Labonne G. v Intercept Ltd

2022 IND 47

Cause Number 968/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Gervais Labonne

Plaintiff

v.

Intercept Ltd

Defendant

Judgment

In this plaint, it is common ground that Plaintiff was in the continuous employment of Defendant as Handyperson/Driver since 23.5.2011.

He was employed on a 5-day week basis and was remunerated at monthly intervals at the basic rate of Rs 30,900 per month.

By way of a letter dated 24.5.2019, he was requested by Defendant to appear before a disciplinary committee on 5.6.2019 to answer the charges mentioned therein viz.:

"on Friday 15th May 2019, you left the work premises on or about 15:30 hrs, earlier than the normal office closure, without notification of permission whatsoever. Upon verification by the Office Manager on that day, you could not be reached on the company cell phone in your possession."

He appeared before the disciplinary committee on 5.6.2019 and denied the charges.

As regards the rest, the averments are as follows. By way of a letter dated 10.6.19, Defendant terminated his employment on the ground of misconduct.

He considers that Defendant has terminated his employment on 10.6.19 without notice and without any justification.

Plaintiff is, therefore, claiming from Defendant the sum of Rs 785,843 made up as follows – (a) one month's wages as indemnity in lieu of notice: Rs 30,900, severance allowance for 96 months' continuous employment (Rs 30,900 x 3 x 96/12 years): Rs 741,600 and refund of outstanding annual leave for 2019 (Rs 30,900/22 x 9.5 days): Rs 13,343.

Defendant, on the other hand, in its amended plea has averred that Plaintiff despite having been accompanied by a Labour Officer at its disciplinary committee, he deliberately failed to offer any explanation on the charges put to him when so requested and instead, stated the words: *"rien à dire"* each time his explanation and/or version was sought. Plaintiff had been subject to two previous warnings on 6 September 2017 and 15 January 2019 respectively following unacceptable behaviour amounting to misconduct on his part. Furthermore, Defendant had to pay for the costs of repairs among others incurred in the sum of Rs. 49,705.43 as a result of damage caused to a Government vehicle No. 49 RM 10 by Plaintiff following a road accident while he was driving Defendant's vehicle No. 5045 NV 09 which occurred barely one year after he joined employment with Defendant and for which he failed to disclose to it which demonstrated his inherent bad faith and lack of respect towards it throughout his employment. However, I have made abstraction of some averments in the said amended plea in relation to that accident in view of the exclusionary nature of Section 7(2) of the Criminal Procedure Act namely "*the verdict or judgment in the one case shall not be admitted as evidence in the other*" because of the different standards of proof obtained in civil and criminal matters bearing in mind that there is no *"aveu extra-judiciaire"* (see- **Jamodhee v. Jharia & Ors** [2013 SCJ 148]) as he pleaded not guilty to the criminal case of "*driving without due care and attention*".

Nevertheless, Defendant made some *ex-gratia* payment to Plaintiff as averred and his employment was rightly terminated as per a letter dated 10.6.19 on the ground of serious breach of trust and which was fully justified following the finding of guilt of misconduct by the disciplinary committee and as such Defendant was not liable to any payment to him in any sum whatsoever.

Plaintiff gave evidence in Court. He worked daily as from 7.30 a.m. to 5.00 p.m. In the morning, he recorded his presence in an attendance sheet and if ever he ended up late after 5.00 p.m., then he recorded the time he left on the eve on the following morning when he resumed work.

By way of a letter dated 24.5.2019 viz. Doc. P1, he was convened to attend before a disciplinary committee in relation to the charges contained therein. He was not agreeable to the said charges. He attended at the disciplinary committee accompanied by a Labour Officer and when he was asked as to whether he had anything to say as regards the said charges in terms of explanations in terms of his version of facts, he said *"rien à dire"*. He said so because prior to the committee being held, he was offered the sum of Rs.100,000 by Defendant in order to quit his job which he did not accept. At the disciplinary committee, the first thing he was not agreeable was as regards to the date and time in relation to the charges contained in the letter of charges. When he went there, he thought that his colleague was not offered Rs.100,000 and he was not asked to quit his job although he was in the same situation as him. So, he was not agreeable to the charges leveled against him but he did not say anything at the committee as according to him, whatever he would have said in terms of explanations, Defendant had already taken the decision to terminate his employment.

However, in Court he provided the following explanations:

1. He did agree that he left work early without informing Defendant on the material day as he did not use to take lunch on site where he was working with his co-workers and it was only when his work finished that he did so.

2. On the material day of the incident meaning around 15-17 May 2019, it was about 3.45 p.m. that he had 30 minutes lunch at Rivière des Anguilles after having left Bel Ombre.

3. At 4.15 p.m., they already had their lunch and then, he had a colleague who was going to get married and he had to return at his place to help him with the wedding preparations.

4. He was not working alone as he had 2 colleagues working together with him namely Mr. Juste and Mr. Cedric.

5. He had the choice to bring either a Counsel or a Labour Officer to defend him at the disciplinary committee. As regards the cellular phone of Defendant when questioned at the committee, he did not say *"rien à dire"*, but said that it was in his possession but when Defendant phoned him, he did not hear. He received that phone call from Defendant at about 4.50 p.m. but he did not phone Defendant back as its premises were closed after 5.00 p.m.

6. He did not call any of his two co-workers as his witness as he would not have called them in any event and furthermore, he had lost their contact numbers.

7. After the present case was entered, Defendant received a letter from the Government of Mauritius that he was the driver of Defendant's car which was involved in a road accident with a police vehicle and in that respect, Defendant had to incur expenses *inter alia* towards the repairs of that Government vehicle and which fact he did not reveal to the previous director in about 2014 as everyone at Defendant was aware of that fact. According to him, the new director was made aware of the said accident as he was provided with the same transport.

Following the disciplinary committee, he was given a letter of termination of his contract of employment dated 10.6.2019 as per Doc. P2 which he did not accept as he was a good worker and was in charge of a department for eight years with 2 persons working under his orders, although he had received two warnings from Defendant which he considered to be unwarranted. In the second and final warning as per Doc. P6, he was reproached for defying authority, of gross insubordination and of his continual disruptive attitude.

He did not agree that the termination of his employment was justified and although some payment was made to him by Defendant, he did not agree that he was not entitled to any payment whatsoever. Following the termination of his contract of employment, he was being bothered with the issue of that accident by Defendant and had to retain the services of Counsel. Thus, he has claimed the sum

of Rs. 785,843 from Defendant representing severance allowance among other items of remuneration as detailed in his plaint.

Ms. Virginia Paul in her capacity as Administrative Manager of Defendant and Mr. Julio Thomas in his capacity as General Manager of the holding company of Defendant gave evidence in Court. They were both present at the disciplinary committee where Plaintiff was heard concerning the charges made against him in relation to the material day of the incident. Their unrebutted testimonies boil down to the following:

1. On the material day of the incident, Plaintiff was supposed to work at a workplace at Belle Rose. During working hours, meaning before 5.00 p.m., Plaintiff was called at least twice by Ms. V. Paul in her capacity as Office Manager in the presence of Mr. Thomas and he did not answer his Company cell phone.

2. She had to call his colleague Mr. Steve Juste who answered his phone but who lied by saying that he was somewhere near Grand Bassin when they tracked him through the GPS of the company vehicle while talking to him that he was at La Brasserie Road, Curepipe so that they asked him to come immediately at Winners car park at Forest Side which was five minutes' drive from where he was and from where they were from their office at Curepipe. When they met Mr. Juste at the carpark, he was alone in the car without Plaintiff and it was still well before 5.00 p.m.

3. Plaintiff ought to have phoned Ms. Paul as she was the Office Manager, informing her that he would have ended up late at work in order to get her approval not to return to the office should that have been the case.

4. Plaintiff should have phoned her even after 5.00 p.m. as she was the Office Manager of Defendant company at that time and given that her approval was necessary.

5. He was offered some sort of compensation in the sum of Rs. 100,000 prior to the disciplinary committee by Defendant and he accepted a certain amount of money from Defendant.

6. At the disciplinary committee, he did not give any explanation as regards the charges put to him but just said *"rien à dire"* although it was important for

Defendant to know why he was not in the company vehicle and why he did not answer his phone at all and both during working hours on the material day.

7. Indeed, Defendant had to pay for the expenses because of the damage caused by its company vehicle to a Government one following a road accident involving Plaintiff as driver which came as a surprise to Mr. Thomas as he was new. That fact would have been known to Defendant by its previous General Manager but, it was not taken into consideration at the time the decision was taken by Defendant to terminate Plaintiff's contract of employment following the finding of its disciplinary committee.

8. His contract of employment was terminated because of a serious misconduct and a serious breach of trust.

I have given due consideration to all the evidence put forward before me and the submissions of learned Counsel. Although the letter of charges mentioned that the incident happened on 15 May 2019 as per Doc. P1, but as per the letter of termination of his contract of employment viz. Doc. P2, it was in relation to the incident that happened on 17 May 2019, there is no dispute that both parties knew that they related to the same incident so that the Court has referred to the incident as that which happened around 15-17 May 2019.

Now, it is abundantly clear that the case run by Plaintiff at the disciplinary committee in relation to the charges leveled against him on the day of the incident around 15-17 May 2019 was not to dissuade his employer at all so that he could have been kept in employment as he admitted having persistently said *"rien à dire"* when his explanations were sought in terms of his version of facts although at some point he admitted that he did not answer his cell phone at all on that day during working hours. I do not believe him when he said that at the disciplinary committee, he answered part of the charges in relation to the phone call only and not to the rest which is quite far-fetched and cannot be relied upon when he himself stressed that whatever he would have said at the committee according to him, Defendant had already decided to terminate his employment so that he said *"rien à dire"* each time an explanation was sought from him.

Furthermore, in Court, he corroborated the case he had run before that committee by failing to dissuade his employer so that he could keep his job by saying that he did not answer his cell phone belonging to Defendant during working hours and that he went to help a colleague with his wedding preparations when it was still working hours namely before 5.00 p.m. on the material day. Moreover, he candidly admitted that he received two previous warnings by Management bearing in mind that the last warning was a final one because of his defying authority, gross insubordination and his continual disruptive attitude as mentioned therein as per Doc.P6 and that he had been involved in a road accident around the year 2014 while driving Defendant's vehicle and having damaged a Government vehicle as a result of which Defendant had to pay for the costs of repairs among others and that he failed to reveal same to Management.

Defendant, on the other hand, there is no evidence to show that it ran counter to the case it had run before the disciplinary committee in that Plaintiff ought to have informed Ms. V. Paul, his superior namely his Office Manager, that he would have finished late on the day of the incident which he failed to do and that he did not answer his cell phone when called by her more than once during working hours on that day itself. Furthermore, it has remained unrebutted that he was not found in the company vehicle during working hours on that day which means that he had left work earlier than the normal office closure without notification or permission whatsoever precisely as admitted by him that he went to a colleague's place during working hours to help with his wedding preparations which clearly explains which he did not answer his cell phone at that time.

Thus, Defendant rightly concluded that he had left his work premises earlier than the normal office closure, without notification or permission whatsoever which has also been reflected in the finding of its disciplinary committee in that he was found guilty of the said charges in relation to that particular incident.

True it is that at the time Defendant took the decision to dismiss Plaintiff after the finding of its Disciplinary Committee, it did not take into consideration of the issue of the accident which had occurred prior to the incident pertaining to the said charges leveled against him. However, Defendant found that Plaintiff could not be trusted anymore and I hold that the road accident was within the ambit of the material which Defendant knew or ought to have reasonably known at the time it took the decision to dismiss Plaintiff so that the **Northern Transport Principle** as propounded in the

Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] has not been violated.

Hence, I take the view that Plaintiff has lamentably failed to discharge the onus which is placed upon him as employee to dissuade his employer as regards the charges leveled against him so that he could keep his job and that was the reason why he was afforded an opportunity to be heard before the disciplinary committee as conferred by Statute pursuant to the provisions of Section 38(2)(a)(ii) of the Employment Rights Act 2008 in force at that time (see- **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343]). It is apposite to note that It was held in the Supreme Court case of **Plaine Verte Co-operative Store Society v Rajabally** [1991 SCJ 227] that the refusal of an employee to offer his explanations when convened before a disciplinary committee is construed as an act of defiance and justified the employer to dismiss him summarily on that account.

Thus, I find that Defendant has successfully discharged the burden of proof placed upon it in that in view of all the evidence that it was aware or ought to have been reasonably aware in relation to the charges leveled against Plaintiff pertaining to the incident around 15-17 May 2019, at the time it took the decision to dismiss Plaintiff following the outcome of its disciplinary committee, it could not in good faith have taken any other decision (see – **Smegh**(supra)) given that there has been a serious breach of trust between employer and employee having an equal impact on the degree of seriousness of the misconduct committed by Plaintiff although at some point in time some monetary compensation was offered to him and some payment was made to him by Defendant.

For all the reasons given above, I fail to find that the case for the Plaintiff has been proved on a balance of probabilities. The plaint is accordingly dismissed.

S.D. Bonomally (Mrs.) *(Vice President)*
29.8.2022