Domingue M.S.C. v Maritim (Mauritius) Ltd

2023 IND 57

Cause Number 632/2017

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Michel Serge Cyril Domingue

Plaintiff

v.

Maritim (Mauritius) Ltd

Defendant

Judgment

In this amended plaint, it is common ground that-

Plaintiff was in the continuous employment of Defendant as Accountant since 1 August 2014. His terms and conditions of employment were governed by the Catering and Tourism Industries Remuneration Regulations 2004, GN No. 202 of 2014. He was employed on a 6-day week basis.

He was suspended verbally on 28.2.17. By way of a letter dated 7.3.17, Defendant confirmed his suspension and informed him of the alleged charges retained against him. He was sick as from 10.3.17 to 25.3.17 which was duly certified by a medical practitioner. On 17.3.17, he informed Defendant of his sickness and submitted his medical certificate through e-mail.

By way of a letter dated 21.3.17, he was informed that the Disciplinary Committee has been rescheduled for 27.3.17 when he attended and which was further postponed for 3.4.17 on request of his Counsel.

Plaintiff has averred the following - (i) He was last remunerated at monthly intervals at the basic rate of Rs 50,750/- per month and was paid a monthly fixed fuel allowance of Rs 15,000. (ii) By way of a letter dated 13.3.17, he was convened to appear before a Disciplinary Committee on 21.3.17 to answer alleged charges leveled against him. (iii) On 3.4.17, he attended the Disciplinary Committee and denied the said charges. (iv) By way of a letter dated 5.4.17, Defendant terminated his employment without notice on alleged ground of misconduct. (v) He considers the termination of his employment to be without justification. (vi) He has not been paid 21 days wages for period 10.3.17 to 4.4.17. (vii) As at the date of termination of employment, he had 17 days annual leave outstanding and Defendant has refunded him only wages for 3.5 days.

Plaintiff is, therefore, claiming from Defendant the sum of Rs 659,091.34/- comprising of one month's remuneration in lieu of notice (Rs 50,750 + Rs 15,000): Rs 65,750.00, severance allowance for 32 months' continuous service (Rs 50,750 + Rs 15,000) x 3 months x 32/12 years: Rs 526,000.00, alleged outstanding wages for period 10.3.17 to 4.4.17(Rs 50,750/26 x 21 days): Rs 40,990.38 and alleged refund of 13.5 outstanding local leaves for year 2017(Rs 50,750/26 x 13.5 days): Rs 26,350.96.

He has prayed for judgment condemning and ordering Defendant to pay to him the sum of Rs 659,091.34/- with interest from the date of termination of employment to the date of final payment and wages lost or compensation for wages lost and expenses incurred in attending Court.

Defendant in its plea (which has remained the same following the amendment of the plaint) has denied that Plaintiff was last remunerated at monthly intervals at the basic rate of Rs 50,750 together with a monthly fixed fuel allowance of Rs 15,000 as the fuel allowance did not form part of the monthly remuneration as it was given by Defendant to Plaintiff to attend work and for no other purposes.

Defendant has averred that by way of a letter dated 13.3.17, Plaintiff was convened to appear before a Disciplinary Committee on 21.3.17 to answer the charges leveled against him. On 3.4.17 when Plaintiff attended the said committee,

he had no valid grounds to deny the charges. His employment was terminated on 5.4.2017 on grounds of gross misconduct. His employment was terminated following a disciplinary committee which found that charges 1,2,4,5,6,7,8 and 9 levelled against him had been established. Defendant acting as a reasonable employer, could not in good faith take any other course of action in the circumstances but to dismiss him with immediate effect.

Plaintiff had exceeded his sick leave entitlements and Defendant was therefore fully justified in not paying to him any salary during the period of 10 March 2017 to 4 April 2017, during which Plaintiff was on sick leave. Defendant had refunded him on a *pro rata* basis his annual leave for year 2017. Defendant has denied being indebted to Plaintiff in any sum whatsoever and has moved that the amended plaint be dismissed with costs.

In the course of the trial, evidence was led on behalf of both Plaintiff and Defendant in Court.

The following evidence remained uncontested –

Plaintiff's letter of offer of employment dated 26.6.2014 for an indeterminate duration starting as from 1.8.2014 viz. Doc. A and his pay slip for December 2016 were produced as per Doc. B. He was suspended from his work verbally on 28.2.2017. He was then sent a letter of charges as per Doc. C dated 7.3.2017. Thereafter, he fell ill as from 10.3.2017 to 25.3.2017 during his suspension period and he informed his Defendant employer about it as per Doc. D. By way of a letter dated 13.3.2017 viz. Doc. E, he was informed of the date of his hearing before the disciplinary committee to answer the 9 charges which have been specified for the first time as being those of misconduct. At the disciplinary committee, he denied all the 9 charges levelled against him and gave his version of facts by way of explanations. As per a letter dated 5.4.2017 namely Doc. F, he was informed that following the findings of the disciplinary committee whereby all the said charges levelled against him were established except charge 3, Management, acting in good faith, had no other alternative than to put an end to his employment with effect from the date of that letter on the ground of gross misconduct.

It has remained unchallenged that Plaintiff has denied that his dismissal was justified in good faith by Defendant. Plaintiff was not paid his salary for the period 10 March 2017 to 4 April 2017 while he was on sick leave whilst under suspension. At

the time his contract was terminated, he had 17 days annual leave outstanding and he was reimbursed for only three and a half days. Thus, he made his claim as per the amended plaint in the sum of Rs 659,091.34. He has also claimed travel expenses to come to Court thrice by bus (Rs 70 x 3): Rs 210 which remained uncontested.

All the said documents produced have remained uncontested in Court in their form and tenor and the evidence referred to above will suffice for the purposes of the present case although there were other documents produced and other evidence adduced for the reasons which will become apparent later.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for Plaintiff and learned Senior Counsel for the Defendant. It remained unrebutted that Plaintiff was suspended verbally on 28.3.2017 and that he had denied all the 9 charges levelled against him at the disciplinary committee and in Court and that he denied that his dismissal by Defendant was justified.

Learned Counsel for the Plaintiff has submitted on one crucial issue which will dispose of the present case without the need for the Court to address itself on other issues covered in evidence in order to construe whether the burden of proof that laid upon the Defendant has been discharged or not in the sense that following the findings of the disciplinary committee and the material of which Defendant was aware or ought to have been reasonably aware at the time it dismissed Plaintiff, it could not in good faith take any other course but to terminate his employment so that his dismissal was not unjustified(see- **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]).

Learned Counsel for the Plaintiff submitted as follows:

As per the termination letter dated 5.4.2017 (Doc. F), Plaintiff's employment was terminated with immediate effect on the ground of gross misconduct. The matter is governed by the Employment Rights Act 2008 wherein there could have been a termination of employment of an employee following a disciplinary committee on the ground of either misconduct or poor performance. As per the letter dated 7.3.2017 as per Doc. C, Plaintiff was called before the disciplinary committee to answer the following charges enlisted 1-9 without any specification given as to whether they were charges of misconduct or poor performance or both in relation to which he had

to provide his explanations. In the absence of any charge of misconduct having been properly put to the Plaintiff employee in the course of his disciplinary hearing before that committee, by law, the termination on the ground of misconduct as borne out in the subsequent letter of 5.4.2017 is necessarily unjustified because no gross misconduct was ever put to the employee during a disciplinary proceeding. The requirement of the provision of Section 38 of the Employment Rights Act 2008, the opportunity that should be given to an employee is not an opportunity to answer mere facts but to answer a charge which can only be one of misconduct or poor performance. Given that there are two possible charges and two statutory regimes, two separate sub sections of the law pertaining to disciplinary hearings either of his misconduct or poor performance, it was necessarily incumbent on the Defendant employer to specify whether those facts constituted charges of misconduct.

Learned Senior Counsel for the Defendant submitted that when the Plaintiff received the letter of charges as per Doc. C, reference was made to the meeting of Plaintiff with Management on 28.2.2015 to hear his explanations and following which he was suspended from work. He knew on certain terms that he would be called in a disciplinary committee to answer the following charges. A matter of discipline does not involve poor performance. Thus, that letter dated 7.3.2017(Doc. C) leaves no doubt that we are dealing with disciplinary charges, that is, with acts of misconduct. The fact that the letter does not mention the magic word “misconduct” is neither here nor there. This is confirmed that on 13.3.2017 as per the Doc. E, Plaintiff was informed that pursuant to his suspension, he was convened to appear before a disciplinary committee to answer the charges which if proven would entail his summary dismissal on the ground of gross misconduct. It was not a *promenade de santé* through which Defendant wanted to take Plaintiff in order to help him improve his performance. Plaintiff knew what was at stake. What was at stake was his job because he was facing charges of misconduct.

Learned Counsel for the Plaintiff replied that the question which the Court needs to address is whether a charge proper as per the requirements of the law was put in a timely manner to the employee during the disciplinary process. Furthermore, Doc. E. was referred to by his learned Friend and it was not disputed that Plaintiff received that letter which was dated 13.3.2017. As per the letter dated 7.3.2017, Defendant purported to inform Plaintiff of the charges which mean if proven would entail his summary dismissal on the grounds of gross misconduct and Defendant already used the word charges.

As per para. (f) of the amended plaint, by way of a letter dated 7.3.2017, Defendant confirmed his suspension and informed him of the alleged charges retained against him. This has been admitted at para.3 of the plea where Defendant has accepted that the letter dated 7.3.2017 was a letter of charges. Then, this would put Defendant in a situation where there has been a further breach of section 38 of the Employment Rights Act by not informing the employee of the charges of misconduct within the 10 days provided by law from 28.2.2017 to 13.3.2017. The flaw in the disciplinary process and the breach of the relevant statutory provisions are further exacerbated.

Learned Senior Counsel for the Defendant had nothing to add in reply.

At this stage, it is imperative to note that most of our Labour Legislations have been inspired from the International Labour Organisations (created in 1919 to which Mauritius is a member) "ILO" because **Primacy is given to Security of Tenure because it is inextricably linked with the Livelihood of an employee**.

In that context, it is relevant to note the levity with which the letter of charges as per Doc. C dated 7.3.2017 has been reduced in writing as reproduced below:

*"**Suspension***

We refer to the meeting held on 28th February 2015 with Management to hear your explanations and you were suspended from work. You will be called in a disciplinary committee to answer the following charges:

(1) You did not forward a complete list of Cross Charge expenses to MAC resulting in outstanding balances on the Debtor list.

(2) You misled the Financial Controller and Management in your Statement of account by presenting unprecise figures to Head of Departments in the Management meeting.

(3) You deliberately provided the Management with fictitious figures for the Budget presentation at the Head Office in order to cover your wrongful acts and doings.

(4) You did not supervise and control the Stores, Receiving, other Outlets as well as the Cost controller which has resulted in a high deviation of stock over the last 10 months.

(5) You failed to report to Management missing cash amounts in the Cash Book of Rs 105,940/- and Rs 126,680.08/- respectively for month of September and October 2016, while doing your monthly Bank reconciliation.

(6) You failed to carry out an accurate and timely monthly Bank reconciliation despite several reminders by Management in the Finance meetings.

(7) You failed to present cheques in transit figures amounting to more than Rs 14 million into the Cash flow list and pending list, putting in peril the financial Cash flow status of the Hotel.

(8) You failed to ensure that all opening balance in the Guest Ledger figures tally with real figures in Filosof.

(9) You did not supervise the Purchasing and Receiving process to ensure Purchase Orders tally with Invoices.

The date and time of the disciplinary committee will be communicated to you shortly."

Now, it is relevant to note that pursuant to Section 38(7) of the Employment Rights Act 2008, the Defendant can suspend Plaintiff pending the outcome of disciplinary proceedings against him on account of his misconduct or poor performance.

Based on the tenor of that letter of charges, as rightly pointed out by learned Counsel for the Plaintiff, it has not been specified whether the charges are those of misconduct or of poor performance which if proved are grounds for the termination of employment of a worker by virtue of Section 38(2) and Section 38(3) respectively of the Employment Rights Act 2008. Both Section 38 subsections (2) and (3) of the Act provide for disciplinary hearing in terms of oral hearing as per subsections(2)(v) and (3)(d) respectively for charges of misconduct and poor performance.

The relevant provisions of **Section 38 of the Employment Rights Act 2008** are reproduced below:

*"**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;

(…)

(3) No employer shall terminate a worker's agreement for reasons related to the worker's poor performance, unless-

(a) he cannot in good faith take any other course of action;

(b) *the worker has been afforded an opportunity to answer any charge made against him related to his alleged poor performance;*

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

(d) *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.*

(…)

(7) Where an employer suspends a worker pending the outcome of disciplinary proceedings against the worker on account of the worker's misconduct or poor performance –

(a) any period of such suspension shall be on full pay;

(b) any extension to the delay provided for under subsection (2)(a)(iv), (2)(b)(iii) or (3)(c) made by or on behalf of the worker, shall be on full pay for a period not exceeding 10 days, where the worker is found not guilty of the charge made against him." **(all the above underlining is mine)**

True it is that the letter as per Doc. C refers to the meeting held on 28th February 2015 with Management where Plaintiff's explanations were heard and following which he was suspended from work. It was also mentioned that he would be called in a disciplinary committee to answer the following 9 charges as listed and the date and time of the disciplinary committee would be communicated to him shortly.

Nowhere in that letter has it been mentioned that following his suspension on 28.2.2015 after his explanations were given on that day itself, an internal enquiry or investigation was conducted at the level of Management and following which the 9 charges were leveled against him and which he will have to answer shortly before a disciplinary committee.

Had those charges been *prima facie* charges of misconduct, it is imperative that the Defendant notifies the said charges levelled against Plaintiff within 10 days of the day on which it becomes aware of the acts of misconduct failing which Defendant cannot terminate Plaintiff's contract of employment pursuant to Section 38(2)(a)(iii) of the Act. Such statutory delay does not apply to charges of poor performance. Therefore, the inescapable conclusion is that the charges mentioned in the said letter of charges as per Doc. C dated 7.3.2017 are necessarily those of poor performance.

Further to that letter of charges, as per Plaintiff's letter of convocation dated 13.3.2017 to appear before a disciplinary committee as per Doc. E., he was informed as follows:

"'Dear Mr. Domingue

DISCIPLINARY COMMITTEE

This is to inform you that pursuant to your suspension on 28th February 2017, you are convened to appear before a Disciplinary Committee to answer the following charges:

(1) You did not forward a complete list of Cross Charge expenses to MAC resulting in outstanding balances on the Debtor list.

(…)

(9) (…).

The Disciplinary Committee will be held at Maritim Resort & Spa on Tuesday 21st March 2017 at 14h00.

(…)

You are to note that Management takes a serious view of the charges which may, if proven, entail your summary dismissal on the grounds of ***gross misconduct****. This disciplinary committee will take place whether you be present or not."*

Therefore, it was only when he was convened by Defendant to appear before the disciplinary committee to answer those 9 charges leveled against him that it was made clear that the charges were those of misconduct and not of poor performance and that he was suspended on 28.2.2017 instead of 28.2.2015.

It is significant to note that thus, it is clear that following the explanations given by Plaintiff on 28.2.2017 to Management, he was suspended on that day and the Defendant was already aware of the 9 *prima facie* charges of misconduct against him on that day itself as no internal enquiry or investigation needed to be conducted because neither Doc. C (the letter of charges) nor Doc. E (his convocation letter) mentioned such internal enquiry or investigation having been carried out by Defendant.

As rightly pointed out by learned Counsel for Plaintiff, then, the question of delay of 10 days will come into play. Thus, I agree with the contention of learned Counsel for Plaintiff that as from 28.2.2017 to 13.3.2017 when Plaintiff was made aware of the 9 acts or charges of misconduct leveled against him as per Doc. E, the statutory delay of 10 days has been exceeded offending Section 38(2)(a)(iii) of the Act and which is fatal.

I find it apt to quote an extract from the Privy Council case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [2006 PRV 33]:

""15. Of course, it may seem strange to describe the termination of an employee's employment for established misconduct as "unjustified" merely because the necessary notice reaches the employee eight, rather than seven, days after the completion of the disciplinary hearing. Nevertheless, the legislature has adopted a policy of laying down a fixed time-limit - clearly, with the Recommendation of the ILO in mind and with the aim of ensuring that both parties know where they stand as quickly as possible. See Mahatma Gandhi Institute v Mungur P [1989 SCJ 379]

where the Supreme Court described the time-limit as being based on sound principles and added:

"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 courts must respect the policy which lies behind the time-limits that the legislature has imposed. (…)

27. (…) But the legislature was entitled not only to lay down a time-limit but – subject, of course, to any relevant provisions in the Constitution – to prescribe the penalty that is to attach to a failure to comply with that time-limit. In this case, the legislature chose, as it was entitled to, a single, undifferentiated, sanction." ***(emphasis added)***

Therefore, pursuant to Section 38(2)(a)(iii) of the Act and the reasoning in **Mauvilac** (supra), the underlying policy in line with the Recommendation of the ILO which lies behind the time-limits imposed by the Legislature, is to ensure that both parties know as quickly as possible where they stand so that a plain meaning of Section 38(2)(a)(iii) of the Act shows that the said time limit of 10 days is mandatory and which was not observed by Defendant. Indeed, as per **Droit du travail, J. Rivero et J.Savatier, Collection Thémis, 12ème ed.(1991), p.32.**, it has been stressed that-

"… le droit du travail lui par contre à une finalité précise, celle de ***"la protection du faible contre le fort"****." (*see - Introduction au Droit du Travail Mauricien, 2ème Edition at page 2 by Dr. D. Fok Kan). (emphasis added)

Thus, Defendant has waived its right to invoke that Plaintiff's dismissal was justified because it has failed to notify Plaintiff of the charges of misconduct leveled against him within 10 days of the day on which he became aware of those 9 acts of misconduct and as such is precluded from terminating his contract of employment under Section 38(2)(a)(iii) of the Act. Hence, the termination of Plaintiff's contract of employment by Defendant following the outcome of the disciplinary committee is deemed to be unjustified and he is thus entitled to severance allowance.

At this stage, I find it pertinent to reproduce Section 2 of the Employment Rights Act 2008 as follows:

""remuneration"-

(a) means all emoluments, in cash or in kind, earned by a worker under an agreement;

(b) includes –

(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work;"

It is worthy of note that for the computation of the amount of severance allowance pursuant to Section 46(5) of the Employment Rights Act 2008, the monthly remuneration is taken into account and not the basic salary so that the fuel allowance of Rs 15,000 as per the pay slip of Plaintiff namely Doc. B will be included in the computation. Indeed, I find it apt to reproduce Section 46(5) of the said Act as follows:

"**46. Payment of severance allowance**

(5) Where a worker has been in continuous employment for a period of not less than 12 months with an employer, the Court may, where it finds that –

(…)

(b) the termination of agreement of the worker was in contravention of section 38(2), (3) and (4);

(c) the reasons related to the worker's alleged misconduct or poor performance under section (38)(2) and (3) do not constitute valid reasons for the termination of employment of the worker;

(…)

order that the worker be paid severance allowance as follows –

(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months remuneration; and (**emphasis added)**

(ii) for any additional period of less than 12 months, a sum equal to one twelfth of the sum calculated under subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer;

(iii) notwithstanding paragraphs (a), (b), (c) and (d), the termination of agreement of the worker was unjustified;"

Therefore, I agree with the computation of severance allowance as claimed by Plaintiff namely severance allowance for 32 months' continuous service (Rs 50,750 + Rs 15,000) x 3 months x 32/12 years: Rs 526,000.00. In the same breath, it is relevant to reproduce Section 37 of the said Act as follows:

*"**37. Notice of termination of agreement***

(5) 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."

Hence, I agree that Defendant will have to pay to Plaintiff one month's remuneration in lieu of notice (Rs 50,750 + Rs 15,000): Rs 65,750.00 as per his pay slip vIz.Doc. B.

Now, it has remained unrebutted that following Plaintiff's suspension, he was suffering from acute stress as per the medical certificate produced as per Doc. D which shows that he was on medical leave as from 10.3.2017 to 25.3.2017. No evidence has been adduced to the effect that Plaintiff has exceeded his sick leave entitlements. Indeed, Section 38(7)(a) of the Act above stipulates that the Plaintiff is entitled to full pay on suspension. As per his pay slip produced namely Doc. B, his basic salary is Rs 50,750. Thus, Defendant will have to pay to Plaintiff: (Rs 50,750/26 x 21 days): Rs 40,990.38. (prior to his dismissal with immediate effect on 5.4.17).

As regards the refund of outstanding local leaves viz. annual leave for the year 2017, by virtue of Section 25(5) of the Act:

*"**25. Payment of remuneration due on termination of agreement***

(5) Where an agreement is terminated by an employer otherwise than on grounds of misconduct, and at the time of termination the worker has not taken any

of the annual leave to which he is entitled to under section 27 or any other enactment, the employer shall in lieu of leave, pay to the worker the remuneration to which the worker would have been entitled if he had worked." (**emphasis added)**,

he cannot claim same as his contract of employment was terminated by Defendant on the ground of misconduct. Furthermore, he is not qualified "a worker" under Section 2 (c) (ii) of the Act:

"

" worker", subject to section 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;"

as his basic wage or salary is at a rate in excess of Rs 360,000 rupees per annum.

Therefore, I order Defendant to pay to Plaintiff the sum of Rs 632,950.38 comprising of one month's remuneration in lieu of notice (Rs 50,750 + Rs 15,000): Rs 65,750.00, severance allowance for 32 months' continuous service (Rs 50,750 + Rs 15,000) x 3 months x 32/12 years: Rs 526,000.00 with interest at the rate of 12% per annum on the amount of severance allowance payable from the date of termination of employment to the date of final payment, outstanding wages for period 10.3.17 to 4.4.17(Rs 50,750/26 x 21 days): Rs 40,990.38 and the travel expenses to come to Court thrice by bus (Rs 70 x 3): Rs 210. With Costs

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

12.7.2023