BAPOO Hans Kenji v/s CHANTIER NAVAL DE L'OCEAN INDIEN LIMITED

2020 IND 1

THE INDUSTRIAL COURT OF MAURITIUS

(CIVIL JURISDICTION)

C N 316/15

In the matter of :

BAPOO Hans Kenji

Plaintiff

v/s

CHANTIER NAVAL DE L'OCEAN INDIEN LIMITED

Defendant

JUDGMENT

Plaintiff is claiming from the defendant the total sum of Rs 378,525 (as amended during the course of trial) representing one month's wages in lieu of indemnity and severance allowance for 99 months' continuous service as he considered that his employment has been terminated without notice and without justification.

Plaintiff averred that he was in defendant's continuous employment as Storekeeper since 20.03.06 and was working on a 5-day week basis. He was remunerated at fortnightly intervals at the rate of Rs 14,700 monthly as basic wages. On the 29.06.14 which was a Sunday he sent a SMS to his Supervisor Mr Roby Panier requesting for an urgent annual leave for Monday 30.06.14, following which the latter replied him through SMS to say "Nou en plein l'inventaire, to pas capave mette sa pour demain", to which the plaintiff replied by another SMS that his request for an urgent annual leave was very important.

It is further averred that Mr R Panier agreed to the plaintiff's request by replying via SMS "Ok" to confirm same and thus plaintiff remained absent on 30.06.14. Thereafter by letter dated 01.17.14 Defendant suspended him from duty and he was convened to attend a disciplinary committee on Tuesday 08.07.14 to answer charges as mentioned therein. The meeting was rescheduled on 09.07.14 to which he attended and was assisted by his trade union representative, Mr R Chuttoo. He denied the charges but by letter dated 15.07.09 defendant terminated his employment. Plaintiff considered that defendant has terminated his employment without notice and without justification. Hence his claim from defendant in the total sum of Rs 378,525 particularised as follows:

(a) 1 month's wages as indemnity in lieu of notice ..... Rs 14,700
(b) Severance allowance for 99 months' continuous service .....Rs 363,825

TOTAL Rs 378,525

Plaintiff is further claiming 12% interest per annum on the amount of severance allowance payable as well as compensation for wages lost and expenses incurred in attending Court.

In its plea defendant averred that plaintiff started work as Store helper and was then employed as Storekeeper as from 1st May 2009 drawing a monthly basic salary of Rs 14,700. It admitted that a SMS was sent to plaintiff's Supervisor Mr Panier on 30.06.14 and that the latter replied through SMS to postpone the leave for tomorrow but upon plaintiff's insistence he agreed to his request. Defendant further admitted that by letter dated 01.07.14 plaintiff was suspended from duty and was convened to a disciplinary committee. It averred that the plaintiff was charged for failing to report to work during annual stock take when he was duly aware that no local leave would be granted during that period. Furthermore plaintiff requested a local leave less than 48 hours before the said leave, contrary to the "règlement interne" of the defendant. The plaintiff by his absence jeopardized the good running of the defendant's operations inasmuch as the stock take could not be completed in one day, as it should have been. Defendant also averred that in the past plaintiff has been the subject of unauthorized absences and on the 3rd July 2012 plaintiff was suspended then reinstated and was given a warning for having been absent during stock taking namely on the 30th June 2012.

Defendant further averred that during the disciplinary committee plaintiff admitted that his request for an "urgent local leave" was in fact for a sick leave since he had been allegedly suffering from a severe tooth ache and had to go to hospital on Monday 20th June for treatment and he produced a hospital attendance to confirm same. Plaintiff also stated that he had not

requested for a sick leave because he would have lost his end of year bonus. In view of same plaintiff's trade union representative asked for defendant's compassion and even admitted that the plaintiff could have committed a misconduct by applying for a local leave instead of a sick leave.

Defendant conceded that plaintiff's employment was terminated on 15.07.14 based on the findings of the disciplinary committee which found all the charges against the plaintiff proved and concluded that the plaintiff defrauded the defendant by applying for an urgent local leave when it was in fact a sick leave. It further averred that the leave of the 30th June 2014 was not as per the plaintiff's record the first time that he was absent on a day of stocktaking exercise. Hence in view of all the above the defendant could not in good faith take any course of action than to terminate the plaintiff's employment in view of his gross misconduct and breach of trust in his relationship with the defendant. Hence the defendant considered that the plaintiff's termination of employment was fully justified and thus it is not indebted to the plaintiff in the sum claimed or in any sum whatsoever. It therefore moved that the present action be dismissed with costs.

Plaintiff's case

At trial plaintiff was assisted by the representative of the Permanent Secretary, Ministry of Labour, Industrial Relations, Employment and Training.

Plaintiff deposed under oath and maintained all the averments mentioned in the plaint. He produced his contract of employment (Doc.A) as well as a pay slip (Doc.B). He maintained that his request through a SMS to his Supervisor for an urgent local leave for the 30.06.2014 was acceded to by the latter who after having replied to him to take the local leave on the next day finally sent him a SMS "OK" after he had told him that he urgently needed this local leave. Plaintiff explained that when his Supervisor had replied to his request for an urgent local leave by "OK" he understood same to mean that his request had been accepted and therefore he did not have to attend duty on that date i.e on the 30.06.2014. He stated that as at 30.06.2014 the inventory exercise was already completed as same started some two weeks before. It only had to be validated by the Supervisor. He had already finished his work and his Supervisor needed only to verify same.

Plaintiff further stated that on the next day i.e on the 01.07.2014 he attended duty at 7h00 and at about 9h00 his Supervisor called him to his office. He was informed that he was suspended because he did not attend duty and was handed over a letter which he produced (Doc.C). He

conceded that as per the said letter he was convened to attend to a disciplinary committee to be held on the 08.07.2014 at 09h30 to answer two charges as mentioned in the said letter. The disciplinary committee was held on the 09.07.2014 which he attended and was assisted by his trade union representative.

Plaintiff testified to the effect that at the hearing of the committee he denied both charges levelled against him. In respect of the first charge he explained that he was never informed that he could not take any leave during inventory period. He conceded that any request for local leave should be done 48 hours before and that same had to be approved by his Head of Department. He however added that in the past he had applied and granted local leaves on the same day like several other employees of the company. He maintained that when his Supervisor had replied to his request for local leave by "OK" he understood that his local leave had been approved.

Concerning the second charge levelled against him, he denied that his absence had jeopardized the good running of the company's operations. He maintained that the stocktaking operation was already completed and therefore the company would suffer no loss. He further stated that during the disciplinary committee he explained the reason why he took the local leave namely for him to go to the dentist and that he had other things to do as well. He confirmed that following the disciplinary committee he received a letter of termination of employment dated the 15.07.2014 which he produced (Doc.D) informing him that all charges against him had been proved. Plaintiff further added that he apologized for having requested a local leave less than 48 hours. He admitted that in the past namely on the 03.07.2012 he was suspended and was given a warning because he did not attend work during inventory period namely on 30.06.2012 which was a Saturday. He contended that the defendant could have converted the local leave into a sick leave but it should not have terminated his employment, the more so as he had not taken any sick leave. He contended that it was Mr R Chuttoo who told the committee that he did not take a sick leave because this would have affected his attendance bonus. He admitted that he met with an accident in January 2013 following which he has some health issues but he always attended duty and never took leave regularly. He admitted that he committed a "faute" in applying for a local leave instead of a sick leave. But he did not agree that the defendant terminated his employment. Hence his claim in the total sum of Rs 378,525 comprising of one month's notice in the sum of Rs 14,700 and severance allowance in the sum of Rs 363,825. He therefore prayed for a judgment condemning and ordering the defendant to pay him the aforesaid sum.

Under cross examination plaintiff admitted the following facts:

-As per his contract of employment with the defendant he was not entitled to take any leave if no such request was made 48 hours before.

-No employee is entitled to take any local leave during the stocktaking exercise. He was given a warning on the 03.07.2012 because he was absent on Saturday 30 June 2012 at a time when there was an inventory.

Plaintiff maintained that on Monday the 30.06.2014 the stocktaking exercise was already completed. He explained that the inventory started two weeks before the 30.06.2014 and that on the aforesaid date only Mr Perrier was supposed to give his approval. It was the Chief Storekeeper namely Mr Panier who had to show to Mr Perrier all the goods which were already counted. As far as he was concerned he did not have any role to play after the stocktaking exercise was completed but he could not recall whether he said so during the disciplinary committee which was held on the 09.07.2014.

Plaintiff stated that he usually made any request for leave to his Supervisor, Mr Roby Panier. He conceded that when on Sunday he requested for a local leave for Monday he was in breach with his contract of employment because he was not complying with the 48 hours delay. He further conceded that when he sent a SMS to his Supervisor requesting for a local leave for Monday the latter had replied to him to postpone same to the next day. He admitted that though his Supervisor was insisting that he should be present for the stocktaking he did not tell the latter that he had already done his part of work. He did not agree that his Supervisor replied to him “OK” by SMS because he was insisting too much with him for his request of a local leave. He stated that he went to the dentist because he had a tooth ache. He could have gone to the dentist on another date but as he had taken one day’s off because he had certain things to do, so he went to the dentist on the same date.

Plaintiff further admitted that though his Superior Officer told him not to take a local leave during this specific period of stocktaking he nevertheless took a local leave because he had certain things to do and had also to go to the dentist. He confirmed that during the disciplinary committee he was assisted by Mr R Chuttoo,Trade Unionist. He maintained that it was Mr Chuttoo who stated during the committee that he should have taken a sick leave to go to the dentist but that he did not do so in order not to lose his bonus. He conceded that though he heard Mr Chuttoo stating that same could amount to a misconduct he did not take this fact into consideration nor did he afterwards tell the company that he did not agree to what Mr Chuttoo

said before the committee. He agreed that the fact that he did not deny what was said during the committee hence the defendant was entitled to believe that same was true.

It came out that it was not the first time plaintiff had problems in the company. On the 03.07.2012 he was given a warning because he was very often absent without authorization and also because he did not attend work on the inventory date. On the 23.11.2011 he was given another warning due to his absence from work for two days without authorization. He conceded that he should not have asked for a local leave on a Sunday in breach of the company's rules and that he did not attend work on Monday though he knew that the inventory will be carried on Monday. He did not know that the inventory was not yet completed on Monday and he did not agree that this was due to his fault. He further did not agree that due to his absence and breach of his contract of employment namely in relation to the clause of 48h prior notice for any request of local leave he caused disruption in the company's work organization. He conceded that the fact he lied to the company namely that he took a local leave instead of a sick leave the company could no longer trust him. He however did not agree that the company was justified in terminating his employment

In re examination plaintiff stated that since 03.07.2012 when he was given a warning until end of June when his employment was terminated, he did not have any other warning. He further maintained that normally when he has to take a local leave he phoned his Supervisor to inform him. He admitted that as per the contract of employment any local leave has to be applied 48 hours before but in the past he did apply for local leave within a delay less than 48 hours. He further maintained that the fact that his Supervisor replied to his request for a local leave by "OK" he understood same to mean that his leave has been approved. If his reply was "No" he would have reported to work on the next day.

Defendant's case

Mrs Arline Marquet represented the defendant company in the present case. She is posted in the human resource department. She confirmed that disciplinary sanctions were taken against the plaintiff because the latter absented himself from work on a day when there was stocktaking. She further confirmed that it is the company's policy that any application for local leave has to be made 48 hours before and that no worker is entitled to a local leave during stocktaking exercise.

Mrs Marquet stated that plaintiff had a history of repeated absences for which he was given several warnings among which was one absence during an inventory exercise. She further

stated that she was present during the disciplinary committee held against the plaintiff. She confirmed that the plaintiff was represented by Mr Chuttoo who informed the committee that the plaintiff was supposed to take a sick leave but had preferred to take a local leave so as not to lose his sick leave bonus, to which plaintiff did not say anything. She explained that a 10% bonus on the basic salary is allocated to employees who are never absent or who don't take any sick leave. She contended that by lying to the defendant the plaintiff committed a fraud.

Defendant 's representative stated that the company terminated the plaintiff's contract of employment based on the findings of the disciplinary committee. She further added that the company wanted to send a strong signal to all its personnel so that there are no more absences during inventory period. Hence the company had no other alternative than to terminate the plaintiff's contract of employment due to his repeated absences and more particularly his absence during a stocktaking exercise but also because the company could no longer trust the plaintiff who had lied to the management. Hence the defendant considered that the termination of the plaintiff's contract of employment was justified and thus it was not liable to the payment of any severance allowance to the plaintiff.

Under cross examination the defendant's representative confirmed that Saturday was not a working day for plaintiff. However if there is an urgent work and plaintiff is requested to work on a Saturday then he has to inform the company if he cannot attend work. She explained that though 03 July 2012 was a Saturday plaintiff was given a warning for not attending work because though he undertook that he will come to work on that date he did not turn up and did not even inform his employer. Concerning the procedure for an application for local leave, she confirmed that same has to be done 48 hrs before. She further confirmed that though the application is made 48 hrs before, the worker must wait for approval of his leave because it will depend upon his Head of department and whether there is any urgent work. Likewise if a worker applies for a local leave less than 48 hrs - it will all depend whether there is any urgency to take the local leave for same to be approved by the Head of department.

The defendant's representative admitted that there was a SMS sent by the plaintiff to his Supervisor. Following a question by Court she admitted that if a person replies by "OK" to a SMS it means "Yes". She conceded that during the disciplinary committee the plaintiff explained that his wife was sick and he brought her to the doctor and at the same time he went to the dentist. She further admitted that plaintiff showed his good faith in telling the company the truth of what he did on the material date. But she did not agree that the plaintiff did not commit any

fraud. She contended that the plaintiff should not have made an application for local leave and should not have lied to the company.

In re examination she maintained that plaintiff should have informed his employer that he would not be coming to work on the Saturday of July 2012. She stated that at no point in time before the hearing of the disciplinary committee had the plaintiff informed the management or the human resource department that on the material date he had an urgency and had to bring his wife to the doctor. It was only during the disciplinary committee that he said so.

Mr R Panier was called as a witness in support of the defendant's case. He confirmed that in the defendant company plaintiff was working under his responsibility. He further confirmed that plaintiff was absent on a Monday at a time when there was an inventory taking place in the company. He explained that when plaintiff sent him a SMS on Sunday requesting for a local leave on the next day, he told him via SMS that there is an inventory and he cannot take any leave for that day. He confirmed that it is the company's policy that no worker is entitled to any local leave during a stocktaking exercise.

The above witness explained that when he told plaintiff via SMS that he could not take a local leave for Monday the latter replied that he really needed this one day's leave but he did not give him any reason. He admitted that at one point in time he replied to plaintiff's SMS by "OK" which he explained was meant to say to the plaintiff that if he wanted to take a local leave he (Mr Panier) could not do anything. He never approved plaintiff's request for leave. He stated that it is the management and more particularly the human resource department which is concerned with the approval of such application for leave. In that case as there was an ongoing inventory it was Mr Perrier who should have been contacted for approval of any local leave during that period.

Mr Panier explained the importance of an inventory in the company. It involves several persons who had to do the counting of several stalls of goods. Counting usually starts very early in the morning until 8 p.m and sometimes until 11h p.m. When it is finished a report is forwarded to the accounting department but until the accounts department don't give the green light that everything is in order all the employees involved in the stocktaking exercise have to stay because there may be a possibility of recount. An inventory usually lasts for several days and each worker is responsible for a stall and hence if is there is any query or recount for a specific stall it is for the worker in charge of same to do the needful. Hence as plaintiff was in charge of a stall his absence would delay the inventory operation. Mr Panier did not agree that at the material time the inventory exercise was completed. He is the only one responsible to give

directives to his workers to that effect and to authorize them to leave the company to proceed to their place. The inventory is considered as completed when he receives the final report from the accounts department, until then all the workers involved in the inventory must be present for the good running of the company.

Under cross examination he stated that he did not recall whether he told the plaintiff to defer his local leave for the day after (i.e after Monday). He explained that he cannot approve any local leave until the inventory is completed. It is only when the management and the accounts department have already approved the inventory that same is considered to be completed and then he can allow a worker to take a leave. He stated that all employees of the defendant company are aware that they are not allowed to take any local leave until the inventory exercise is completed. He usually approves a worker's leave for any day except during the inventory period. He admitted that he told the plaintiff not to take his local leave on Monday but on the day after – that is when the inventory was completed. He could not recall how many messages were exchanged between the plaintiff and himself. He contended that when the plaintiff insisted on taking a local leave on Monday he could not take any decision and sent the request to the management. He admitted that when he told the plaintiff that he could not take a local leave on Monday it means that the answer to his request for local leave on Monday was a "No". But when the plaintiff insisted he then told him "OK" which he explained means to say that he had to send the request to the management. It is the management which takes all decisions. He did not agree that when he replied "OK" it means to say that the plaintiff could take his local leave. He did not agree either that on the material date the stocktaking exercise was completed. He explained that the report from the accounts department was not yet ready. He however conceded that he had no document in support of his version that as at the 30 June the stocktaking operation was not yet completed.

Following questions by Court the above witness stated that as the plaintiff was working under his supervision any request for sick leave or local leave has to be made to him and then he informed the human resource department. However he will be the person who will at first instance tell the plaintiff either "yes" or "No" to his request for leave. He further stated that on the 30 June when he sent a message "OK" to the plaintiff following the latter's insistance to take a local leave, he meant to say that he had to pass on the information to his Superior Officer but he admitted that he did not tell the plaintiff that he had to do so.

Submissions

Counsel appearing for the defendant submitted that there are two limbs to the present case, the first one relating to the plaintiff's absence on the material date i.e on the 30.06.14 and the second one is in respect of the local leave taken by the plaintiff instead of a sick leave.

As regards the first limb Counsel submitted that the question to be determined is the interpretation to be given to the word "OK". He stated that as per the evidence on record someone cannot be absent during an inventory exercise. However despite previous warning, plaintiff sent a SMS to his Supervisor, Mr Panier asking for a local leave for the next day. The latter's reply was clear – namely that he could not ask for a leave on the said day because of the stocktaking exercise. Plaintiff then sent another message to which Mr Panier replied by "OK". It is the contention of Counsel that there are two views to be attributed to the word "OK" – one interpretation is that Mr Panier has approved plaintiff's request to take the leave and the other interpretation is the explanation given by Mr Panier to the effect that "OK" was meant to put an end to the conversation and to "*remonter l'information vers ses supérieurs*". It was submitted that the plaintiff knew that request for local leave has to be sought 48 hours before. Though plaintiff asked for an urgent local leave he did not aver what was urgent. Hence it was perfectly natural for Mr Panier to consider that when he replied by "OK" it does not mean that he has approved plaintiff's local leave. It was therefore submitted that the word "OK" should be construed in the light of the previous warning and numerous absences of the plaintiff at work. It was submitted that the plaintiff's absence during stocktaking amounts to a misconduct as it necessarily entails a "*disfonctionnemen*t" of the company. The case of **Mauritius Chemical and Fertilizers Ltd v Somauroo Ltd [1984] SCJ 161** was referred to by Counsel .

In respect of the second limb Counsel submitted that plaintiff lied when he took a local leave and this lie came to the knowledge of the management from the plaintiff's representative in the presence of the plaintiff. It was contended that there was no need for the management to convene another disciplinary committee to hear plaintiff's explanations because it was an "aveu" on the part of the plaintiff who did not say anything to that effect. It was thus submitted that this lie is tentamount to a fraud to a system as an employee cannot decide to take a local leave when he should have taken a sick leave just to benefit from the performance bonus. Such a lie has an impact on all the other employees and the company can no longer trust an employee who lied in order not to put his performance bonus at stake. It was therefore submitted that the plaintiff's dismissal was justified.

Analysis

I have carefully analysed all the evidence on record as well as the submissions of Counsel appearing for the defendant.

It is common ground that plaintiff was an employee of the defendant company since 20.03.06 where he was working as Storekeeper. On the 15.07.09 defendant terminated his employment after he was convened to a disciplinary committee to answer two charges levelled against him (Vide Doc.C). It is the plaintiff's contention that the termination of his employment is unjustified and hence his claim for severance allowance. It is however the defendant's contention that based on the findings of the disciplinary committee which found the charges against the plaintiff proved the defendant has no other alternative than to terminate plaintiff's employment as it considered that the latter's acts and doings amount to a misconduct and a breach of trust (Vide Doc.D).

The plaintiff's employment having been terminated on the 15.07.14 the law applicable in the present matter is the **Employment Rights Act (ERA) 2008** as amended by Act No.6 of 2013 which came into effect on the 11 June 2013. The section of the law relevant to the case in hand is **Section 38 (2) of the ERA 2008** which reads as follows:

(2*) No employer shall terminate a worker's agreement –*

(a) for reasons related to the worker's misconduct , unless-

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

(ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his misconduct.

(iii) he has within, 10 days of the day on which he becomes aware of the misconduct, notified the worker of the charge made against the worker;

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

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is subject of an oral hearing, after the completion of such hearing;

In relation to the case in hand the only issue to be determined by the Court is whether the charges levelled against the plaintiff were justified and if so, whether the defendant had no other alternative than to terminate the plaintiff's employment.

At this juncture it is apposite to reproduce the charges leveled against the plaintiff as per Doc.C and which reads as follows:

Charge 1:

You failed to report to work during the annual stock take, requesting a local leave when you have been duly informed by Mr N. Perrier, the Finance and Admin Manager, that during this exercise no local leaves will be granted. Moreover, as per 'reglement interne' of the company, you are fully aware that local leaves should be requested 48hrs before and duly approved by your head of Department .....

Charge 2:

You jeopardized the good running of the operation of CNOI by being absent as the stock take has still not been completed as at today when it should have been completed yesterday.

Charges 1 and 2 are inter related inasmuch as both charges are in relation to plaintiff's absence from work on Monday 30.06.14. Hence the Court will deal with both charges in the same analysis.

It is not disputed that plaintiff was absent from work on Monday 30.06.14. It is also not disputed that on Sunday 29.06.14 plaintiff sent a SMS to his Supervisor Mr Panier to request for a local leave on the next day i.e on Monday to which the latter equally replied by way of SMS that he could not take a local leave on Monday because of the stocktaking process going on in the company and to report same to the following day (See Doc.C). It is also admitted by both parties that plaintiff sent another SMS insisting that he needed an urgent leave for the next day to which his Supervisor then replied "OK" via SMS.

It is the defendant's contention that the plaintiff has not followed the procedures regarding application for local leaves as same should be requested 48 hrs before and duly approved by the Head of department and furthermore as per the company's policy no leave is to be taken during the annual stocktaking exercise – as per charge 1. Hence by taking a local leave on a day on which there was an inventory albeit not following the procedures for application of local leave, defendant considered that plaintiff's absence on the 30.06.14 has jeopardised the good running of the stocktaking exercise which could not be completed - subject matter of charge 2.

The Court is well alive of the evidence on record that it is the company's policy that local leaves should be requested 48 hours before and that generally no employee is entitled to take any local leave when there is an inventory exercise taking place in the company. In fact same has been admitted by plaintiff during cross examination (sitting of 14.11.17, pg 13). However it transpires from the evidence adduced by the representative of the defendant (under cross examination) that sometimes an employee may apply for a local leave less than 48 hrs before and same will be approved depending upon the urgency of such leave (sitting of 20.03.18, pg 14). Therefore whilst it is true to say that there is an established procedure regarding application for local leaves, there are however exceptions to that rule regarding urgent local leaves whereby an employee is entitled to request for an urgent leave less than 48 hours. It also transpires from the testimony of the defendant's representative that whether the application for leave is made 48 hrs before or less, the employee must wait for approval of his leave by his Head of department. Such approval is subject as to whether there is any urgent work to be carried out by this employee. Hence it can be said that there is an existing practice in the company whereby leaves may be granted, though applied for less than 48 hours, whenever there is an urgency for such leave and subject to the approval of the employee's Head of department. As per the own words of the defendant's representative regarding request for urgent leave - "li au cas par cas" (sitting of 20.03.18, pg 14)

As regards the mode of application of local leaves in the company, there is nothing on record as to any established procedure. In fact it can be gleaned from the evidence on record that request for leave namely for an urgent leave can be made by phone or SMS as was the case in the present matter. Indeed it is not disputed that on Sunday the 29.06.14 plaintiff sent a SMS to his Supervisor, Mr Panier requesting for an urgent leave for Monday 30.06.14.

Now turning to the instant issue regarding plaintiff's absence from work on Monday 30.06.14 – subject matter of charges 1 and 2, from the evidence on record it came out that at the material time Mr Panier was plaintiff's Supervisor and Head of department and therefore he was the person to whom plaintiff must make his application for leave. Same is clear from the reply of Mr Panier following a question by Court whereby Mr Panier conceded that as the plaintiff was working under his supervision he had to make his application for leave to him and he will be the one who will then inform the human resource department. He further admitted that he is the person who will approve or not any request for leave made by the plaintiff. It is pertinent to reproduce the questions and answers in relation to the above:

"Q: Donc n'importe ki congé li (meaning the plaintiff) demander que ce soit sick leave que ce soit local leave bisin passe par ou?

A: Oui

……..

Q: Ca veut dire li bizin informe ou?

A: Oui

Q: Mais c'est ou ki pou dire li oui ou non?

A: Oui"

In light of the above it is clear that plaintiff must make any request for leave to his Supervisor, Mr Panier. And this was what he did on Sunday 29.06.14 when he sent a message – namely a SMS to Mr Panier requesting for an urgent leave for Monday 30.06.14. It is furthermore not disputed that Mr Panier equally replied by SMS to the plaintiff to postpone his leave to the next day because of the stocktaking exercise (Vide Doc.C). The Court further bears in mind the undisputed evidence on record that plaintiff sent another SMS insisting that he needed an urgent leave for the next day to which his Supervisor then replied by SMS "OK". Whilst it is true to say that plaintiff has requested for a local leave less than 48 hours before, it cannot be said that he has flouted the procedures regarding application for local leave inasmuch as plaintiff was requesting for an urgent leave, hence it stands to reason that same cannot be made 48 hours before. Further it is on record that plaintiff duly informed his Head of department, Mr Panier of his request for an urgent leave albeit by SMS. As stated above, there is nothing on record that request for leave cannot be made through a phone call or SMS.

Now the other issue regarding charge 1 is whether the plaintiff's request for an urgent leave on Monday 30.06.14 was duly approved by his Head of department as per the established procedure in force in the defendant company. Indeed it is on record that all applications for leave must be approved by the Head of department of the employee concerned. On that score the Court bears in mind the unchallenged evidence on record that upon the plaintiff's insistence for an urgent leave for Monday 30.06.14 the plaintiff's Supervisor, Mr Panier sent him the following reply by SMS namely "OK". It was submitted by Counsel appearing for the defendant that the whole issue here is the interpretation to be given to this word "OK". It is the plaintiff's contention that by replying "OK" he considered that his leave for Monday 30.06.14 was approved whilst the defendant contended otherwise. As per the version of the sender of the said

message namely Mr Panier by “OK” he meant to say that he had to send the request to the management . In his own words in Court by “OK” he meant *“bizin remonte l’information au niveau de la direction” (see sitting of 20 March 2018 at pg 40).*

However the Court is of the considered view that the interpretation given to the word “OK” by Mr Panier is most farfetched and unreasonable especially in our Mauritian context where people though conversing in creole usually use both English and French words in their conversation. Indeed the word “OK” or “okay” is an English term which all Mauritians use in their everyday language and conversations to express approval. In fact the word “OK” is defined in the **Concise Oxford dictionary, ninth edition** as a word which expresses *“agreement or acquiescence”*. Its french translation is *“bon!, d’accord”* (Harraps Shorter dictionnaire). Therefore the Court does not find any ambiguity in the second SMS sent by Mr Panier replying “OK” to the plaintiff’s insistence to take an urgent leave on Monday 30.06.14. One cannot attribute any other interpretation to the word “OK” used by Mr Panier than the above meaning when replying to plaintiff’s request for an urgent leave for the 30.06.14. If Mr Panier was to seek approval of the management for plaintiff’s request for leave for 30.06.14 because according to him the inventory exercise was still ongoing, then he should not have replied by only “OK” but should have been more explicit in his reply to the plaintiff’s request for an urgent leave.

In light of the above observations the Court is of the view that by replying “OK” to the plaintiff’s request for leave for Monday 30.06.14 Mr Panier gave his approval to same. This therefore explains the plaintiff’s absence from work on the 30.06.14. Whether the stocktaking exercise was still in process it cannot be said that plaintiff did not abide by the company’s rules inasmuch as his leave was duly approved by his Head of department.

Furthermore if Mr Panier would have considered that plaintiff could not be absent from work on Monday 30.06.14 because of the stocktaking exercise he would have plainly and clearly told same to plaintiff albeit by SMS and not instead replied by “OK”. Hence it cannot be said that by being absent on the 30.06.14 plaintiff jeopardized the good running of the defendant company’s operations inasmuch as his absence from work on the said date was duly authorized by his Head of department. The latter was in a better position to decide whether plaintiff’s presence at work was necessary on 30.06.14. If Mr Panier would have felt that plaintiff’s presence was necessary on the aforesaid date he would not have approved plaintiff’s request for leave on 30.06.14.

Taking all the above into consideration the Court finds that charges 1 and 2 were not warranted against the plaintiff and that the latter could not be sanctioned for not attending duty on 30.06.14 when his absence was a duly authorised leave. As elaborated above plaintiff did follow the existing procedures regarding application for an urgent leave and as same has been duly approved by his Head of department the defendant cannot now consider his absence from work on the aforesaid date as having jeopardized the good running of the stocktaking exercise.

Apart from charges 1 and 2, another ground on which the defendant based itself to terminate the plaintiff's contract of employment was the alleged fraud committed by the plaintiff in applying for a local leave instead of a sick leave so as not to lose the attendance bonus (Vide Doc.D). Same reads as follows: *"You declared before the committee that you did not apply for sick leave in order not to lose the attendance bonus. This is unacceptable and is considered as a fraud towards the company."*

It is clear from Doc. C (letter of suspension) that the above ground on which the defendant is equally relying to terminate plaintiff's employment did not form part of the initial charges which were levelled against the plaintiff and for which he was requested to appear before a disciplinary committee. From the evidence on record it would appear that this ground for termination of the plaintiff's employment comes to light to the defendant during the hearing of the disciplinary committee. Indeed from the undisputed evidence on record it came out that it was during the hearing of the disciplinary committee that the representative of the trade union who was assisting the plaintiff informed the committee that in fact plaintiff took a local leave instead of a sick leave so as not to lose his attendance bonus. Though during his testimony in Court plaintiff has denied having said so, however at one point in time during examination in chief he admitted that he committed a "faute" in applying for a local leave instead of a sick leave (See see sitting 14.11.17 at pg 13). In cross examination too plaintiff conceded that he lied to the defendant when he took a local leave instead of a sick leave. Furthermore even if the Court were to believe the plaintiff that he did not say anything to that effect during the disciplinary committee however he admitted that same came from the mouth of the representative of the trade union. Hence as the latter was assisting the plaintiff during the disciplinary committee it stands to reason that whatever the latter said during this hearing came from the instructions given to him by the plaintiff himself.

Now the question which arises is whether there was a need for a further hearing before the defendant could rely on this ground for termination of the plaintiff's contract of employment. It is trite law that the termination of a worker's contract of employment on the ground of misconduct

is deemed to be unjustified if he was not given an opportunity to answer the charges levelled against him. The matter is governed by Section 38 (2) (ii) & (iv) of the ERA 2008 as reproduced above and which stipulates that an employer cannot terminate a worker's employment for misconduct unless the latter has been given an opportunity to give his explanations. In the instant case can it be said that in relation to this particular charge the plaintiff was given such an opportunity before the disciplinary committee held on 09.07.2014 ?

At this juncture it is pertinent to state that the whole purpose of a disciplinary committee is to give to an employee an opportunity to offer his explanations to the charge (s) against him and to give his defense so as to dissuade his employer from terminating his employment. As pointed out by the author **Dr. D. Fok Kan** in his book ***"Introduction au droit du travail mauricien"*** *at pg 423* that the purpose of this "opportunity to answer the charge" was to *"permettre au salarié d'être entendu, de s'expliquer, de présenter sa defense afin justement de persuader l'employeur que le licenciement n'est pas justifié".* In the Privy Council case of **Bissoonauth v Sugar Insurance Fund Board, Privy Council Appeal No. 68 of 2005** (which was a case decided under the Labour Act) the Law Lords adopted the same approach when they stated that *" Section 32(2) (of the Labour Act) is concerned to give an employee an opportunity of dissuading his employer from dismissing him in circumstances where he might otherwise be dismissed. In other words, the primary purpose of section 32(2) is to afford an employee the opportunity of keeping his job"*.

In the case of "Bissoonauth" (supra) there was no hearing held and the appellant (Mr Bissoonauth) was summarily dismissed from work without notice and compensation after he was found guilty of an offence not related to his work. The Judicial Committee of the Privy Council held that the appellant was entitled to a hearing because *"it does not seem entirely fair, or in accordance with the purpose of section 32, that, simply because his misconduct had been the subject of criminal proceedings, an employee should be deprived of the opportunity which is afforded by section 32(2). It is not hard to imagine circumstances where an employee might be able to advance strong mitigating factors to his employer in order to explain why his activities which led to a conviction, and which in the absence of those factors might justify his dismissal, should lead his employer to conclude dismissal was not appropriate, or the only option – see section 32(1) (b) (i)".*

The above case is to be distinguished from the case in hand. In the present matter the plaintiff was convened to a disciplinary committee and was given a hearing. True it is that this specific ground of termination of the plaintiff's contract of employment did not *stricto sensu* form part of

the two charges mentioned in the letter of suspension sent to the plaintiff (Vide Doc.C). But it is however related to the two charges inasmuch as it is in connection to the local leave taken by the plaintiff on the 30.06.14. Furthermore it is on record that this issue of taking a local leave so as not to lose the attendance bonus was raised by the employee himself albeit through the representative of his trade union who was assisting him. Hence the Court is of the considered view that the plaintiff -employee was fully aware of this issue and there was no need to hold another disciplinary committee for him to give his explanations thereon. It was for the employee (plaintiff) to offer his explanations on an issue raised by him during the hearing of the 09.07.14 but as per the evidence on record he chose to remain silent when this issue was raised. The following extracts of the example of the pilfering cook caught red handed illustrated in the Supreme Court case of **Tirvengadum v Bata Shoes (Mauritius) Co. Ltd [1979] MR 133** is of relevance : *"In that …..category, common sense requires us to place a situation where, on entering his kitchen, the employer sees his cook placing two pounds of sugar in her own basket and hiding it under the table. If, on being confronted by the employer, the cook says nothing and runs away, surely one cannot expect the employer to tell his cook, if she comes back to work on the following day, that he proposes to hold Court in his dining room at 10 O'clock to hear her answers before sacking her".* As rightly pointed out by **D Fok Kan** (supra) in relation to this situation *"Si l'employeur n'a pas à convoquer l'employé pour un 'hearing' formel, c'est bien parce que le cuisinier a eu son 'opportunity to answer the charge' quand il "was confronted by the employer and ran away".* This situation is akin to the present one where the employee (plaintiff) himself admitted during the disciplinary committee of having lied to his employer (defendant) so as not to lose his attendance bonus. Hence the defendant is perfectly entitled to act on the admission made by the plaintiff albeit though his representative. There was no need for a further hearing for plaintiff to give his explanations on this issue when such an opportunity was already there for him to do so but plaintiff did not deem it necessary to give his explanations. Therefore it was perfectly legitimate on the part of the defendant to construe this specific act on the part of the plaintiff as a lie.

Now the question arises as to whether this lie amounts to a fraud as contended by the defendant which would warrant the termination of the plaintiff's contract of employment. On that score the Court bears in mind the evidence adduced by the defendant's representative in Court to the effect that the attendance bonus is a well established policy in the defendant's company whereby employees who are never absent or who don't take any sick leave are entitled to a 10% bonus on their basic salary. It stands to reason that this policy was put in place by the management to act as an incentive for employees to be regular at work for the good and

efficient running of the company. Therefore it would defeat the purpose of such a policy if employees tried to circumvent it by being absent from work but still benefitting from the attendance bonus, which the plaintiff did in the present case "en toute connaissance de cause" as he admitted having lied to the defendant. Hence it is perfectly legitimate for the defendant-employer to view such an act on the part of its employee with much concern and to consider same as amounting to a fraud to an existing system which if tolerated will send a bad signal to other employees. The Court is of the view that in so doing the plaintiff committed an act of dishonesty which amounts to a misconduct. In such circumstances the defendant was perfectly entitled to consider same as a breach of trust which had severed the employer-employee relationship. At this juncture I find it apposite to refer to the following extracts from **Jurisclasseur, Droit du Travail, - Licenciement pour motif personnel, fasc 30-42, V** under the heading *"Indélicatesse, malhonnêteté"* namely at ***notes 154 & 158:***

154. *Principe. – Qu'ils soient ou non pénalement répréhensibles, les agissements du salarié sont constitutifs d'une cause réelle et sérieuse lorsqu'ils révèlent un manquement à l'obligation de probité, une fraude, une malversation, une indélicatesse.*

158. *– Fraudes. – Tout comportement frauduleux du salarié vis à vis de l'employeur étant susceptible de constituer à tout le moins un motif réel et sérieux, justifient encore le licenciement, les fausses déclarations et falsifications. Ainsi en est-il par exemple……*

-la fraude d'un salarié dans l'utilisation d'une pointeuse pour empêcher le contrôle de son temps de travail (Cass.soc.,5 mars 1981: Bull. Civ.1981, V,no 187)

Furthermore one can read at ***note 171*** under the heading "*Manquement à l'obligation de loyauté"* the following:

171.- *Reconnaissance.- Le salarié est tenu d'une obligation de loyauté à l'occasion de l'exécution du contrat de travail ….et la jurisprudence sanctionne avec rigueur ses manquements. …….*

Les allégations mensongères, la dissimulation d'un fait, d'un acte en rapport avec l'exécution du contrat de travail ou ayant une incidence sur celle-ci, justifient le licenciement, soit qu'elles constituent une faute, soit qu'elles entrainent la perte de confiance de l'employeur.

……..

La dissimulation des faits ayant une incidence sur l'activité professionelle du salarié, bien que relatifs a sa vie privée, ne retient pas davantage l'indulgence des juges……...

Solliciter un congé pour une raison autre que la véritable justification (Cass. soc., 16 janv. 1985: Cah. prud'h. 1985, p. 98), quelle que soit le mobile de dissimulation (Cass. soc., 15 mars 1983: Bull. Civ. 1983, V, no 157), sont passibles de l'ultime sanction……

Taking all the above into consideration, the Court is of the view that the plaintiff's lie to the defendant can only have the effect of undermining this element of trust which is fundamental in a good employer- employee relationship. As was pertinently held in the case of **Barbe J.B. v Shell Mauritius Ltd [2013] SCJ 202**, a *"breach of trust can in itself be a cause for dismissal*" and the Court cited the following extracts from **Dalloz- Contrat de Travail a Durée Indeterminée (Rupture – Licenciement pour motif personnel : Conditions) Janvier 2014 at Note 434**

"En attachant ses services à un employeur le salarié s'engage à avoir un comportement loyal et honnête. Le manquement aux obligations qui découlent de cet engagement peut constituer une cause réelle et sérieuse de licenciement." (Emphasis added).

Conclusion

In the light of all the above, having found that the acts and doings of the plaintiff in lying to his employer constitute a breach of trust, the Court is not satisfied that the plaintiff has proved his case on a balance of probabilities to the effect that the termination of his employment was unjustified. On the other hand the defendant has satisfied this Court that it could no longer maintain a good working relationship with the plaintiff as the latter by his conduct has breached the bond of trust in the employer-employee relationship leaving it with no alternative course of action than to put an end to his employment.

Hence the present plaint is therefore set aside.

This 31st January 2020

K. Bissoonauth (Mrs)

Ag. President, Industrial Court.