Gery L.D. v Cargo Handling Corporation Limited

2022 IND 27

Cause Number 461/20

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Louis David Gery

Plaintiff

v.

Cargo Handling Corporation Limited

Defendant

Ruling

The averments of this plaint are reproduced below:

"1. The Plaintiff was at all material times employed with the Defendant as senior tyreman at the Workshop Department of the Defendant for and in consideration of a monthly basic salary of Rs. 22,900/-.

2. Following a report made by Mr. Juggiah, an engineer to the management of the Defendant on the 21 August 2021 to the effect that the Plaintiff was playing cards during working hours, the Plaintiff denied the accusation and gave a statement to the Human Resource Department on the 24 August 2020 as follows:

"Mo pé déclaré ki aujourdhui monne vine donne mo statement dans buro HR suite au charge ki Mons Juggiah inne faire contre moi le Vendredi 21 Aout 2020, ki

mo ti pé jouer carte dans mo l'heure travail. Sa charge ki Mons Juggiah inne metter contre moi la li totalement fausse. Sa jour la monne travaille dans mo l'heure tea time entre 1 hr à 1 hr 15 pour ki mo capave alle reunion ki management inne faire dans MCT food court à 14 hr 15. Kan monne alle prend mo papier manger dans Logistics et kan mo pé sorti, monne trouve banne collegues ki pé jouer carte. Ti éna chaises vide et monne assize lors ene chaise, monne guette zotte jouer. En même temps Mons Juggiah inne rentrer et linne accuse moi ki mo pé jouer carte. Monne rode faire li comprand ki monne travaille dans mo l'heure break, mais li pas pé comprand. Lerla monne passe message avec mo chef Mons Vivian Mestry. Monne dire li ki monne travaille dans l'heure manger et ki ingénieure la pé dire ki mo pé jouer carte. Mons Mestry inne réponde moi ki li réconnaite ki monne travail dans l'heure manger. C'est tout ce ki mo éna pour dire."

3. By a letter dated 25th August 2020 addressed to the Plaintiff, the Defendant stated "inter alia" therein that it has closely examined the Plaintiff's explanations tendered in his statement, "is not satisfied with same" "considers this a serious breach of discipline and conduct" and further warned the Plaintiff that "any such recurrence in future will entail more severe disciplinary measures" against him.

4. The Plaintiff avers that the Defendant's findings and warning contained in letter dated 25th August 2020 is unwarranted and without any cause or justification having regard to his explanations.

The Plaintiff therefore humbly prays from this Honourable Court for a judgment dismissing the warning given by the Defendant to the Plaintiff as per letter dated 25th August 2020. With Costs."

Defendant has raised a plea *in limine* to the effect that Plaintiff cannot proceed with the present case in its form and tenor inasmuch as this Court does not have jurisdiction to entertain the present claim as the Plaintiff's cause of action relates to a "labour dispute" as defined under the Employment Relations Act 2008. The Defendant has therefore moved that the present plaint be set aside with costs.

The matter was accordingly fixed for arguments.

The main thrust of the arguments of learned Counsel for Defendant is that *ex facie* the plaint, the Industrial Court does not have jurisdiction to hear the matter as the cause of action is more akin to a labour dispute as defined under the Employment Relations Act. Under para.2 of the plaint, there had been a report

undertaken on behalf of Defendant to the effect that Plaintiff was playing cards during working hours and a statement was taken from him. A large part of the statement has been averred in para.2. Thereafter, at para.3, a letter was addressed to the Plaintiff by the Defendant wherein it was stated to the Plaintiff that the explanations that he had tendered were not satisfactory and that he was therefore considered to have participated in a breach of discipline and conduct and that a warning was issued in that respect. So, *ex facie* the plaint it is a matter of discipline. At para.4, Plaintiff has averred that this was unwarranted and that there was no justification for same. The prayer specifically is where Plaintiff prays for a judgment dismissing the warning which was taken as a disciplinary measure against the Plaintiff. He relied on Section 3 of the Industrial Court Act 1973 which has exclusive jurisdiction to try any matter arising out of the enactments that are set out in the First Schedule to the Act and none of them relate to matters of discipline between an employer and an employee. It falls within the jurisdiction of the Commission for Conciliation and Mediation and if not satisfied within that of the Employment Relations Tribunal but not this Court.

Learned Counsel for the Plaintiff's main contention is that by relying on Section 71 of the Employment Relations Act where the Tribunal's jurisdiction is excluded and shall not enquire into any labour dispute where the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court, he relied on the Supreme Court case of **Raman Ismael v United Bus Service** [1986 SCJ 303] to submit that the Industrial Court has jurisdiction to hear the present case.

I have given due consideration to the arguments of both learned Counsel. True it is that the present case concerns solely a claim in relation to an alleged breach of discipline and conduct where a written warning was inflicted to Plaintiff after Defendant was not satisfied with his answer. Thus, Plaintiff's claim is to have the warning dismissed against him as according to him it was not warranted. This is the only grievance of Plaintiff against the Defendant in relation to its management.

Section 3 of the Industrial Court Act 1973 reads as follows:

*"**3. Establishment of Industrial Court***

There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any

regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment."

Now, by virtue of Section 3 of the Industrial Court Act 1973, the Industrial Court has exclusive civil and criminal jurisdiction to try matters arising out of the enactments listed in the First Schedule to the Act. It is worthy of note that the First Schedule does not include the Employment Relations Act and does not cater for matters of purely and simply discipline inflicted by an employer as part of its management to its employee as rightly pointed out by learned Counsel appearing for the Defendant.

Indeed, the present type of labour dispute as averred in the plaint as per the findings of Defendant in its letter dated 25.8.2020 to the effect that Plaintiff committed a *"breach of discipline and conduct"* so that he was inflicted a warning namely *"any such recurrence in future will entail more severe disciplinary action"* following the report made to its management that Plaintiff was playing cards during working hours and his statement given in relation thereto will necessarily attract the applicability of the Employment Relations Act 2008 as amended which is not covered by Section 3 of the Industrial Court Act 1973 for which the Industrial Court has jurisdiction.

Section 71 of the Employment Relations Act 2008 reads as follows:

"71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue –

(a) Within the exclusive jurisdiction of the Industrial Court,

(b) Which is the subject of pending proceedings before the Commission or any Court of law.

Thus, the said Employment Relations Tribunal which is a statutory body set up by Parliament derives its powers from the Employment Relations Act 2008 as amended which in turn empowers the Defendant to take disciplinary measures against the Plaintiff.

Therefore, the Plaintiff ought to have reported that labour dispute to the President of the Commission for Conciliation and Mediation pursuant to Section 64(1) of the Employment Relations Act 2008 as amended by Act 21 of 2019 (the Act) after

meaningful negotiations have taken place between the parties and a deadlock has been reached within the meaning of Sections 64(2) (a) & 64 (2)(b) of the Act. The "Terms of Reference" of his labour dispute, for instance, would be along those lines namely *"whether Plaintiff should have been given flexibility at work daily in covering his daily number of working hours following any entitlement to have the written warning given against him by Defendant on 25.8.2020 dismissed or revoked."*

In the event of no settlement being reached meaning of a deadlock, pursuant to Section 69(9)(b) of the Act, the Commission shall refer the labour dispute to the Tribunal at the request of the Plaintiff meaning the party reporting the dispute.

It is significant to note that as adumbrated in the Privy Council case of **Bundhoo v H.K.S. Jankee & 32 Others [2000 UKPC 28]** and in the Supreme Court case of **Ittoo P. & Ors v The Permanent Secretary, Ministry of Health & Quality of Life** [2006 SCJ 20] that it stands to reason that a right relating to a matter of discipline which in the present case is a warning *simpliciter* is a "dispute of interest" as opposed to a "dispute of right" inasmuch as that warning *simpliciter* is part of an employer's interest in relation to management. Hence, in the same breath, the Industrial Court will not try cases challenging such a warning as it has no actual consequence.

However, an employee will have a right to challenge a warning before the Industrial Court where the warning is likely to affect his working conditions like, for instance, a warning coupled with a diminution of remuneration could be perceived by an employee as he is being constructively dismissed by his employer (see- **Raman Ismael v United Bus Service** [1986 SCJ 303]) which is "a dispute of right" as opposed to "a dispute of interest" and which is not the case *ex facie* the averments of the present plaint.

Thus, matters of petty grievances arising out of management by an employer namely matters of discipline inflicted by an employer to its employee having no actual consequence on the employee's working conditions are necessarily matters which arise out of the provisions of the Employment Relations Act 2008 as amended and which is not listed in the First Schedule to the Industrial Court Act 1973.

For all the reasons given above, I uphold the plea *in limine*. The plaint is accordingly set aside. With costs.

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

10.6.22