Bhundhoo v Sun Limited

2022 IND 29

CN305/2020

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr Kiran Bhundhoo

Plaintiff

v/s

Sun Limited

Defendant

JUDGMENT

The Plaintiff is claiming from the Defendant Company by way of Plaint:

1) The sum of Rs383 092. 50/- representing one month's Wages as Indemnity In Lieu Of Notice and Severance Allowance for 38 months' Continuous Service;
2) 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 payment; and
3) Such amount by way of compensation for Wages lost or expenses incurred in attending Court;

for the termination of his employment without Notice and without Justification.

The Defendant Company has denied the said Claim in its Plea.

The Plaintiff was assisted by the Labour Officer, and the Defendant Company was assisted by Learned Counsel.

The Proceedings were held partly in English and partly in Creole.

Case For The Plaintiff

The Plaintiff's case is in effect that the termination of his employment was without Notice and without justification, inasmuch as:

1) the comments ascribed to him on the Facebook page of Sugar Beach Resort (hereinafter referred to as SBR) were not committed during his working house nor whilst he was at work at his place of work;
2) the Plaintiff did not post any comment on the Facebook page of SBR but on his personal Facebook account in relation to an article which he considered unpleasant as it read "*Maurice c'est un endroit à fuire (sic) absolument sauf si vous cultivez le racisme et l'homophobie…*";
3) it was one Yomann Yomann, author of the abovementioned article, who posted on the Facebook page of SBR an incomplete extract of their chat (Doc. D1);
4) the said Yomann Yomann tendered his apology on the Facebook page of SBR on 16-06-18 for having mixed his private Life with his profession;
5) the comments the Plaintiff made were in regards to his private Life and conduct, and were no way meant to affect the Defendant Company's operations, activities, values and reputation; and
6) the Defendant Company has not acted in good Faith and could have taken other actions than to terminate his Contract of Employment.

Case For The Defendant Company

The Defendant Company's case was to the effect that having regard to the nature/character of the Plaintiff's exchanges with the said Yomann Yomann and their negative incidence on the reputation and goodwill of the Defendant Company, having regard to the acts and doings of the Plaintiff, which were tantamount to misconduct and which were unacceptable to the Defendant Company which seeks to promote values and tolerance, the bond of Trust and the good working relationship between the Plaintiff and the Defendant Company had been impaired.

The above coupled with the Plaintiff's previous Warning, meant the Defendant Company could not, in all good Faith, take any other course but to terminate the Plaintiff's employment with immediate effect.

Analysis

The Court finds the following passage from the Authority of **Lih Thoy Lim Yu Choy v Rey And Lenferna Limited** [2021 SCJ 252] pertinent:

> In an action for summary dismissal, the burden rests upon the employer to establish that the acts and doings of his employee amount to misconduct and that the misconduct is such that he cannot in good faith take any other course of action than terminate his employment. Such a situation would only exist where the misconduct is tantamount to "faute grave" or "faute lourde" justifying the worker's dismissal without the payment of severance allowance.
>
> In **Deep River Beau Champ Ltd v Beegoo [1988 SCJ 432]** it was held that whether misconduct may entail the termination of employment depends on the facts of each case. The determination of the question of justified dismissal depends essentially on the degree and seriousness of the misconduct.
>
> Furthermore, it is relevant to cite the decision of the *Chambre Sociale of the Cour de Cassation* **(Soc. 26 février 199, 88-44.908, Bulletin 1991 V No 97 p.60)** where "faute grave" was defined as "une faute résultant d'un fait ou d'un ensemble de faits imputable au salarié, constituant une violation des obligations du contrat de travail ou des relations de travail, d'une importance telle qu'elle rend impossible le maintien du salarié dans l'entreprise pendant la durée du préavis".

In the Authority of **Sotravic v Chellen** [2021 SCJ 425], the Court was of the view that "[w]e need […] to be guided by the following extract from "**Introduction au Droit du Travail Mauricien –1/Les Relations Industrielles de Travail" (2ème édition –2009)** at page 365 which refers to termination for misconduct under the ERA –

> “Le législateur définit la notion de 'misconduct' essentiellement par rapport à sa gravité. En effet un 'misconduct' pouvant justifier un licenciement sans indemnité de licenciement doit être telle que l'employeur "cannot in good faith take any other course". Il existe en effet divers degrés de faute. Au bas de l'échelle il y a les fautes légères qui ne sauraient justifier un licenciement et entraîneraient en cas de licenciement le paiement de l'indemnité de licenciement. La faute n'étant que légère l'employeur aurait dû sanctionner l'employé autrement que par le licenciement. Le deuxième degré de faute est la faute sérieuse. Bien que la faute justifie ici la sanction ultime du licenciement, elle n’est pas considérée comme suffisamment grave pour écarter le paiement de l'indemnité de licenciement. Au sommet de la hiérarchie des fautes nous retrouvons les fautes graves, les cas de 'gross misconduct', qui elles justifient un "summary dismissal", c'est-à-dire sans préavis et donc éventuellement sans indemnité de licenciement. L'appréciation de la gravité de la faute se détermine non seulement en fonction de la faute en elle-même mais également en fonction de toutes les circonstances de l’espèce.”

The Court has duly considered all the evidence on Record and all the circumstances of the present matter.

The Court has also given due consideration to the Submissions put forward by Learned Counsel for the Defendant Company.

The Court has duly considered all the documents produced in the course of the Proceedings:

1) the Plaintiff’s Contract of Employment (Doc. P1);
2) the Letter of Charge (Doc. P2);
3) the Termination Letter (Doc. P3);
4) the Facebook post (Doc. D1); and
5) 02 photos (Doc. D2 collectively).

The Parties were in agreement as regards the following:

1) The Plaintiff was in the continuous employment of the Defendant Company as Information Technology Specialist / Information System Supervisor since 01-07-15;

2) The Plaintiff was employed on a 05-day week basis, and was remunerated at monthly intervals at the basic rate of Rs36 458/- per month;
3) The Plaintiff had a private conversation with one Yomann Yomann on his personal Facebook account, outside working hours and whilst he was not at his place of work, and extracts of the said chat (Doc. D1) were posted by the said Yomann Yomann on the Facebook page of SBR;
4) The Plaintiff was suspended from Work with immediate effect on 25-06-18;
5) The Plaintiff was convened to a Disciplinary Committee on 06-07-18 by way of letter dated 25-06-18 which the Plaintiff received by post on 28-06-18;
6) The Plaintiff attended the said Disciplinary Committee which was adjourned and completed on 20-09-18; and
7) The Plaintiff's employment was terminated with immediate effect by way of letter dated 25-09-18 which the Plaintiff received on the same day.

The Plaintiff contends that the Defendant Company was not entitled to use a private chat he had had with an Internet User named Yomann Yomann on his personal Facebook account, outside of working hours and whilst he was not at work, as the basis for his dismissal, as this was with regards to his private Life and was in no way meant to affect the Defendant's operations, activities, values, and reputation.

The Plaintiff further contends that the Defendant Company had not acted in good Faith and could have taken another course of action than to terminate his employment.

The Defendant Company contends for its part that it was entitled to act on the basis of the said chat, which was posted by the said Yomann Yomann on the public Facebook page of SBR:

1) as same was grossly offensive and / or was of an indecent, obscene or menacing character, that the Plaintiff knew and / or ought to have known that the said comments were bound to inter alia, cause annoyance to anyone who read same;
2) as same reflected a mindset which was most unbecoming and in sheer contravention of the Defendant Company's values; and
3) as same put at stake the Defendant Company's reputation and goodwill, and undermined all the efforts of the Defendant Company to promote its resorts and the Mauritian destination as a haven of tolerance.

In light of the principles set out in the Authority of **Lateral Holdings Ltd v Murdamootoo [2021 SCJ 19]**:

> 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.
>
> […]
>
> **Dalloz, Répertoire de Droit du Travail, Rubrique Contrat de Travail à Durée Indéterminée : Rupture et Conditions de Licenciement pour Motif Personnel** –
>
> > C – Fixer les limites du litige
> > 113. La lettre de licenciement fixe les limites du litige ; par suite, lorsque cette lettre énonce un seul motif de licenciement, une cour d'appel n'a pas à examiner les autres motifs allégués par l'employeur en cours d'instance" (Cass. Soc. 9 mars 1993, Bull. civ. V, no 83).
> >
> > 1 o – Limites opposées à l'employeur
> >
> > 114. En cas de litige, l'employeur ne pourra se prévaloir devant les juges, d'un motif de licenciement qu'il n'aurait pas préalablement notifié au salarié (Cass. Soc. 20 mars 1990, Bull. civ. V, n o 124 D. 1990, IR 94 ; 9 oct 2001, Bull. civ. V, no 306)
> > (…)
> > 2 o – Pouvoir limite des juges du fond
> >
> > 117. En cas de contestation sur le caractère bien fondé de la rupture, les juges du fond doivent tout d'abord rechercher si la lettre de licenciement contient un motif de rupture du contrat de travail, énoncé de façon claire et explicite. Si tel est le cas, il leur appartient ensuite d'examiner si les motifs énoncés présentent ou non un caractère réel et sérieux (V. infra, no 165 et s.).

> 118. Dans cette appréciation, ils doivent se fonder exclusivement sur les motifs énoncés par l'employeur dans la lettre de notification. Ce principe général implique trois conséquences distinctes.
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> 119. En premier lieu, si l'employeur invoque à l'instance une cause de licenciement qu'il n'a pas notifiée au salarié, les juges n'ont pas à examiner son caractère réel et sérieux.

In the present matter, the operative part of the letter of termination (Doc. P3) reads as follows:

> Management has accepted the said report; and it considers that your acts and doings, besides being tantamount to misconduct and unacceptable to any organization which seeks to promote values and tolerance, have also given rise to a situation whereby the bond of trust and good working relationship – which are essential between any employer and any employee – have been seriously impaired.
>
> It has also had the opportunity to review your personal file, including the previous warning issued to you.
>
> In the light of all the above, Management considers that it cannot, in all good faith, take any other course but to dispense with your services.
>
> Your contract of employment with the Company is accordingly terminated with immediate effect.

The Defendant Company was of the view that the Plaintiff's acts and doings were tantamount to misconduct, and were unacceptable to any organization which sought to promote values and tolerance, and which had given rise to a situation whereby the bond of Trust and the good working relationship had been seriously impaired, such that the termination of the Plaintiff's employment was fully justified.

Although the nature / character of the exchanges in mentioned in the said letter (Doc. P3), no mention is specifically made therein as the said exchanges being grossly offensive and / or indecent, obscene or menacing character; that the Plaintiff knew and / or ought to have known

that the said comments were bound to inter alia, cause annoyance to anyone who read same; and that that same reflected a mindset which was most unbecoming and in sheer contravention of the Defendant Company's values.

The Court will therefore only consider whether the Plaintiff's acts and doings were tantamount to misconduct, and were unacceptable to any organization which sought to promote values and tolerance, which had given rise to a situation whereby the bond of Trust and the good working relationship between the Plaintiff and the Defendant Company had been seriously impaired, justifying the termination of the Plaintiff's employment, although the Court is of the considered view that the Letter of Termination is somewhat ambiguous as to the precise reason/s for the Termination of the Plaintiff's employment.

The following extract from the Authority of **Sotravic (supra)** is found of relevance:

> Indeed in **Deep River Beau Champ Ltd v Beegoo [1988 SCJ 432]**, it was held that the degree and seriousness of the misconduct are valid considerations in deciding whether the misconduct warrants a termination of the employment so as to make it a justified dismissal. Gross misconduct or "faute grave" is therefore at the highest end of the spectrum of degrees of "fautes" and would alone justify summary dismissal, without payment of severance allowance (see also **Barbe v Shell Mauritius Ltd (supra)**. Moving downwards, the misconduct can either amount to "faute sérieuse"(which can justify termination but may entail payment of severance allowance) or "faute légère"(which would not justify dismissal and would, in case there has been dismissal, result in severance allowance being payable to the worker). [1]

In the absence of any local pronouncement on the specific issue of dismissal due to a Social Media Post which was not work-related, the Court turns to the French Authorities for guidance.

[1] **Barbe v Shell Mauritius Ltd [2013 SCJ 202]**

In an *Arrêt* of 30-09-2020 [2], the *Cour de Cassation* held that an employer was justified in terminating an employee's employment, given the said employee had posted on her personal Facebook account set in private mode, a confidential photo.

The facts were briefly that the *société Petit Bateau* had terminated one of its Employee's employment on the ground that the said Employee had breached the obligation of Confidentiality to which she was subject as per her Contract of Employment, by posting on her Facebook account a photo of the new collection, which photo the employee had obtained in the course of her employment.

The employee had contested her dismissal on the ground that the employer had used a post which she had made in her personal Facebook account set in private more, and had thus interfered with private Life.

The *Cour de Cassation* held that although the employee's Facebook account was set in private mode, the photo had been obtained *de façon loyale*, as it had been sent to the employer by another employee, without any intervention/solicitation on the part of the employer, who had thus not interfered with the employee's private Life without the said employee's knowledge.

Further, the *Cour de Cassation* was of the opinion that it was essential for the employer to produce the said photo, although it infringed the employee's Right to Privacy, as this was the only way for the employer to establish the employee's breach of her contractual obligations.

The *Cour de Cassation* held, in the circumstances, that the intrusion into the employee's Right to Privacy was proportionate to the aim pursued, that is the protection of the employer's legitimate interests to confidentiality of its affairs, especially as the fashion industry was ultra-competitive.

In effect, the said *Arrêt* highlights the principle that no Freedom is absolute, and although the Right to Freedom of Speech and the Right to Privacy exist for every person, it is for the Courts to determine whether one Party's Rights have been infringed by another Party.

[2] Cass. Soc., 30 septembre 2020, n°19-12.058, publié au Bulletin

As aptly put by John Stuart Mill, Abraham Lincoln, or Alfred George Gardiner, to cite a few, "a person's freedom ends where another person's freedom begins".

The Court is therefore called upon to make a balancing exercise, in light of this conflict of Rights, as opposed to having a blanket protection afforded to any Social Media user the minute his Account is set in private mode, by virtue of the fundamental Rights to Freedom of Speech and to Privacy.

For further guidance, the Court has looked at the United Kingdom, in the case of **British Waterways Board v Smith (UKEATS0014/15/SM, 3 August 2015)**, where the employee was dismissed for gross misconduct relating to offensive and derogatory Facebook posts about his employer and fellow employees. Although the employer had a policy prohibiting employees in the employee's position from drinking while they were on standby, and a social media policy prohibiting postings which may embarrass the company, the employee still posted the said offensive comments on Facebook. The employer terminated the employee two years later upon discovering the said Facebook posts.

Whilst the Employment Tribunal found that the employee had been unfairly dismissed, the UK Employment Appeal Tribunal (hereinafter referred to as EAT) overturned the Tribunal's decision, finding inter alia that the employer was clearly within the band of reasonable responses when it decided to terminate the Plaintiff. [3]

In the case of ***Game Retail Limited v. Laws*** **(UKEAT0188/14/DA, 3 November 2014)**, the employer terminated the employee for making numerous offensive tweets about numerous groups including dentists, Newcastle fans, and the disabled on his personal Twitter account. Despite the fact that the employee did not identify himself as an employee of the Company, he was aware that many of the employer's store managers knew of his role within the Company and had become followers of his Twitter account. His account was also publicly available for anyone who chose to follow him on Twitter.

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[3] **Termination for Offensive Social Media Posts May Be a "Reasonable Response" in the UK**, by Daniel Ornstein, Erika C. Collins and Ian Plummer, 10 March 2016

The employee alleged unfair dismissal, and the Employment Tribunal concurred. However, the EAT overturned the Tribunal's decision, and inter alia made it clear that employees' Right to Freedom of Expression must be balanced with the employer's desire to remove or reduce reputational risk from its employees' social media communications.

These decisions show that in the UK, it is not unfair (and therefore lawful) for employers to terminate an employee for offensive social media postings, depending on the facts of the case.

The ***British Waterways Board*** decision indicates that termination may still be reasonable despite the offensive postings occurring many years in the past. And the ***Game Retail Limited*** decision also demonstrates that an employee does not have to identify herself as a company employee in order for the postings to be considered damaging to the company's reputation, and that the posts do not have to be work-related.

And both said decisions clearly show that a balancing exercise is to be carried out between the employee's Right to Freedom of Expression, and the employer's desire to remove or reduce reputational risk from its employees' social media communications, that is the employer's legitimate interests. [4]

The Court is alive to the fact that specific principles are applicable in the said two Jurisdictions, but the Court is of the considered view that the said decisions are relevant as to the following general principles:

1) whilst bearing in mind the employee's Right to Freedom of Expression and to Privacy, it is not illegal for an employer to use private posts to take disciplinary action against an employee, to protect its legitimate business interest;
2) the posts may be unrelated to work, remote in time, may have occurred outside working hours, whilst the employee was not at work, and not with Office equipment;
3) the employee does not have to identify himself/herself as an employee "in order for the postings to be considered damaging to the '[employer]'s reputation";

[4] Ibid.

4) the question is whether the said "comments made on social media […] are […] sufficiently connected to the employer" or in other words "impacts on the employment relationship" [5];
5) a balancing exercise is to be carried out by the Courts between the competing Rights to Privacy and to Freedom of Expression of an employee, and the employer's legitimate business interests, to determine whether the said posts, which may not be work-related and / or may be remote in time, may still be considered damaging to an employer's reputation, such that the employee's dismissal is justified [6].

In the present matter, the Court is alive to the fact that the present matter can be distinguished from the Breach of confidentiality committed by the employee in the ***Arrêt Petit Bateau*** **(supra)**, inasmuch as in the present matter, the said chat was not work-related.

The Court is nevertheless of the considered view that it is to determine whether the said post was obtained by the Defendant Company *de façon loyale*, whether there was an infringement into the Plaintiff's Constitutional Right to Freedom of Expression and Right to Privacy, whether this infringement was the only way for the Defendant Company to establish the Plaintiff's breach of his contractual obligations, whether the said intrusion into the Plaintiff's Right to Privacy and Right to Freedom of Expression was proportionate to the aim pursued, that is the protection of the Defendant Company's legitimate interests to protect its reputation, given the Plaintiff was employed by SBR, which is in the Hotel/Hospitality Industry.

The Plaintiff contends that the said private Facebook chat on his personal Facebook account, which occurred outside working hours and whilst he was not at work, do not affect his employment relationship with the Defendant Company, inasmuch as same was with regards to his private Life.

As per paragraph 1. i) ii. of the Plaint, and throughout the Proceedings, it was the case for the Plaintiff that the said words were written in the course of a private chat with the said Yomann Yomann on his personal Facebook account, and at no stage did the Plaintiff accept having posted anything on the public Facebook page of SBR.

Further, as per paragraphs 2.1, 2.2, and 6.3 of the Plea, it is clearly averred that the comments were posted by the said Yomann Yomann on SBR's public Facebook page.

[5] **Misconduct by social media – a global perspective**, by Ashurt's World@Work, 01 May 2016
[6] Ibid.

However, in cross-examination, Learned Counsel for the Defendant Company put the following question to the Plaintiff:

> […] Avec sa post ki oune fer lor la page publique de Sugar Beach, oune nuire à la réputation de l'hotel parski, banes clients ti aussi forme partie de la communauté LGBT. Kan zot pou guette sa, zot pas pour rode vine a l'hotel.

Be that as it may, the Parties are bound by their Pleadings, and the Parties were in agreement as to the fact that the said words were written by the Plaintiff in the course of a private chat he had with the said Yomann Yomann on his personal Facebook account, and that at no stage did the Plaintiff post the said chat on the public Facebook page of SBR.

From the principles set out in the ***Arrêt Petit Bateau*** **(supra)**, it is clear that the mere fact that a post is made on an employee's personal Facebook account set in private mode does not automatically mean that same cannot be used by the employer to prove the employee's breach of his / her contractual obligations.

Had it been otherwise, hypothetically, an employee could knowingly breach his / her contractual obligations, and cause damage to his/her employer, with impunity.

Now, it can hardly be contested that the said chat, which was a private chat the Plaintiff had with the said Yomann Yomann on his personal Facebook account, outside working hours, whilst he was not at work, *relève de la vie privée* of the Plaintiff.

Applying the said principles of the ***Arrêt Petit Bateau*** **(supra)** to the present matter, the Court is of the considered view that the mere fact that the said chat was a private one on the Plaintiff's personal Facebook account does not automatically prevent the Defendant Company from relying on same.

The Court is further of the considered view that it was necessary for the Defendant Company to rely on the said private chat (Doc. D1) to try and establish the Plaintiff's misconduct. There was no other way available to the Defendant Company to try and establish the said misconduct on the part of the Plaintiff.

The fact that the said chat was posted without the Plaintiff's knowledge, has no bearing on the determination of the present matter, in light of the principles set out in the case of ***Arrêt Petit Bateau*** **(supra)**.

In fact, short of removing the said post, the Plaintiff had no control over the said post's circulation, which chat could reach an audience far beyond what was initially intended or expected, thanks for instance to screenshots.

Now, although the Court is of the considered view that there is an infringement into the Plaintiff's fundamental Right to Privacy and Right to Freedom of Expression, by the very fact that the said post found its way, albeit without the Plaintiff's knowledge, onto the said public Facebook page of SBR, the fact remains that this occurred without any intervention on the part of the Defendant Company.

The said chat came to the Defendant Company's knowledge when same was posted on the public Facebook page of SBR by the said Yomann Yomann.

It follows therefrom that the said post was obtained by the Defendant Company without any intervention / solicitation on its part, and was therefore obtained by the Defendant Company *de façon loyale*.

There is no evidence on Record to conclusively establish that the Plaintiff identified himself as an employee of the Defendant Company on his personal Facebook account, and / or that the Plaintiff's said account was set to private mode. Nonetheless, the said Yomann Yomann managed to identify where the Plaintiff worked, located the Facebook page of SBR, and posted the said chat, even if it was only an extract thereof, on the said public Facebook page of SBR.

Once this post was on the public Facebook page of SBR, a direct link was established between the Plaintiff and the Defendant Company.

Specifically, the said Yomann Yomann wrote in his post as per (Doc. D1):

> Ci-joint un membre du personnel qui sait parler à ses clients… 😱😱😱

Clearly, the very fact that the Plaintiff was identified as an employee of the Defendant Company created a direct link between the Plaintiff and the Defendant Company.

Now, in light of the very words used by the Plaintiff, and the tenor of the chat (Doc. D1), the Court is of the considered view that the Plaintiff's words were discriminatory in nature.

Not only were the words used insulting (for example "*saletés*" and "*connards*"), but also the word "*pede*" (which etymologically means an older man having sexual relations with a younger man, has been replaced in the course of the XXth Century by the word homosexual) is clearly aimed at a specific group and is discriminatory.

Further, in cross-examination, the Plaintiff agreed for instance that the word "*connard*" (which is translated in the Online Collins Dictionary as "asshole") is definitely an insult ("*Définitivement li ene insulte*").

The Plaintiff maintained that this was his reaction to what the said Yomann Yomann had said to him in the said chat. But the fact remains that the Plaintiff admitted having written the said words in the said chat on his personal Facebook account, irrespective of the way the said posts found their way on the public Facebook page of SBR.

The Plaintiff also contends that the said chat posted on the Facebook page is merely an extract of the chat he had with the said Yomann Yomann on his private Facebook account.

Be that as it may, this does not detract from the fact that the Plaintiff admitted having written the said words, and further admitted that the word "*connard*" for instance was an insult.

It is also worth noting that the Plaintiff stated in Court that he knew how to use his words ("Mo cone servi mo mots").

All the above clearly demonstrates that the Plaintiff was fully aware of the meaning of the said words, and of the tenor of his chat.

The Plaintiff also deponed to the effect that he had reacted in order to defend his Country. But by doing so, the Plaintiff was *en train d' ajouter de l'eau au moulin* of the said Yomann Yomann, by expressing homophobic views.

The Plaintiff was employed by the Defendant Company, which operated in the Hotel Industry. And the Court takes Judicial Notice of the need for any hotel and its Staff to be respectful, and non-discriminatory, towards its Clientele, however diverse.

In view of the specific circumstances of the present matter, the Court is of the considered that the views expressed by the Plaintiff, albeit privately, were not in line with the values and interests of the Defendant Company which operated in the Hotel Industry.

By engaging in such conduct, and by expressing in unequivocal terms his views about Homosexuals, the Plaintiff was in effect adopting a discriminatory attitude towards a specific group, which went against the values of any Hotel, including the Defendant Company,

True it is that the Plaintiff is afforded protection as to his Freedom of Speech and protection to the Privacy of his Home (bearing in mind that the said chat took place on the Plaintiff's personal Facebook account, outside working hours, not whilst the Plaintiff was at his place of Work, and was in no way directly related to his Employment), but the said Fundamental Rights are to be counterbalanced by the Defendant Company's legitimate Rights to the protection of its operations, activities, interests, reputation, and goodwill.

Having carried the said balancing exercise with the utmost caution, in light of all the evidence on Record and all the circumstances of the present matter, the Court is of the considered view that the said infringement to the Plaintiff's said fundamental Rights was the only way for the Defendant Company to establish the Plaintiff's misconduct, that the said intrusion into the Plaintiff's Right to Privacy and Right to Freedom of Expression was proportionate to the aim pursued, that is the protection of the Defendant Company's legitimate interests as to its operations, activities, values, reputation, and goodwill.

In the circumstances, the Plaintiff's said conduct amounted misconduct and constituted a valid reason for disciplinary action.

Having found, in light of all the above, that disciplinary action was justified, the question which now arises is whether the ultimate sanction was the appropriate one, in light of all the circumstances of the present matter.

Whilst it can hardly be disputed that summary dismissal was one of the options available to the Defendant Company, as highlighted in the cases of **British Waterways** for instance, it is crucial for the Court to address to its mind to the justness of the sanction ultimately imposed by the Employer on the Employee.

In the present matter, the Court is in doubt as to whether the ultimate sanction was the most appropriate and proportionate one, for the reasons given below.

When measuring the Plaintiff's said conduct, although private, against the values and interests of the Defendant Company, the Court is of the considered view that the Plaintiff's said acts and doings were not of such a nature for the Plaintiff to be in breach of his employment contract or obligations, to have irreparably damaged his employment relationship with the Defendant Company, and to have irretrievably severed the bond of Trust that ought to exist between the Employer and the Plaintiff.

The Plaintiff's said misconduct was not such as to constitute « une violation des obligations du contrat de travail ou des relations de travail, d'une importance telle qu'elle rend[ait] impossible le maintien du salarié dans l'entreprise pendant la durée du préavis". [7]

The fact that the Plaintiff's said chat was unrelated to his Work, in no way detracts from the fact that the said chat had the potential to reflect negatively on the Defendant Company, the more so as the said comments were accessible by other employees, clients, and / or potential clients of the Defendant Company.

Although it cannot reasonably be contested that the said post on SBR's public Facebook page had the potential to cause damage to the Defendant Company's operations, activities, values, and reputation, bearing in mind that the said Yomann Yomann felt sufficiently strongly about the Plaintiff's conduct to go to the extent of posting the said chat on the Defendant Company's public

[7] *Cour de Cassation* **(Soc. 26 février 199, 88-44.908, Bulletin 1991 V No 97 p.60)**

Facebook page, the Defendant Company could not confirm whether in fact, any adverse effect had resulted from the said post.

Also, the Identity of the said Yomann Yomann could not be established, a confirmed by the Defendant Company.

The Defendant Company clearly said it could not say whether anyone had seen the said post, conceded that there were no likes or dislikes on its Facebook page in relation to the said post, and that it could not confirm whether any cancellations due to the said post.

There is no concrete evidence on Record for the Defendant Company to show that the said post put at stake its reputation and goodwill (letter of charge (Doc. P2).

It was conceded by the Defendant Company that the Plaintiff had done the said act only once. It therefore follows that the Warning given to the Plaintiff was not in relation to a questionable social media post.

Further, there is no indication as to whether the previous Warning issued to the Plaintiff was in relation to similar issues, the time lapse between the present incident, and the said Warnings, for instance.

In light of all the above, the Court is of the considered view that the Defendant Company has failed to show that it had no other alternative open to it but summary dismissal.

Had the Defendant Company been of the view that the Plaintiff's continued employment with the Defendant Company would be detrimental to its interests (see paragraph 9.2.3 of (Doc. P1)), it could have terminated the Plaintiff's employment subject to the conditions set out in the Law.

Miscellaneous

When the question was put to the Defendant's Representative "*pour ne pas utiliser le mot PD, quelle (sic) est le mot qui est politiquement correct?*", the answer was "*homophobe*".

This was clearly a mistake on the part of the said Defendant's Representative, as the politically correct word would be "*homosexuel*" as opposed to "*homophobe*" which in fact means "*Qui est hostile à l'homosexualité, aux homosexuels*" as per the Online Version of the Larousse Dictionary.

Further, the said Representative produced two photographs (Doc. D2) as regards the values painted on the wall of SBR.

The Plaintiff denied having seen same whilst he was employed by the Defendant Company.

The Defendant Representative's testimony was to the effect that she did not have the exact date when same was painted at SBR, although it was before 2018, adding that the said values had been published in 2014.

Be that as it may, the Court is of the considered view that it cannot act on same (Doc. D2), as there is no way for the Court to determine whether the said values were present at the relevant time in the said restaurant at the Plaintiff's place of Work.

There is no evidence on Record as to any Internet or social media policy the Defendant Company may have had at the relevant time [8].

Nonetheless, at no stage did the Plaintiff raise the said issue or advance the argument that he was unaware of any Internet or social media policy of the Defendant Company.

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 Claim on the Balance of Probabilities, and the Defendant Company is therefore condemned and ordered to pay to the Plaintiff the total sum of Rs383 092.50/- made up as follows:

1) One month's Wages As Indemnity In Lieu Of Notice Rs36 485/-; and
2) Severance Allowance For 38 Months' Continuous Service: Rs346 607.50/-

[8] Ibid.

Rs36 485/- x 3 months (38/12)

Although the Plaintiff has claimed 12% Interests per annum, the Court is of the considered view that 5% Interests on the amount of Severance Allowance only from the date of Judgment is reasonable, and exercises its discretion accordingly.

No Order as to Costs.

[Delivered by: D. Gayan, Ag. President]
[Industrial Court]
[Date: 29 June 2022]