

**KOOSH RAJ SOOKNAH VS REHM GRINAKER CONSTRUCTION CO LTD -
Ruling**

2024 IND 5

KOOSH RAJ SOOKNAH VS REHM GRINAKER CONSTRUCTION CO LTD

Cause Number: 784/17

THE INDUSTRIAL COURT OF MAURITIUS

(Civil Division)

In the matter of:

KOOSH RAJ SOOKNAH

Plaintiff

VS

REHM GRINAKER CONSTRUCTION CO LTD

Defendant

Ruling

Introduction

The present case has started with the testimony of the Plaintiff. At one point during the examination in chief of the Plaintiff, Learned Senior Counsel for the Plaintiff asked the Plaintiff whether any issue had been raised by the Plaintiff with the senior management with regards to the previous senior management of the Defendant and their or his or their related entities. To this question, Learned Senior Counsel for the Defendant has objected on the ground that this item has not been averred in the Plaintiff's statement of claim. Learned Senior Counsel for the Plaintiff intimated to the Court that he intended to touch on the issue of discrimination, in line with paragraph 13 of the Plaintiff's statement of claim which reads that: "The Plaintiff avers that the termination of his employment was unfair, unjustified and in contravention of the provisions of law".

The point of contention is whether the averment of the words – unfair, unjustified and in contravention of the provisions of the law – can cover an umbrella of unlawful activities by the Defendant. Before I proceed on the legal issues involved, I deem it fit to set the background to contextualize the nature of the present case.

The background

For the purposes of the facts of the case, the Plaintiff was in the continuous employment of the Defendant. On the 1st July 1999, he joined the services of R-G Electrical as Finance Manager and on the 6th May 2002, was transferred to the Defendant company in the post of Financial and Administrative Manager with effect from the 1st May 2002. The years of service of the Plaintiff with R-G Electrical was acknowledged and taken on board by the Defendant, such that the Plaintiff was deemed to be continuously employed since the 1st July 1999.

By virtue of a Plaintiff dated the 17th October 2017, the Plaintiff has averred that the Defendant terminated his employment in an unfair, unjustified manner and in contravention of the provisions of the Law. He is therefore claiming from the Defendant the sum of Rs 30,741,638.25/-.

The Plaintiff testified that he was employed as a Finance Director by the Defendant up to the 27th December 2017 at a monthly remuneration of Rs 515,609. However, on the 17th February 2017, the Plaintiff was issued with a letter by the Managing Director of the Defendant, Mr Neil Vincent Cloete, directing the Plaintiff to proceed on garden leave in view of his involvement in some alleged irregularities. On the 14th April 2017, the Defendant raised six charges against the Plaintiff in a letter. He was called upon to appear before a Disciplinary Committee on the 9th May 2017 to give his explanations to the charges levelled against him. By letter dated the 23rd May 2017, the Defendant raised two additional charges against the Plaintiff. It is the contention of the Plaintiff that he attended the Disciplinary Committee set up by the Defendant and he denied the charges levelled against him. He gave his explanations. Nonetheless, by letter dated the 27th September 2017, the Defendant informed the Plaintiff that:

- (i) Charge 6 was dropped during the disciplinary committee;
- (ii) Charges 7 and 8 were not found proved; and
- (iii) Charges 1 to 5 were proved.

In the circumstances, given that charges 1 to 5 were found proved, the Defendant could not in good faith take any other action but to terminate the Plaintiff's employment forthwith.

The Plaintiff averred that the termination of his employment was unfair, unjustified and in contravention with the provisions of the Law. As a result, the Plaintiff claimed from the Defendant severance allowance at punitive rate in the sum of Rs 28,229,592.75.

The Plaintiff further claimed that he was due the sum of Rs 2,512,045.50 in addition to the severance allowance, which sum is made up as follows:

(i)	Refund of annual leave amount to :	Rs 357,056.-
(ii)	Vacation leave representing one month salary After 10 years of continuous service	Rs 278,950.-
(iii)	Unused overseas travel up to 27.09.2017	Rs 120,000.-
(iv)	End of year bonus pro-rated	Rs 209,212.50.-
(v)	Three months salaries in lieu of notice	Rs 1,546,827

		Rs 2,512,045.50

The Plaintiff testified that the Defendant is indebted to the Plaintiff in the sum of Rs 30,741,638.25 which sum is liquidated, due and demandable.

The Defendant denied being indebted to the Plaintiff and averred that the Plaintiff was duly summoned to appear before a disciplinary committee, to answer the charges levelled against him, he was duly given an opportunity to present his case before the committee and all procedures were duly followed in compliance with the Law. The committee having concluded that charges 1 to 5 were proved, the Defendant, acting as a reasonable employer, could not in good faith take any other course of action but to terminate the Plaintiff's employment with immediate effect.

Discussions

I have given anxious consideration to the submissions of both Learned Senior Counsel. The crux of the matter is whether the words "unfair, unjustified and in contravention of the provisions of the Law" would be wide enough to cover an umbrella of offences, including discrimination, when this was not specifically pleaded.

At the outset, I shall refer to the rules of pleading as extensively laid down in the case of **HONOURABLE JAGATSINGH vs HONOURABLE BOODHOO and HONOURABLE WALTER vs Others (1981) MR 35** where the Learned Judges quoted Bullen and Leake and Jacob's Precedent's of Pleadings, 12th edition as follows:

"The function of pleadings has been described as a reflection of the role of the court and as an aspect of the adversary system of civil proceedings:

As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finally, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without [due amendment properly made]. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other business" IN THE SENSE that points other than those specified may be raised without notice."

The fundamental principles of the functions of pleadings are precision, certainty and clarity. "*The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision". (RE: Odgers on the Principles of Pleadings and Practice).* The Learned authors added that each party has a duty to state his whole case by

pleading all the facts on which he intends to rely, failing which he will not be able to give any evidence at Trial.

The above concept is in line with the principle of a fair trial and has been expatiated in the case of **HONOURABLE JAGATSINGH vs HONOURABLE BOODHOO and HONOURABLE WALTER vs Others** as follows:

“The “Function of pleadings”, which has been stated to be “primarily designed to bring the parties to an issue or issues on which alone the court can adjudicate between them, but it is also designed to fulfill some of the fundamental principles of natural justice such as that each party should have fair and due notice of what case he has to meet, that each party should have a reasonable opportunity of answering the claim or defence of his opponent, and that each party should have a reasonable opportunity of preparing and presenting his case on the basis of the issues disclosed in the pleadings and no others”.

Our case law is clear on the fundamental notion that a litigant cannot travel outside his pleadings; litigants are bound by their pleadings. **(RE: GLOVER (SIR) VICTOR VS BOODHOO HARISH (1993) SCJ 243** and **GEETA NATHOO AND ANOR VS SHALOM ESHETIQUE AND SPA LTS (2020) SCJ 313).**

Having said that, it is incumbent to remember that we are dealing with a case of unjustified dismissal before the Industrial Court. *“It is trite law that in an action for unjustified dismissal the plaintiff need only aver that his employment was terminated without any cause or justification because the burden of proof on that issue rested on the defendant employer (vide Harel Frères Ltd v. Veerasamy [1968 MR 218])” – TAHALOO D.R. vs CONSOLIDATED ENERGY CO LTD (2021) SCJ 160.*

The fundamentals of pleadings find their application before the Industrial Court in so far as the worker is entitled to know what case he has to meet, the Plaintiff must establish the cause of action and the burden of proving that the dismissal is justified rests on the employer. **(RE: RAMEN VS DESIRE (1986) MR 216).**

Applying the Law to the facts

The bone of contention in relation to the present Argument is whether paragraph 13 of the Plaintiff which reads - *The Plaintiff avers that the termination of the employment was unfair, unjustified and in contravention of the provisions of the law*, will cover the question put by Learned Senior Counsel for the Plaintiff whilst examining the Plaintiff in chief, namely the question: “*(...) has there been any issue which has been raised by you with the senior management with regard to previous senior management of the defendant and their or his or their related entities?*” When probed by the Court about the nature of the question, Learned Senior Counsel for the Plaintiff answered that he wanted to touch on the issue of discrimination.

On that score, I have perused the Demand and Answer to Particulars in relation to paragraph 13 of the Plaintiff. When required to furnish particulars of the unfairness and the unjustified termination, the Plaintiff answered that these are matters of law and evidence. When asked about the facts on which the Plaintiff relies when averring that the termination of his employment was allegedly in contravention of the provisions of the law, the Plaintiff answered that the charges as levelled against the Plaintiff were known to the Defendant over years but were raised after many years, hence contravening section 38(2)(a)(iii) of the Employment Rights Act. To the question relating to the relevant sections/subsections which were allegedly not complied by Defendant, the Plaintiff answered that this should be better known to the Defendant.

Bearing in mind that for a case of unjustified dismissal, the Plaintiff needs only aver that his employment was terminated without cause or justification, I find that the Plaintiff is entitled to substantiate the unfair and unjustified dismissal through evidence in Court. In the present case, by averring that the termination was unfair and unjustified, the Plaintiff has established the cause of action. (**RE: BHEEKARRY VS JAGESHWAR (2008) SCJ 180**).

Our case law is clear that the Plaintiff needs only aver that the termination of his employment was without just cause or justification. However, in this case, the Plaintiff has gone a step further to add that the termination was also through a contravention of the provisions of the Law. It is important to note that the Plaintiff has explained through the Answer to Particulars that the averment in paragraph 13 in relation to the contravention of the Law by the Defendant is the breach of section 38(2)(a)(iii) of the Employment Rights Act. Therefore the breach of the provision of the Law can only be restricted to section 38(2)(a)(iii) of the Employment Rights Act.

Given that the Plaintiff has a duty to establish the cause of action by averring that the termination of his employment was without cause or justification, the question that begs to be answered is which evidence can the Court deem admissible to enable the Plaintiff to sustain his averment? To answer this question, we have to bear in mind that we are in the midst of an Industrial Court case dealing with a case of unjustified dismissal. The whole purport of the alleged unjustified dismissal will rest on the charges levelled against the Plaintiff by the Defendant, which charges the Defendant will have to prove and the same ones which are denied by the Plaintiff. The Plaintiff will have to give evidence in relation to the charges which have been levelled against him by the Defendant, in support of the unjustified dismissal. Therefore, the testimony of the Plaintiff to sustain the unfairness or unjustified nature of the termination of his employment will have to be centered around the charges which have been levelled against him. To be more precise, this testimony will substantiate the denial of the Plaintiff towards the charges levelled against him in relation to the termination of his employment.

The Plaintiff is expected to give evidence as to why he denies the charges levelled and proved against him at the disciplinary committee. However, having said that, I am of the considered view that should the Plaintiff bring in any supporting evidence, specially new evidence, which will rebut the charges, or which will render the charges weaker or a nullity, the Plaintiff ought to aver same in his pleadings. In the present case, the issue which Learned Senior Counsel for the Plaintiff tried to bring to light through the examination in chief is an issue of discrimination.

Discrimination has never been averred in the Plaintiff. It is a totally new element, seemingly going beyond the scope of the charges levelled against the Plaintiff by the Defendant as can be seen from the pleadings. If this evidence is allowed, it may tilt the balance in favour of one party or another by lending credence to either version. I find that the words "*the termination of his employment was unfair, unjustified and in contravention of the provisions of the law*" in paragraph 13 of the Plaintiff are too vague and lack precision, certainty and clarity such that they cannot cover an item which has not been pleaded.

If discrimination or any other issue has not been pleaded, the threshold for the validity and reliability of pleadings will not be met. Indeed, the Plaintiff has not pleaded discrimination or any other extraneous issues as provisions on which he intends to rely on to sustain the cause of action against the Defendant. Raising the point now would mean raising a new issue for the

Defendant which would take the Defendant by surprise, bearing in mind that the cardinal principle is that each party is bound by his own pleadings. Allowing the Plaintiff to bring a new element under the umbrella of “unfair, unjustified and in contravention of the provisions of the Law” would be in breach of natural justice as the Defendant never had fair and due notice of the case for the Plaintiff, did not have a reasonable opportunity to rebut the case in defence through the pleadings and to present his case accordingly.

It is also important to remember that we are here dealing with an Industrial Court case, where the rules of procedure and substance have a certain specificity. It is the case for the Plaintiff that the termination of his employment was unfair, unjustified and in contravention of the Law. It is noteworthy that the reason for the termination of the Plaintiff's employment must be in line with the letter of termination as per section 37(2) of the Employment Rights Act 2008. **(LATERAL HOLDINGS LTD v MURDAMOOTOO V.2021 SCJ 19).** Now, if the Plaintiff is raising any other reason to allege or sustain unjustified termination, he has a duty to clearly and precisely establish same through his pleadings.

In light of the above, I find that the Court would be acting contrary to the principles of justice and procedure if it would allow the Plaintiff to proceed with a line of questioning which has not been specifically pleaded. In the circumstances, I uphold the objection raised by Learned Senior Counsel for the Defendant and rule the question put by Learned Senior Counsel for the Plaintiff to the Plaintiff in the examination-in-chief, to be inadmissible.

Ruling delivered by: M.GAYAN-JAULIMSING, Ag President, Industrial Court

Ruling delivered on: 11th March 2024