Van Hoeken A. v Africa Technical Services Limited

2024 IND 37

Cause Number 635/15

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Alexander Van Hoeken

Plaintiff

v.

Africa Technical Services Limited

Defendant

Ruling

The averments of the present plaint are reproduced *verbatim* below:

1. *The Plaintiff was employed by the Defendant and this by virtue of an International Employment Agreement (the "Agreement") dated 8 October 2014.*

2. *On the 1st May 2015, the Defendant terminated the employment of the Plaintiff on the ground of alleged misconduct.*

3. *By virtue of clause 14.1.3 and Appendix A of the Agreement, the Plaintiff avers that he was entitled to 18 months' notice since as at 1 May 2015 he had already completed his 6 months' probation period.*

4. *The Plaintiff avers that the Agreement being regulated by the laws of Mauritius, any termination for alleged misconduct should have been carried out in strict compliance with Section 38(2) of the Employment Rights Act 2008.*

5. *On or about the 26 April 2015, the Plaintiff received a notice to attend a disciplinary hearing to be held on the 30 April 2015.*

6. *The Plaintiff avers that there have been several irregularities in the manner in which the Defendant held the said disciplinary committee which led to his termination of employment, thus rendering the whole termination of employment unlawful.*

7. *By way of a Notice "Mise en Demeure" dated 28th September 2015 and served on Defendant on the 13th October 2015, the Plaintiff claimed from the Defendant the sum of USD 1,845,714/-.*

8. *However, up to now, the Defendant has failed to comply with the requirements and exigencies of the said Notice "Mise en Demeure".*

9. *The Plaintiff avers that in view of the above, the Plaintiff has elected to enter the present claim before the jurisdiction of the Industrial Court for the sum of* ***USD 1,345,714****(One Million Three Hundred and Forty Five Thousand, Seven Hundred and Fourteen United States Dollars) made up as follows which is due to the Plaintiff by the Defendant: -*

		USD
(i)	*Salary for October 2014(USD 500,000/12)*	*41,666*
(ii)	*Guaranteed bonus for the first year*	*500,000*
(iii)	*Remuneration in lieu of 18 months' notice (USD 500,000 X 18/12)*	*750,000*
(iv)	*2 rotation flights from DRC to Netherlands (USD 4,957 X 2 X 3)*	*29,742*
(v)	*Unpaid 2014 End of Year Gratuity pro-rata (USD 500,000/12)/12 x3*	*10,417*
(vi)	*2015 End of year gratuity pro-rata (USD 500,000/12)/12 x 4*	*13,889*

Total ***1,345,714***

10. The Plaintiff therefore prays from this Honourable Court for a judgment condemning and ordering the Defendant to pay to the Plaintiff the aforesaid sum of USD 1,345,714/- with interest at the legal rate as from service of the notice dated 28 September 2015.

With Costs and "faux frais" occasioned in lodging the case. (**emphasis added**)

Defendant raised a plea in *limine* as per the two limbs given below which was not acceded to after arguments were heard namely:

(a) This Honourable Court has no jurisdiction to hear and determine the present matter for

(i) the Defendant as styled is not the Plaintiff's employer;

(ii) this Honourable Court is not empowered to grant items of the relief sought by the Plaintiff.

(b) *Ex facie* the *Praecipe*, no cause of action is disclosed.

Now, after the Plaintiff has been heard on personal answers, learned Counsel for the Defendant raised another objection in law which is two-fold, the first one being jurisdictional and the second being on the procedure adopted to challenge the decision of his employer to terminate his employment.

The following admissions were made by Plaintiff in the course of his examination on personal answers which are reproduced *verbatim* below from the transcript of proceedings dated 30 November 2022 at pages 12 and 13:

"Q. At the time of your employment back in time, 2014, for one full year your salary, which includes your basic salary has exceeded the sum of Rs 360,000, which is the equivalent of approximately 10,500 dollars. At the time of your employment, because the rate has changed since.

A. Yes.

Q. You confirm that you were not physically present to the Disciplinary Committee hearing that you were convened to? (…)

A. I was not there.

Q. You chose by way of an email dated 29th of April 2015 to send your explanations to the charges that were levelled against you to the Chairperson of the Disciplinary Committee. You confirm? (…)

A. Yes, I sent an email.

Q. You sent an email containing all your explanations to the charges levelled against you?

A. Yes."

Indeed, it is not disputed that the following admissions were made by Plaintiff namely that -

(i) his basic salary when he was employed by Defendant exceeded the sum of Rs 360,000 per year in line with the averment of his plaint viz. paragraph 9 (i) above;

(ii) he was not present at the Disciplinary Committee hearing for which he was convened to attend by Defendant and it was under the assumption of learned Counsel for the Defendant that he chose not to attend;

(iii) he sent an email dated 29.4.2015 to the Chairperson of the Disciplinary Committee containing all his explanations in relation to the charges levelled against him.

Learned Counsel for the Defendant, in the light of the admissions obtained from Plaintiff raised the following preliminary objection –

1. Plaintiff having admitted that his salary exceeds the sum of Rs 360,000 per annum, this Court has no jurisdiction to entertain the present claim inasmuch as he does not fall within the definition of a worker as defined under Section 2 of the Employment Rights Act 2008 hereinafter referred to as "ERA".

2. In the light of the admission of Plaintiff, an employee at the relevant time, that he chose not to attend the Disciplinary Hearing where he was convened, but opted to send an email explanation dated 29.4.2015 to the said Disciplinary Committee, Plaintiff is debarred from challenging before this Court or any Court for that purpose the decision of his employer to terminate his employment. The reason further being that Plaintiff cannot

be allowed to bypass the provisions of the law, giving him the opportunity to put forward his explanations before an independent committee when he himself chose not to attend the committee and then come before this Court to challenge the decision of his employer to terminate his employment.

The main thrust of the arguments of learned Counsel for the Defendant is that based on those answers, Plaintiff having admitted that his basic salary exceeded Rs 360,000 annually coupled with the fact that he is not entitled to claim severance allowance under Section 46(1) of the ERA, the present Court has no jurisdiction to entertain the present claim inasmuch as the Plaintiff does not fall within the definition of a worker as defined under Section 2 of the ERA. Secondly, in the light of the admission of Plaintiff that he chose not to attend the Disciplinary Committee set up by his employer to provide him with an opportunity to give his explanation, the Plaintiff is debarred from challenging the decision of the Defendant employer before this Court inasmuch as the Plaintiff is bypassing the process of the law and is trying to use the Court as a substitute to the Disciplinary Committee.

As regards the first point, he relied on Section 3 and the First Schedule of the Industrial Court Act 1973 setting out that there shall be an Industrial Court with exclusive Civil and Criminal Jurisdiction to try any matter arising out of the ERA. The Plaintiff's case is based on non-payment of remuneration on termination of employment under Section 25 of the ERA precisely Section 25(3) and Section 25(4). He relied on the decided case of **Maxo Products Ltd v The Permanent Secretary of the Ministry of Labour & Industrial Relations** [1991 SCJ 225] in relation to worker.

He submitted that both the employer and the employee under Section 38 of the ERA have a legal obligation. The Defendant employer has fulfilled its obligation by providing the Disciplinary Committee hearing and the employee does not follow the legal obligation upon him to attend and it was being done to give him an opportunity to give his explanations after charges were levelled against him. He chose not to go, and he sent an email with his explanations to the Disciplinary Committee. It was impossible for Plaintiff to be cross-examined. His explanations could not be tested. Then, the employer acts on the findings of the Committee which finds the charge list proved, then he comes before the Court and says well that is wrong, the Disciplinary Committee is wrong. He has been unlawfully terminated and wants the Court now to hear him to tell the Court that this Committee was wrong as per his plaint as there have been several

irregularities in the manner in which the Defendant held the said Disciplinary Committee. The Court should not entertain the claim. He relied on the decided cases of **Moortoojakhan R. v Tropic Knits Ltd [2020 SCJ 343], Lateral Holdings Ltd v Murdamootoo V. [2021 SCJ 19], Chan Man Sing G. v Win Tai Chong Company Ltd [2012 SCJ 82], Plaine Verte Co-operative Stores Society Ltd v Rajahbalee G. [1991 SCJ 227]**. He also relied on the decided New Zealand case of **Radius Residential Care v Megan Mcleay Limited [2010] NZEMPC 149**.

For the Plaintiff to claim before the Industrial Court, he could only claim that notice if he fell under Section 37 of the ERA. But his submissions are that Plaintiff does not fall under Section 37 because Defendant has not terminated his employment under Section 37 by providing him with the notice and he would only then have been able to claim the notice if he was not paid the notice period. This is not the case of the Plaintiff. His case is that his agreement was terminated on the ground of misconduct, clearly falling under Section 38 of the ERA. Plaintiff has averred that there have been several irregularities which led to the termination of his employment, thus rendering the whole termination of his employment unlawful. All the items claimed as per his plaint would fall under the definition of remuneration as provided in the ERA. The ruling given by the Court was given *ex facie* the pleadings without the benefit of hearing the Plaintiff' evidence himself on personal answers.

The contention of learned Counsel for the Plaintiff boils down to the fact that evidence has not been heard in this case. The only safe manner in which we can understand whether the Plaintiff really chose not to attend, whether there is a reason for his non-attendance on the date set for hearing by the Disciplinary Committee, is when the case is heard on the merits. Plaintiff says in his plaint that there were serious irregularities in the Disciplinary Proceedings. He has indicated to the Court that was why he was not there, because he felt that there were serious irregularities and the termination of his employment by Defendant was unjustified. The opportunity contemplated in law which is one which consists of at least 7 days' delay to prepare his case to attend the Disciplinary Committee hearing was never given to the Plaintiff *ex facie* the plaint. Defendant cannot assume and allege that Plaintiff chose not to attend the Disciplinary Hearing. The Industrial Court Act 1973 is a specific legislation that gives to this Court exclusive jurisdiction to hear such a case of unjustified dismissal based *inter alia* on a breach of statutory provisions of Section 38(2) of the ERA. He relied on the Supreme Court decision of **Modaykhan A.R. & Ors v SBM Bank (Mauritius) Ltd [2021 SCJ 416]** in relation to

wages earned by Plaintiff exceeding Rs 360,000 annually for which there was already a ruling given by the present Court.

The risk of a head of claim being disallowed does not oust the jurisdiction of the present Court especially when the plaint itself unequivocally establishes a breach of the provisions of Section 38(2) of the ERA which makes any ensuing dismissal unjustified.

I have duly considered the arguments of both learned Counsel by way of their oral and written submissions albeit that most cases which have been referred to concern authorities of equal jurisdiction which regrettably have no binding force on the present Court. Further, there has been a foreign authority namely a New Zealand decision of **Radius Residential Care v Megan Mcleay Limited [2010] NZEMPC 149** relied upon by the Defendant. I find it apt to stress that the Industrial Court cannot depart from the doctrine of precedent namely the principle of *stare decisis* when there are already binding decisions of the Supreme Court some of which have found their way before the Board of the Privy Council leading to Privy Council decisions which are in turn binding to the Supreme Court and to the present lower Court. This position has been clearly highlighted in **Beeharee and Anor v State [2023 SCJ 282]** where the Supreme Court had this to say:

"It must be said at the outset that there is no justification to refer to cases from other jurisdictions where there are decisions from the Supreme Court on the issue in view of the principle of stare decisis."

At this stage, it is appropriate to reproduce Section 3 of the Industrial Court Act 1973 which stipulates the following:

"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, it is imperative to note that the ERA is only one of the enactments found in the First Schedule of the Industrial Court Act 1973 as amended by Act 6 of 2013 for which the Industrial Court has jurisdiction.

The definition of a "worker" pursuant to Section 2 of the ERA which does not include a person whose basic wage is in excess of 360,000 rupees per annum is subject to Sections 33 or 40 and with the exception of Sections 4, 20, 30, 31 and Parts VIII, VIIIA, IX, X and XI of the Act.

Therefore, the present plaint being a case falling under **"PART VIII – TERMINATION OF AGREEMENT"** (comprising of the following Sections namely "36. Termination of agreement, 37. Notice of termination of agreement, 38. Protection against termination of agreement and 39. Worker under notice of termination") of the then ERA falls within the exception although Plaintiff has admitted having earned more than Rs 360,000 annually, so that the Industrial Court has jurisdiction to hear the present case although Plaintiff's basic wage is more than Rs 360,000 annually. However, the items of compensation claimed are not within the ambit of "**PART X-COMPENSATION**" (comprising of the following Sections viz. "46. Payment of severance allowance,47. Payment of recycling fee, 48. Deductions from severance allowance, 48. Gratuity on retirement, 50. Death grant, 51. Certificate of employment, 52. Termination of appointment under the Constitution and 53. Contractual worker") which form part of the exception.

Therefore, only item (iii) as per paragraph 9 of the plaint, can be claimed by Plaintiff namely "*Remuneration in lieu of 18 months' notice (USD 500,000 X 18/12)"* in the sum of 750,000 USD pursuant to "Section 37. *Notice of termination of agreement"* under **"PART VIII – TERMINATION OF AGREEMENT"** of the ERA, should that sum be warranted after the case has been heard on the merits, upon a finding that Plaintiff's dismissal was unjustified by the present Court. Although the contract of employment of Plaintiff was terminated otherwise than by notice by Defendant, but on the ground of alleged misconduct pursuant to Section 38(2) of the ERA following the finding of Defendant's Disciplinary Committee within the statutory time frame to have Plaintiff notified of its decision, there would have been no wages payable to Plaintiff as indemnity in lieu of notice in the event that the Industrial Court finds that the dismissal of Plaintiff was justified.

However, in the event that the Industrial Court finds that the dismissal of Plaintiff was unjustified, then Plaintiff would be deemed to be entitled to an indemnity in lieu of notice so that Section 37(5) of the ERA will apply viz. *"Any party may, in lieu of giving notice of termination of*

agreement, pay to the other party the amount of remuneration the worker would have earned had he remained in employment during the period of notice." falling under the exception of **"PART VIII – TERMINATION OF AGREEMENT"** of the ERA, although Plaintiff is in receipt of wages exceeding Rs 360,000 yearly.

True it is that "**PART V – REMUNERATION**" of the ERA by virtue of its corresponding Section 25(4), it covers payment of remuneration due on termination of agreement and that such **"PART VIII – TERMINATION OF AGREEMENT"** of the ERA applies to a worker earning wages more than Rs 360,000 yearly.

However, such "**PART V – REMUNERATION**" is not within the scope of the exception under Section 2 of the ERA and thus, does not apply to a worker who earns more than Rs 360,000 per year, so that Plaintiff not being qualified a worker for that purpose, remuneration cannot be claimed by him. But remuneration can be claimed by a worker under Section 25(4) of the ERA upon termination of his agreement by his employer, only in the event that he earns less than Rs 360,000 per year, which obviously is not applicable to the present matter.

Moreover, as regards the prorated end of year gratuity claimed and which is governed by the End of Year Gratuity Act 2001, Plaintiff is not qualified by virtue of Section 3(2) of the said Act, as his contract of employment was terminated on the ground of alleged misconduct verging on a purported unlawful dismissal and was not terminated on the ground of redundancy. The relevant provisions read as follows:

*"**3. Payment of gratuity***

(2) Subject to subsection (4), the gratuity payable to an employee who reckons continuous employment with his employer –

(a) for the whole or part of the year and who is in his employment on 31 December, shall be equivalent to not less than one twelfth of the monthly basic wage or salary of the employee payable in respect of the month of December, multiplied by the number of months during which he has worked in that year;

(b) for only part of the year and –

(a) whose employment has been terminated by reason of redundancy; or

(ii) who retired in the course of the year in compliance with the provisions of any agreement or enactment, shall be equivalent to not less than one- twelfth of the monthly basic wage or salary of the employee payable in the last month of his employment multiplied by the number of months during which he has worked."

Therefore, the Industrial Court has jurisdiction to hear the present case which is in line with my previous ruling, although Plaintiff was in receipt of wages exceeding Rs 360,000 annually(see- **Kosseeal A.M. v Dauget R.**[1994 SCJ 216] distinguishing **Maxo Products Ltd v Permanent Secretary Ministry of Labour & Industrial Relations** [1991 SCJ 225]), so that a preliminary objection after an examination of Plaintiff on his personal answers to re- thrash the same issue, is not to be encouraged in view of the authority of **Modaykhan A.R. & Ors v SBM Bank (Mauritius) Ltd** [2021 SCJ 416] at page 9 where the Supreme Court had this to say:

"Abuse of process is thus not restricted to the relitigation of an issue which has already been determined but also extends to issues which are part of the subject matter of the litigation and could have been raised in the previous proceedings."

Further, there is no provision under the ERA stipulating that where there has been a breach of Section 38(2) by a worker, that is, where the worker does not attend to a Disciplinary Committee hearing convened by his employer, and the latter having in turn breached Section 38(2) by failing to give that worker at least 7 days to answer any charge made against him before that Committee, the Industrial Court would be depleted of jurisdiction, because of two competing breaches of Section 38(2) of the ERA purportedly committed by the Plaintiff and Defendant respectively.

It is opportune to reproduce Section 38(2) of the ERA as follows:

"***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;*

(b) *unless, where an alleged misconduct is the subject of criminal proceedings –*

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

(ii) *he has, within 10 days of the day on which he becomes aware of the conviction of the worker by the Court of first instance, notified the worker of the charge made against the worker;*

(iii) *the worker has been given at least 7 days' notice to answer the charge made against him; and*

(iv) *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;*

(c) *in cases not covered by paragraphs (a) and (b), unless the termination is effected within 7 days from the day the employer becomes aware of the misconduct."* **(all the above underlining is mine)**

Thus, I take the view that it is within the jurisdiction of the Industrial Court **[**where Plaintiff has elected to stake his claim (*vide*- **Perrine v Duke Haberdashers Co. Ltd. [1986 MR 127])]** pursuant to Section 3 of the Industrial Court Act 1973 to hear the present civil matter. Indeed, it will be only after having heard the case on the merits, that the present Court will be in a position to adjudicate as to whether the purported breach of the statutory delay of 7 days for which Plaintiff was given in order to persuade his Defendant employer, so that he could keep his job, so that in view of the reduced opportunity afforded to him among other reasons to be canvassed

at the trial proper, the Plaintiff did not attend to the Disciplinary Committee hearing, but only provided his answers to all the charges leveled against him by way of an email before that hearing, could be construed as an act of defiance on his part, so that it could be construed in good faith by Defendant as justified dismissal(see- **Plaine Verte Co-operative Stores Society Ltd v G. Rajabally** [1991 SCJ 227] relied by learned Counsel for the Defendant), bearing in mind that the burden is on the Defendant employer to show that upon the material it had or it reasonably ought to have known at the time of termination of Plaintiff's employment, it could not in good faith take any other course of action, but to dismiss its Plaintiff worker(see- **Lateral Holdings Ltd v Murdamootoo V.** [2021 SCJ 19]**, Chan Man Sing G. v Win Tai Chong Company Ltd** [2012 SCJ 82]) which are in line with the reasoning in **Smegh (Ile Maurice) Ltée v Persad [2010] UKPC 23**).

It is also at the level of the trial, for the present Court to assess whether there has been a breach of statutory delay by Defendant by affording Plaintiff less than 7 days to answer the charges levelled against him before its Disciplinary Committee and whether on that basis alone, Plaintiff was entitled to treat his dismissal as unjustified, no matter whether he appeared before that Disciplinary Committee or not. It is relevant to refer to the following extract cited by learned Counsel for the Plaintiff in **Manish Meeheelaul v Maubank Ltd** [2023 SCJ 281] at page 4 which reads as follows:

"A perusal of Part VIII of the Act which is entitled "Termination of agreement" shows that the legislature has provided for very short delays, calculated in days, regarding the different steps involved in the procedure which has to be followed when instituting disciplinary proceedings for misconduct against a worker. Section 38(2) of the Act which is found under Part VIII of the Act sets out a mandatory procedure and time limits which must be strictly adhered to by an employer where he institutes disciplinary proceedings for misconduct entailing dismissal against a worker.

Pursuant to 38(2), the employer must give the worker an opportunity to answer the charge made against him in relation to the alleged misconduct. For the worker to be able to answer the charge, he must first be notified of the charge made against him within 10 days of the day on which the employer becomes aware of the misconduct. Section 38(2)(a)(iv) in turn provides that the worker has to be given at least 7 days' notice to answer the charge."

In the same vein, *"at least 7 days' notice"* to answer any charge made against him as per Section 38(2)(a)(iv) of ERA would mean at least "7 clear days" (see- **Padaruth and Ors. v The Queen [1964 MR 185]** as rightly cited by learned Counsel for the Plaintiff).

It is apposite to note that despite a breach of such statutory delay, it was open to the Defendant not to have dismissed Plaintiff upon being satisfied by his explanations given *via* email on 29.4.2015 prior to the Disciplinary Committee hearing on 30.4.2015 as averred in the plaint. It was not obligatory for the Defendant employer to have the Plaintiff employee convened before a Disciplinary Committee hearing (see- Section 38(2)(a)(ii) of the ERA), and should he not be present on that day, to hold that the charges have been proved against him. But it is obligatory to give Plaintiff an opportunity to be heard by virtue of Section 38(2)(a)(ii) of the ERA as reproduced above. It is relevant to reproduce the following extract from the decided case of **Tyack L. Gerard v Air Mauritius Ltd & Ors [2010 SCJ 257]** at page 4 which reads as follows:

"What it did was to proceed to conclude proceedings in the absence of the plaintiff and to find the charges proved.

It is in this that both the employer and the Disciplinary Committee went astray. For, even in a criminal jurisdiction, a default judgment cannot be pronounced and the principle of cotumace is applied with clear principles of law. A Disciplinary Committee is not a teleguided machine to do the bidding of the employer. It is an impartial and independent body set up to determine whether disciplinary actions may be taken against an employee in a given situation. Air Mauritius, therefore, may not rely on a decision taken by the Committee in such circumstances." (**emphasis added**)

Indeed, in the Privy Council decision of **Michel Lafresière v New Mauritius Hotels Ltd [2023 UKPC 38]**, the Board of the Privy Council highlighted *inter alia* on the need to take into account of the reasons why the Plaintiff employee did not attend to the Disciplinary Committee hearing of his Defendant Employer. Indeed, at paragraph 6 at page 3, the Board highlighted the following:

*"**6.** The following principles as to the application of section 38(2) are common ground in this appeal. First, when a worker brings a claim for severance pay before the Industrial Court, that Court is required and entitled to investigate afresh the truth behind the allegations on which the*

employer relies to justify the dismissal of the employee. This was confirmed in the case of Smegh (Ile Maurice) Ltée v Persad [2010] UKPC 23 ("Smegh"). In that case the Board cited a passage from the earlier case of G. Planteau De Maroussem v Dupou [2009] SCJ 287 which stated that a disciplinary committee is no substitute for a court of law. The Board went on in Smegh (para 20) to say that it "would be remarkable if the exclusive jurisdiction to decide whether a worker has been unjustifiably dismissed in a particular case were to be vested in the employer.

(…)

***38.** If Hotels was inviting the Magistrate to infer from Mr Lafresière's failure to attend the disciplinary hearing that he had no real answer to the allegations, then the Magistrate should have considered Mr Lafresière's reasons for deciding not to attend. His rejection of Mr Lafresière's contention that he had been dismissed in March 2013 was not a complete answer to this point. (…) But Mr Lafresière's belief that he had been dismissed – or his belief that the disciplinary hearing would not be a genuine opportunity for him to put forward his explanations because Hotels' mind was made up – might still have explained his failure to attend."* (**emphasis added)**

It is also worthy of note that the findings of a Disciplinary Committee hearing are not conclusive and are not even binding on the Defendant, but the said hearing is merely an obligatory procedure in the sense of giving the Plaintiff an opportunity to dissuade his employer by way of his version of facts so that he could keep his job, prior to a decision being taken by Defendant whether to dismiss him or not as pertinently highlighted in the following extract from **Smegh** (supra):

"19. (…) In G. Planteau De Maroussem v Dupou [2009] SCJ 287, the Supreme Court of Mauritius held that the question whether an employee has been unjustifiably dismissed was a matter for the court and not the employer's disciplinary committee. The court said:

"*The aim of a disciplinary committee, as we have said, 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.*"

20. The Board agrees. It would be remarkable if the exclusive jurisdiction to decide whether a worker has been unjustifiably dismissed in a particular case were to be vested in the employer. The denial to workers of the right of access to a court to decide such a question could only be achieved by the clearest statutory language. (…) It does not provide that the findings of a committee are conclusive. The obligation to afford an opportunity to be heard is no more than an obligatory part of the employer's internal procedure for dismissing an employee." **(emphasis added)**

In the same breath, it is useful to refer to the following passage from the decided Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd [2020 SCJ 343]** at pages 5 and 6 as follows:

*"Now, it is trite law that a Disciplinary Committee is not a Court of law and does not have its attributes (see **Planteau de Maroussem** as endorsed in **Smegh**). It is set up by the employer as "an obligatory part of the employer's internal procedure for dismissing an employee" (see **Smegh** at paragraph 20). (…)*

*We fully agree in that regard with the following pronouncement of the Supreme Court in **Planteau de Maroussem**, which was cited with approval in **Smegh**-*

"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. (…), subject to the sanction of the Industrial Court."

*The Disciplinary Committee therefore operates as an obligatory mechanism for the employer to provide an opportunity to its employee to give his version in relation to the charges laid against him pursuant to the law (in this case, **section 38(2)(a) of the Employment Rights Act**) and to attempt to dissuade the employer from dismissing him. The findings of the Disciplinary Committee are not conclusive and the employer may still come to a different conclusion. It is then for the Industrial Court to determine if any termination of the employee's employment was justified or not on the basis of the evidence that was or ought to have been available to the employer at the time.*

*An employee does not therefore enjoy the same rights before a Disciplinary Committee set up by his employer as he does before an independent and impartial tribunal set up to determine the extent of his civil rights and obligations pursuant to **section 10(8) of the Constitution**. Indeed*

a disciplinary hearing is not conducted with the same formality as a trial before a Court or tribunal. The employee should however be given a fair opportunity to put forward his defence and give his version before the Disciplinary Committee." **(emphasis added)**

Hence, it would be misconceived to invoke that the Industrial Court would substitute itself to the Disciplinary Committee inasmuch as its findings are not binding on Defendant as opposed to the Industrial Court and it is for the said Court to decide as to whether the dismissal of Plaintiff was justified or unjustified and not the Defendant's Disciplinary Committee (see- **Smegh**(supra) and **Moortoojakhan**(supra)).

Therefore, breach of provisions of Section 38(2) of the ERA cannot be equated to an ouster of jurisdiction of the Industrial Court. But on the contrary, to try such breach is within the ambit of the ERA and therefore within the jurisdiction of the Industrial Court although the items of remuneration being claimed under the ERA under paragraph 9 of the plaint, are outside its purview, apart from item (iii) viz. "*Remuneration in lieu of 18 months' notice (USD 500,000 X 18/12)"* in the sum of 750,000 USD pursuant to "Section 37. *Notice of termination of agreement"* under **"PART VIII – TERMINATION OF AGREEMENT"**, by reason of the fact that the Plaintiff is not qualified a worker for the purposes of the other items, because he has admitted having earned a salary of more than Rs 360, 000 annually both *ex facie* the averments of his plaint and upon being heard on his personal answers.

For the reasons given above, the two-fold objection in law cannot succeed and is thus, overruled.

This matter is accordingly fixed *proforma* to 29 August 2024 for both learned Counsel to suggest common dates for trial in September 2024.

S.D. Bonomally (Mrs.) *(Vice President)*
23.8.2024