

Tahaloo D.R. v Consolidated Energy Co. Ltd.

2021 IND 8

Cause Number 151/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Dinesh Raj Tahaloo

Plaintiff

v.

Consolidated Energy Co. Ltd.

Defendant

Judgment

In this plaint, it is common ground that Plaintiff was in the continuous employment of Defendant as Power Plant Shift Supervisor (Chef de Quart) from 4 May 2006 to 9 February 2016 and he was remunerated at a monthly interval at the rate of Rs.33,985 as basic pay.

Plaintiff has averred that on 9 February 2016, Defendant terminated his employment without any good cause or justification and without notice namely as per his answers to demand of further and better particulars, he was unjustly suspended from his duties on the basis of false allegations to the effect that he was allegedly suspected of larceny of copper rods at Ex-Deep

River Beau Champ Sugar Factory when he has never committed any larceny or any other offence whatsoever.

Therefore, Plaintiff has claimed from the Defendant the sum of Rs. 1,732,733/- representing one month's wages as indemnity in lieu of notice and severance allowance for alleged unjustified termination of employment for 117 months.

Defendant, for its part, has denied liability and has averred the following:

"(i) The Plaintiff was called upon to answer the charge of "having on or about the 24th – 25th December 2015, been involved in the misappropriation of copper at Ex- Deep River Beau Champ Sugar Factory";

(ii) The disciplinary hearings were held on 20th January, 29th January and 4th February 2016 where the Plaintiff was given the opportunity to answer the charge made against him;

(iii) The Disciplinary Committee found the charge against Plaintiff proved;

(iv) The Plaintiff has thus committed a misconduct justifying his dismissal;

(v) The findings and determination of the disciplinary hearings against the Plaintiff also concluded that the bond of trust between employer and employee was severed;

(vi) In the circumstances, the Defendant was in good faith left with no other alternative than to terminate the employment of the Plaintiff."

Defendant has further denied being liable to the Plaintiff for the sum claimed or for any sum whatsoever as the dismissal of Plaintiff was fully justified and as such the Plaintiff is not entitled to the payment of wages in lieu of notice and/or to severance allowance.

The case for the Plaintiff rested on his testimony only. He produced a plan of the Ex-Deep River Beau Champ Sugar Factory and his place of work drawn up by him as per Doc. E which was not produced at the disciplinary committee in the company of his learned Counsel. In fact, he conceded that the plan was drawn by him well before his suspension. Then, he decided that it was drawn after his suspension but before the disciplinary committee and then he further decided that it was done on the day of his suspension on 30.12.15 as he did not work on that day.

He conceded that there were 8 cameras in the premises and that both the Defendant and ex Ex-Deep River Beau Champ Sugar Factory had a common yard with a common fencing which was damaged at some points. His testimony boiled down to the fact that he knew how it was possible for him to enter and leave his office any time and even entering into the Ex-Deep River Beau Champ Sugar Factory and leaving through the damaged fencing without being caught by the security cameras. He was well aware of the stuffs found in that ex-factory and its workings as well given that he was there as a trainee for about four months in the year 2004. Should he avoid the cameras, then, when leaving his office, he would have come across some of his five operators with whom he was working. On 24-25 of December 2015, he was working as Power Plant Shift Supervisor and he was found about twice in the security cameras as he stated before the disciplinary committee of the Defendant but was not detected by the cameras at the time the larceny of copper at the ex- factory took place meaning late at night time at about midnight. When he was informed about the said larceny late during the night, he went into the said ex-factory and there in the company of the superior officers meaning security officers, and although it was dark inside the factory they made their way through a torch, he estimated the loss to be around Rs.500,000 seeing the peeled off copper protective sheaths without the metal inside. He was wearing a greyish black tracksuit at the time which had stripes at his lower sleeves so that he was not in his working clothes and he was wearing a white cap helmet. But he conceded that there was a watchman who deponed at the disciplinary committee and said that he saw him at the back. He claimed that he was unjustly dismissed although he appeared before a disciplinary committee as he did not commit the larceny of the copper metal contained in the sheaths which were stripped off without the metal or any other offence whatsoever. But he conceded that such a job would have involved more than one person. Thus, he was claiming one month's wages as indemnity in lieu of notice and severance allowance from Defendant.

The representative of the Defendant, Mr. Dominique Perrier, in his capacity as Head of Aleo Cluster and further in his capacity as Manager of Defendant gave evidence in Court. He sent a letter of suspension to Plaintiff dated 30 December 2015 wherein it was confirmed that he was suspended from his duties as from 30 December 2015 in relation to a suspected larceny of copper rods at Ex- Deep River Beau Champ Sugar Factory as per Doc. B. He further sent to Plaintiff another letter dated 8 January 2016 wherein he was requested to attend a disciplinary committee on 20 January 2016 in relation to the charge of having on or about 24th - 25th December 2015, been involved in the misappropriation of copper at Ex – Deep River Beau

Champ Sugar Factory as per Doc. C. He sent a final letter to Plaintiff on 9 February 2016 wherein following the disciplinary committee held on 20 January 2016, 29 January 2016 and 4 February 2016, he was informed that the disciplinary committee had found the charge of misconduct levelled against him proved and that the bond of trust between employer and employee in the matter at hand had been severed so that the Management had decided that he had in good faith no other alternative than to terminate his employment forthwith as per Doc. D. He did not depone at the disciplinary committee but stated in court as representative of Defendant that the Plaintiff was not unjustly dismissed as the Defendant had no choice in good faith but to dismiss him as the bond of trust between employer and employee had been broken and that at the material time, a watchman, Andy Shirley saw Plaintiff at the time the larceny was being committed and that the Plaintiff could leave his office and make his way to the ex-factory without being detected by the security cameras. There was a plan of the locus namely Doc. F on behalf of the Defendant and was the material used at the disciplinary committee but he was not the maker of that plan. There were photographs viz. Docs. G & H shown to him and which were used at the disciplinary committee but he was not the one who took them.

The watchman, Mr. Andy Louis Shirley, who deponed at the disciplinary committee gave evidence in Court. He did not say that he was the maker of the plan produced on behalf of the Defendant namely Doc. F and nor did he say that he took the photographs viz. Docs. G & H. He was working as watchman at the Ex-Deep River Beau Champ Sugar Factory on 24 December 2015. He did a patrol check of the ex-factory on two occasions and did not find anything abnormal. It was in the course of his third check at about midnight that he heard some noise inside the ex-factory meaning the noise of a sawing machine and a hammer. He got inside and lied down and saw a person who was wearing a greyish black jacket meaning a tracksuit with white stripes at the sleeves on both sides. He saw him at the back and he was wearing a white helmet. Then, he phoned his superiors. The entrance door to the factory was half open. He was 5-6 metres away from that person. He heard other persons too who were talking. When he went inside in the company of his superiors, that person was not there anymore and the copper sheaths were peeled off and the copper metal already removed. They went outside and at a later stage, he saw that person meaning the culprit still night time and he was wearing the same clothes viz. greyish black tracksuit with white striped sleeves, wearing a white helmet and was of the same stature as the one who had cut the copper rods, meeting another of his superiors who told him that he was the Plaintiff responsible for another department. Then, he saw his face and he identified him in Court as being the Plaintiff. At the disciplinary committee he

deposed the way he did in Court. At no time in cross-examination, was the question put to him that it was not the Plaintiff who stole the copper rods from their protective sheaths at the material time at the ex-factory bearing in mind that he said that only employees of a superior hierarchy wore white helmets.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Counsel. As highlighted by the Appellate Court, the facts in issue that I need to consider are the following:

- "(i) whether the appellant (then plaintiff) has committed a misconduct justifying his dismissal;*
- (ii) whether the findings and determination of the disciplinary hearing against the appellant (then plaintiff) which concluded that the bond of trust between employer and employee had been severed was founded; and*
- (iii) whether in the circumstances the respondent (then defendant) in good faith was left with no other alternative than to terminate the employment."*

At the very outset, it is significant to note that this Court can only rely on the material used before the disciplinary committee meaning on the basis of the material which the employer was or ought to be aware at the time of dismissal as highlighted in the Supreme Court case of **Abdurrahman N. v Total Mauritius Limited [2013 SCJ 480]**:

*"(...) the question as to whether as an employer the respondent was entitled to justifiably dismiss the appellant had to be judged on the basis of the material which the employer was or ought to be aware at the time of the dismissal (**The Northern Transport Co. Ltd v Radhakisssoon[1975 MR 228]** and **Smegh(Ile Maurice)Ltée v Persand[2012 UKPC 23]**)."*

Therefore, on the authority of **Abdurrahman(supra)**, the plan viz. Doc. E drawn by the Plaintiff as admitted by him for the purposes of establishing his case was not used before the disciplinary committee of the Defendant and obviously the Defendant would not have been aware of same at the time of dismissal. In the circumstances, this plan cannot be relied upon for the purposes of the present case. Secondly, as regards the representative of Defendant who deponed namely Mr. Dominique Perrier, he was only the maker of Docs. B, C & D but not the maker of the plan nor did he take the photographs namely Docs. F, G & H produced on behalf of Defendant although they were produced before the disciplinary committee. Hence,

given the exclusionary rule as regards hearsay evidence as enunciated in the case of **Subramaniam v. Public Prosecutor [1956] 1 WLR 965** and cited with approval in the Supreme Court case of **Phillipe L. Ors. v. The State [2013 SCJ 141]**, I do not propose to rely on his evidence given in relation to Docs. F, G &H let alone that he conceded that he did not depone before the disciplinary committee. As regards, the testimony of the last witness for the Defendant, Mr. Andy Louis Shirley, he highlighted that all he said in Court, he said so before the disciplinary committee so that it is the same material used before that committee. However, I do not propose to rely on his evidence in relation to Docs. F, G &H as he was not the maker of the plan nor was he the one who took the photographs.

At this stage, what calls for my consideration is the first item namely *whether the appellant (then plaintiff) has committed a misconduct justifying his dismissal.*

Both the culprit of the copper rods at the ex-factory at the material time and the Plaintiff seen a short while after by the watchman, Mr. Andy Shirley, were of the same stature, wearing the same clothes and a white helmet so that he concluded was the same person bearing in mind that Plaintiff said that he was wearing his own clothes at night time on that day.

The Plaintiff was detected by the cameras on the material day but not at the material time when the larceny of the copper rods took place bearing in mind that he knew how to make his way from his office to the ex-factory without being detected by the cameras. Had he left his office in that manner to avoid the cameras in order to make his way to the ex-factory in his own personal clothes meaning in his own greyish tracksuit with white striped sleeves and a white helmet, he would have been seen by at least one of the five operators. Now, he did not call any of those operators as his witness so that the possibility that he was seen leaving his office around midnight on the 24 December 2015 by some of them cannot be disregarded.

He estimated the stolen copper by looking at the peeled off empty protective sheaths to be about Rs.500,000 by looking at them with a torchlight only and he said that such a job could not be done alone bearing in mind that the watchman said he heard people talking at the material time and place and more importantly in the course of the cross-examination of that watchman, at no time was the question put to him after he said that he saw the Plaintiff from his back at the material place and time which was confirmed by the Plaintiff himself, that the said Plaintiff was not the culprit.

For all the reasons given above, I am convinced on a balance of probabilities that Plaintiff committed the larceny of the copper rods belonging to the Ex-Deep River Beau Champ Sugar Factory at the material time and at the material place with the help of others. Thus, I take the view that Plaintiff has committed a misconduct justifying his dismissal.

The second point for my consideration is *whether the findings and determination of the disciplinary hearing against the appellant (then plaintiff) which concluded that the bond of trust between employer and employee had been severed was founded*. I find that the evidence relied upon before the disciplinary committee and which is the same material relied upon by the present Court although not in its entirety was founded when it concluded that the bond of trust between employer and employee had been severed because it has been established on a balance of probabilities that the Plaintiff has committed a larceny of the copper rods belonging to Ex-Deep River Beau Champ Sugar Factory with other people at the material time and material place.

The last point for my consideration is *whether in the circumstances the respondent (then defendant) in good faith was left with no other alternative than to terminate the employment*.

I agree that the Defendant in good faith was left with no other alternative than to terminate the employment of Plaintiff because it has been established on a balance of probabilities that the Plaintiff occupying the post of Power Plant Shift Supervisor was to say the least, involved in the commission of the larceny or misappropriation of the copper rods belonging to Ex-Deep River Beau Champ Sugar Factory with other people which obviously cannot be tolerated by the Defendant.

In the light of all the reasons given above, I find that the dismissal of the Plaintiff was fully justified and the Defendant is not liable to any claim whatsoever to the Plaintiff. The plaint is accordingly dismissed with costs.

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

17.12.2021

