Appadoo v SBM

2023 IND 28

CN482/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

CHANDRADEV APPADOO

Plaintiff

v/s

SBM BANK (MAURITIUS) LTD

Defendant

JUDGMENT

By way of *Proecipe* dated 14-08-18, the Plaintiff is claiming from the Defendant Company Rs88 194 796.90/- representing Severance Allowance, with Costs, for the unilateral, summary, unlawful and unjustified termination of his employment by the Defendant Company on the ground of gross misconduct.

The Defendant Company denied the said Claim in its Plea dated 10-09-2020 and moved for the Plaint to be dismissed, with Costs.

Each Party 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 dismissed unlawfully and without justification, such that he was entitled to Severance Allowance.

Case for the Defendant Company

The Defendant Company denied the Plaintiff's Claim and averred that the Plaintiff's employment was terminated in view of the seriousness of his misconduct, and that it had, in good Faith and as a responsible employer, no other alternative than to dismiss the Plaintiff.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the Submissions made by each Learned Senior Counsel, to the Written Submissions put in by each Learned Senior Counsel, and to the Authorities, cases, and extracts of authoritative texts, referred to and put in by, each Learned Senior Counsel.

Applicable Law

It is common ground between the Parties that the Plaintiff's employment was terminated on 04-12-17, by way of letter of even date.

Hence, the applicable Law at the relevant time was the **Employment Rights Act (hereinafter referred to as ERA)** as amended.

Not in dispute

The following matters were not in dispute:

1) The Plaintiff joined the Defendant Company on 10-06-80;
2) On 30-09-99, the Plaintiff's employment with the Defendant Company terminated (Docs. P2 and P17);
3) Between 01-10-99 and 30-09-09, the Plaintiff was employed on a fixed duration contract basis as Senior Officer (Docs. P2 and P17);

4) On 04-08-09, the Plaintiff accepted appointment as Divisional Leader with the Defendant Company for 03 years, renewable for one more term on mutually agreeable terms subject to satisfactory service (Doc. P3);
5) On 10-10-12, with reference to (Doc. P3), the Plaintiff's employment was extended under the same terms and conditions to 30-11-12 (Doc. P4);
6) On 12-12-12, the Plaintiff signed another contract of employment as Divisional Leader for a fixed duration of 05 years, that is from 24-12-12 to 31-12-17 (Doc. P5);
7) By way of letter dated 15-09-17, the Plaintiff was suspended and convened to appear before a Disciplinary Committee to answer several charges which according to the Defendant Company, may, if proven, constitute gross misconduct;
8) The Disciplinary Committee was presided over by His Lordship Mr S.B. Domah, former Judge of the Supreme Court;
9) At the Disciplinary Committee hearing of 22-11-17, the Defendant Company's Counsel stated that the Disciplinary Committee was no charade and that the Plaintiff would not be dismissed until and unless there was a Finding that the charges had been proven; and
10) By way of letter dated 04-12-17, the Defendant Company informed the Plaintiff that having considered the Report of the Disciplinary Committee, it could not "reasonably and in all good faith take any other course of action but to terminate [his] employment with immediate effect on the grounds of gross misconduct".

Does the letter dated 04-12-17 (Doc. P1) constitute valid notification of the reasons for the termination of the Plaintiff's contract of employment, in light of the exigencies of s**. 37(2) of the ERA**?

S. 37(2) of the ERA relates to the Notice of termination of agreement and reads as follows:

> The employer shall, at the time of notifying a worker of the termination of his employment, state the reason of such termination.

The Court finds the 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]**).

There is therefore a statutory obligation placed on the employer to notify the employee of the reasons for the termination of his employment, in light of the express provisions of **s. 37(2) of the ERA**.

The operative part of the letter of termination dated 04-12-17 (Doc. P1) reads as follows:

> We have now considered the report of the disciplinary committee set up to hear your explanations in relation to the charges leveled (sic) against you.
>
> In the circumstances, the Bank cannot reasonably and in all good faith, take any other course of action but to terminate your employment with immediate effect on the grounds of gross misconduct.

S. 37(2) of the ERA places no obligation on the Defendant Company to state what charge/s has/ve been proven, but requires the Defendant Company to state the reason/s for the termination of the employment of the employee.

Merely referring to the letter of charge (Doc. P9) and stating that it has considered the Report of the Disciplinary Committee set up in relation to the Plaintiff without saying what charge/s, if any, amounted, in the Defendant Company's opinion, to gross misconduct, leaving the Defendant Company with no other reasonable option, in good Faith, but to terminate the Plaintiff's employment (Doc. P1), amounts to giving no reason/s at all. The Plaintiff does not know which of the charge/s levelled against him at the Disciplinary Committee amounted to gross misconduct according to the Defendant Company, justifying the termination of his employment.

It was of the essence for the Defendant Company to notify the Plaintiff, at the time of such notification, of the charge/s which, in its opinion, amounted to gross misconduct justifying the

termination of his employment, given there were no less than 04 charges levelled against the Plaintiff, as set out in the letter of charge (Doc. P9):

1.1. In the report dated 13 May 2014 signed by you and Mr K. Dursun entitled "*Purchase of Freehold property at Ebene/Trianon-Proposed SBM Village Project*" addressed to the Board of the Bank (the 'Board') and in the knowledge that such report would be relied upon by the Board, you have misled the Board by:

1.1.1. failing to disclose to the Board material information which was to your knowledge to enable the Board to take an informed decision. Such material information included:

1.1.1.1. the evaluation reports of Noor Dilmohamed and Associates dated 4 March 2014 commissioned by the Bank in respect of two plots of land of 6A (TV 3524 No. 10) and 5A86 (TV 3524 No. 11);

1.1.1.2. The value of the above referred two plots of land as given in the reports of Noor Dilmohamed and Associates; and

1.1.1.3. the identity of the vendors, one of whom was a politically exposed person.

1.1.2. stating in your comments, at section 4 of the report, that "*the offers received range from Rs 15m to Rs 25m per acre*" and that such offers reflect "*the demanding price for property in this particular region*", when you were in possession of sales evidence which did not reflect such price range.

1.1.3. wrongly stating in your comments at section 4 of the report that the offered price for proposal 4 was Rs17.5m per acre.

1.2. After having sought approval from the Board for the purchase of "plot 1" of 6A (TV 3544 No. 10) for a value not higher than "*Rs15m per acre*", you caused and/or allowed the acquisition for that plot to be effected for Rs15.5m per arpent.

1.3. You failed to seek the expert opinion report of an independent valuation surveyor to ascertain the price reasonableness, as stated in the report to the Board dated 13 may 2014, and you caused and/or allowed the above-referred two plots of land to be acquired without paying heed to the report of Noor Dilmohamed and Associates and/or without seeking any further independent valuation reports to determine price reasonableness.

1.4. In the report dated 2 February 2015 prepared by Mr K. Dursun and reviewed by you, addressed to the Board, you again misled the Board by failing to disclose the

> report of Noor Dilmohamed and Associates at item 9 and by failing to disclose that no formal valuation report had been obtained from Mr Ramlackhan of Broll Indian Ocean Ltd at item 14.

Given a number of charges may be levelled against an employee, but that the Disciplinary Committee may find only one charge proven, it is of the essence for the employee to be informed, at the time of his/her being notified of the termination of his/her employment, of the reason/s for such termination.

By merely referring to the letter of charge in the letter of termination (Doc. P1), the Defendant Company cannot be said to have discharged its duty of informing the Plaintiff, at the time of notifying him of the termination of his employment, of the reason/s for such termination.

As held in **Lateral Holdings (supra)**, it is the termination of letter, in the present matter (Doc. P1) which is central to the determination of the question as to whether the Plaintiff has been given the reason/s for the termination of his employment, at the time of his being notified of the termination of his employment, and therefore simply referring to the letter of charge (Doc. P9) in the letter of termination (Doc. P1) is of no avail.

Further, as per Dr Fok Kan, if the communication of the reason/s for termination of the employee's employment is a *règle de fond*, then *à défaut d'une énonciation du ou des motifs de licenciement […] le licenciement sera jugé injustifié comme étant sans motif […]*.

The Court is of the considered view that in light of the principles set out in the Authority of **Lateral Holdings (supra)**, it is clear that the communication of the reason/s for the termination of the employment is a *règle de fond*.

The Defendant Company stating at paragraph 23(c) of its Plea that the "disciplinary committee found those charges proved", does not detract from the fact that as per the termination letter (Doc. P1), no charge/reason is mentioned as justifying the termination of the Plaintiff's employment.

At any rate, from the clear wording of **s. 37(2) of the ERA**, the crucial time was the time at which the Plaintiff was notified of the termination of his employment.

The Plaintiff deponed in Court to the effect that neither had he been favoured with the Findings of the Disciplinary Committee nor was he informed of which charge/s was/were found proven against him, or what charge/s amounted to gross misconduct.

True it is that the Plaintiff admitted in Court not having disclosed the Noor Dilmohamed and Associates Report (hereinafter referred to as the Dilmohamed Report) to the Board (charge as per paragraph 1.1.1.1. of Doc. P9) and that the value mentioned in the said Report (charge as per paragraph 1.1.1.2. of Doc. P9) was much lower than the price in fact paid.

Also, the Plaintiff deponed to the effect that he thought that the comparable sales mentioned in the Dilmohamed Report were put in the Board Paper (Doc. P19).

In fact, paragraph 4. 0 of (Doc. P19) mentions offers received were in the range of Rs15 million to Rs25 million per acre, when the Plaintiff stated in Court that the range was between Rs06 million and Rs20 million as per the Dilmohamed Report.

It is clear that the range mentioned by the Plaintiff in Court was far from being what is contained in the Report to the Board (Doc. P19) (charge as per paragraph 1.1.2. of Doc. P9).

The Plaintiff also conceded not having disclosed the Dilmohamed Report even in the 2015 Report to the Board (Doc. P16) (charge as per paragraph 1.4. of Doc. P9).

The Plaintiff's explanation was that there were many Reports, and none were disclosed to the Board, that the price was the going price in the market at the time, and that the Defendant Company had lost no money there being no impairment on the said investments, which meant that it was the correct price, and hence he was of the view that the Defendant Company was not justified in terminating his employment, the more so as he had worked for 35 years.

Despite the Plaintiff's admissions as highlighted above, the Court was left in the dark as to what factor/s were available to, and relied upon by, the Defendant Company, at the time it took the decision to terminate the Plaintiff's employment, to decide to terminate the Plaintiff's employment.

The Defendant Company stated in Court that the ground for the Plaintiff's employment being terminated was gross misconduct relating to charges at paragraphs 1.1, 1.3 and 1.4 of (Doc. P9), but no mention was made as to the charge as per paragraph 1.2. of (Doc. P9), and conceded that its case was not that it had paid too much for the said plots of land, and/or that it would not have purchased the said plots of land had it been apprised of the Dilmohamed Report.

That being said, the Plaintiff, as a high ranking Officer of the Defendant Company, the more so as Divisional Leader, Finance, of the Defendant Company, and being involved directly in the preparation of the said Reports (Docs. P16 and P19) had a duty to exercise care, skill and diligence in view of the functions he occupied at the Defendant Company and in view of his knowledge, skill and experience as Divisional Leader, Finance, which the Plaintiff failed to exercise by failing to disclose the said Dilmohamed Report to the Board. This is even more so as the Plaintiff was one of the two persons to sign (Doc. P19), which was submitted for approval of the Board. Whether the Defendant Company paid too much for the said plots of land or not, whether the Bank would have purchased the said plots of land or not had it been apprised of the said Dilmohamed Report are irrelevant. The duty on the Plaintiff was to disclose all relevant information for the Board to be in a position to take an informed decision.

In light of all the above, it is clear, given the position the Plaintiff occupied at the Defendant Company, that it was incumbent on the Plaintiff to communicate to the Board all the relevant information in order for the Board to take an informed decision as to the purchase of plots of land. True it is that the Plaintiff was not the only officer of the Defendant Company to be involved in the process of reporting to the Board, as evidenced by (Docs. P16 and P19), and that the Plaintiff only signed the covering letter of (Doc. P16) and not the document titled “Acquisition of Land” thereto attached, but it is clear from the contents of the said documents, including the covering letter of (Doc. P16), that the Plaintiff was taking ownership of the said documents. The fact that (Doc. P19) was signed by the Plaintiff and one other Officer of the Defendant Company, and that the Plaintiff only signed the covering letter of (Doc. P16) in no way exonerates the Plaintiff of his responsibility to the Board, the more so as the Plaintiff was Divisional Leader, Finance (Doc. P18) and played an active role in the preparation of the said documents (Docs. P16 and P19) for submission to the Board of the Defendant Company.

Be that as it may, in light of the express provisions of **s. 37(2) of the ERA**, and in fairness, the Defendant Company was under a statutory obligation, at the time of notifying the Plaintiff of the termination of his employment, i.e. on 04-12-17 (Doc. P1), to state the reason/s of such termination.

In light of all the above, the Court finds that the said letter of termination (Doc. P1) does not constitute valid notification for the purposes of **s. 37(2) of the ERA**, and that hence the Defendant

Company has failed to comply with the obligation placed on it by the express provisions of the said section of the **ERA**.

Could the Defendant Company not reasonably and in all good Faith take any other course than to terminate the Plaintiff's contract of employment?

The Plaintiff explained in Court that the Defendant Company gave no reason/s as to why it could not, in all good Faith, take any other course or action than to terminate his employment.

That being said, it was not disputed that the Dilmohamed Report was not disclosed to the Board by the Plaintiff.

When the Plaintiff produced the Anti-Fraud Department (hereinafter referred to as AFD) Report (Doc. P10), he was only examined in chief in relation to whether any information communicated by the whistle-blower came to light in the course of the Disciplinary Committee, whether he was informed of the nature of the information provided by the whistle-blower, and that one could not know whether it was an internal person to qualify as whistleblowing.

At no stage was the Plaintiff asked whether he agreed or not with the said Report (Doc. P10).

Be that as it may, the said Report (Doc. P10) contains a handwritten note at page 20, to the effect that the exclusion of the Dilmohamed Report in the Report dated 14-05-14 was not a deliberate attempt to mislead the Board and he could have missed the said information as he was not the one who drafted the report, to which the Plaintiff was specifically referred to and with which he agreed.

The Plaintiff also confirmed having signed the report dated 02-05-15 (Doc. P16). And as highlighted above, the Court is of opinion, given the position the Plaintiff occupied at the Defendant Company, that it was incumbent on the Plaintiff to communicate to the Board all the relevant information in order for the Board to take an informed decision as to the purchase of the said plots of land.

Such failure on the part of the Plaintiff, in the circumstances of the present matter, could only have resulted in the Trust between the Plaintiff and the Defendant Company being broken.

In the circumstances, although the Plaintiff was not the only officer of the Defendant Company who signed (Docs. P16 and P19), given the Plaintiff's clear admission in Court and in the AFD Report (page 20 of Doc. P10) as highlighted above, the Court is of the considered view that the

Defendant Company was justified in concluding that it could not reasonably and in all good Faith take any other course than to terminate the Plaintiff's contract of employment.

Has the Defendant Company waived its right to terminate the Plaintiff's employment for reasons related to his alleged misconduct, as per the Findings of the Internal Investigation carried out by the AFD so that the termination of the Plaintiff's employment falls foul of **s. 38 of the ERA**, in particular **s. 38(2)(a)(iii) of the ERA**?

S. 38 of the ERA relates to the Protection against termination of agreement, and specifically provides at **s. 38(2)(a)(iii) of the ERA** as follows:

> No employer shall terminate a worker's agreement –
>
> (a) for reasons related to the worker's misconduct, unless –
>
> […]
>
> (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.

S. 38 of the ERA is listed as one of the exceptions which apply to a worker, regardless of his/her basic wage or salary, and hence applies to the Plaintiff even though he was earning in excess of the prescribed amount of Rs360 000/- per annum.

The Court finds the following principles set out in the Authority of **Chellen v Mon Loisir S.E. [1971 MR 180]** pertinent to determine when did the Defendant Company become aware of the Plaintiff's misconduct:

> There is no doubt that the limitation of seven days is mandatory but the question is: "When does the period start?".
>
> […] 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 decision of **Chellen (supra)** was in relation to the now repealed **Labour Act**, and the Court is also alive to the fact that **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 **s. 38(2)(a)(iii) of the ERA** provides for the employer 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.

That being said, the Court is of the considered view that the principles set out in the Authority of **Chellen (supra)** apply *mutatis mutandis* to the present matter given the philosophy and rationale underlying the **ERA** are very similar to the ones underlying the now repealed **Labour Act**.

It was the contention of the Plaintiff that:

1) the Defendant Company had become aware of his alleged misconduct on 07-08-17, when the report of 01-08-17 was placed before the Board;
2) the Defendant Company had issued the suspension and charge letter (Doc. P9) on 15-09-17, that is more than 10 days after the day on which it became aware of his alleged misconduct, i.e. Board meeting of 07-08-17;
3) the Defendant Company had therefore failed to notify him of the charge/s against him within the prescribed delay of 10 days;
4) the result being that the Defendant Company was therefore deemed to have condoned his alleged misconduct; and
5) hence the termination of his employment on 04-12-17 fell foul of the provisions of **s. 38(2)(a)(iii) of the ERA**.

As per paragraphs 17 and 18 of its Plea, the Defendant Company became aware of the Plaintiff's alleged misconduct when the Final Report (Doc. P10) was placed before the Board.

The Representative of the Defendant Company stated that the charges were levelled against the Plaintiff on the basis of the Final Report (Doc. P10) dated 12-09-17, but unequivocally admitted

under solemn Affirmation that the Defendant Company became aware of the alleged misconduct of the Plaintiff as at 07-08-17, based on the draft report.

This admission on the part of the Defendant Company through its *fondé de pouvoir spécial* amounts to an *aveu judiciaire*, which has "*une force probante remarquable, puisqu'il constitue une preuve complète. En effet, l'article 1356 du Code Civil dispose que l'aveu judiciaire "fait pleine foi contre celui qui l'a fait*" *en sorte que le juge est lié par l'aveu: il s'impose au juge, qui doit tenir pour exacts les faits avoués (**A. Marais, introduction au droit, Vuibert, no. 291**, p. 217) – l'aveu judiciaire intervient donc au cours du procès, devant la juridiction appelée à trancher le litige, le sort du procès dépendant d'une telle déclaration*" [**Cour de Cassation Civ. 3e, 10 Mars 2016, no. 15 – 10.995**]" (**De Guardia De Ponte v Park Lane Properties & Ors [2021 SCJ 16]**.

The Defendant Company cleverly attempting to show that the charges were levelled against the Plaintiff on the basis of the said Final Report (Doc. P10), cannot supersede the admission of the Defendant Company that it became aware of the Plaintiff's alleged misconduct on 07-08-17, based on the Draft Report. The Defendant Company stating that the charges were levelled against the Plaintiff on the basis of the Final Report (Doc. P10) is not sufficient to show that the *aveu judiciaire* of the Defendant Company resulted from an *erreur de fait*. The Defendant Company explained that it could only have acted on the basis of the Final Report (Doc. P10) to level charges against the Plaintiff.

That being said, given the *aveu judiciaire* binds the hands of the Court, the Court finds that the date on which the Defendant Company in fact became aware of the Plaintiff's alleged gross misconduct, in light of the unequivocal admission of the Defendant Company's Representative, was 07-08-17, and given the Defendant Company proceeded to suspend the Plaintiff and level charges against him by way of letter dated 15-09-17, it had acted well outside the 10 days from which it become aware of the Plaintiff's alleged gross misconduct.

The mandatory nature of the time limits set out in the **ERA**, including the said 10 day statutory delay 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 v The State** [2008 SCJ 305]).

The Legislator, by using the word "shall" in the said **s. 38(2)(a)(iii) of the ERA**, 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 finds the following extract from the Authority of **MGI v Mungur** [1989 SCJ 379] pertinent is as to the rationale behind the said time limits being mandatory:

> There was on the other hand delay which exceeded, however slightly, the statutory limit of 7 days prescribed by section 32(1)(b) of the Labour Act for the dismissal of a defaulting worker following the completion of a hearing when there is a hearing. This is not a time limit which it is in the power of the courts to extend and it is based on sound principles. Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct.

The Court is alive to the fact that the said pronouncement was in relation to the now repealed Labour Act, but is nevertheless of the considered view that the abovementioned principles apply *mutatis mutandis* to the present matter under the **ERA**, as the philosophy and objectives of the **Labour Act** and the **ERA** are very similar, including for the Parties to know where they stand within a prescribed time limit. Certainty is key in such situations, and thwarting the effects of such time limits would only have the opposite result, with an employee potentially not knowing what would happen next for an unspecified period of time. Such cannot have been the intention of the Legislator.

The Defendant Company in the present matter had 10 days from the day in which it became aware of the Plaintiff's alleged misconduct to notify the Plaintiff of the charge/s made against him, "failing which [it] is deemed to have condoned the misconduct." (**Merai v Indian Ocean International Bank Limited** [2011 SCJ 140]).

In light of all the above, the Court is of the considered view that the Defendant Company, by admitting that it became aware of the Plaintiff's alleged gross misconduct as from 07-08-17, and levelling charges against the Plaintiff on 15-09-17 (Doc. P9), acted well outside the statutory delay of 10 days, and has hence failed to comply with its statutory obligation pursuant to **s. 38(2)(a)(iii) of the ERA**, is "deemed to have condoned [the Plaintiff's alleged] misconduct", and cannot proceed to dismiss the Plaintiff on the basis of such alleged gross misconduct.

Were the Disciplinary Proceedings instituted against the Plaintiff in fact a charade and meant to merely pay lip service to the provisions of the ERA?

The Plaintiff adduced no evidence in relation to the said issue, and the Court therefore finds that the Plaintiff has not substantiated his said contention.

Did the Defendant Company, through some Senior Officers, act *male fide* with intent to permanently damage the Plaintiff's reputation throughout the duration of the Disciplinary Proceedings in the hope that the Plaintiff would be stripped of his "fit and proper" status and be disqualified from occupying a post of responsibility within another banking or financial services institution after his dismissal?

The Plaintiff stated in Court that the real reason for his employment being terminated was a vendetta, to strip him of his "fit and proper" status, as he had not cooperated with the Chairman, due to which their relationship became sour.

The Plaintiff explained the circumstances in which at the end of 2016 and during more than one year, the Chairman was requesting information from him in relation to the former Chairman, and when he repeatedly said there was nothing incriminating against the former Chairman, the Chairman called the Head of Internal Audit and the Head of the Fraud Department, and told them, in the Plaintiff's presence, to carry out an investigation and get him, i.e. the Plaintiff, out.

The date on which the said instructions were given to the Head of Internal Audit and Head of the Fraud Department was not specified.

These instructions, if given, were given, when the Plaintiff was still in employment with the Defendant Company, and therefore well before any Disciplinary Proceedings were instituted against the Plaintiff, and hence do not demonstrate that the Defendant Company acted with bad Faith throughout the duration of the Disciplinary Proceedings in the hope that the Plaintiff would be stripped of his "fit and proper" status and be disqualified from occupying a post of responsibility within another banking or financial services institution after his dismissal.

There is therefore no evidence on Record as to the intent of the Defendant Company to permanently damage the Plaintiff's reputation throughout the duration of the Disciplinary Proceedings in the hope that he would be stripped of his "fit and proper" status and be disqualified from occupying a post of responsibility within another banking or financial services institution after his dismissal.

It is also worth noting that the Plaintiff deponed to the effect that he "won't be fit and proper for a senior position in the banking sector" which would affect his chances of getting employment in the banking sector, but at no stage stated that he had in fact been stripped of his "fit and proper" status as a direct result of the said Disciplinary Proceedings.

And given the Plaintiff was working as Finance Director at the time of his testimony on 08-12-21 and 22-04-22 clearly shows that the Plaintiff has found employment.

In light of all the above, the Court finds no merit in the said contention of the Plaintiff.

<u>Were there systematic leakages of confidential information in the press regarding the Disciplinary Proceedings which could only have emanated from the Defendant Company in an attempt to further humiliate and embarrass the Plaintiff?</u>

Several press articles were produced (Docs. P11 to P15) by the Plaintiff, to substantiate his claim that there were systematic leakages of confidential information in the press regarding the Disciplinary Committee Proceedings which could only have emanated from the Defendant Company and this in an attempt to further humiliate and embarrass him.

It is clear that the press article (Doc. P11) does not support the Plaintiff's abovementioned contention, inasmuch as this press article was published in the Samedi Plus Newspaper of 31

January to 06 February 2015, i.e. well before any Disciplinary Proceedings were instituted against the Plaintiff, given the Plaintiff was suspended and convened to appear before a Disciplinary Committee on 15-09-17, that is more than 02 years after the said press article.

The remaining press articles produced by the Plaintiff are dated as follows:

1) Week-end edition (Doc. P12) is dated 01-10-17;
2) l'express edition (Doc. P13) is dated 02-10-17;
3) le mauricien edition (Doc. P14) is dated 02-10-17; and
4) Le Defi Plus edition (Doc. P15) is dated 07-10-17 to 13-10-17.

i.e. after the letter of charge (Doc. P9), but contain no confidential information relating to the Disciplinary Committee Proceedings proper.

In light of all the above, the Court finds no merit in the said contention of the Plaintiff.

<u>Was the real motivation behind the termination of the Plaintiff's employment the misconceived perception that his first loyalty lied with the former Chairman of the Defendant Company who was minded to favour a political figure closely associated with the outgoing Government?</u>

Learned Senior Counsel appearing for the Plaintiff confirmed in the course of the Plaintiff's cross-examination that it was not the Plaintiff's case that his dismissal was political, but that the Plaintiff's case was that the Defendant Company could not say it had no other alternative than to terminate his employment because the motivation was to get rid of the Plaintiff because he was not cooperating about the former CEO.

The Plaintiff offered no testimony in relation to same.

In light of all the above, the Court finds that there is no evidence on Record to establish the said contention of the Plaintiff.

Did the Chairman of the Group make public radio statements on or about 22-11-17 to the effect that the Defendant Company had already concluded that the Plaintiff was guilty of gross misconduct and that the Findings of the Disciplinary Committee were awaited to decide on the sanction to be meted to the Plaintiff?

The Plaintiff adduced no evidence in relation to the said issue, and the Court therefore finds that the Plaintiff has not substantiated his said contention.

Continuous employment

The Plaintiff confirmed the following in the course of his cross-examination:

1) between 1980 and 1999, he was initially on a contract of indeterminate duration;
2) starting in 1999, he was then employed by the Defendant Company on a fresh contract for a period of 10 years, which was to expire on 30-09-09 (Doc. P2);
3) on 26-05-09, he was offered a fresh contract of 03 years, which he accepted on 04-08-09 (Doc. P3);
4) on 10-10-12, the Defendant Company wrote to him informing him that his contract of employment had been extended up to 30-11-12 (Doc. P4); and
5) by way of letter dated 12-12-12, he was offered employment as Divisional Leader, starting on 24-12-12 and ending on 31-12-17 (Doc. P5).

The Plaintiff denied that his contract of employment with the Defendant Company was terminated on 24-11-12, and stated not being aware of the letter (Doc. P18) sent by the Defendant Company to the Bank of Mauritius (hereinafter referred to as BoM) to the effect that his contract of employment with the Defendant Company as Divisional Leader, Finance, had expired effective 24-11-12, and that he was no longer an employee of the Defendant Company.

It was not contested that the Plaintiff had been in the continuous employment of the Defendant Company, the bone of contention being only as to whether the Plaintiff had been in the continuous employment of the Defendant Company since 1980 (paragraph 1 of the *Proecipe*) or since 24-12-12 (paragraph 1 of the Plea).

As per **s. 2 of the ERA**, ""continuous employment" means the employment of a worker under an agreement or under more than one agreement where the interval between an agreement and the next does not exceed 28 days".

S. 9 of the ERA relates to continuous employment, but does not apply to the Plaintiff in the present matter, given the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- per annum, and hence did not fall within the definition of "worker" for the purposes of the said section, as the said section is not listed as one of the exhaustive exceptions in the definition of "worker" as per **s. 2 of the ERA**.

That being said, the following passage from the Authority of **Periag v International Beverages Ltd** [**[1983 MR 108]**] is pertinent to determine what constitutes continuous employment:

> […] under section 34 of the Labour Act, the notion of severance allowance is inextricably linked with the notion of the termination of the employment relationship itself as distinct from a particular employment agreement or contract which may succeed another. And severance allowance cannot be determined except in terms of the length of "continuous employment" of the worker (section 36) "Continuous employment" itself is defined in section 2 as meaning the employment of a worker under an agreement or under more than one agreement where the interval between one agreement and the next does not exceed 28 days. The notion of "continuous employment" plainly contemplates the continuity of the employment relationship itself irrespective of the different individual contracts under which a worker may have worked for the same employer under possibly different terms. It follows, therefore, that the payment of severance allowance presupposes the ending of the employment relationship and cannot arise unless the worker is no longer employed by his employer.

The Court is alive to the fact that the Authority of **Periag (supra)** was decided in relation to the **Labour Act**, which now stands repealed. But given the rationale and philosophy underlying both the **Labour Act** and the **ERA**, coupled with the identical definition of "continuous employment" both in **s. 2 of the Labour Act** and **s. 2 of the ERA**, the Court is of the considered view that the principles set out in the Authority of **Periag (supra)** apply *mutatis mutandis* to the present matter under the **ERA**.

In view of the contention of the Defendant Company as per paragraph 1 of the Plea, the only relevant period to determine whether there was a break in the continuous employment of the Plaintiff is that between 24-11-12 and 24-12-12.

The Plaintiff denied being aware of the letter sent to the BoM and the deactivation of ID e-mail (Docs. P18 and D2 respectively).

When reference was made to the Exit Procedure Checklist (Doc. D1), whilst the Plaintiff denied being aware of the said document, he confirmed that his laptop and mobile phone were collected from him on 24-11-12.

Be that as it may, the following documents tend to support the Defendant Company's contention that the Plaintiff's employment was terminated on 24-11-12:

1) the contract of 05 years' duration (Doc. P5) stipulates that the Plaintiff's employment will start on 24-12-12 (paragraph 2.1 of the P5);
2) the letter to the BoM (Doc. P18);
3) the Exit Procedure Checklist (Doc. D1);
4) the deactivation of ID e-mails (Doc. D2, especially the e-mail dated 23-11-12 on (Doc. D2)); and
5) the staff departure e-mail (Doc. D3).

The following elements, however, tend to support the opposite contention:

1) the letter to the BoM (Doc. P18) is dated 26-11-12, that is 02 days after the date on which the Defendant Company contends the Plaintiff's employment was terminated;
2) the Annual Meeting Pamphlet 2012 (Doc. P6), which mentions at paragraph 15 at page 06 that the Shareholders are to take note of "the re-appointment of [the Plaintiff] as director of the Company by the Board of Directors" and of the Ordinary Resolution Fifteen in relation to the Plaintiff having "been designated by the Board to be an ex-officio member of the Board and is thereby an ex-officio member of the Board by virtue of Article 13.1 of the Constitution of the Bank", and at page 11 of the Plaintiff having been designated by the Board of the Defendant Company as a member of the Board;
3) the Minutes of Proceedings (Doc. D5) which took place on 13-12-12 mention that apologies were in relation *inter alia* to the Plaintiff, and at paragraph 40.15 in relation to

the resolution 15, that the Plaintiff had been re-appointed as Director of the Company by the Board of Directors;

4) as per the Exit Procedure Checklist (Doc. D1), the “Last Working Day” was “23 Nov 2012” and the “Date of Departure” was “24 Nov 2012”;
5) The first e-mail on (Doc. D2) and the e-mail (Doc. D3) are dated 26-11-12, that is 02 days after the date on which the Defendant Company contends the Plaintiff’s employment was terminated.

The fact that as per (Doc. D5), the “Chairman moved that the hereunder Fifteenth Resolution be passed as an ordinary resolution”, and “[t]he motion was seconded by Ms. N. Dhunputh and put to the vote at the meeting. It was unanimously approved”, and that the Plaintiff’s name appears in the section headed “Apologies” (Doc. D5), tend to suggest that the Plaintiff’s employment was not terminated on 24-11-12.

The Representative of the Defendant Company denied having lied or misled either the BoM in (Doc.P18) or its shareholders in (Doc. P6).

And the Court would not lightly find that the Defendant Company had lied or misled the BoM or its Shareholders. The Court would only be justified in making such a Finding in the light of concrete and cogent evidence to that effect.

There is no such evidence on Record.

That being said, whatever may have been the intention of the Defendant Company as regards offering another Contract to the Plaintiff after 24-11-12, at no stage of the Proceedings was any evidence placed on Record to in fact put in doubt the authenticity/veracity of the letter to the BoM (Doc. P18).

The fact that the said letter (Doc. P18) is addressed to the BoM, which is the Regulator of licensed financial institutions carrying on activities in, or from within, Mauritius (**s. 5(1)(b) of the Bank of Mauritius Act**), assumes all its importance, and therefore prevails over (Doc. D5).

As held in **Periag (supra)**, “[t]he notion of "continuous employment" plainly contemplates the continuity of the employment relationship itself irrespective of the different individual contracts under which a worker may have worked for the same employer under possibly different terms.”.

In light of all the above, and regardless of the reason/s for such break, the Court is satisfied that there was a break of more than 28 consecutive days [1] in the Plaintiff's employment with the Defendant Company between 24-11-12 and 24-12-12, that the "ties of employment" [2] between the Plaintiff and the Defendant Company were severed after 24-11-12, and that hence there was no "continuity of the employment relationship" [3] between the Plaintiff and the Defendant Company between 24-11-12 and 24-12-12, and that therefore, the Defendant Company has established on the Balance of Probabilities, that the Plaintiff's employment was terminated on 24-11-12.

Severance Allowance

The Plaintiff's last contract of employment started on 24-12-12 (Doc. P5) and the Plaintiff's employment was terminated in 04-12-17 (Doc. P1), such that the Plaintiff had been in the continuous employment of the Defendant Company for more than 24 months under a contract of determinate duration (Doc. P5) at the time of the termination of his employment (Doc. P1).

The Plaintiff being in a position of a permanent nature was not a live issue in the course of the Proceedings.

At any rate, it is clear, from all the evidence on Record, including (Doc. P5), that the Plaintiff was employed by the Defendant Company in a position of a permanent nature.

And it was not in dispute that the Defendant Company terminated the Plaintiff's employment (Doc. P1).

It was submitted on behalf of the Defendant Company that **s. 46(1) of the ERA** only applied to workers earning less than the prescribed amount of Rs360 000/- *per* annum.

As far as relevant to the present matter, "worker" is defined in **s. 2 of the ERA** as follows:

> "worker", subject to s. 33 or 40 –
>
> [...](c) does not include –[...](ii) except in relation to sections 4, 20, 30, 31 and Parts VIII, VIIIA, IX, X and XI, a person whose basic wage or salary is at a rate in excess of 360,000 rupees per annum.

[1] **Manager Benares Co-Operative Factory Limited v Mutkawoa [1967 MR 95]**
[2] **Periag (supra)**
[3] Ibid.

Ex facie the Proecipe, the Court is of the considered view that **ss. 33 and 40 of the ERA**, which relate to the Entitlement of Workers in the Sugar Industry and the Workfare Programme respectively, are not relevant in relation to the present matter.

And "basic wage or salary" is defined in **s. 2 of the ERA** as follows:

> "basic wage or salary", in relation to a worker, means-
>
> (a)where the terms and conditions of employment of the worker are governed by Remuneration Regulations, an arbitral award or an agreement, whether oral or written, express or implied, the basic wage or salary prescribed in the Remuneration Regulations, award or agreement, or where the employer pays a higher wage or salary, the higher wage or salary so paid, but does not include any allowance by any name called, and whether paid in cash or in kind;
>
> (b) in any other case, all the emoluments received by the worker, excluding bonus or overtime.

From the contract (Doc. P5), it is beyond dispute that the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- *per annum* his basic monthly salary being Rs250 000/-.

That being said, the sections and Parts of the **ERA** which apply to a worker, regardless of his/her basic wage or salary, are exhaustively set out in the definition of "Worker" in **s. 2 of the ERA**, and include **Part X of the ERA**, which contains **s. 46 of the ERA**.

By setting out not only set out the Parts of the **ERA** which apply to workers, regardless of their basic wage or salary, but also setting out the sections of the **ERA** which likewise apply to workers regardless of their basic wage or salary, the Legislator has clearly illustrated his intention and it is trite Law that the "legislator does not legislate in vain" (**Curpen (supra)**).

The argument that in relation to the definition of "worker", there is a derogation when it comes to termination, but not in relation to continuous employment, is untenable.

First, the word "worker" is used in the definition of "continuous employment" in **s. 2 of the ERA**, and as highlighted above, some specific sections and Parts of the **ERA** apply to a "worker" as defined in the said **s. 2 of the ERA** regardless of his/her basic monthly wage or salary.

Second, true it is that **s. 9 of the ERA** is not one of the sections applying to a worker regardless of his/her basic monthly wage or salary as per **s. 2 of the ERA**, but the whole of **Part X of the ERA** is, and it is not for the Court to go behind the express words of the **ERA** (**Curpen (supra)**).

The Court is therefore of the considered view that **Part X of the ERA,** which contains **s. 46 of the ERA,** is clearly an exception, and applies to a Worker, irrespective of his/her basic monthly wage or salary, and applies to the Plaintiff in the present matter, even though the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- *per annum*.

And third, more crucially, in view of the principles authoritatively set out by in **De La Haye v Air Mauritius [2018] UKPC 14**, it is now settled Law that the concept of continuous employment applies to a worker, irrespective of his basic monthly wage or salary, and whether or not the worker is employed under a fixed term contract or indeterminate contract, "[t]he plain reason for the provision […] [being] to accord to a worker who has in reality been in employment for a substantial time, albeit under successive contracts closely following one another, the same severance allowance as a co-worker employed for the same length of time under a single, usually but not necessarily indeterminate, contract. There is nothing absurd about such a statutory rule." (paragraph 23 of the Authority of **De La Haye (supra)**).

It was further submitted on behalf of the Defendant Company that pursuant to **s. 46(1A)(c) of the ERA**, the Plaintiff was not entitled to any Severance Allowance.

The said section relates specifically to situations where, unless otherwise agreed by the Parties, no Severance Allowance would be payable, when a worker earning in excess of Rs360 000/- *per annum* and his/her employer enter into a determinate agreement and that agreement comes to an end"(emphasis added). That is the situation envisaged is one where there is a single agreement which is entered into by the Parties, and the worker was earning in excess of Rs360 000/-.

Now, as highlighted above, it is beyond doubt that the Plaintiff was earning in excess of the prescribed amount of Rs360 000/- *per annum*, and as highlighted above, the Court is of the considered view that this last agreement (Doc. P5) is to be viewed as a single agreement, so that two of the said conditions set out in **s. 46(1A)(c) of the ERA** have been met.

The Court is however of the considered view that, in the present matter, the said agreement (Doc. P5) did not come to an end by itself, at the end of the term envisaged by the said contract (Doc. P5) [4], in light of the common will/intention of the Parties or by mutual agreement between the

[4] The first extract is from **Droit du travail, 7ème édition, Antoine Mazeaud, cessation normale note 688** and poses the principle that a contract of determinate duration comes to an end "*de plein*

Parties (as per paragraph 51(c) of the Written Submissions on behalf of the Defendant), for the reasons given below.

First, the contract (Doc. P5) was to come to an end on 31-12-17, but as per the letter of termination (Doc. P1), the Plaintiff's employment was terminated prematurely on 04-12-17, that is before the term envisaged by (Doc. P5).

And second, the termination of the Plaintiff's employment was a unliteral act of the Defendant Company (Doc. P1).

"In **Mauritius Steam Navigation Co Ltd v Roussety** **[1977 MR 25]**, the Court observed that the statutory provisions relating to severance allowance are generally applicable not only in all cases of contracts of indeterminate duration but also in respect "of contracts of determinate duration whenever it can properly be held that the contract has come to an end by the employer unilaterally terminating the contractual relationship binding him to his worker" (**Bungsraz v Air Mauritius [2020 SCJ 333]**).

The Court is therefore of the considered view that the said section does not apply to the present matter, for the reasons given above.

That being said, in light of the Court's Findings above, the Court is satisfied that there was a termination of the Plaintiff's employment by the Defendant Company as per the letter of termination (Doc. P1), that the Plaintiff had been in the continuous employment of the Defendant for more than 24 months at the time of the termination of his employment, and that said termination of the Plaintiff's employment fell foul of **s. 46(5)(b)(e) of the ERA**, and that hence the Plaintiff is entitled to Severance Allowance.

<u>Remuneration</u>

Remuneration is defined in **s. 2 of the ERA** as follows as far as relevant to the present matter:

> "remuneration" –

---

droit" in the sense that it "*s'achève normalement de lui même au terme qui a été fixé, sans formalisme de part ni d'autre..*" (**Roberts v Business & Decision Ltee [2023 SCJ 7]**)

> (a) Means all emoluments, in cash or in kind, earned by a worker under an agreement […].

In the **ERA**, "emoluments" is not specifically defined in the Interpretation section, but in relation to **Part IX of the ERA**, emoluments received by the worker exclude any bonus or overtime as per **s. 40(a) of the ERA**.

The Plaintiff contended that his monthly remuneration as at 2017 was Rs785 699.75/- (paragraph 5 of the Proecipe), whereas the Defendant Company contended that the Plaintiff's monthly remuneration at the time of dismissal in 2017 was Rs682 770.01/- (paragraph 9 of the Plea).

The Plaintiff relied on a statement of emoluments and a payslip for October 2017 (Docs. P7 and P8) respectively in support of his contention, whereas the Defendant Company relied on a document titled "Monthly Remuneration (Jan to Dec 2017) (Doc. D4) to support its case that the Plaintiff's remuneration at the time of the termination of his employment was Rs682 770. 01/-.

(Docs. P7 and P8) have not been challenged by the Defendant Company, which for all intents and purposes, emanate from the Defendant Company, and the Court finds that it can safely act on same.

As regards (Doc. D4), whilst it was produced by the Representative of the Defendant Company and was not in essence challenged by the Plaintiff (save to the effect that it did not contain all the allowances he was receiving, according to him), no name appears on the said document, it bears no signature or date, and further mentions "WRA" which presumably stands for the Workers' Rights Act.

The Court cannot, in the circumstances, pronounce itself as to the source and/or accuracy of the said (Doc. D4), and the Court therefore finds that it would be most unsafe to act on the basis of the said document.

As per the document (Doc. P8), the Plaintiff was earning per month:

1) Basic salary: Rs409 450/-;
2) Allowance: Rs100 000/-; and
3) Conveyance Allowance: Rs105 000/,

making a total of Rs614 450/-.

The Plaintiff deponed to the effect that his "termination package" as at December 2017 was:

1) "base salary of 400,000";
2) "executive allowance of 100,000"; and
3) "conveyance allowance of 125,000",

making a total of Rs625 000/-.

Be that as it may, given the Defendant Company's averment at paragraph 9 of its Plea that the Plaintiff's monthly remuneration amounted to Rs682 770.01/-, the Court acts on the said basis.

And given the Plaintiff's contract (Doc. P5) started on 24-12-12 and ended on 04-12-17 (Doc. P1), the Plaintiff had been in the continuous employment of the Plaintiff for a continuous period of 58 complete months (i.e. January 2013 to November 2017) (**s. 46(12) of the ERA** and the definition of "month" in **s. 2 of the Interpretation And General Clauses Act**).

In light of the factors highlighted above and for all the reasons given above, the Plaintiff is therefore entitled to Severance Allowance as follows:

Rs682 770.01/- x 3 months x 58 months / 12 months = Rs9 900 165. 15/-.

Miscellaneous

The Court has noted the following in the letter of suspension and charges (Doc. P9):

1) At paragraph 1.1.1.1., one of the plots of land mentioned is "6A (TV 3524 No. 10)" (underlining added), and at paragraph 1.2, the plot of land mentioned is "6A (TV 3544 No. 10" (underlining added); and
2) At paragraph 1.2., a line 02, the value mentioned is "*Rs15m per acre*" (underlining added), and at line 03, the value mentioned is "Rs 15.5m per arpent" (underlining added).

That being said, the said points were not raised in the course of the Proceedings.

Further, given the Plaintiff produced various press articles (Docs. P11 to P15), and the way the Plaintiff's case was conducted, it is clear that the Plaintiff was well aware of the plot of land and value in question, and hence the Court finds that no prejudice was in fact caused to the Plaintiff by the said variances.

The Court has noted the Submissions made at paragraph 17 of the Outline Submissions on behalf of the Plaintiff, but is of the considered view that same cannot be entertained, as the issue of the Defendant Company having failed to inform the Plaintiff of the reasons for the termination of his termination, in breach of **s. 38(2)(v) of the ERA** was never raised in the Proecipe, it being *ultra petita*, bearing in mind the basic principles that the Parties are bound by their Pleadings.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and all the factors highlighted above, the Court finds that the Plaintiff has established his case against the Defendant Company on the Balance of Probabilities, and **the Defendant Company is therefore ordered to pay to the Plaintiff the total sum of Rs9 900 165. 15/- as Severance Allowance.**

There is no Prayer in the Proecipe as regards Interest, but Learned Senior Counsel appearing for the Plaintiff prayed for Interest of 12% Interest as provided by **s. 46(11) of the ERA**, to run from the day of termination, that is 04-12-17, until the date of final payment.

As per **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]**), irrespective of whether any Claim has been made in relation thereto or not.

In view of the specific circumstances of the present matter, the Court is of the considered view that Interest at the rate of 03% per annum on the said amount of Severance Allowance only would be fair, and **the Defendant Company is therefore ordered to pay to the Plaintiff 03% Interest per annum on the said 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: 15 May 2023]