to bank. This was a case of embezzlement which warranted dismissal but we gave you a second chance and decide on a warning instead."*

2. *"You also had a second warning on 1st April 2014 concerning local leave not given but which you took despite Manager's non-approval."*

3. *"For a theft you committed on the 18th August 2017. We have witnesses to testify for this gross misconduct."*

4. *"For ignoring client's complaint and failing to report same to the Manager."*

It was also mentioned therein "*You are hereby given 7 days to answer the charges levelled against you.*

Note: You are to take note that this is normally a police case but out of consideration for your future, we have decided not to take that route".

He stated that he was saying in Court that he was denying those allegations. In reply to the letter dated18.9.2017 namely Doc. P4, he did not answer to the charges as he was advised by Mr. Jack Bizlall, a representative of a trade union, not to do so as per his letter dated 22.9.2017 to Mr. Gilbert Veerasamy, the Manager, as per Doc. P5 as the Defendant company was proceeding with disciplinary actions leading to his

eventual dismissal. He mentioned that as regards the first 3 charges, they related to matters which happened more than 10 days before his letter dated 18.9.2017. Those 3 allegations he mentioned were unfounded and were therefore not accepted by him. As regards charge 4, he confirmed that the client concerned footed his bill and when the said client talked to Mr. G. Veerasamy, he was not called upon to have that client to say same in his presence, although he said that he could not give any explanation regarding that charge so long as it was associated with the first three.

On 26.9.2017, he received a letter from Defendant's Manager, Mr. G. Veerasamy, as per Doc. P6 wherein it was stated that he did not directly answer the charges levelled against him and which was found to be unsatisfactory and his contract was terminated with effect from 29.9.2017 on the ground of gross misconduct.

In Court, Plaintiff gave his explanations in relation to the charges.

For the first charge concerning the sum of Rs 6,647.00 in 2014 when he was working as Senior waiter for Defendant, he was somehow responsible for the hall and he had to ensure the cleanliness of the restaurant. He was also in charge of the cashier, took orders from clients and paid suppliers who came to deliver provisions for the restaurant and at the same time he bought provisions that were missing from Winners supermarket or from even the market. He was in charge of the cashier and was paying the suppliers. There were two balance accounts, one for clients who paid cash in the restaurant and the other was called petty cash. It was with that petty cash that payments were made to suppliers or to buy the provisions. Concerning the sum of Rs 6,647, there was a supplier who came to deliver the provisions and his balance of petty cash did not enable him to pay the amount needed to pay to that supplier. Then, he took a bill where a client paid cash, he paid the supplier and took the receipt and put it in the cash drawer. He could not bank that amount as he could not bank a receipt but had to wait for that money from the Accounts' department in order to bank same. When he received the said money from that department, he finally banked it. He did not give that explanation before as no one put that question before. He gave that explanation verbally to the Manager who was aware that he had used the cash to buy provisions and thus, he did not accept that charge. After he had banked the money and not before that he received a letter of warning in that he was sanctioned by the same Manager on behalf of Defendant by being inflicted a warning as per Doc. P7.

For the second charge where he took unauthorised leave, it was in relation to a wedding. He informed Defendant verbally through the same Manager one week before and he was not told that it was not approved. When he had already taken the 2 leaves and having resumed duty that he was informed that one of his leaves for 21.3.2014 was not approved as there was a special function on that particular day and he was also inflicted a warning in relation to the unauthorised leave as per Doc. P8.

For the third charge, it was on 18.9.2017 that he learnt that there was an alleged charge of theft against him which was the day he received his letter of charges. He had to ask what he took and was told that he took Iced Tea which he said he denied as he was not aware. In his letter of charges, no mention was made of any pack of Iced Tea. He was told only verbally. He said that he did not know anything about that, he was not aware and did not take it. Although as per the letter of charges, it was mentioned that there were witnesses in relation to that, he maintained that he did not take it and was not aware. He has thus denied that charge. However, he accepted that in 2017, he was waiter in charge, Neelesh Gudjadhur was a waiter and Sameer Kootab was a cook. He was in good terms with both of them and did not have any problem with them in the past. He did not know why the two of them signed a document on 8.9.2017 to say that on 18.8.2017, he took a pack of Iced Tea from the store after all the clients had left and shared it with them by giving 2 litres to Sameer and two litres to Neelesh while they were in the car of Sameer and leaving the place as it was not true. They were in the car of Sameer on that day and he did not take that pack of Iced Tea from the store and nothing happened as they left in that car. At that time, Mr. G.Veerasamy was the Manager and when he was absent, Plaintiff was responsible for the hall and one Vasoo who was the Cook was responsible for the kitchen. Usually, it was the cook that had the right to go to the store but it was not specified although he had nothing to do with the store and was not a storekeeper. He was not aware that following the 18.8.2017, there was an internal inquiry in order to know what happened.

For the fourth charge namely *"For ignoring client's complaint and failing to report same to the Manager."* he did not give any evidence in Court save and except made a denial.

Hence, he went on to say that Defendant terminated his contract of employment without any justification and claimed the sum as detailed in his amended plaint from Defendant.

The case for the Defendant unfolded as follows:

Mr. Sameer Kootab in his capacity as Cook, gave evidence in Court as representative of Defendant. In 2017, Mr. Gilbert Veerasamy was the Manager. He made a statement addressed to that Manager on 8.9.2017 and he identified his signature as per Doc. D1 wherein he stated that on Friday 18.8.2017 when all the clients had left, he took his car and brought it in front of the restaurant and he was waiting for Plaintiff and his colleague Neelesh to come and to leave. Plaintiff took Iced Tea and gave him 2 litres and also gave Neelesh 2 litres. He accepted the Iced Tea as he thought it was expired and left. Plaintiff took the Iced Tea from the restaurant and he did not know how much he took. He said what he said in his statement was true. The incident happened on 18.8.2017 which was a Friday and during the weekend the restaurant was closed. The storekeeper after an inventory found out that provisions were missing and then he made an inquiry initiated by that Manager following which he got to know when he signed his statement given on 8.9.2017. At the time of the incident, he had been working for Defendant for 7 years. He knew the procedures and it was not allowed to take provisions from the store. He did not report the matter to management and it was only when he was asked that he gave his statement otherwise he would not have said anything as he thought the Iced Tea was expired. Neelesh accepted that he committed a fault and had apologized but it was the Plaintiff who took that Iced Tea and it was his responsibility as it was for the restaurant and as per the rules at the restaurant, it was not allowed to take provisions from there. He gave his statement 3 weeks after the incident and between 18.8.2017 till 8.9.2017, he had made no other statement. He stated that the Plaintiff's case had to be dismissed.

Mr. Neelesh Gudjadhur in his capacity as waiter gave evidence in Court. He identified his signature and he gave a statement to the same Manager, Mr. G. Veerasamy, on 8.9.2017 as per Doc. D2 to the effect that on Friday night on 18.8.2017 when all the clients had already left, when he was changing his uniform, Plaintiff took one pack of Iced Tea from the store and told him that he was taking it away. When he got into the car of Sameer, he gave Sameer 2 litres and also gave him 2 litres of that Iced Tea. He did not say anything as he was shocked he did something like that but he did not say anything as Plaintiff was responsible for the restaurant. Plaintiff had no right to do so. On Monday when he went to work, the barman, Christopher Augustin, told him that Iced Tea was missing in the store while making an inventory and he told him that Plaintiff took that Iced Tea from the store on

that Friday. He accepted the Iced Tea as Plaintiff gave it to him. In his statement he accepted that Plaintiff was dishonest and he apologised if ever he committed a fault from the perspective of Defendant as he took the Iced Tea in the car and not in the restaurant as he was not the one who removed the Iced Tea from the restaurant. He did not agree that he took that pack of Iced Tea from the restaurant and that he together with Sameer concocted to frame Plaintiff. It was dishonest for him to accept that Iced Tea which he agreed but he was under the impression that Plaintiff shared the Iced Tea with them so that they would remain silent on that matter. But neither Sameer nor he took that pack of Iced Tea from the store on that day. He swore as to the truth of his statement in Court. Between 18.8.2017 and 8.9.2017, the same Manager conducted an internal inquiry and it was only when he was queried and asked that he gave his statement in September and did not give any further statement.

Mr. E.B. Gilbert Veerasamy gave evidence in Court. He was working at the restaurant of Defendant in his capacity as Manager. He was shown documents D1 and D2 emanating from Mr. Sameer Kootab and Mr. Neelesh Gudjadhur respectively and he identified his signatures on those 2 statements which he took in the course of an inquiry conducted by him. Apart from Mr. Gudjadhur and Mr. Kootab, he took a statement from the barman Mr. C. Augustin. The inquiry started when he found that there was something abnormal at the level of the store. It was the barman who was responsible. He called the said barman as to what happened as he saw that something was abnormal and asked him to make an inventory of the store. On the material day viz. on 18.8.2017, he left early and Plaintiff was responsible until closure of restaurant. After having been apprised of that inventory, he started an internal inquiry by interrogating all the employees and Mr. Gudjadhur and Mr. Kootab signed their statements on 8.9.2017. About 3-4 days after the 8.9.2017 when he completed the inquiry and brought same to the Director for approval which took a maximum of 8-10 days. Then, Plaintiff was given his suspension letter. Thereafter, his contract of employment was terminated.

As regards the first charge levelled against Plaintiff in 2014 in relation to the sum of Rs 6,647 which was not banked, he had verified the bank statement and saw that the sum of Rs 6,647 was never banked. When that sum was not banked, he called Plaintiff and informed him that the selling and banking did not tally. The explanation given by Plaintiff was that he could not succeed in banking it as he had to use that money to buy provisions because at the level of petty cash it was around Rs 5,000

maximum and it concerned a sum of above Rs 6,000. There was a deficit in the petty cash but as per instructions given, the sum sold was not to be used as petty cash, it had to be banked. Concerning the petty cash then, Plaintiff had to come and see him and he would have given him a cheque to be used for petty cash. When Plaintiff said so, he was given a few days to bank that money but he took far more time that was given to him for that exercise. The petty cash was on a daily basis and the cheque could be drawn at any time. Plaintiff was in charge of the cashier and was the one who had the control of petty cash at that level. At the end of each day, a report should be sent to state what was sold and what was used in the course of the day and as soon as the petty cash became zero, he had to be notified about it one day before to prepare the cheque bearing his signature for the petty cash to remain always in the sum of Rs 5,000. But he was never notified for that sum of Rs 6,647. Plaintiff had no right to take money from the selling meant for banking to be used as petty cash, he had to ask him first.

As far as the second charge was concerned as per his letter dated 1.4.2014, Plaintiff was also given a second warning as per Doc. P8 wherein he stated:

"You requested for 2 local leaves for 21st and 22nd March 2014 for reason of attending a wedding. The local leave for 21st March was approved, and you were told that it was not possible for us to grant you the local leave for 22nd March 2014 since we have a special function on that particular date.

You did not come to work on 22nd March 2014 despite the fact that you were told that the local leave for that particular date was not approved, and your presence on that date was an absolute necessity. This is a gross misconduct on your part, and has caused us major inconveniences and prejudice.

You had already been given a first written warning on 14th March 2014, and therefore this present warning will constitute as a 2nd written warning to you."

At that time, he was the Manager. Plaintiff made his application for a local leave for that day and as there was a big event on that very day, his local leave was not approved but which he took despite the Manager's disapproval. When Management took all those events into consideration especially the theft that occurred on 18.8.2017 and Plaintiff's antecedents, it took the decision to terminate his employment as it was not satisfied with his explanations.

In cross-examination, he accepted that the problems concerning the petty cash and leave happened in 2014 and in relation to which he sanctioned Plaintiff by giving him a warning himself. As per the letter of charges as per the Doc. P4, those 2 acts have been mentioned in that letter dated 18.9.2017 although Plaintiff had already been sanctioned for them viz. for the first 2 charges which he agreed. In fact, Plaintiff had to answer all the 4 charges. He did not see Plaintiff stealing Iced Tea but he conducted an internal inquiry in relation to the theft that occurred on 18.8.2017. He had to verify what all the witnesses had said in their statements and put that in writing to be presented to the Director of Defendant company who was Mr. Hervé Leung. Following the statements given to him by Sameer and Neelesh, they had to tally with the barman's inventory as to how much shortage there was or not and then he could remit the file to the Director.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Counsel.

The provisions of the law applicable to the present case are to be found under Section 38(2)(a) of the Employment Rights Act 2008 which are reproduced below:

*"**38. Protection against termination of agreement***

(2) No employer shall terminate a worker's agreement-

(a) for reasons related to the worker's misconduct unless –

(i) he cannot in good faith take any other course of action;

(ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his misconduct;

(iii) he has within, 10 days of the day on which he becomes aware of the misconduct, notified the worker of the charge made against the worker;

(iv) the worker has been given at least 7 days' notice to answer any charge made against him, and

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him,

or where the charge is subject of an oral hearing, after the completion of such hearing;" (**emphasis added)**

Now as per the evidence borne out by the record, it remained uncontested that Plaintiff received his suspension letter which contained 4 charges of acts of misconduct made against him as per Doc. P4 on 18.9.2017. Thus, he did receive his letter of charges wherein he was suspended on the same day on 18.9.2017 for 4 *prima facie* charges (viz. 4 serious acts of misconduct on his part) made against him and in relation to which he was given 7 days to answer. Plaintiff gave his reply as per his letter dated 22.9.2017 viz. Doc. P5 and following which he was dismissed by way of a letter dated 26.9.2017 viz. Doc. P6. Therefore, there is no evidence to show that the respective letters were not received by the respective parties within the prescribed delays.

Thus, it can safely be inferred that Sections 38(2)(a)(iv) and 38(2)(a)(v) of the Employment Rights Act 2008 have been complied with although there was no oral hearing before a disciplinary committee. Now, Plaintiff when giving his written explanations in relation to the 4 charges made against him had the choice of either being assisted by a Labour Officer from the Ministry of Labour and Industrial Relations or a Counsel of his choice or a Trade Unionist and he could even mention his witnesses if any when giving his written explanations in relation to each charge.

Therefore, Plaintiff was expected to give his 4 versions of facts which could have been vetted by his Counsel by way of written explanations to dissuade the Defendant in relation to each charge of misconduct in order for him to keep his job following his suspension. It is significant to note that he denied the first 3 charges and refused to give any explanations and as regards the last charge he did not deny same and did not give an explanation as such but attempted to challenge that charge without it being associated with the 3 other ones.

However, in Court, after having retained the services of Counsel, he tried to dissuade his employer in relation to the first 3 charges only and failed to do so in relation to the last one which was *"For ignoring client's complaint and failing to report same to the Manager."* in order to keep his job.

It is worthy of note that a single charge of misconduct is sufficient for Defendant employer to dismiss Plaintiff provided that it is able to discharge the burden of proof

laid upon it at the time of dismissal after the Plaintiff employee was given an opportunity to be heard as imposed by statute namely Section 38(2)(a)(ii) of the Employment Rights Act 2008.

At this stage, it is significant to note that Plaintiff neither retained the services of Counsel nor the services of a Labour Officer but retained that of a Trade Unionist under the name of Mr. Jack Bizlall. Plaintiff's response to the letter of charges on 22.9.2017 as per Doc. P5 to the Manager, Mr. G. Veerasamy, is reproduced below:

"I have been advised by Mr. Jack BIZLALL of the FPU not to answer the charges contained in your letter, as they clearly indicate that the Company is proceeding with disciplinary actions leading to my eventual dismissal.

I have been advised to ask you to read Section 38(2)(iii) of the Employment Rights Act.

May I draw your attention that the first three charges are related to matters which happened more than 10 days, before your letter dated 18-Sep-2017.

I seize this opportunity to tell you that I have made an official complaint at the Labour Office of Pamplemousses (to Mr. Rajiv Nungur, tel: 243 4153). In case you have no intention to dismiss me, I would have no objection to explain in writing what I have already told you verbally concerning the first three charges. I also claim that these allegations are unfounded and are therefore NOT accepted by me.

I cannot give you any explanation regarding charge 4, so long as it is associated with the first three charges. Nevertheless, I confirm that the concerned client footed his bill and when he talked to you, I was not called upon to have him say same in my presence.

In case our relationship cannot be maintained on basis of mutual trust, please contact the Labour Office for the termination of my contract with payment of compensation at approved rates."

Plaintiff having said so in Doc. P5, when one reads subsections (ii) along with subsections (iv) and (v) of Section 38(2)(a) of the Employment Rights Act 2008, it becomes clear that the law contemplates 2 possibilities of disciplinary hearing namely a written hearing or an oral hearing which means that the explanations of the Plaintiff can take 2 forms. As highlighted in the Supreme Court case of **Tirvengadum v Bata Shoe (Mauritius) Co. Ltd** [1979 SCJ 223], each case must be

decided on its own merits and it is not expected from the employer before dismissing its employee in relation to charges of misconduct made against him to turn itself into a Court and to hold a formal hearing.

Likewise, pursuant to Sections 38(2)(a) subsections (ii), (iv) and (v) of the Employment Rights Act 2008, no provisions are made for the employee to impose his conditions prior to furnishing his explanations in relation to the charges of misconduct levelled against him by his employer nor to canvass objectionable points in law be it for an oral disciplinary hearing or a written one.

Instead of opting for an oral disciplinary hearing in the sense of having Plaintiff heard orally before a disciplinary committee [which does not have the attributes of a Court of law rendering its finding inconclusive (see- **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343])] in relation to the 4 charges levelled against him, Defendant chose a written disciplinary hearing for that purpose which was lawful.

The Defendant employer's role is limited to the taking of the decision of whether to keep Plaintiff in employment or not after having read his 4 written versions of facts in relation to each charge made against him and also taking into consideration of material of which it was aware or ought to have been reasonably aware at that time (see- **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] by way of analogy).

At that stage, after having afforded Plaintiff a written disciplinary hearing, his answers contained in his letter viz. Doc. P5 were crucial for Defendant to decide whether he could give him another warning, for example, following his explanations given in relation to each charge and avoid the termination of his employment or whether such a measure would not have served any meaningful purpose as he would have continued to commit acts of misconduct so that he could not be trusted anymore by Defendant. Precisely, this is why the burden of dissuading Defendant so that he could keep his job rested on the Plaintiff which he lamentably failed as per the tenor of his letter namely Doc. P5. Moreover, at that stage, he was not expected to canvass an objectionable point in law in that explanation letter concerning the statutory delay of 10 days having been complied or not in relation to the first three charges by Defendant pursuant to Section 38(2)(a)(iii) of the Employment Rights Act 2008. But he was at liberty to raise such a point in law after his dismissal before a Court of law in that his Defendant employer has waived its right to invoke justified dismissal because such statutory delay of 10 days being mandatory has not been complied with in relation to the first 3 charges but not at the stage of his written

disciplinary hearing, that is, not in his letter meant *stricto sensu* for his explanations in terms of his 4 versions of facts in relation to the 4 charges made against him by Defendant.

As per Plaintiff's testimony, it was only in Court that he tried to dissuade Defendant so that he could keep his job in relation to the first 3 charges whilst when he was given an opportunity to do so, he failed to give such versions of facts in writing. Indeed, he failed to dissuade his employer in relation to the fourth charge in his explanations letter where the charge was not denied by him but he only did so in Court.

As regards the third charge, it has been established from the unrebutted evidence of both Sameer and Neelesh that Plaintiff did take away a pack of Iced Tea from the store on Friday 18.8.2017 and gave 2 litres to each of them and left in the car of Sameer which was further reinforced by the fact that the Manager asked the barman to carry out an inventory as there was an anomaly at the store of the restaurant on the following Monday as the restaurant was closed during the week-end let alone that Plaintiff admitted himself that it was not specified that he could not go to the store although it was usually the cook who did so. Plaintiff conceded that there was no bad blood between them and as such there was no reason for Sameer and Neelesh to frame him and thus, I do not accept his testimony that he was unaware and did not commit the theft of the Iced Tea at the material time when he was in charge in the absence of the Manager as I find that the testimonies of those two witnesses are more plausible and reliable and are in line with their statements namely Docs. D1 & D2 given to the Manager as part of his internal enquiry. Indeed, the testimony of the Manager remained unrebutted that Plaintiff was in charge on the day the theft was committed. Therefore, it is abundantly clear that after all the clients had left the restaurant on the material evening when Plaintiff was in charge, he took a pack of Iced Tea from the store and left with same in the car of his subordinate waiting in front of the restaurant and shared it with him and another subordinate also found in that car at that time so that they would not say anything to management as they were benefiting too. Thus, I find on a balance of probabilities that Plaintiff did commit that theft at the material time on 18.8.2017 as per the third charge.

Again, as regards the first charge, although he explained that there was late banking on his part as he took money from the selling as there was not enough from

petty cash and had to obtain money from the accounting department in order to bank that money, it remained unrebutted from the Manager's testimony that he ought to have asked the Manager for a cheque as he had no right to take money from the selling to pay for the purchase of provisions and that he took far longer than required in order to bank that money which explained why he was inflicted a warning by the same Manager. Thus, I find on a balance of probabilities that he did commit that act of misconduct as per the first charge.

As regards the second charge namely the unauthorised leave, he said that he verbally informed the Manager one week before that he had to attend a wedding but yet after that event when he resumed work that he was told that he took unauthorised leave. At no time did he reply to the Manager that as explained to him, he had to attend a wedding as he was already made aware and that the warning inflicted on him in that respect by the said Manager was not warranted so that the warning be waived. Thus, again, I find on a balance of probabilities that he did commit that act of misconduct as per the second charge.

Finally, as regards the fourth charge namely *"For ignoring client's complaint and failing to report same to the Manager."* he did not deny the charge in his written disciplinary hearing as per Doc P5 but admitted that the said client footed his bill while in Court he simply denied the charge without substantiating it. Thus, I find on a balance of probabilities that the charge has been proved that Plaintiff did ignore that client's complaint and failed to report same to the Manager.

Irrespective of the issue of the statutory delay of 10 days having been exceeded by Defendant in relation to the first 2 charges pursuant to Section 38(2)(a)(iii) of the Employment Rights Act 2008, true it is that Plaintiff was already sanctioned in the past by Defendant for those 2 unauthorised acts by being inflicted a warning in relation to each of them as per Docs. P7 and P8. Furthermore, as regards the third charge namely of theft, it has not been established that Defendant acted more than ten days of the day on which it became aware of the finalised file remitted to him by its Manager to notify Plaintiff of that charge made against him as it involved the statement of the barman following his inventory from the store as well as those of the 2 witnesses namely Neelesh and Sameer. Thus, it can safely be inferred that Defendant was still within the delay of 10 days in relation to that third charge.

At this particular juncture, assuming that the charge of theft can be dissociated from the first 2 charges concerning unauthorised acts committed by Plaintiff so that

he is administered another warning. Then, it will be too easy for him to continue to commit unauthorised acts in the future and each time rely on the fact that he was already sanctioned by his employer for the previous ongoing unauthorised acts as he was already given a warning in relation to each of them and that should he be given a more severe sanction than a warning, he would rely on the ground that he cannot be punished twice for the previous acts of misconduct. The inevitable conclusion is that such a course will enable the employee to get away with a warning each time an unauthorised act is committed by him which obviously cannot be condoned.

Thus, it is plain enough that Defendant while assessing whether in view of Plaintiff's repeated commission of unauthorised acts as per the 4 charges proved against him, will not condone dissociating the first 2 charges from the last two just because they were committed about 3 years ago and for which Plaintiff was already sanctioned in terms of 2 warnings having been administered to him, because the trend adopted by him clearly shows that 2 previous warnings did not serve any useful purpose so that more warnings cannot be considered as an alternative to his dismissal.

In the present circumstances, true it is that Defendant has waived its right to invoke justified dismissal for the first 2 charges because Plaintiff was already inflicted a warning in 2014 in relation to each of them so that the mandatory delay of 10 days pursuant to Section 38(2)(a)(iii) of the Employment Rights Act 2008 as per his letter of charges dated 18.9.2017 viz. Doc. P4 is deemed not to have been complied with. It is relevant to quote an extract from the Privy Council case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [2006 PRV 33] which reads as follows:

"15. (…) Nevertheless, the legislature has adopted a policy of laying down a fixed time-limit - clearly, with the Recommendation of the ILO in mind and with the aim of ensuring that both parties know where they stand as quickly as possible. See Mahatma Gandhi Institute v Mungur P [1989 SCJ 379] where the Supreme Court described the time-limit as being based on sound principles and added:

"Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct."

(…) The courts must respect the policy which lies behind the time-limits that the legislature has imposed."

However, in view of the fact that Defendant has not waived its right to invoke justified dismissal regarding charges 3 and 4 as per Doc. P4 as it acted within delay of 10 days pursuant to Section 38(2)(a)(iii) of the Act in the absence of any evidence suggesting otherwise and that those two charges having been proved against Plaintiff, the 2 previous warnings inflicted to him as per Docs. P7 and P8 will have to be taken into consideration because it is beyond dispute that administering more warnings will be a futile exercise as unauthorised acts like charges 3 and 4 have recurred and the trust between the Defendant employer and Plaintiff employee cannot realistically continue to exist.

Now there is nothing to suggest that the evidence given by both Plaintiff and Defendant's three witnesses (who were its employees at all material times at its restaurant) in the course of the trial, was not within the ambit of what Defendant knew or ought to have reasonably known at the time he dismissed the Plaintiff following his written disciplinary hearing namely Doc.P5.

Therefore, it is clear enough that following the written disciplinary hearing of Plaintiff viz. Doc. P5 and on the basis of material of which Defendant knew or ought to have been reasonably aware at the time it dismissed Plaintiff in relation to charges 3 and 4 only and in view of his previous antecedents in terms of 2 warnings having been inflicted against him for unauthorised acts committed by him as per Docs. P7 & P8, it could not in good faith have taken any other decision so that his dismissal was not unjustified.

For all the reasons given above, the case for the Plaintiff has fallen short of being proved on a balance of probabilities. Accordingly, I dismiss the Plaintiff's action with costs.

S.D. Bonomally (Mrs.) *(Vice President)*
21.4.23