Bholah R. v Mauritius Duty Free Paradise Co. Ltd

2020 IND 14

Cause Number 99/15

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Mr. Rajen Bholah

Plaintiff

v.

Mauritius Duty Free Paradise Co. Ltd

Defendant

Ruling

Plaintiff has averred that since 16 December 1991 by virtue of a written contract, he was in the continuous employment of Defendant as Attendant on a 5 -day week basis earning a monthly remuneration at a basic rate.

He was suspended from duty on 8 May 2013 on a charge of absenteeism and was requested to submit his explanations in writing.

On 16 May 2013, he was issued with a letter to appear before a disciplinary committee on 21 May 2013 to answer the charge of absenteeism which he did and which he denied.

Defendant terminated his employment on 24 May 2013 without notice on an alleged ground of gross misconduct.

Plaintiff considers his dismissal to be unjustified in as much as:

(i) he was not given at least 5 working days' notice to answer the charge made against him contrary to law;

(ii) (…);

(iii) (…).

Thus, he has claimed wages as indemnity in lieu of notice and severance allowance for the period of his continuous employment from Defendant.

On the other hand, Defendant has raised a plea *in limine* to the effect that item (i) above be dismissed given that Plaintiff was given at least 5 working days' notice to answer the charge made against him. The matter was fixed for arguments.

As agreed by both learned Counsel appearing for the parties, Plaintiff deposed in Court solely for the purposes of the arguments. He worked for Defendant since 16 December 1991 by being employed on a 5 -day per week basis excluding Saturdays. He received a letter dated 8 May 2013 from his employer meaning Defendant requesting for his explanations within a delay of 5 days upon receipt of that letter namely Doc. AG1. He gave his explanations as per his letter dated 12 May 2013 which he sent to Defendant viz. Doc. AG2. Thereafter, by way of a letter dated 16 May 2013, he was convened to appear before a disciplinary committee by Defendant as per Doc.AG3. The hearing by the disciplinary committee was held on 21 May 2013 and its chairman gave his report on 23 May 2013 viz. Doc. AG4. Then, he received a letter from Defendant on 24 May 2013 informing him that he was dismissed for gross misconduct as per Doc. AG5.

The main thrust of the argument of learned Counsel for Defendant is that 5 days' notice has been given to the Plaintiff to answer the charge made against him pursuant to Section 38(2)(b)(iv) of the Employment Rights Act 2008. He is not disputing the fact that it is mandatory to comply with the time limits provided by Section 38(2)(b) of the Act failing which the dismissal of Plaintiff would be inferred as being unjustified. The first

letter was dated 8 May 2013 addressed to Plaintiff as follows: *"Dear Mr. Bholah, It has been noted that despite being warned for absence without notification for the period 22nd to 25th August 2011, 27th to 30th October 2011, 20th to 23rd October 2012, 02nd to 05th January 2013 and 02nd to 09th April 2013, you again failed to notify your absences from work for the period 29th April 2013 to 07th May 2013."* So, the next paragraph: *"You are hereby requested to submit your explanations to the undersigned within five days of receipt of this letter regarding your absences without notification (…)"*. It goes on *"and as to why your contract of employment should not be treated as having been broken by you and having thereby terminated. Meanwhile you are suspended from duty with immediate effect until further notice."* So, that was the first letter addressed to the Plaintiff and who according to that letter was already being informed of the reasons why he was to be suspended but he was also required to provide his written explanations as to why he failed to inform his employer of his reasons for his absences from work.

That started from 8 May 2013. Following, the second letter dated 12 May 2013 emanating from Plaintiff, Doc. AG2, wherein he gave his explanations in relation to Doc. AG1 as to why he failed to notify his employer of his repeated absences from work, the employer sent another letter dated 16 May 2013, Doc. AG3, wherein Defendant stated that it was not satisfied with the explanations given in writing by Plaintiff as per his letter dated 12 May 2013 again repeated the same charge found in the letter of 8 May 2013 in its Annex 1 being an exact replica in relation to which he had to appear before a disciplinary committee. Then, there was the decision of the latter, Doc. AG4, given on 23 May 2013 after Plaintiff was heard on 21 May 2013 before that committee following which there was the dismissal letter dated 24 May 2013, Doc. AG5, from Defendant.

Hence, the mandatory time limit of 5 days for the employee to be given the opportunity to be heard in the sense of answering the charge made against him has been complied with in the present case as the time starts to run as from 8 May 2013. Nowhere has it been said that the opportunity to answer the charge has to be before the Disciplinary Committee. He has been given in that letter the opportunity to answer the charge and he answered the charge on 12 May 2013 and still after that the employer did not find satisfactory the explanations, sent a letter dated 16 May 2013 and he was formally convened before a Disciplinary Committee on 21 May 2013. So, the time here is as from 8 May 2013 till 21 May 2013 where a decision was taken and he was subsequently dismissed. Clearly, 8 May and 21 May would be excluded as per Section 38 of the

Interpretation and General Clauses Act because the first date that the letter was sent is excluded and the day of the hearing is excluded for the purpose of computation of the time limit. He begged to differ with the argument that the time starts to run as from 16 May 2013, Doc. AG3, till 21 May 2013 meaning there is less than 5 days because the 16th is excluded and the 21st is excluded, that is, there are only 4 days. It is the contention of Defendant that there was no obligation on the employer to set up a disciplinary committee. The opportunity to answer the charge can take various forms. It can take the form of a hearing by a disciplinary committee or the form of a letter being sent by an employer to an employee and he giving his explanation as Section 38 of the Employment Rights Act does not prescribe the procedure how a disciplinary committee should be held. So, in the present case, in fact Plaintiff was given 12 days which is ample opportunity/time for him to answer the charge made against him and which is in conformity with Section 38(2)(b)(iv) of the Employment Rights Act. The time is a reasonable one for the employee to answer the charge formally before a disciplinary committee on 21 May and it was a longer delay than the minimum of 5 days.

The contention of learned Counsel for Plaintiff is that the issue is purely in law and hinges on the interpretation of Section 38(2)(b)(iv) of the original Employment Rights Act as it was when it was first enacted. It is because the termination has been effected in May 2013 as per Doc. AG5 and the amendment to the Employment Rights Act which changed the 5 working days to 7 days came into effect only in July 2013. How the 5 days are supposed to be calculated, we have Section 38 of the Interpretation and General Clauses Act where the first and the last day are not counted and he relied on the case of **Permanent Secretary, Ministry of Labour v Flacq Bus Service Ltd** [1966 MR 71]. The Plaintiff has revealed that he does not work on Saturdays so it is only weekdays. What his learned friend is saying is that Doc. AG1 is the letter of charge and the 5 days' time limit starts from 9th of May which is the day after 8th of May. He strongly disagrees. The letter Doc. AG3 says *"in that respect please find charge preferred against you"* which means the charge that has been leveled and not Doc. AG1 wherein it is not mentioned that Plaintiff can have the services of a lawyer, or of a trade union representative. Even if one looks at Section 38(2)(b)(iv), and one considers the letter Doc. AG1 as the letter of 8th of May as the letter of charge and Plaintiff has answered the charge on 12th of May as per Doc. AG2 but then the Defendant would not have 7 days after this letter to terminate meaning 7 days after the 12th of May when it was terminated

on 24th of May which is more than 7 days meaning outside the delay. This is because it should not be later than 7 days. As per Doc. AG4 which is the disciplinary hearing, there is no mention of the first letter, Doc. AG1, the letter of charge is the 16th of May. As per Doc.AG4 as per the second line it is written: *"On 16th of May, the employer requested him to attend to answer the charge."* So, for the disciplinary hearing, the letter of charge was the 16th of May and this tallies with his submission that the 5 days have not been given. It is relevant in the present case as Section 46(5) of the Employment Rights Act which is the severance allowance provision says *"The termination of the agreement of the worker is in contravention of Section 38(2)"*. Here there has been a contravention of Section 38(2) as the time limit of five days namely 5 working days has not been given and this contravention entitles the worker to be paid severance allowance.

Learned Counsel appearing for the Defendant replied that he was relying on Section 38(2)(v) which is to the effect that no employer shall terminate a worker's agreement for reasons related to the worker's misconduct unless 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 to an oral hearing after the completion of the hearing. The Defendant is saying that the letter of charge was already sent on the 8th of May and the opportunity to answer the charge can take the form of a hearing or a writing like a letter. It is only when there is an oral hearing that there needs to be assistance of a legal adviser or a representative of a trade union as per Section 38(4) subsections 2(a)(2), 2(b)(1) or 3(b). In the present case there was an oral hearing on the 21st and so the worker was informed on the 16th of May that he may be assisted but there was no duty on the employer to set up an oral hearing. What the Defendant is saying is that the employee was already informed of the charge against him on the 8th of May.

Learned Counsel for the Plaintiff replied that his learned friend is correct that an opportunity to answer the charge can either be an oral hearing or in writing and cannot be both. It is almost a matter of policy as the process has to be swift and quick.

I have given due consideration to the submissions of both learned Counsel. The legal issues which these facts give rise relate to the Employment Rights Act 2008, Act No. 33 of 2008 which replaced the Labour Act 1975 and which in turn replaced The Termination of Contracts of Service Ordinance 1963("the 1963 Ordinance"). Section 6 of the Ordinance provided inter alia:

"(2) An employer may not dismiss a worker for alleged misconduct except in a case where he cannot in good faith be expected to take any other course and unless such dismissal is effected within seven days after the employer becomes aware of such misconduct."

Section 32 of the Labour Act 1975 is headed "Unjustified termination of agreement." It provides:

"(1) No employer shall dismiss a worker –

(b) for alleged misconduct unless-

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

(ii) the dismissal is effected within 7 days of-

(A) where the misconduct is the subject of a hearing under subsection (2), the completion of the hearing;

(B) where the misconduct is the subject of criminal proceedings, the day on which the employer becomes aware of the final judgment of conviction; or

(C) in every other case, the day on which the employer becomes aware of the misconduct.

(2)(a) 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.

(b) The worker may for the purposes of paragraph (a), have the assistance of a representative of his trade union, if any, of an officer or of his legal representative."

Section 38 of the Employment Rights Act 2008, Act No. 33 of 2008 replacing the Labour Act 1975 reads as follows:

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

(1) (…)

(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 5 working 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 to an oral hearing, after the completion of such hearing."

Now, true it is that there was an amendment brought to the said Employment Rights Act by The Employment Rights (Amendment) Act 2013 namely Act No.6 of 2013 amending the requirement of at least 5 working days' notice to 7 days to be given to the worker to answer any charge made against him but which came into force as from 11 June 2013 and will not apply in the present case. As clearly illustrated and confirmed by the Judicial Committee of the Privy Council in **Mauvilac Industries Ltd v Ragoobeer**[2007 MR 278][2006 PRV 33], the Legislature has adopted a policy of laying down a fixed time limit in line with the International Labour Organisation with the aim of ensuring that both parties know where they stand as quickly as possible. Indeed, both learned Counsel are agreeable to the fact that those statutory delays are mandatory in nature and have to be complied with by giving them their plain meaning in conformity with Section 38 of the Interpretation and General Clauses Act. It is abundantly clear that by virtue of a chronology of the evolution of the Labour legislations in line with the International Labour Organisation as cited above that an opportunity to be heard does not imperatively means a disciplinary hearing through a disciplinary committee. As clearly stressed in the case of **Tirvengadum v Bata Shoe (Mautitius) Co. Ltd [1979 MTR 133]** which was quoted with approval in the case of **Gopaul P v Le Meridien Hotels & Resorts Ltd** [2011 SCJ

371] namely that we are not envisaging a situation whereby the employer of a worker guilty of gross misconduct must, before dismissing him, turn himself into a court and hold a formal hearing and this is clearly not so and it has also highlighted the fact that the failure to permit the worker to give any explanation at all is clearly fatal, but the worker may ask to be assisted when making his answer. Indeed, in the case of **Bissonauth v Sugar Insurance Fund Board, Privy Council appeal no. 68 of 2005**, the Board of the Judicial Committee commenting on Section 32(2)(a) of the defunct Labour Act 1975 analogous to Section 38(2) of the Employment Rights Act took the view that it was intended to give an employee who may be facing dismissal an important substantive right namely as to why he should not be dismissed.

I subscribe to the submission of learned Counsel for the Defendant that the charge was put to the Plaintiff in the letter dated 8 May 2013 (Doc. AG1) asking him for an explanation within at least five days in relation to the various unexplained absences as detailed in the letter which is an opportunity to be heard and is in fact a hearing by way of letter. True it is that it is not mentioned that a representative of his union or his legal advisor to be present. The simple answer is that it is not practicable and that is why it is not mentioned in the letter, but for the purposes of an oral hearing like the one held by a disciplinary committee, it can be mentioned. However, there is nothing preventing the Plaintiff from having his explanations vetted by his legal advisor or Counsel before giving his explanations to his employer by way of a letter within the delay of at least five days. The Plaintiff filed his explanations within delay on the 12 May 2013 which means that the hearing ended on the 12 May 2013 and the Defendant ought to have taken the decision to dismiss him within 7 days and not send another letter dated 16 May 2013 which is a replica of the letter dated 8 May 2013 as regards the charge with the only difference that he could bring along his Counsel or a representative of his trade union. As rightly pointed out by learned Counsel for the Plaintiff, the provisions of Section 38 of the Employment Rights Act have made it clear that the employer can either opt for a hearing by way of writing meaning by way of a letter or by way of a disciplinary committee because of the swift and quick decisions to be taken within a short statutory delay and which is in line with the International Labour Organisation encompassed in our labour legislations and which have not been abrogated as per **Mauvilac (supra).** Hence, clearly item (i) of the plaint cannot be dismissed at face value. However, the Legislator in its wisdom has qualified the mandatory requirements of 5 days by imposing 5 working days and such requirement for explanations as per the letter of 8 May 2013 does not mention that Plaintiff has to give his explanations in writing within 5 working days but only 5 days let alone that he does not work on Saturdays. Thus, the

mandatory delay of at least 5 working days has not been complied with let alone that the fact remains that the delay of 7 days to dismiss the Plaintiff after the hearing was over meaning on the day he forwarded his explanations on 12 May which is mandatory has not been complied with. There cannot be two hearings one by way of letter and one by way of a disciplinary hearing held by a disciplinary committee. The charge formulated against the Plaintiff has already been made against him in the letter dated 8 May 2013 which has been replicated in the letter of 16 May for the purposes of a Disciplinary hearing held by a Disciplinary Committee which means that the hearing as well has been repeated which is not condoned by Section 38 which does not cater for an opportunity to heard to be more than once. It is not disputed that the charge made against the Plaintiff on 16 May is the same as in the letter of 8 May let alone that it has been clearly averred in the plaint that the charge was put to Plaintiff on 8 May. As per that latter letter bearing in mind that the employer has to put the charge to the employee within 10 days of he becoming aware of the misconduct and then the employee is being given five days to answer the charge by way of written explanations and which is the opportunity to be heard and is being heard by way of letter and within the 5 days delay, the Plaintiff can have the benefit of his Counsel to vet his explanations before they are given to the employer by way of letter. When the letter is given on 12th it means that the hearing is over on that day. Had there been another charge formulated against the employee after that on the 16th of May, then it is clear that following explanation given and further enquiry, the employer has become aware of a different act of misconduct committed by Plaintiff as there has been a new charge formulated against him and that the employer is satisfied that there has been no misconduct in relation to the previous charge of misconduct. In the present case, the charge put to the Plaintiff on 16 May is the same as the one put to him on the 8th clearly would be in breach of the provisions of Section 38(2)(iii) wherein within 10 days of the employer becoming aware of the misconduct has to put the charge to the Plaintiff. This is where the provisions of Section38(2)(b)(v) become relevant namely the termination has to be effected not later than 7 days after the worker has answered the charge made against him or where the charge is subject to an oral hearing, after the completion of such hearing. Be it as it may it cannot be the intention of the Legislature to have the mandatory time limits provided by Section 38 (2) of the Employment Rights Act compromised and as such Defendant was bound to have acted outside the delay of the mandatory 7 days as per Section 38(2) of the said Act to dismiss Plaintiff (see- **High Security (Guards) Ltd v Fareedun** [2009 SCJ 48]**)**. The need to have a hearing is in fact giving the Plaintiff an opportunity to be heard which is in line with the Rules of Natural Justice namely the Audi Alteram Partem Rule which is a substantive right but it is at the option of the Employer to

decide which course to adopt whether a hearing by way of letter or by way of an oral hearing but he cannot opt for both in line with Section 38(2)(b)(v) of the Employment Rights Act. It is apposite quote an extract from the Supreme Court case of **G.Plateau De Maroussem v Dupon** [2009 SCJ 287] where it was held that the question as to whether an employee has been unjustifiably dismissed was a matter for the court to decide:

"The aim of a disciplinary committee (…) is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the disciplinary committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court."

True it is that the defunct Labour Act has been replaced by the Employment Rights Act 2008 but the test for gross or serious misconduct would in this context mean that the court has to be satisfied that it has been proved on a balance of probabilities that the misconduct was sufficient enough for the employer to be left with no choice in good faith but to dismiss the worker and in that situation only the dismissal is justified as it was a gross or serious misconduct. However, where there is some misconduct but not sufficient enough for the employer in good faith to have dismissed the worker, then severance allowance is payable. Likewise, when there is a breach of the mandatory delay for a hearing be it oral or in writing, or the delay to dismiss, the dismissal of the worker would be deemed to be unjustified as the employer had he acted in good faith had the option of notifying the worker by hand himself or through his *prepose*s rather than by post and as such he is deemed to have acted out of bad faith by flouting the mandatory delay and that supersedes the presence or absence of misconduct on the part of the worker because of the International Labour Organisation embedded in our Labour legislations as a matter of policy (see- **Mauvilac Industries Ltd** (supra) a relevant extract is as follows: *"The Judicial Committee approved the approach adopted by the full bench of the Supreme Court in* **Happy World Marketing Ltd. v. Agathe** *when it stated: "if an employer does not dismiss a worker within the mandatory statutory limit of seven days, he is deemed to have waived his right to dismiss the worker for serious misconduct and not to pay severance allowance (section 35(1) of the Act) so that any subsequent dismissal becomes unjustified and attracts severance allowance at the punitive rate, irrespective of whether he has or not a valid reason to discontinue with the employment of the worker with or*

without payment of severance allowance at the normal rate- vide section 36(7) of the Act."") given that security of tenure is inextricably linked with the livelihood of an employee.

For all the reasons given above, I find that the mandatory delay of **at least five working days** has not been given to the Plaintiff as the relevant part of the letter namely Doc. AG1 reads as follows: *" (…) You are hereby requested to submit your explanations to the undersigned within five days of receipt of this letter regarding your absences without notification(..)"* meaning that it is not to be found in the letter of charge of 8 May 2013. Although the Plaintiff responded within a delay of 5 days to give his explanations in writing, he has been deprived of the mandatory benefit of having at least 5 working days to give his explanations let alone that he works on a 5 day per week basis excluding Saturdays and the rigours of Section 38 (1)(b) and Section 38(1)(d) of the Interpretation and General Clauses Act, the relevant provisions of which stipulate as follows:

*"**38. Computation of time***

(1) (…)

(a) (…)

(b) Where there is a reference to a number of days between two events, whether expressed by reference to a number of clear days of "at least" a number of days or otherwise, the days on which the events happen shall be excluded in calculating the number of days.

(c) (…)

(d) Where there is reference to a period of time specified to run from a given date, the period of time so specified shall be calculated so as to include the given day."

clearly show that there is an infringement of Section 38(2) of the Employment Rights Act. Thus, the plea *in limine* fails.

The matter is accordingly fixed *proforma* to 17 June 2020 for both learned Counsel to suggest common dates for stand.

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

10.6.2020