Bertin L.A.K. v Mauritius Freeport Development Company Ltd

2023 IND 35

Cause Number 478/18

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Louis Alain Kersley Bertin

Plaintiff

v.

Mauritius Freeport Development Company Ltd

Defendant

Judgment

In this plaint, **the averments of Plaintiff** are that he had been in the continuous employment of Defendant as *"Manutentionnaire"* since 5.7.2004 pursuant to a written contract of employment. Subsequently, on the 14.1.2018, he was promoted to *"Cariste/Manutentionnaire"*. His monthly remuneration included overtime.

According to his contract of employment, he had to perform a minimum of 180 hours of work per month and he was also entitled to perform overtime duties. Plaintiff has worked overtime on a regular basis whilst in employment with Defendant without any issue and constantly covered at least a minimum of 200 hours of work per month.

During the course of his employment with Defendant, he has always worked diligently and in the best interests of Defendant company and has never been

subjected to any disciplinary action or warning and since 2008, he has never been absent on a sick leave.

On 30.11.2017, he started work at 7.00 a.m. and he completed all his required tasks and left work at 3.00 p.m. At no time he was requested or notified by Defendant company or his Superior, to perform any overtime so that he was never called upon to perform overtime on that day and he left work after completing his tasks at 3.00 p.m. He stands verily advised that any overtime is to be consented by both, the employer and the employee and furthermore, a notice to perform overtime should have been given at least 24 hours to him which was not done.

He was astonished and surprised when he received his suspension letter dated 4.12.2017 from Defendant and furthermore, he had to answer the following charges:

"You have failed to perform the scheduled work/overtime on the 30 November 2017 and having left your place of work without due authorisation and good and sufficient cause at around 15hr00."

Plaintiff went to the Disciplinary Committee on 2.3.2018 and he presented his defence. Subsequently, he was informed by way of a letter dated 6.3.2018 that the charges levelled against him have been proved and thereafter he was dismissed with immediate effect on the ground of misconduct.

The charges that were levelled against him were unfair and unjust and ultimately, he was unfairly/unjustly dismissed. He believes that the true motive behind his dismissal is that he had refused the request of Defendant to implement biometric fingerprint attendance clock in system whereby he had even sought the support of his trade union.

Plaintiff is, therefore, claiming from Defendant the sum of Rs 1,593,370.03/- representing one month's remuneration in lieu of notice and severance allowance for 12 years and 4 months' continuous employment and end of year bonus (pro-rated for the year 2018).

On the other hand, **Defendant in its plea** has averred that Plaintiff was in the continuous employment of Defendant as *"Manutentionnaire"* since 6.7.2004 and was promoted as *"Cariste/Manutentionnaire"* as from 1.1.2008.

Plaintiff's contract of employment was terminated which was fully justified for the reasons and circumstances given below after the Disciplinary Committee having found the charges proved against him, Defendant had no alternative, in good faith, other than to terminate his employment as it could not have condoned such irresponsible and/or unlawful and/or unfair labour practice by Plaintiff and could not have proceeded otherwise than lawfully terminating his employment namely:

(a) Defendant is an economic operator in the logistics sector and assists a wide panoply of businesses to achieve their economic endeavours.

(b) Defendant has about 300 clients which entrust it with the storage and handling of their stock of goods. The clients are thus totally dependent on Defendant.

(c) It is of prime importance that the said clients' goods be made available to them on a timely basis, failing which Defendant would be in breach of its obligations towards its clients and would lose all its business.

(d) Defendant has, therefore, incorporated in its employees' contracts of employment clauses to fit the exigencies imposed by Defendant's clients.

(e) Consequently, Plaintiff's contract of employment, just as the contract of employment of employees in Category D, *inter alia*, provides that the employee's working hours *"est fixé à 45 et votre horaire de travail dépendra de l'organisation du service (permanence d'ouverture 7 sur 7, 24 heures sur 24)."*

(f) The said contract of employment also provides that *"les conditions d'exercice soit régies par le règlement intérieur de société M.F.D."* and the said *"Règlement Intérieur de MFD"* provides, *inter alia*, that *"le nombre d'heures normales qu'un employé des catégories C et D doit fournir est fixé à 45 par semaine pour le personnel des services des opérations et …."* and that *"pour les catégories C et D, les horaires peuvent être modifiés pontuellement selon les besoins de l'entreprise, en particulier pour l'organisation des opérations en deux ou trois équipes"*.

(g) The said *"Règlement Intérieur de MFD"* further provides, *inter alia*, that *''L'employé est requis de faire des heures supplémentaires qui seraient éventuellement nécessaires et demandées par MFD."*

(h) Plaintiff's contract of employment provided for a minimum of 195 hours (4 and 1/3 weeks x 45 hours per week) of work per month and during peak period, Plaintiff even reached up to 318.28 hours of work.

(i) The average number of hours of work per month performed by Plaintiff from 2013 to 2017 are as follows: 2013: 269.44 hours, 2014: 263.46 hours, 2015: 256.24 hours,2016:247.21 hours and 2017: 242.22 hours.

(j) The normal working hours on week days for Plaintiff were from 7 a.m. to 6 p.m. which included 3 hours of structured overtime payment.

(k) Any overtime work required for the day beyond 6 p.m. is normally communicated to Defendant by its clients at around 1.00 p.m., following which Defendant then informs its employees whether arrangements would have to be made for work beyond 6 p.m. or not.

(l) All employees in Plaintiff's category are fully aware of the need to work at least to until 6 p.m. on a daily basis from Monday to Friday and up to noon on Saturday and as averred by Plaintiff himself, he had constantly been doing this during the term of his employment.

(m) Any employee who wishes to leave work earlier and who cannot carry out the structured overtime, is required to timely notify his Manager/ Assistant Manager/Senior Supervisor/Supervisor in the morning when he reports to work or at the time he assumes duty or at such time whenever an unforeseen need arises so that necessary manpower planning is made.

(n) Plaintiff had taken 21 sick leaves in each of 2008, 2009 and 2010. He had previously, on 9 occasions on 24 & 27 March 2017, 27 & 28 April 2017 and 2,3,4,5 & 8 May 2017, taken part in concerted actions, being collective stoppage of work, together with several employees, to put pressure on the Defendant in the course of negotiations for a new collective agreement with the union. Such concerted actions put Defendant's reputation and the livelihood of its employees at risk and jeopardized the Defendant's execution of its obligations, as detailed above, towards its clients.

(o) Defendant has denied that Plaintiff allegedly completed all his required tasks on 30.11.2017 and reiterated that the normal daily working hours extended to 6 p.m. On 30 November 2017, on or around 12.58 p.m., Defendant had been

informed that one of its clients, being also one of its biggest clients and a leading distributor of Fast Moving Consumer Goods (FMCG), would be working up to 9 p.m. on that day. Consequently, Defendant's employees would have to work after 6 p.m. so as to ensure that the said client's products would be on the supermarkets' shelves instead of the client's competitor's products.

(p) Defendant immediately informed all the relevant employees, including Plaintiff, that they would be required to work beyond 6 p.m. on that day.

(q) No employee, including Plaintiff, informed Defendant that he would not be able to work beyond 6 p.m.

(r) However, at around 3 p.m. on 30 November 2017, 34 employees who were expected to work overtime (in department Cold and Dry), left their site of work without due authorisation and good and sufficient cause.

(s) The said 34 employees, including Plaintiff, undertook a concerted stoppage of work which was motivated by the following:

(i) On the morning of the 30 November 2017, the Management of Defendant had a meeting with the Port Louis Maritime Employees Association (PLMEA), which is a union to which the said 33 employees, including Plaintiff, belonged.

(ii) The request of the PLMEA for a special bonus was discussed in the said meeting and the said union was informed that Defendant was unable to accede to that particular demand.

(iii) Following the said meeting, on the same day, PLMEA, without Defendant's consent and authorisation, held a meeting with Defendant's employees in the canteen, being on Defendant's premises.

(iv) After the said meeting in the canteen, the employees, including Plaintiff, abruptly stopped working at 3 p.m. and left their place of work.

(t) This concerted action was meant to put a halt to Defendant's activities on that day and to specifically not allow Defendant to honour its contractual commitments towards its client.

(u) This concerted action was an attempt to pressurise Defendant to adhere to the request of PLMEA for a special bonus.

(v) During previous negotiations, similar sudden stoppages of work had been encountered by Defendant on 24,25 & 27 March 2017, 27,28 & 29 April 2017 and 2,3,4,5,6 & 8 May 2017. Plaintiff had on nine occasions namely on 24 & 27 March 2017, 27 & 28 April 2017 and 2,3,4,5 & 8 May 2017 participated in such stoppages of work.

(w) No disciplinary action had been taken by Defendant for such actions carried out by employees in March, April and May 2017 in order to maintain a spirit of good industrial relations during the negotiation process.

(x) There was no need for Defendant to inform Plaintiff to work until 6.00 p.m. since working until 6.00 p.m. was considered to be in accordance with established customs and practices tantamount to a contractual obligation.

(y) Consequently, before Plaintiff left at 3.00 p.m., he should have informed his supervisor much earlier that he would not be able to work until 6.00 p.m. on that day. He was informed by Defendant that he had to work beyond 6.00 p.m. on that day.

(z) However, Defendant, in November 2017, could no longer allow the irresponsible acts of some employees, including Plaintiff to jeopardise Defendant's reputation and the living of its employees, the more so as the said biggest client's trust in Defendant was put at stake by the stoppage of work which could have resulted in the non-renewal of its contract which could have in turn jeopardised the employment of Defendant's employees.

Thus, Defendant has denied being indebted to Plaintiff in any sum whatsoever and has averred that the termination of Plaintiff's employment was fully justified having nothing to do with the biometric cloak in attendance system of workers meant for the calculation of remuneration of employees only and has moved that the plaint be dismissed with costs.

The case for the Plaintiff rested solely on the evidence given by him in Court which is to the following effect.

He was employed by Defendant on 6.7.2004 as *"Manutentionnaire"* as per Doc.P1 wherein he was on probation for a period of 3 months. In about the year 2008, he became *"Cariste/Manutentionnaire."* He produced his contract of employment after his probation period as per Doc. P2. On 6.3.2018, his contract of employment was terminated after 13 years of service when he was last working as *"Cariste"* as per Doc. P5. He produced his suspension letter with immediate effect dated 4.12.17 from Defendant containing two charges leveled against him as per Doc. P4 in relation to which he was convened to appear before a Disciplinary Committee which was subsequently held on 2.3.18 to answer the said charges namely:

"You have failed to perform the scheduled work/overtime on the 30 November 2017 and having left your place of work without due authorisation and good and sufficient cause at around 15hr00."

He received his termination letter dated 6.3.2018 wherein he was informed that the 2 charges levelled against him as per his suspension letter have been proved before the disciplinary committee and in the circumstances, it could not in good faith take any other course of action but to terminate his employment for gross misconduct with immediate effect as per Doc. P5. As at November 2017, Plaintiff was drawing a basic salary of Rs 17,409.00/- per month as per his pay slip viz. Doc. P3 and for overtime, he obtained about Rs 16,000. He had been doing overtime nearly everyday for the past 13 years. He did 142 hours overtime per month. He went to work at 7.00 a.m. and ended work automatically at 3.00 p.m. so that after 3.00 p.m. it was overtime as per *règlement intérieur* of his contract of employment.

At the Disciplinary Committee, he denied the charges made up against him and gave his explanations.

At some point in Court, he candidly admitted that there was no need for Defendant to give him 24 hours prior notice to do overtime until 6.00 p.m. as it was standard that he ought to have worked daily until 6.00 p.m. If ever he was not able to stay after 3.00 p.m. until 6.00 p.m. then he ought to have informed his Superior early in the morning when he attended work. His Superior would only inform him that he had to stay after 6.00 p.m. until 9.00 p.m. at about 1.00 p.m., otherwise he had to

work until 6.00 p.m. on a normal working day. Then, he decided that because his wife who was pregnant, he informed his Superior that he had to leave at 3.00 p.m. later after midday on 30.11.2017 although in the past he did drop her at home and then came back to work. Then, he further decided that his pregnant wife was not well and that was why he had to leave at 3.00 p.m. on 30.11.2017. He admitted that on that day there was a meeting with his union in the canteen from 12.00 hours to 13.00 hours with other workers and he was present whereby the issue of a special bonus was discussed and that his employer namely the Defendant did not agree to same in the meeting held in the morning. It was after that meeting at 1.00 p.m. that he knew that he would not get that special bonus and he went back to work as well as the other workers. When the question was put to him that he participated in previous concerted stoppages of work on the previous different dates mentioned by Defendant in its plea that he left early as well as other employees when the will of the union was not acceded to by Defendant, he replied that on each of those occasions he left at 3.00 p.m. after having informed his Superior. He admitted that he was a member of the union whereby following a meeting with same and Defendant on 30.11.2017 morning, Defendant did not accede to its request for a special bonus. When the question was put to him that because Defendant did not accede to the request for a special bonus, he left at the time the other employees left in relation to a concerted stoppage of work on 30.11.2017, he replied that he had left at 3.00 p.m. after having informed his Superior, Mr. Emrith Samad. Indeed, the question and answer are given below:

Question: *"Si la compagnie dire ou ki oune arete travail akoze ti ena enn issue lors, ti ena enn problème plutôt lors special bonus. Ki ou ena pou dire?"*

Answer: *"Non, non, mo pas d'accord parski sa jour là, le 30 là, mo madame ti déjà enceinte et mone bisin alle lacaze oussi et ziz pas zis sa, c'est personne panne dire moi faire overtime. Mo pas d'accord seki akoze sa ki li pé dire moi ki mone alle lacaze bonhere 3 heures."*

At some stage, Plaintiff stated *"Mo pas d'accord avec sa charge là parski personne pas ti informe moi pou rester sa jour là, le 30, le 30 novembre là pou rester mais mo pas d'accord ki zot ine dire moi ki c'est pou sa kine met moi dehors akoze sa jour là. "*

He admitted that his employment contract spelt out that: *"Le nombre d'heures de travail par semaine que vous devriez fournir est fixé à 45 et votre horaire de travail*

dépendra de l'organisation du service (permanence d'ouverture 7 sur 7, 24 heures sur 24)." He admitted that in his section which was a FMCG (Fast Moving Consumer Goods) department, on 30.11.2017 there was a request from (PNL) (Pharmacy Nouvelle) which was one of the biggest clients of Defendant around 1.00 p.m., that he was aware that he had to work until 9.00 p.m. and that he was working as *"Cariste"* meaning *"Reachtruck Driver"* as per Doc. P6 and that his importance could not be undermined as the stocks of PNL which were dry goods not frozen ones had to be replenished at supermarkets. He further made his claim as per the breakdown given in his plaint as according to him, the termination of his employment was unjustified.

The case for the Defendant unfolded as follows:

Mr. Trilok Prayag in his capacity as Chief Human Resource Officer and Director of Defendant company gave evidence in Court. He confirmed that Plaintiff was bound by the *règlement intérieur* of his contract viz. Doc. P1 on the day he joined employment with Defendant on 6.7.2004 and he formed part of the Category D of workers as per Doc. D1. Thus, Plaintiff was affected to a department known as FMCG and that sector supported a particular customer viz. PNL and Plaintiff's normal working hours was as from 7.00 a.m. till 6.00 p.m. with 3 hours structured overtime for the purposes of payment only which formed part of the normal customs and practices of that particular department. However, work in that department could go beyond 6.00 p.m. subject to the demands of the customer and the sale that the customer had done during the course of the day. PNL was a customer who served all the supermarkets in Mauritius. So, depending on the sales of the day throughout, may be, in the afternoon around 1.00 p.m., it would know what stock was left in the supermarkets and Plaintiff amongst other workers had to support the exigencies of that customer so that he had to start work at 7.00 a.m. until 6.00 p.m. with 3 hours of structured overtime and could go beyond 6.00 p.m. up to 10.00 p.m. or 11.00 p.m. especially towards the end of the month. Plaintiff had been working in that manner since the inception of the department as per the *règlement intérieur*, so that when he took employment with Defendant as per Doc. P1, being fully aware of Defendant's specificities namely the specific requirements of its business and the market realities where workers were required to perform extra hours, he consented to same. If Plaintiff or any employee from that department wished to leave at 3.00 p.m., he had to inform the Management failing which the latter would consider same as an act of disobedience or misconduct as an arrangement for replacement needed to be done

to ensure that service continuity was not broken down nor affected so that there were no complaints from Defendant's customer about its level of service delivery to replenish the shelves of the supermarkets to avoid competitors' products being put instead. Time was of the essence and Defendant operated seven out of seven days a week to honour the exigencies of customers. Thus, Management had to inform the workers only when they needed to stay after 6.00 p.m. It was not true that Plaintiff had never been absent on sick leave.

On 30.11.2017, in the morning, there was a meeting held by Defendant with a recognized trade union concerning a special bonus which was a last item left for negotiation and the said union was told that it was not granted. Then, on the same day there was a meeting held by the union in the canteen of Defendant with the workers without the express permission and approval of the Defendant. Thereafter, they left work including the Plaintiff at 3.00 p.m. There were similar stoppages of work in the past at Defendant company as negotiations started as early as April/May 2017 as per the plea of Defendant, but Defendant did not take any action. However, after the event of 30.11.2017, Management decided to take actions by having the employees who acted in concerted action suspended. Plaintiff having left work without authorization on that particular date namely on 30.11.2017, his act was unfaithful, un-contractual, disobedient and not acceptable and was definitely a misconduct. Defendant could not in good faith as per the law take any other action but to terminate Plaintiff's employment which had nothing to do with the issue of biometric finger print attendance system.

Mr. Narden Pettapermal gave evidence in Court in his capacity as Dry Operations Manager of Defendant and was Plaintiff's Superior. Plaintiff who was a *"Reachtruck Driver"* worked in the FMCG department and his normal working hours was from 7.00 a.m. to 6.00 p.m. For remuneration purposes, it consisted of 3 hours structured overtime from 3.00 p.m. to 6 p.m. Plaintiff had to work every day. The specificity in the said department, was to prepare orders for the customers and the food sectors and in the afternoon load the lorries to get ready in the morning so that the lorries left the premises early in the morning to reach all outlets. Plaintiff worked in the section for Pharmacy Nouvelle being a specific client. As a *"Reachtruck Driver"* he had to move the goods so that the pickers could prepare the orders. That was a critical element in the chain of command. He was required to move the goods from the store so that they could be loaded on the lorries in the afternoon to be delivered to the

customer early in the morning as per the orders of Pharmacy Nouvelle. It was quite common for Plaintiff to work beyond 6.00 p.m. following a communication from a particular client to Defendant especially at the end of the month and also as from October till December being peak periods.

On 30.11.2017, Plaintiff's got in to work at 7.00 a.m. and his scheduled finishing time was 6.00 p.m. On that day there was a request from Pharmacy Nouvelle at about 1.00 p.m. by email namely from Mr. Dhanesh Khaundun to perform overtime till 9.00 p.m. as per Doc. D4. The Supervisor responsible of the warehouse informed the workers in different sections of the warehouse that they had to work till 9.00 p.m. Upon doing so, he did not receive nor did any member of his team receive any return from Plaintiff that he would be unable to perform such an overtime from 18.00 hours to 21.00 hours. When the instructions were passed and Plaintiff did not react, his reasonable conclusion was that he would continue till 21.00 hours.

On 30.11.2017 at about 11.00 a.m., he received a phone call from Mrs. Martine Cesar, the Manager of Pharmacy Nouvelle, who informed him that Dhanesh, the one responsible based at Defendant for PNL, informed her that there should be an interruption in the distribution of man power at 15.00 hours. Upon being informed of that, he immediately called the responsible officer of the warehouse and some supervisors to enquire with the staff as to what was the issue if ever there was one. There was no answer on their part meaning that there was no issue and he was back at Defendant at about 1.00 p.m. When he entered the yard, he met with one representative of the union to inform him that there was a meeting and Defendant was refusing to send the staff from FMCG to attend that meeting. Then, he explained when he enquired as to whether there was any issue, he was told that there was not. Nevertheless, he went physically to the department and thereat, he met Rajeev Beeharry, a union representative for that particular department. He told him that there was a union meeting in the canteen and the one responsible of the warehouse was refusing to send the staff there. On that day of 30.11.2017, there was no formal request and nor the proper channel was followed for the convening of a union meeting within the workplace of Defendant. He told him that rightly so, it was legitimate that no staff was released to attend that particular meeting on that particular day. He was informed that Plaintiff left his workplace at 3.15 p.m. on that day. He was also informed by the supervisors and the representative of PNL namely Dhanesh that all the staff had left. He immediately rushed there to see what could be done and saw that all workers of that particular department which was S10 had

abandoned their place of work as they were supposed to work till 6.00 p.m. and that at 3.00 p.m. everyone had left. Among those who abandoned their work at 3.00 p.m. there was also the Plaintiff. As a result, Defendant had not been able to deliver the goods on the same day due to lack of man power and it had to move people from other departments to continue the deliveries that had already been prepared. They had to work the following days even during the following weekend in order to update the deliveries. Thereafter, Defendant had lost that customer namely the business of Pharmacy Nouvelle as the latter no longer made use of the service of Defendant. The role of Plaintiff as a *"Reachtruck Driver"* in the team at S10 department of FMCG was crucial as without a *"Reachtruck Driver"*, the Defendant could not operate daily. Because the goods were stacked on the racks. In order to move the goods from the racks and put them on the ground for preparation, Defendant needed a *"Reachtruck Driver"* to put those pallets and approximately 200 pallets were moved per day by Defendant. Without a *"Reachtruck Driver"*, those pallets could not be moved. That operation was critical as everyday that task needed to be done, otherwise the goods could not be prepared. The *"Reachtruck Driver"* was used to put the pallets in stock as well. So, that process was crucial. Checkers or pickers could be replaced but the *"Reachtruck Driver"* was a task that needed dexterity and one had to be well trained to do that because one would be working at 8 metres and 10 metres high. Plaintiff was properly trained to work as a *"Reachtruck Driver"* which was a job that not anyone could do. In his view there was a significant prejudice caused by Plaintiff having abandoned his work on 30.11.2017. Furthermore, on that day, the whole department stopped working. It was not for the first time that such a concerted stoppage of work had taken place within the department and which was linked to union activities as at times there were negotiations in view and at times meetings with Defendant and the union. He believed that it was a means by the union and its employees concerned to put pressure or by trying to impose on the Defendant employer so that the Defendant in the present situation would bow to their requests and exigencies. Plaintiff was convened before a disciplinary committee and he deposed at the said committee. Plaintiff's actions on 30.11.2017 were constitutive of gross misconduct. Thus, Defendant in good faith terminated Plaintiff's employment.

Under cross-examination, he stated that the normal working hours for Plaintiff in that department was from 7.00 a.m. to 6.00 p.m. with 3 hours of structured overtime which had been the case since 2011. If the Plaintiff wished to leave earlier than 6.00 p.m., when he came to work in the morning or he had an urgency to leave, he could inform in the morning or anytime during the day so that arrangements could be

made. On 30.11.2017, Plaintiff did not inform Defendant that he would leave early. On that day there were only 2 members of staff who informed Defendant in the morning that they would leave early. When the relevant employees had to perform overtime, they were informed verbally by Management or himself through the supervisors or the assistant Manager on the floor that they had to do overtime. On 30.11.2017, Plaintiff as well as the other workers were informed through the supervisor and assistant Manager that they had to stay after 6.00 p.m. On that day, it was not because of specifically the Plaintiff but also because of stoppages of work on several occasions before including the Plaintiff so that for that customer PNL, Defendant could not provide the service and became unreliable and in 2019 PNL confirmed that it was leaving Defendant but which was delayed because of the Covid-19 Pandemic. Thus, Defendant lost that customer which was PNL. In the event an essential employee had an emergency, he was allowed to go earlier meaning before 6.00 p.m. and he would have been replaced. But that was not the case for Plaintiff on the material day, as he did not obtain the requisite authorization or permission to do so as he did not request to anyone nor informed anyone for him to leave early at 3.00 p.m.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel for Defendant.

The unrebutted evidence of the two witnesses for Defendant are to the effect that:

1. The normal working hours was from 7.00 a.m. to 6.00 p.m. given the specific department where Plaintiff was posted. It meant that for the purposes of payment only, as from 3.00 p.m. to 6.00 p.m., it was structured overtime. Thus, on a daily basis, Management did not inform the employees of that department that they had to work until 6.00 p.m., it was only when they had to work beyond 6.00 p.m. that they were informed by the supervisors or assistant Manager of the floor at about 1.00 p.m. that they had to stay which was done on the material day so that all the employees of that department including Plaintiff were informed that they had to stay until 9.00 p.m. at the request of one of the biggest customers of Defendant namely PNL. Same was candidly admitted by Plaintiff.

2. Should Plaintiff or any employee not be able to work after 3.00 p.m. on a particular day which was on 30.11.2017, he ought to have informed his

Superior early in the morning when he turned up for work like two employees did. But in the event Plaintiff had an emergency during the day before 6.00 p.m., he ought to have informed his Superior so that needful could have been done for a replacement which he did not do.

3. Plaintiff abandoned his work together with all the other employees posted in his department at 3.00 p.m. following the request of the union of which Plaintiff being a member, was turned down by Defendant namely for a special bonus after the meeting was held in the morning of the same day on 30.11.2017 between Defendant and the union and which was the last item left for negotiation.

4. Following that meeting in the morning, there was another meeting held in the canteen of Defendant between the workers and the union representative without formal authorization of Defendant or without passing through the proper channel to do so. The representative of PNL did inform Management that those employees would stop working on that day at 3.00 p.m. and which was what happened as all of them posted in that department had left at that time.

5. There were several stoppages of work involving the union members in the past when dissatisfied with the decision of Defendant during the negotiation process, whereby the workers including Plaintiff had left early namely at 3.00 p.m. As a result of such continued occurrences, the last one dating back to 30.11.2017, the PNL stopped its business with Defendant thereafter.

6. Furthermore, the job of Plaintiff as *"Reachtruck Driver"* could not be easily performed by someone else as training was needed and dexterity with height so that it was a crucial job in that FMCG dry department.

Plaintiff candidly admitted that he was informed by Management that he had to stay until 21.00 hours on 30.11.2017. Indeed, he further admitted having attended the meeting with the union until about 13.00 hours on that day and then went to work and which concerned a meeting held in the morning between the union and Defendant and where the issue of a special bonus was not acceded to. Thereafter, his pregnant wife being sick, he informed one Mr. Samad Emrith, his Superior, that he would be leaving at 3.00 p.m.

I do not believe Plaintiff when he said that he informed his Superior, Mr. S. Emrith that he was going to leave at 3.00 p.m. on the material day as he himself admitted earlier that he needed to go to his place and also that his wife was pregnant having nothing to do with an emergency. Indeed, he kept repetitively relying on the fact that Defendant did not inform him that he had to stay after 3.00 p.m. so that his contract could not have been terminated because he left at 3.00 p.m. on 30.11.2017 when he himself candidly admitted that it was only when he had to stay beyond 6.00 p.m. that he was to be informed by Management. Furthermore, Plaintiff did not call any witness in Court to support the fact that he informed Mr. S. Emrith after 13.00 hours after his meeting with the union on the material day, that he had to leave at 3.00 p.m. because his pregnant wife fell sick. Indeed, none of the Defendant witnesses conceded in Court that Plaintiff had obtained the permission of Mr. S. Emrith to leave at 3.00 p.m. on that day. Instead, Plaintiff admitted that he had left at 3.00 p.m. on the various dates [as per the plea of Defendant wherein Defendant claimed that Plaintiff participated in several concerted stoppages of work with workers of his union], because he informed his Superior that he would be leaving at that time.

Thus, it is abundantly clear that Plaintiff did not seek the permission of his Superior in order to leave his workplace at 3.00 p.m. on the material day and that on the previous occasions where there were concerted stoppages of work by other employees of Defendant who were concerned with the union of which Plaintiff was a member and Defendant did not take any action then, as it was still negotiation stage.

Furthermore, it is clear enough that Plaintiff did commit a gross misconduct bearing in mind the crucial and huge responsibility he had in his capacity as a *"Reachtruck Driver"* viz. *"Cariste"* whereby he was posted in a department where the PNL was essentially concerned and that he could not be replaced easily by another worker from another department of Defendant in that he disobeyed Management going against its *règlement intérieur* by leaving at 3.00 p.m. on the material day without authorisation. The inescapable consequence of such an act from Plaintiff on the material day having the cumulative effect of his compellingly ongoing participation in concerted stoppages of work involving the union led to the PNL ceasing business with Defendant for having provided an unreliable service cannot be disregarded. The reason being that it is untenable that Plaintiff had to be informed on a daily basis by Management that he had to stay until 6.00 p.m. because a normal working day was as from 7.00 a.m. to 6.00 p.m. as admitted by him that since he joined employment with Defendant, it was part of Defendant's *règlement intérieur* and the exigencies

and customs of the department to which he was posted and to which he consented voluntarily after having been on probation for a period of 3 months.

In the circumstances, Plaintiff being aware that he had to stay until 9.00 p.m. on the material day but after having met the members of his union did not even stay until 6.00 p.m., but left without informing Defendant meaning without authorisation around 3.00 p.m. Needless to add that such a course adopted by Plaintiff was clearly an act of defiance or disobedience on his part which to all intents and purposes cannot be condoned by the Defendant employer.

At this juncture, I find it apt to reproduce the following provisions of Sections 14 and 16 of the Employment Rights Act 2008 below:

*"**14. Normal working hours***

(1) The normal day's work of a worker, other than a part-time worker or a watchperson –

(a) shall consist of 8 hours' actual work, and

(b) may begin on any day of the week, whether or not on a public holiday.

(…)

16. Overtime

(1) Subject to subsection (3) –

(a) a worker and an employer may agree on the number of hours of work to be performed in excess of the stipulated hours where the exigencies of an enterprise so require;

(b) no employer shall require a worker to perform work in excess of the stipulated hours unless he has given, as far as is practicable, at least 24 hours notice in advance to the worker of the extra work to be performed.

(2) A worker who does not wish to work in excess of the stipulated hours on a particular day shall notify his employer, at least 24 hours in advance, of his intention not to work on that day.

(3) Subject to subsection (5), where a –

(a) worker works on a public holiday, he shall be remunerated at twice the notional rate per hour for every hour of work performed;

(b) worker, other than a watchperson, performs more than 90 hours' work or such lesser number of hours as may be specified in an agreement in a fortnight, not being the hours of work referred to in paragraph (a), he shall be remunerated at one and a half times the notional rate per hour for every hour of work performed; or

(c) watchperson performs more than 144 hours of work in any fortnight, not being the hours of work referred to in paragraph (a), he shall be remunerated at one and a half times the notional rate per hour for every hour of work performed.

(4) For the purpose of subsections 3(b) and (c), the day on which a worker is on annual leave shall be reckoned in the computation of overtime.

(5) An agreement may stipulate that the remuneration provided for therein for a pay period includes payment for work on public holidays and for work in excess of the stipulated hours where –

(a) the maximum number of public holidays; and

(b) the maximum number of hours of overtime on a day other than a public holiday,

covered by the remuneration are expressly stated for in the agreement."

Therefore, it is clear from the above provisions pursuant to Sections 14(1)(a) of the Act, the stipulated working hours on a normal working day are eight so that in the present case it should have been from 7.00 a.m. to 3.00 p.m.

However, in the same breadth, Section 16(1)(a) of the Act has envisaged the possibility where a worker and an employer can agree on the number of hours of work to be performed daily by that worker in excess of the stipulated hours (viz. from 7.00 a.m. to 3.00 p.m.) where the exigencies of an enterprise so require namely as in the present case by virtue of its *règlement intérieur* so that it is from 7.00 a.m. to 6.00 p.m. on a normal working day. That is why, when it is unrebutted that Plaintiff on a normal working day, he had to work as from 7.00 a.m. to 6.00 p.m. and that from 3.00 p.m. to 6.00 p.m., it was termed structured overtime, Defendant did not

offend Section 14(1)(a) of the Act and which was purely in the sense of remuneration when read together with the provisions of Section 16(1)(a) of the Act.

Now, given the *règlement intérieur* of the Defendant where a normal working day had to be from 7.00 a.m. to 6.00 p.m., it would obviously be impracticable for it to give at least 24 hours' notice in advance to the worker of the extra hours to be performed daily pursuant to Section 16(1)(b) of the Act, above the stipulated 8 hours pursuant to Section 14(1)(a) of the Act namely as from 3.00 p.m. to 6.00 p.m. the more so as it is needed on an ongoing basis for each normal working day. Even, in the event the worker has to stay after 6.00 p.m. until 9.00 p.m., the employer will only know at about 1.00 p.m. on that same day by its customer that its employees of the said department will have to perform overtime until 9.00 p.m. so that then as well such notification by the Defendant employer of at least 24 hours in advance to its Plaintiff employee to stay after a normal working day's working hours is impracticable for the Defendant.

Plaintiff, on the other hand, who does not wish to work in excess of the stipulated 8 hours [by virtue of Section 14(1)(a) of the Act meaning from 7.00 a.m. to 3.00 p.m.] on a particular day, it is practicable for him to notify his Defendant employer, at least 24 hours in advance, of his intention not to work after 3.00 p.m. on that day and which Plaintiff did not do on the material day. It is clear enough that it was impracticable for him to do so, not because there was an emergency in relation to his pregnant wife but that he was awaiting the decision of his union until 13.00 hours on that day and where he was present at that meeting.

It is apposite to note that it is stipulated in Section 16(1) that it is subject to subsection (3) which is in turn subject to subsection (5) of the Act. However, both subsections (3) & (5) are relevant for the purposes of remuneration only and which is not in dispute in the present case, because, it is not disputed that as from 3.00 p.m. to 6.00 p.m. on a normal working day, it is termed as structured overtime so that overtime rate was paid to the workers by Defendant. Given the nature of the business of Defendant and the type of contract of employment of Plaintiff belonging to the category D whereby he was posted at the FMCG dry department, the *règlement intérieur* as per Doc. D1 of the contract was fully warranted.

Hence, I take the view that it is plain enough that Plaintiff had disobeyed the *règlement intérieur* of his contract of employment by having failed to perform his normal working hours on the material day till 6.00 p.m. when he was fully aware that

there was a request for him to stay until 9.00 p.m. by having left his place of work around 3.00 p.m. without informing his Superior or *without due authorisation* together with some other 33 workers and *without good and sufficient cause* as he admitted that he had to leave at 3.00 p.m. on that day when there was no emergency for doing so.

It is worthy of note that there is no evidence adduced whatsoever before this Court to show that both Plaintiff and Defendant had departed from the cases they had already run before the Disciplinary Committee so that it can be safely inferred that the cases run by both of them at the said committee have been corroborated in Court.

Thus, I hold that the Northern Transport Principle endorsed in the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] has not been infringed.

Therefore, the case Plaintiff had run before the Disciplinary Committee that his normal working hours ended at 3.00 p.m. daily on normal working days and that he had to be requested to perform overtime until 6.00 p.m. by Defendant or else his work was deemed to finish at 3.00 p.m. cannot be successfully invoked in the circumstances in order for him to dissuade his employer so that he could keep his job (see- **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343]). Indeed, the case run by Plaintiff at the Disciplinary Committee has reinforced the case run by Defendant at the said Committee in that the failure of Plaintiff to have notified Management on 30.11.2017 that he was leaving his place of work early at 3.00 p.m. was done in order not to allow for the proper arrangements to be made for the necessary manpower for until 9.00 p.m. for PNL in order to pressurize Defendant to give in concerning the special bonus which is in line with a concerted stoppage of work with the other workers viz. about 33 in all in his department to have left at 3.00 p.m. which in turn is in line with other similar previous concerted stoppages of work whereby Plaintiff left at 3.00 p.m. when the negotiation stage between the Defendant and the Union was not over.

I take the view that Defendant complied with the provisions of the law by affording Plaintiff an opportunity to answer the charges leveled against him at the Disciplinary Committee pursuant to Section 38(2)(a)(ii) of the Act and following its finding, Defendant has acted within the ambit of the evidence adduced or versions of facts relied upon by both parties before the said Disciplinary Committee and has also

acted within the ambit of the material of which Defendant ought to have been reasonably aware at the time it took the decision to dismiss so that it could not in good faith have taken any other course of action but to terminate Plaintiff's employment with immediate effect (see- **Smegh** (supra)) so that his dismissal was not unjustified. As regards the item of prorated end of year bonus for the year 2018 claimed by Plaintiff, he was suspended in 2017 on the basis of the charges found in his letter of suspension and thereafter he was dismissed with immediate effect following the finding of the Disciplinary Committee of Defendant whereby the charges were proved against him, Plaintiff did not adduce any evidence in order to substantiate his claim on that issue in the sum of Rs 9,428.23 so that his claim for that item lamentably fails.

For all the reasons given above, the case for the Plaintiff should fail. I, accordingly, dismiss the plaint and make no order as to costs.

S.D. Bonomally (Mrs.) *(Vice President)*
30.5.2023