Nundlall v Emcar

2022 IND 57

CN483/16

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Kooshal Nundlall

Plaintiff

v/s

EMCAR Co. Ltd

Defendant

JUDGMENT

By way of Amended Plaint With Summons, the Plaintiff is claiming from the Defendant Company **the total sum of Rs1 160 122. 80/- (Doc. E) as Severance Allowance in accordance with s. 46(5)(12) of the Employment Rights Act 2008 (hereinafter referred to as ERA) with Interests at the rate of 12% per annum as from the date of dismissal until the date of final payment together with Costs**.

The Defendant Company denied the said Claim in its Plea.

The Plaintiff was assisted by Learned Counsel and the Defendant Company was assisted by Learned Senior Counsel.

The Proceedings were held in English.

Case For The Plaintiff

It was the case for the Plaintiff that he was unfairly dismissed (paragraph 10 of Amended Plaint With Summons) inasmuch as:

1) He was not notified of the charge/s against him within 10 days of the Defendant Company becoming aware of the alleged complaints against him;
2) He was dismissed on grounds extraneous to the Letter of Charge dated 25-04-16;
3) In the course of the Disciplinary Committee Hearing, his explanations were sought on matters extraneous to the Charge Letter and/or that had been dropped by the Defendant Company;
4) The Defendant Company had no evidence of any wrongdoing on the part of the Plaintiff that could amount to "*faute sérieuse*" or "*faute lourde*";
5) The Defendant Company could in good faith have taken any other course of action in respect of the Plaintiff; and/or
6) The Plaintiff was not given at least 07 days' Notice to answer the charge/s against him.

The Plaintiff was therefore claiming to have been unfairly dismissed by the Defendant Company.

Case For The Defendant Company

The Defendant Company denied the said Claim in its Plea, and averred that it could not, in good Faith, have taken any other course of action than to terminate the Plaintiff's Employment on the ground of Misconduct, this coupled with the Plaintiff's attitude and behaviour during the Disciplinary Committee Hearing which depicted insolence and arrogance:

1) The Plaintiff chose not to provide the Defendant Company with the necessary reassurances regarding feedback received from 06 female Colleagues of the Plaintiff;
2) The Plaintiff asserted that it was his private affair whether he chose to make advances to his female Colleagues; and
3) The Plaintiff accused the Defendant Company's Management of being racist and expressly stated that there was a Conspiracy at Higher Management Level to get rid of him because of his being Hindu.

Analysis

The Court has duly considered all the evidence on Record and all the circumstances of the present matter.

The Court has also given due consideration to the Submissions of Learned Counsel for the Plaintiff, and to that of Learned Senior Counsel for the Defendant Company.
The Court finds the principles set out in the Authority of **Lih Thoy Lim Yu Choy v Rey And Lenferna Limited** [2021 SCJ 252] pertinent:

> In an action for summary dismissal, the burden rests upon the employer to establish that the acts and doings of his employee amount to misconduct and that the misconduct is such that he cannot in good faith take any other course of action than terminate his employment. Such a situation would only exist where the misconduct is tantamount to "faute grave" or "faute lourde" justifying the worker's dismissal without the payment of severance allowance.
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> In **Deep River Beau Champ Ltd v Beegoo [1988 SCJ 432]** it was held that whether misconduct may entail the termination of employment depends on the facts of each case. The determination of the question of justified dismissal depends essentially on the degree and seriousness of the misconduct.

The Court has duly considered all the documents placed on Record:

1) The Plaintiff's Contract of Employment (Doc. A);
2) The Employee Handbook (Doc. B);
3) The Termination Letter (Doc. C);
4) Payslip for April 2016 (Doc. D);
5) Computation of Salary prepared by the Plaintiff (Doc. E);
6) The Suspension Letter (Doc. F);
7) The Charge Letter (Doc. G);
8) A series of text messages (Doc. H made up of 11 pages);
9) A Confidential Report On Focus Group Discussion (Doc. J); and
10) The Disciplinary Committee Proceedings (Docs. K and L).

<u>Not In Dispute</u>

It was common ground between the Parties that:

1) Between 01-03-13 and 31-05-16, the Plaintiff had been in the continuous Employment of the Defendant Company under a Contract of Employment of indeterminate duration governed inter alia by the terms and conditions contained in the Defendant Company's Employee Handbook;
2) The Plaintiff's Remuneration for April 2016 was Rs96 027. 03/-;
3) Prior to his Dismissal, the Plaintiff had been working as Head of Business Unit at EMCAR Bell Village, with 22 Employees reporting directly to him;
4) On 14-04-16, the Plaintiff was informed by the Defendant Company verbally and subsequently in writing by letter of even date that he would be suspended with immediate effect because the Defendant Company had received Complaints from his female Colleagues about his conduct and attitude towards them;
5) A Disciplinary Committee took place;
6) The Complainant who deponed before the Disciplinary Committee was one Mrs Nubboo, who was the Plaintiff's direct subordinate; and
7) The Plaintiff was dismissed by the Defendant Company on 31-05-16 and informed thereof by letter of even date.

The Court proposes to consider the procedural issue of whether the Plaintiff was informed of the charges against him within 10 days of the Defendant Company becoming aware of same in the first instance.

Plaintiff Was Not Notified Of The Charge/s Against Him Within 10 Days Of The Defendant Company Becoming Aware Of The Alleged Complaints Against The Plaintiff

It was submitted by Learned Counsel for the Plaintiff that the Defendant Company had failed to inform the Plaintiff of the charges against him within 10 days of becoming aware of same.

Now, true it is that **s. 64(3) of the Workers' Rights Act** (hereinafter referred to as **WRA**) now provides that "[b]efore a charge of alleged misconduct is levelled against a worker, an employer

may carry out an investigation into all the circumstances of the case and the period specified in subsection (2)(a)(i) or (b)(i) shall not commence to run until the completion of the investigation" [1].

But the applicable Law at the relevant time was the **ERA**, and therefore, in the absence of any express statutory provisions to the contrary, the time started to run from the moment the Defendant Company became aware of the Complaint.

As to the question of when an employer becomes aware of an Employee's misconduct, as per the principles set out in the Authority of **Chellen v Mon Loisir S.E.** **[1971 MR 1980]** "[…] the starting point of the seven days should not be wholly subjective, as it would be too easy for any employer wishing to evade the provisions of the law to decide arbitrarily when he becomes aware of a worker's misconduct. This starting point should be assessable with some certainty but the circumstances of each case must be taken into consideration."

The said decision of **Chellen (supra)** was in relation to the now repealed **Labour Act**, but the Court is of the considered view that the philosophy and rationale underlying the **ERA** are very similar to the now repealed **Labour Act**, and that hence, the said principles set out above apply *mutatis mutandis* to the present matter.

Also, **s. 32(1)(b)((ii)(C) of the Labour Act** provided for the dismissal to be effected within 07 days of the day on which the employer became aware of the misconduct, whereas pursuant to **s. 38(2)(a)(iii) of the ERA** the employer has to notify the employee of the charge made against him within 10 days of the day on which the employer becomes aware of the employee's misconduct.

In the present matter, the Plaintiff was suspended on 14-04-16 by way of the Suspension Letter (Doc. F) dated 14-04-16, and the Plaintiff was informed of the charges against him on 26-04-16 by way of Charge Letter (Doc. G) dated 25-04-16.

There were therefore more than 10 days, whether between 14-04-16 and 26-04-16, or between 15-04-16 and 26-04-16.

[1] **S. 64(2)(a)(i) of the WRA** provides that subject to subsection (3), no employer shall terminate a worker's agreement for reasons related to the worker's alleged misconduct, unless the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker.

As per the testimony of Mr Bhooboty, who represented the Defendant Company, it was clear that the Defendant Company was aware of the Plaintiff's alleged misconduct in relation to Mrs Nubboo at least as from 14-04-16, date of the Suspension Letter (Doc. F).

Mr Béchard's Report (Doc. J) is dated 02-05-16, and hence was dated about 07 days after the Charge Letter (Doc. G) dated 25-04-16.

It therefore follows that even if the Defendant Company had decided to carry out an internal investigation, it did not wait for the outcome of the said internal investigation and/or for the said Report (Doc. J) to draft the Charge Letter (Doc. G).

In the given circumstances, the Court is of the considered view that the Defendant Company became aware of the alleged misconduct on 14-04-16, i.e. date of the Letter of Suspension (Doc. F), and that hence, the Letter of Charge (Doc. G) was outside the statutory delay of 10 days, it being dated 25-04-16, that is more than 10 days after the Letter of Suspension (Doc. F), and therefore fell foul of the statutory provisions applicable at the relevant time.

The mandatory nature of the time limits set out in the **ERA** has been authoritatively set out in **Mauvilac Industries Ltd Ragoobeer [2006] PRV 33**.

The Court is alive to the fact that the Authority of **Mauvilac Industries (supra)** related to the dismissal being a day late, whereas in the present matter, the issue is the notification of the charges.

The Court is however of the considered view that "[….] having regard to principles underlying statutory interpretation, when the words used are unambiguous the clear intention of the legislator must be put into effect for the legislator does not legislate in vain." (**Curpen (supra)**).

The Legislator, by using the word "shall" in the said **s. 38(2)(a)(iii) of the ERA**, the Legislator clearly indicated his intention that the said time limit be mandatory. And pursuant to **s. 5(4)(a) of the Interpretation And General Clauses Act**, "[t]he word "shall" may be read as imperative."

The Court is of the considered view that the wording of the said section of the **ERA** sets out the obligations placed on an Employer to terminate an Employee's employment, and failure to comply with same renders the dismissal unlawful.

In light of all the above, the Defendant Company having failed to comply with its statutory obligations as highlighted above, the whole process was vitiated *ab initio*, and the dismissal of the Plaintiff was not in accordance with the Law.

Having found as above, although there is no need for the Court to consider the other issues raised in the course of the Proceedings, the Court does so for the sake of completeness.

Termination Letter (Doc. C)

The Court finds the following principles set out in the Authority of **Lateral Holdings Ltd v Murdamootoo** [2021 SCJ 19] pertinent:

> The reason given by the appellant for the summary dismissal in the letter of termination assumes all its importance when one bears in mind that the burden is on the employer to show that the termination was justified. Indeed, when notifying the worker of the termination of his employment, the employer was, under the obligation, pursuant to **section 37(2) of the Employment Rights Act 2008**, to state the reason of termination (see also **Berlinwasser International AG Mauritius v Benydin** [2017 SCJ 120]).
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> […]
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> **Dalloz, Répertoire de Droit du Travail, Rubrique Contrat de Travail à Durée Indéterminée : Rupture et Conditions de Licenciement pour Motif Personnel** –
>
> *C – Fixer les limites du litige*
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> *113. La lettre de licenciement fixe les limites du litige ; par suite, lorsque cette lettre énonce un seul motif de licenciement, une cour d'appel n'a pas à examiner les autres motifs allégués par l'employeur en cours d'instance" (Cass. Soc. 9 mars 1993, Bull. civ. V, n° 83).*

The Court therefore considers the Termination Letter (Doc. C), which sets out the following reasons invoked by the Defendant Company to terminate the Plaintiff's Employment:

1) The Disciplinary Committee found that the Plaintiff caused harassment to Mrs Nuboo, through his "constant text messages to [her] over a span of time […], […] frequent advances to [her], showing his personal interest in her, […] [when she] was working under his supervision and the later hour of the day on which they were sent on certain occasions and the fact that in 2016 he again made advances to her in person", and nevertheless the Plaintiff was of the view that he had "at all times acted professionally towards [her]";

2) The Plaintiff did not have to provide the Defendant Company with any reassurances regarding the feedback received from 5 other female employees, although there was no formal charge levelled in that connection, because [the Plaintiff] consider[ed] that it [was his] private affair whether or not [he had] made advances to other female colleagues;

3) The Plaintiff was "justified in reprimanding a colleague in presence of Police Sergeant Pheerunggee";

4) The Plaintiff was "the victim of a conspiracy instigated by Higher Management because [he is] a hindu and, according to [him], the only hindu to be part of Management"; and

5) "[I]n view of the attitude that [the Plaintiff] chose to adopt at the aforesaid [Disciplinary Committee], Management ha[d] no alternative but to terminate [the Plaintiff's] employment with immediate effect on the ground of misconduct".

It is therefore clear from the above, and as confirmed by the Defendant Company itself in the course of the Proceedings, that there was no complaint as regards the Plaintiff's competence and performance at Work, and/or that of Mrs Nuboo, and/or that of any of the Plaintiff's subordinates.

The Letter of Termination (Doc. C) and paragraph 6. (i) of the Plea mention that the Plaintiff's employment was being terminated with immediate effect on the ground of misconduct.

In the Contract of Employment (Doc. A), it is provided at paragraph 17(d) at page 04 that the Plaintiff's employment may be terminated at any time by the Defendant Company in case of gross misconduct.

It is trite Law that misconduct and gross misconduct are not equivalent, and that gross misconduct in principle entitles an Employer to dismiss an Employee summarily, that is without Notice or payment in lieu of Notice.

Be that as it may, this was not made a live issue in the course of the Proceedings.

Now, no mention of "in good Faith" was made in Letter of Termination (Doc. C), but in the Plea, at paragraph 6.(i), the Defendant Company did mention that it could not in good Faith take any other course of action that to terminate the Plaintiff's employment.

This was not made a live issue in the course of the Proceedings, but it is an express provision of **s. 38(2)((a)(i) of the ERA** that no Employer shall terminate an Employee's employment for reasons related to the Employee's misconduct unless the Employer cannot in good Faith take any other course of action.

The use of the word "shall" indicates the clear intention of the Legislator (**Curpen v The State [2008 SCJ 305]**) that this is an obligation placed on the employer.

And given, the Termination Letter, in our present case (Doc. C), *fixe les limites du litige*, it follows that the omission of the words "in good Faith" in the termination letter assumes all its importance, and the Court is of the considered view that this omission in the Termination Letter (Doc. C) cannot be cured by the Defendant Company mentioning same in the Plea.

Harassment Of Mrs Nuboo?

It was not disputed that the SMS (Doc. H) were sent by the Plaintiff to Mrs Nuboo, and the Plaintiff stated in Court, very earnestly, that there was *un intérêt de part et d'autre*, that is that there was a mutual attraction.

Mrs Nuboo, who deponed before the Disciplinary Committee, but not in Court due to her not being required by the Defendant Company, chose to produce before the Disciplinary Committee the SMS (Doc. H) sent by the Plaintiff to her, and not her the SMS she may have sent to the Plaintiff.

Now, from the tenor of the SMS (Doc. H) sent by the Plaintiff, it is clear that the Plaintiff was interested in Mrs Nuboo, and was not tergiversating.

On no less than 03 occasions, over the span of 01 month, that is between 18-11-13 and 18-12-13, the Plaintiff asked Mrs Nuboo to give him a place in her Heart or open the door to her Heart (SMS of 18-11-13 at 08h09 pm, SMS of 13-12-13 at 02h26 pm, and SMS of 18-12-13 at 06h35 pm(Doc. H)), and told her that he liked her a lot (SMS of 20-12-13 at 12h08 pm (Doc. H)).

The Court bears in mind that the Defendant Company, as Employer, explained in Court it had a duty to provide a safe Work environment to all its Employees, and Mr Bhobooty, who represented the Defendant Company, deponed to the effect that the Defendant Company had, at the relevant time, predominantly male Employees, so that it was under a duty to ensure there was a conducive environment to inspire Trust for everyone.

As Head of Business Unit, the Plaintiff was occupying a position of Authority, and it was averred in the Proecipe that the Plaintiff had 22 Employees reporting directly to him. In this capacity, the Plaintiff himself had a responsibility of ensuring there was a safe Work environment for all Employees.

Despite the repeated requests from the Plaintiff in 2013, the version of Mrs Nubboo before the Disciplinary Committee, however, was to the effect that, there was nothing untoward in her relationship with the Plaintiff up to December 2015, and it was one incident where the Plaintiff made advances to her in 2016 which triggered the Complaint.

Mrs Nubboo gave no specific details as to how she felt humiliated or intimidated, and there is no evidence that Mrs Nubboo sought Police assistance, despite saying before the Disciplinary Committee that she feared for her Life and that of her Family.

In fact, Mrs Nuboo gave no explanation as to why she so feared and/or how the Plaintiff had become aggressive, except by saying that the Plaintiff was aggressive, and conceded that the Plaintiff was not aggressive in 2015, and that their relationship was alright in December 2015.

And for the first time stated in the course of the Disciplinary Committee, Mrs Nuboo stated that the Plaintiff was shouting loudly, even at Clients.

Further, it is important to note that the Complaint was made by Mrs Nuboo in 2016, whereas the SMS (Doc. H) which were produced dated back to 2013.

Mrs Nuboo, despite explaining before the Disciplinary Committee that she had decided to report the matter because the Plaintiff had renewed his advances to her in 2016, only the SMS sent to her by the Plaintiff in 2013 were placed before the Disciplinary Committee.

No explanation was forthcoming as to why only SMS of 2013 were produced to support a Complaint made in 2016, and Mrs Nubboo explained before the Disciplinary Committee that she had only produced the SMS sent by the Plaintiff as she had not had time to print all the SMS.

In fact, there is not a single SMS (Doc. H) sent by Mrs Nubboo, and the Disciplinary Committee and the Court were left in the dark as to any responses, if any, of Mrs Nuboo.

The Court is of the considered view that from the SMS (Doc. H) produced, it appears that there was a deliberate and systematic choice of only printing the SMS sent by the Plaintiff to Mrs Nuboo, and the Court takes Judicial Notice of the fact that SMS sent and received are in chronological order.

In light of all the above, and for all the reasons given above, the Court is of the considered view that Mrs Nubboo's testimony before the Disciplinary Committee fell short of establishing any humiliation and/or intimidation having been caused to her by the Plaintiff's conduct and attitude in 2016 and that the Defendant Company was not justified in relying on the SMS (Doc. H), to reach its decision to terminate the Plaintiff's Employment, and that the evidence established no *faute sérieuse or faute lourde* on the part of the Plaintiff.

Also, the Charge Letter (Doc. G) specifically mentioned humiliation and intimidation in relation to Mrs Nubboo, but in the Termination Letter (Doc. C), the ground invoked in relation to Mrs Nubboo is harassment.

The Court is of the considered view that humiliation and intimidation cannot be equated to harassment, and that a charge for humiliation and intimidation cannot be satisfied by a finding by the Disciplinary Committee that there was harassment.

In light of all the above, without condoning the Plaintiff's admitted conduct as regards the SMS (Doc. H), the Court is of the considered view that it was not justified for the Defendant Company to rely on the harassment of Mrs Nubboo to decide to terminate the Plaintiff's Employment, when the charge was one of humiliation and intimidation.

Reassurances Regarding The Feedback Received From 05 Other Female Employees Although No Formal Charge Was Levelled In That Connection

The following paragraphs from the Authority of **De Maroussem v Societe Dupou [2009 SCJ 287]** are found to be of particular relevance:

> "[…] section 32(2)(a) of the Labour Act (the Act) provides, "*No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him and any dismissal made in contravention of this paragraph shall be deemed to be an unjustified dismissal.*"
>
> The primary aim of that section [is] to give the employee *an opportunity of dissuading his employer from dismissing him in circumstances where he might otherwise be dismissed and of keeping his job* (vide **Bissonauth V Sugar Insurance Fund Board, Privy Council appeal no. 68 of 2005**) […]".

The Court is alive to the fact that **De Maroussem (supra)** related to the **Labour Act**, whereas the present matter is under the **ERA**.

The Court is however of the considered view that the philosophy and rational of the **Labour Act** and of the **ERA** are very similar, and that the principles set out above apply *mutatis mutandis* to the present matter under the **ERA**.

The Plaintiff was therefore to be "afforded […] an opportunity to answer any charges made against him" (**ERA (supra)**) and "put in his version of facts." (**Sagar Hotels & Resorts Ltd v Sewdin [2012 SCJ 122]**

The Defendant Company however itself averred that no charge had been levelled against the Plaintiff in relation to the Complaints of the 05 female Employees who had refused to depone before the Disciplinary Committee, there was therefore no charge for the Plaintiff to answer to in relation thereto.

The Plaintiff's reply that he consider[ed] "that it [was his] private affair whether or not [he had] made advances to other female colleagues" cannot be considered to be an act of defiance on his part (**Plaine Verte Co-operative Stores Society Ltd v Rajabally [1991 SCJ 227]**), given the fact that no charge was put against the Plaintiff as regards the said 05 other female Employees and any pattern of behaviour on the part of the Plaintiff.

It is settled Law that "[t]he question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal." (**Smegh (Ile Maurice) Ltée v Persad [2011 PRV 9]**).

At the time of the Disciplinary Committee, there was no evidence of any wrongdoing as regard 05 other female Employees, who had refused to depone before the Disciplinary Committee.

True it is that the Defendant Company and the Disciplinary Committee were in presence of Mr. Béchard's Report (Doc. J), but it was made clear at the Disciplinary Committee that the said Report (Doc. J) was being put in solely for the purpose of establishing that Complaints were made, and not as to their veracity.

And in Court, Learned Counsel for the Plaintiff and Learned Senior Counsel for the Defendant Company both stated that the said Report (Doc. J) was being put in *quantum valeat*.

This clearly means that neither the Disciplinary Committee nor the Court were entitled to act on the basis of the said Report (Doc. J) to reach the conclusion that the said Complaints were true. And the Court therefore does not act on the said Report (Doc. J).

The Plaintiff contended that his explanations were sought in the course of the Disciplinary Hearing in relation to matters which were either extraneous to the said Letter of Charge and that had been dropped by the Defendant Company, i.e. the complaints of the other Employees who were not called.

Although the complaints of the said employees were mentioned in the Charge Letter (Doc. G), and were hence not extraneous to the Charge Letter (Doc. G), in light of all the above, and for all the reasons given above, the Court is of the considered view that it was not open to the Defendant Company to seek reassurances of the Plaintiff regarding the feedback received from the said 05 female Employees and any pattern of behaviour of the Plaintiff, in the absence of any formal charge in relation thereto.

<u>The Plaintiff Was “justified in reprimanding a colleague in presence of Police Sergeant Pheerunggee”</u>

There was a charge put as regards “a number of [the Plaintiff’s] colleagues [who] ha[d] felt humiliated by the degrading manner in which [the Plaintiff had] addressed them during the course of work” (Doc. G), and in the Termination Letter (Doc. C), it is stated that the Plaintiff felt he was “justified in reprimanding a colleague in presence of Police Sergeant Pheerunggee”.

No specific name/s and/or incident/s was/were mentioned in relation to the said charge.

Mrs Nubboo did state in the course of the Disciplinary Committee that the Plaintiff had reprimanded her for mistakes contained in an e-mail she had sent, but at no stage did Mrs Nubboo state that she had been reprimanded in presence of Police Sergeant Pheerunggee, and that she had felt humiliated by the degrading manner in which the Plaintiff had addressed her.

Police Sergeant Pheerunggee deponed before the Disciplinary Committee that there had been an issue in relation to one Jennifer Charles and one Westley, and that the Plaintiff had called the said Ms. Jennifer Charles to order, and that it was not inappropriate for the Plaintiff to speak to the said member of staff.

Although Police Sergeant Pheerunggee gave the name of one employee, there was no evidence of any date/s or specific issue/s which gave rise to Ms. Jennifer Charles being called to order by the Plaintiff, and Police Sergeant Pheerunggee did not mention that the Plaintiff had humiliated the said employee by the degrading manner in which he had addressed her.

Mrs Nubboo and Police Sergeant Pheerunggee did not depone before the Court.

The said Ms. Jennifer Charles and the said Mr. Westley did not depone before the Disciplinary Committee or in Court.

The Plaintiff conceded that he would be firm if there were repetitive mistakes, and he was firm in order to give Clients no errors.

It is also to be noted that the Charge Letter (Doc. G) mentioned a number of the Plaintiff's colleagues who had felt humiliated by the degrading manner in which the Plaintiff had addressed them during the course of work, but Police Sergeant Pherunggee only mentioned one incident in relation to the said Mrs. Charles.

That being said, the fact that the Plaintiff conceded that he would be firm when there were mistakes is not sufficient to conclude that the Plaintiff had humiliated the said member/s of staff by addressing them in a degrading manner during the course of work.

In light of all the above, the Court is of the considered that there was no evidence before the Disciplinary Committee for the Defendant Company to conclude that the Plaintiff had not been justified in reprimanding one of his colleagues in presence of Police Sergeant Pheerunggee.

<u>The Plaintiff Was "the victim of a conspiracy instigated by Higher Management because [he is] a hindu and, according to[him], the only hindu to be part of Management" And Plaintiff's Attitude At The Disciplinary Committee</u>

The Plaintiff conceded in the course of the Trial that he did raise the issue that he considered it a possibility that he had been the victim of conspiracy because of his ethnicity (05th answer at 10th page of (Doc. L)), but also that he no longer considered this as a possibility, adding that he had

said so in the heat of the moment (Answers 2 and 3 at page 42 of 71 of the Transcript of 04-09-2020).

It was further submitted on behalf of the Plaintiff that another Disciplinary Committee ought to have been set up, and that the Plaintiff ought to have been given 07 days to answer any charge/ in relation to matters which came out during the course of the Disciplinary Committee.

The Court is of the considered view that in presence of such strong accusations, which were levelled by the Plaintiff in the course of the Disciplinary Committee, it was incumbent on the Defendant Company to level a charge against the Plaintiff, and give the Plaintiff the opportunity of answering to the said charge, as per the procedure established by Law.

In light of all the above, the Court is of the considered view that the Defendant Company was not justified in deciding to terminate the Plaintiff's employment on the basis of the Plaintiff's said allegation made in the course of the Disciplinary Committee, which was extraneous to the Letter of Charge (Doc. G).

Miscellaneous

No Charge

Learned Counsel for the Plaintiff submitted that there was no wrongdoing because there was no charge/no real charge, because there was no evidence, and because the charge as regards the pattern of behaviour was dropped.

The basic principle remains that the Parties are bound by their Pleadings, and in paragraph 10, in which the Plaintiff's case is set out, no where is it averred that there was no charge/no real charge against the Plaintiff.

Further, this issue was not raised at the Disciplinary Committee.

The Court is of the considered view that there were proper charges against the Plaintiff in the said Letter of Charge (Doc. G).

Particulars

The Plaintiff had asked for Particulars of the charges, but the Defendant Company refused to provide any.

Now, sensitivity and fairness towards Complainant/s does not however necessarily override the requirements of a fair disciplinary procedure, and alleged perpetrators of misconduct are to be treated equally fairly.

In the present matter, it was only at the Disciplinary Committee that the Plaintiff was informed of the Identity of one of the Complainants, i.e. Mrs Nuboo, and the Defendant Company justified its decision to refrain from disclosing to the Plaintiff the Complainants' Identities due to their fearing for their safety.

Although **s. 64(5) of the Workers' Rights Act (hereinafter referred to as WRA)** now places a statutory obligation upon the Employer to provide to the Employee who so requests, information or documents relevant to the charge, at the relevant time, the **ERA** did not provide for such a statutory obligation.

There was therefore no such obligation on the part of the Defendant Company to do so, and the Defendant Company cannot therefore be held to have been in breach of its statutory obligations, when it refused to communicate information or documents in relation to the charges to the Plaintiff.

Further, the Plaintiff replied in cross-examination that he knew that the charge related to Mrs Nubboo, but that he still could not connect the dots (page 34 of 71 of Transcript of 04-09-2020).

The Plaintiff was therefore clearly aware that paragraph 2 of the Charge Letter (Doc. G) related to Mrs Nubboo.

Garden Leave

The Plaintiff was placed on Garden Leave as per the Suspension Letter (Doc. F).

In the absence of any pronouncement in Mauritius as to Garden Leave, the Court turns to the Law of England, where Garden Leave relates to the practice of placing restrictions on an employee during his/her Notice period, usually by preventing him/her from attending the

workplace or having contact with Clients and is usually enforced pursuant to an express clause in the contract of employment (**Square Global Limited v Leonard [2020] EWHC 1008 (QB)**).

No issue was made of the Plaintiff having been placed on Garden Leave, as opposed to suspension, and the Court therefore acts on the basis that the Plaintiff understood that he had been suspended pursuant to the Letter of Suspension (Doc. F).

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court finds that the Plaintiff has established his case on the Balance of Probabilities on the ground that he was not informed of the charges against him within the statutory delay of 10 days only, and the **Defendant Company is therefore ordered to pay to the Plaintiff the total sum Rs 1 160 122. 80/- as Severance Allowance**.

Pursuant to **s. 46(11)** of the **ERA**, the Court has a discretion as to any award for Interest on the amount of Severance Allowance payable (**Ramnarain v International Financial Services Ltd [2021 SCJ 35]**).

The Court is of the considered view that in the circumstances of the present matter, Interest at the rate of 05% per annum on the said amount of Severance Allowance would be fair, and **the Defendant is therefore ordered to pay to the Plaintiff 05% Interest per annum on the amount of Severance Allowance only, payable from the date of the present Judgment to the date of final payment**.

With Costs.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]
[Date: 06 December 2022]