Dodla-Bhemah v Mauritius Co-operative Alliance Ltd

2022 IND 14

CN751/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mrs. Kemwantee Dodla-Bhemah

Plaintiff

v/s

Mauritius Co-operative Alliance Ltd

Defendant

In the presence of:

Mr. Rajesh Unnuth

Co-Defendant And Party In Presence

RULING (NO. 1) (PLEA IN LIMINE LITIS)

By way of Amended Proecipe, the Plaintiff is praying the Court, "in the exercise of its supervisory jurisdiction over the aforesaid disciplinary proceedings, for –

(a) an Order setting aside (i) the aforesaid finding of the Co-Defendant that charge 1 (i) had been established; and (ii) the severe warning administered by Defendant upon the plaintiff;

(b) such further or other relief as the justice of the case may require. With costs".

The Defendant Company has denied the said Claim in its Amended Plea and has moved for the Amended Plaint to be set aside.

The Co-Defendant has, for his part, denied the said Claim in his Amended Plea, and has moved for the Plaint *quoad* him to be set aside.

The Plaintiff was assisted by Learned Senior Counsel, the Defendant Company and the Co-Defendant were respectively assisted by Learned Counsel.

The Proceedings were held in English.

The Defendant Company raised the following Plea In Limine Litis in its Amended Plea:

1. This Honourable Court has no jurisdiction to entertain the present claim of the Plaintiff inasmuch as the Plaintiff was at the material time and is presently drawing yearly wages in excess of Rs 360,000.

2. The present action is misconceived in law.

3. The Defendant therefore moves that the Amended Plaint be dismissed. With costs.

The Co-Defendant raised the following Plea In Limine Litis in his Amended Plea:

1. The Court has no jurisdiction, to entertain the present action quoad the Co-Defendant.

2. The Co-Defendant avers that ex-facie the plaint, there is no cause of action against him.

3. The present action is misconceived in law.

4. In the circumstances, the Co-Defendant moves to be put out of cause. With costs.

The matter was therefore set for Arguments on the Pleas In Limine Litis as set out above.

Case For The Plaintiff

Learned Senior Counsel for the Plaintiff submitted to the effect that the present matter was a disciplinary one, and inter alia referred to the **Industrial Court Act** (hereinafter referred to as **ICA**), to the **Labour Act** (hereinafter referred to as **LA**) and to the **Workers' Rights Act 2019** (hereinafter referred to as the **WRA**), and to the Authorities of **United Bus Service Ltd v Gokhool [1978 MR 1]**, **Raman v United Bus Service [1986 MR 182]**, and **De Maroussem v Société Dupou [2009 SCJ 287]** to support his Submissions that the Industrial Court did have jurisdiction in relation to disciplinary matters, and that therefore, both Pleas In Limine Litis should fail.

Learned Senior Counsel for the Plaintiff conceded that it was an admitted fact that the Plaintiff earned more than Rs360 000/- and hence did not fall within the definition of "worker", but added that this was of no consequence, as the Law relating to discipline applied to the Plaintiff irrespective of the level of remuneration.

In Reply, Learned Senior Counsel for the Plaintiff submitted that the cases of **Gokhool (supra)** and **Raman (supra)** were binding on the Court, and that the principles as to the jurisdiction of the Court were reaffirmed by the Court of Appeal in 2009 in the Authority of **De Maroussem (supra)**.

Case For The Defendant

In relation to the first limb of the Plea In Limine Litis, Learned Counsel for the Defendant Company submitted that by virtue of s.127(2)(a) of the **WRA**, the applicable Law was the **ERA**.

Learned Counsel for the Defendant Company went on to submit that the **ERA** is listed in the First Schedule of the **ICA**, and that the **ERA** was limited to a worker whose salary was below Rs360 000/- per annum, except in relation to Part VIII. And given that Part VIII was in relation to the protection against termination, the Court has no jurisdiction as there was no termination in the present matter and the "intervention of the court as an exception to the definition of the word worker is only warranted where there is a termination". The Court therefore had "no jurisdiction to adjudicate upon the claims which do not fall under the purview of section 38 of the Employment Rights Act".

In relation to the second limb of the Plea In Limine Litis, Learned Counsel for the Defendant Company referred to paragraph 19 at page 07 of the Authority of **Smegh v Persad [2012] UKPC 23**, and submitted that since a Disciplinary Committee has no statutory status, the Court has no power to intervene, and that "the court can only intervene with regards to adjudicate as to whether the termination is justified or unjustified and to award severance allowance".

Learned Counsel for the Defendant Company went on to submit that "a court of law cannot intervene to order the employer to reinstate the employee", as established in the Authority of **Cahoolessur v Mauritius Telecom [2020 SCJ 59]**.

Learned Counsel for the Defendant Company also referred to some Judgments of the **International Labour Organisation Administrative Tribunal** in support of his Submissions that the Court had no jurisdiction where the sanction imposed on the employee was a Warning.

Learned Counsel for the Defendant Company further submitted that there were no provisions in the **ERA** as regards the Court being able to intervene in relation to disciplinary hearing, but only in relation to Termination, and added that an additional reason why the Court had no jurisdiction is the fact that the Plaintiff is earning more than Rs360 000/- per annum, and moved for the Plaint to be dismissed with Costs.

Case For The Co-Defendant

Learned Counsel for the Co-Defendant joined in the Submissions offered by Learned Counsel for the Defendant Company, and highlighted that the Plaintiff was asking the Court, under its supervisory jurisdiction, to review the Warning, without saying whether the said Warning was unjustified, and submitted that "this particular case is about the administration of a lesser sanction than termination to an employee", and that the Court is limited to what had been provided.

Analysis

The Court has given due consideration to the Submissions made, and to the Authorities referred to, by Learned Senior Counsel for the Plaintiff, and to the Submissions, Authorities, and cases referred to by Learned Counsel for the Defendant Company.

At the outset, Learned Counsel for the Co-Defendant informed the Court that the Co-Defendant was aligning himself on the Defendant Company's Plea In Limine Litis, and the Court has duly considered the Submissions of Learned Counsel for the Co-Defendant also.

In order to avoid repetition, the Court will deal with the respective Pleas In Limine Litis raised by the Defendant Company and the Co-Defendant together.

Plea In Limine Litis

Learned Senior Counsel referred to the case of **Rama v Vacoas Transport Co Ltd [1958 MR 184]** to submit that "that the *plea in limine litis* must be always taken and approached on the assumptions that all the facts in the plaint, are admitted".

The relevant extract from the said case before the Reviewing Authority, is as follows:

> Objections cannot properly [be] heard in limine unless the objector accepts—for the purposes of argument only—all the facts alleged by the plaintiff but argues that, even accepting them, his opponent cannot succeed. Where the objection is based on disputed facts the court must hear the evidence before it can rule on the point of law; the objection cannot be taken in limine. (emphasis added)

From the above extract, the principle enunciated above is that even if the Defendant were to accept the facts alleged by the Plaintiff, for the purposes of the Arguments only, the Defendant contends that the Plaintiff would still not be successful.

Be that as it may , this was not, strictly speaking, made a live issue before the Court, and further the Court is of the considered view that in the present matter, the Pleas In Limine Litis raised by the Defendant and Co-Defendant are "[p]oints which are more appropriately raised *in limine* […]" given their "reliance on the pleadings only and without having recourse to the production of evidence, […] [and which] could dispose of the case and avoid protracted hearing of the whole evidence in the case." (**Avigo Capital Managers Pvt Ltd v Avigo Venture Investments Limited [2019 SCJ 158]**).

Applicable Law

The first issue to be determined is what is the applicable Law.

Learned Senior Counsel for the Plaintiff referred in the course of his Submissions to **WRA**, whereas Learned Counsel for the Defendant Company submitted that the applicable Law was the **ERA**.

The Court is of the considered view that given the Disciplinary Committee took place on 27-04-18, the relevant Law is the **ERA**, pursuant to s. 127(2)(a) of the **WRA**.

Jurisdiction

Worker

The first limb of the Plea In Limine Litis is that the "Court has no jurisdiction to entertain the present claim of the Plaintiff inasmuch as the Plaintiff was at the material time and is presently drawing yearly wages in excess of Rs 360,000.".

The Court is of the considered view that whether the Plaintiff is presently earning more than Rs360 000/- per annum is irrelevant for the determination of the present matter. The relevant consideration is whether the Plaintiff was earning more than Rs360 000/- per annum at the relevant time.

As per s. 2 of the **ERA**, "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.

Ex facie the Proecipe, the Court is of the considered view that s. 33 of the **ERA**, which relates to the Entitlement of Workers in the Sugar Industry, does not apply to the Plaintiff.

The same reasoning applies to s. 40 of the **ERA**, which relates to the Workfare Programme.

Learned Senior Counsel for the Plaintiff conceded that the Plaintiff was earning more than Rs360 000/- per annum and did not come under the definition of "worker".

It is clear therefore that the Plaintiff was earning more than the prescribed Rs360 000/- per annum as basic wage or salary, and did not hence fall within the definition of "worker" as per s. 2 of the **ERA**, for the purposes of the present matter.

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 they are:

1) S. 4;
2) S. 20;
3) S. 30;
4) S. 31;
5) Part VIII;
6) Part VIIIA;
7) Part IX;
8) Part X; and
9) Part XI.

The Legislator has not only set out the Parts of the **ERA** which apply to "workers", regardless of their basic wage or salary, but has also set out the sections of the **ERA** which likewise apply to "workers" irrespective of their basic wage or salary. This clearly illustrates the intention of the Legislator. And it is trite Law that the "legislator does not legislate in vain" (**Curpen v The State [2008 SCJ 305]**).

Now, the present action arises pursuant to s. 38 of the **ERA**, following a Disciplinary Committee, and s. 38 of the **ERA** is under Part VIII of the **ERA**, which is one of the Parts of the **ERA** which applies to "workers" regardless of their basic wage or salary.

The Court is therefore of the considered view, given the express provisions of the **ERA**, as highlighted above, that the Court has jurisdiction in relation to the present matter, although the

Plaintiff was earning more than Rs360 000/- per annum, and did not fall within the definition of "worker".

Part VIII Of The ERA

The Court has given due consideration to the Authorities referred by Learned Senior Counsel for the Plaintiff as to the power of the employer to impose disciplinary sanctions on employees, subject to the control of the Court.

It is trite Law that an employer has a right to impose sanctions on an employee, and that the Court is to determine whether the sanctions which were imposed on the employee were justified in the circumstances of the case.

The Court is however of the considered view that the Court's jurisdiction can be invoked in limited situations only.

It is not disputed that the Court would have jurisdiction in case of termination of employment.

In relation to suspension, Learned Counsel for the Defendant Company submitted that given Part VIII of the ERA was limited to termination, the Court has no jurisdiction in the present matter, as there is no termination.

True it is that Part VIII of the **ERA** relates to the "Termination of Agreement". The Court however notes that s. 38(7) of the **ERA** provides for suspension "pending the outcome of disciplinary proceedings against the worker on account of the worker's misconduct or poor performance". (emphasis added)

This means that a worker may be suspended until the determination of the Disciplinary Committee.

Further, the Court notes s. 38(9) of the **ERA** provides that "any suspension without pay as disciplinary action following a hearing shall not exceed 4 working days". (emphasis added)

The Court is of the considered view that given the "legislator does not legislate in vain" (**Curpen (supra)**), and given the Legislator chose to specify the sanction of suspension as "disciplinary action following a hearing", as highlighted above, illustrates his intention in relation to the Court's jurisdiction, in cases where there is a suspension but no termination.

The Court is therefore of the considered view that termination of employment is not the only sanction envisaged in s. 38 of the **ERA** and that suspension is a disciplinary measure envisaged under the **ERA**.

The Court therefore finds that it does have jurisdiction in cases where there is a suspension, but no termination.

This being said, the Authorities referred to by Learned Senior Counsel for the Plaintiff can be distinguished from the present matter.

In the Authorities of **Gokhool (supra)** and **Raman (supra)**, which were decided on the basis of the applicable Law at the relevant time, the Court had jurisdiction given the fact that the employees were suspended, and were deprived of part of their salary. The sanction therefore had an effect on the said employees' livelihood, with the suspension imposed on the employees resulting in adverse financial consequences for the said employees.

And "the special nature of a worker's salary" (**Raman (supra)**) has been recognised and is therefore afforded particular protection under the Law.

The Court had jurisdiction in the Authority of **De Maroussem (supra)**, which was decided on the applicable Law at the time, given the employee was dismissed, i.e. there was termination of employment.

The sanctions imposed in the said cases were clearly envisaged by Law.

In the present matter, there was no termination, and the Warning administered on the Plaintiff had no adverse financial consequences on the Plaintiff.

Now, there is no express provision in the **ERA** in relation to a Warning as a disciplinary measure, and had the Legislator intended for the Court to have jurisdiction in relation to a Warning, severe or not, as a disciplinary action, this would have been spelt out in the **ERA**.

The silence of the Legislator in relation to a Warning as disciplinary action is very telling, and leads the Court to the conclusion that the Court has no jurisdiction in relation to a Warning administered as a disciplinary action.

To travel outside these specific legal provisions would be tantamount to thwarting the intention of the Legislator, and would further result in the Court acting beyond the powers conferred upon it by Law.

In light of all the above, the Court is of the considered view that the Court's jurisdiction can be invoked in relation to sanctions imposed as disciplinary measures, which are expressly provided by Law, and that given there is no express provision in the **ERA** in relation to a Warning, the Court finds that it has no jurisdiction in relation to a Warning imposed as a disciplinary measure. Hence limb 1 of the Plea In Limine Litis must succeed for this specific reason.

Misconceived In Law

Disciplinary Committee

Learned Counsel for the Defendant Company "submitted that since a disciplinary committee has no statutory status, the court has no power to intervene and the plaint is misconceived in law."

The Court is of the considered view that the above Submissions of Learned Counsel for the Defendant Company are untenable for the following reasons.

S. 38(3)(4)(4A)(4B) of the **ERA** gives a statutory basis to a Disciplinary Committee.

The Court cannot ignore the fact that although the expression "disciplinary committee" is not specifically mentioned in the **ERA**, "disciplinary proceedings" and "disciplinary action" are respectively clearly mentioned in s. 38(7) and s. 38(9) of the **ERA**.

And this is in line with the Authority of **Smegh (supra)** at paragraph 2:

> The relevant statutory provisions are to be found in the (now repealed) Labour Act 1975 ("the 1975 Act"). A contract of employment may be terminated on notice (section 31) or summarily for misconduct (section 32(1)(b)). The worker must be afforded an opportunity to answer a charge of misconduct (section 32(2)(a)) and a dismissal must be effected within 7 days of the completion of a hearing held for that purpose (section 32(1)(b)(ii)(A)). (emphasis added)

The Court is alive to the fact that the Authority of **Smegh (supra)** was decided under the **LA**, whereas the present matter is under the **ERA**, and that s. 32 of the **LA** is not identical to s. 38 of the **ERA**. Be that as it may, the Court is of the considered view that given the disciplinary procedure is expressly mentioned in the **ERA**, this clearly gives a statutory status to a Disciplinary Committee.

What is spelt out in the Authority of **Smegh (supra)**, is that the " […] findings of the committee have no statutory status." (emphasis added)

There is therefore a clear distinction between a Disciplinary Committee and its Findings.

Learned Counsel for the Defendant Company also submitted that there are no provision in the **ERA** for the Court to intervene with regards to the disciplinary hearing.

The following extract from the recent Authority of **Moortoojakhan v Tropic Knits Ltd** [2020 SCJ 343] is found pertinent:

> Further, since the findings of the Disciplinary Committee are not binding on the employer, the question before the Industrial Court was not whether the Disciplinary Committee had erred or not but whether the employer was right, in the light of the evidence available to it, to dismiss the employee. (emphasis added)

It is therefore clear that the Court is not determine whether the Disciplinary Committee had erred, but rather whether the employer "was justified, on the facts before him at the time, to dismiss the" [1] employee.

In light of all the above, the Court is of the considered view that the present action is not misconceived in Law for this reason specifically, given the disciplinary procedure has a statutory basis, which confers jurisdiction to the Court.

Set Aside A Severe Warning

Learned Counsel for the Defendant Company submitted that the Court "cannot intervene to force an employer to re-instate an employee further to a sanction and the sanction is in regard to termination", relying on **Cahoolessur (supra)** to support his Submissions. Learned Counsel for the Defendant Company further submitted in effect that by the same token, the Court cannot intervene to set aside a Warning.

The Court is of the considered view that the Supreme Court in **Cahoolessur (supra)** pronounced itself in relation to the fact that an employee could not pray to be reinstated in his employment and at the same time, pray "for damages for prejudice suffered through defendant's wrongful, unlawful and illegal acts and doings". This would be tantamount to double compensation, in particular given the provisions of s. 46(5B)(a) to the effect that the worker "be reinstated in his former employment with payment of remuneration from the date of the termination of his employment to the date of his reinstatement". (emphasis added)

At any rate, the Supreme Court in **Cahoolessur (supra)** highlighted that "re-instatement is a very limited statutory remedy provided by s. 46(5B) of the Employment Rights Act" which can only be invoked "on the grounds limitatively set out in sections 38 (1) (a) and (d) of the *Act*". [2]

This clearly provides for a remedy other than Severance Allowance, in appropriate, albeit limited, cases, where the Court finds that the termination of the employment was not justified.

[1] **The Northern Transport Co Ltd v Radhakissoon [1975 SCJ 223]**
[2] i.e. the **ERA**

Be that as it may, the issue of re-instating the Plaintiff in her former employment does not arise in the present matter, as it is not disputed that there was no termination and that the Plaintiff is still working for the Defendant Company.

In relation to the setting aside a Warning specifically, Learned Counsel for the Defendant Company referred to Judgments of The Administrative Tribunal of the International Labour Organisation (hereinafter referred to as the ILO) to support his Submissions to the effect that the Court cannot intervene to set aside a Warning, it being only a provisional measure and an administrative sanction, and that any Complaint in relation to same is not receivable *ratione materiae*.

Save for Judgment **E. (No. 3) v EPO** [3] **- Judgment No. 3629**, the Judgments of The Administrative Tribunal referred to by Learned Counsel for the Defendant Company all relate to the specific situation of a Warning given under Circular No 246, which "is meant to alert an employee to the risk of receiving a marking of less than "good" on their forthcoming staff report and to give them adequate time to improve and hence avoid such a marking" [4] .

No specific mention is made of Circular No 246 in the Judgment **E. (No. 3) v EPO – Judgment No. 3629**. However, the said case relates to "a letter sent to the complainant […] to warn her, in the context of the performance evaluation process, that unless her performance improved before the end of the reporting period, she ran the risk of obtaining a rating less than good in her next staff report" [5]. It is therefore clear that the said case relates to the Complainant's "performance evaluation process", i.e. to performance appraisal.

These cases therefore can be distinguished from the present matter.

The Warnings administered in the said cases were administrative measures, in the specific context of performance appraisal.

More fundamentally, a distinction was drawn by The Administrative Tribunal between a Warning administered as a disciplinary measure, and a Warning which is administered in the context "of

[3] European Patent Organisation
[4] **B. (No. 8) v EPO – Judgment No. 3512** at paragraph 2
[5] At paragraph 1

the procedure which concludes in the drafting of a staff report" [6], which The Administrative Tribunal considered to be an administrative act [7], and found "that the Warnings do not constitute the disciplinary measure provided for Article 93(2)(a) of the Service Regulations" [8].

In the present matter, it can hardly be contended that the severe Warning was administered to the Plaintiff in the context of the Plaintiff's performance appraisal, and was given to her to give the Plaintiff the opportunity of improving her performance, before any report is made relation to her performance, and that the severe Warning cannot be taken into account to the Plaintiff's detriment [9].

On the contrary, the Plaintiff was given a severe Warning following a Disciplinary Committee, and which Warning was thus a disciplinary measure, as opposed to an administrative one.

In light of all the above, the Court is of the considered view that the said Judgments of The Administrative Tribunal relate to Warnings of a totally different nature than the one in the present matter, and can therefore be distinguished from the present matter, and that hence the Court cannot act on same.

At any rate, at no stage did Learned Counsel for the Defendant Company address the Court on the binding effect, if at all, of the said Judgments on the Court.

Be that as it may, as highlighted above at *Part VIII Of The ERA*, the Court is of the considered view that it has no jurisdiction in relation to Warnings, as same are not expressly provided under the **ERA**, and that hence limb 2 of the Plea In Limine Litis must succeed for this reason.

In Relation To The Co-Defendant

The Court has duly considered the Submissions of Learned Counsel for the Co-Defendant.

The following extract from the Authority of **Moortoojakhan (supra)** sets out the question to be addressed by the Court as follows:

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[6] **Judgment No. 3433** at paragraph 8
[7] Ibid.
[8] Ibid.
[9] **M. (J.) v EPO – Judgment No. 3697** at paragraph 5

> Further, since the findings of the Disciplinary Committee are not binding on the employer, the question before the Industrial Court was not whether the Disciplinary Committee had erred or not but whether the employer was right, in the light of the evidence available to it, to dismiss the employee.

It is therefore plain that the Industrial Court is not to assess the Disciplinary Committee, but is to determine whether the Employer was justified in terminating the Employee's employment, based on the evidence available to it, at the time.

Further, it is not open to the Disciplinary Committee to decide on any sanction to be imposed on an employee. The employer alone is empowered to decide disciplinary measures against an employee, as per the following passage from the Authority of **De Maroussem (supra),** cited with approval in the Authority of **Smegh (supra)**:

> Furthermore, the employer is not bound by the recommendations of the disciplinary committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court.

It is therefore clear that "[t]he findings of a Disciplinary Committee are not conclusive" (**Moortoojakhan (supra)**), and are "not binding on the employer" (**Moortoojakhan (supra)**), which "may still come to a different conclusion" (**Moortoojakhan (supra)**).

Also, the Authorities [10] referred to clearly set out the principle that the Court is to determine whether the employer, as opposed to the Disciplinary Committee, was justified, in the circumstances of each case, to impose the sanction on the employee.

In light of all the above, the Court is of the considered view that the present action is misconceived in Law quoad the Co-Defendant, inasmuch as it is not within the powers of the Court to set aside the Findings of a Disciplinary Committee, which Findings have no statutory status (**Smegh (supra)**), for all the reasons given above.

[10] **Gokhool (supra)** and **Raman (supra)**

In light of all the above, the Court finds that the Court has no jurisdiction to entertain the present action quoad the Co-Defendant, which action is misconceived in Law, and that ex-facie the Plaint, there is no cause of action against the Co-Defendant, and that therefore the Co-Defendant ought to put out of cause.

Conclusion

In relation to the Defendant, in light of all the above and for all the reasons given above, both limbs of the Plea In Limine Litis are upheld, and the present matter is dismissed.

In relation to the Co-Defendant, in light of all the above and for all the reasons given above, the Court upholds all the limbs of the Plea In Limine Litis raised, and the Co-Defendant is put out of cause.

No order as to costs.

[Delivered by: D. Gayan, Ag. President]
[Industrial Court]
[Date: 16 March 22]