Ramkurrun B. v Firemount Textiles Ltd

2023 IND 22

Cause Number 4/14

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mr. Brijnath Ramkurrun

Plaintiff

v.

Firemount Textiles Ltd

Defendant

Judgment

The uncontested evidence borne out by the record in relation to this second amended Plaint is that Plaintiff was in the continuous employment of Defendant as Assistant Accountant since 6.1.1998 pursuant to a verbal contract. His terms and conditions of employment were governed by the Export Enterprises [Remuneration Order] Regulations 1984, GN 191 of 1984.

As Assistant Accountant for Defendant, he kept petty cash, verified *inter alia* the bills, deposits and banking of cash money and cheques. He was remunerated at monthly intervals at the terminal basic rate of Rs 20,000/- in line with his pay slip for the month of May-June 2013 as per Doc. A. which also showed that he had 7 untaken local leave and that he also took unauthorized leave.

On 28.5.2013 he was suspended from duty by way of a letter viz. Doc. B. The salient parts of the said document read as follows:

"Management has reasons to believe that you may have acted contrary to your conditions of employment and the best interests of the company, which conduct may have caused prejudice to the company.

You are hereby informed that an internal enquiry is currently under progress and that pending determination of same, Management has decided to suspend you from your duties with immediate effect.

(…) You will be kept informed of the developments and your explanation(s) may be sought, but kindly note that Management reserves its right to such action(s) as it may be advised, including but not limited, to convening you before a disciplinary committee to explain yourself.

Kindly keep yourself available for the enquiry and treat this as very important."

On 3.6.2013 he received a letter of same date from Defendant convening him to appear before a disciplinary committee to answer 9 charges viz. acts of misconduct levelled against him as per Doc. C. The said document mentioned that further to the internal enquiry conducted by Defendant, he was requested to appear before that disciplinary committee on 10.6.2013 whereby he was charged *"with having committed any one or more of the following acts, which taken singly or together constitute gross misconduct"* in the course of his employment as Assistant Accountant.

He attended the disciplinary committee where 2 charges were dropped namely charges 5 and 9. Although he admitted most of them, yet he said he denied the 7 remaining charges on the basis that it was common practice in relation to him, such occurrence could happen, he was authorized by a former Director leading cumulatively to the conclusion according to him that the charges were not serious in the sense that he did not commit them.

The disputed averments of the second amended plaint are as follows:

(a) The charges of misconduct made against Plaintiff were notified to him after 10 days of the day on which Defendant became aware of them.

(b) He attended the disciplinary committee on 13.6.2013 and denied the charges and Defendant could not sustain them.

(c) On 17.6.2013 Defendant terminated his employment. He considers the termination of his employment to be unjustified. He has not been given the prescribed notice of termination of employment nor paid wages in lieu thereof. As at that date of termination of his employment, he has not taken 7 days annual leave for the year 2013.

Plaintiff has therefore claimed the sum of Rs 951,461.54 from Defendant representing one month's wages as indemnity in lieu of notice: Rs 20,000, severance allowance for 185 months' continuous service for unjustified termination of employment (Rs 20,000 x 3 months x 185/12 years): Rs 925,000/- and 7 days' wages in lieu of outstanding annual leave 2013(Rs 20,000/195 hours x 9 hours x 7 days): Rs 6,461.54.

Defendant, on the other hand, has denied liability in its plea which remained the same following the final amendment made to the plaint.

As regards the issue that the charges of misconduct made against Plaintiff were notified to him after 10 days of the day on which Defendant became aware of them, Defendant has denied same and has averred that at no time during the disciplinary committee (at which Plaintiff was represented by Counsel) was this averment made.

It has averred that the termination was done after Plaintiff was given a hearing as provided by law and his termination of employment is justified so that he is not entitled to any claim whatsoever and has prayed that the plaint as amended be dismissed with costs.

The Plaintiff's case rested entirely on the evidence given by Plaintiff himself in Court in relation to the remaining 7 charges as per Doc. C. as follows:

Charge 1. *You are charged with having taken Rs 603 from the petty cash which was entrusted to you by the company and which was under your custody and control in your capacity as assistant accountant of the company without any authorization from and to the prejudice of the company.*

Particulars of the charge: *On 14 May 2013, in your capacity as assistant accountant of the company, you were requested to give a petty cash reconciliation statement to Mr. Sanjay Bhunjan, Finance Manager of the company, but you were*

reluctant to do so. When you eventually did so, there was a shortage of some Rs 603 in the petty cash which was under your custody and control and you have admitted that you took the said Rs 603 for your own personal use.

Evidence: At the disciplinary committee, Plaintiff accepted that there was a shortage of Rs 603 and that it could happen that he had used it. Between 14.5.2013 and 3.6.2013, no sanction was taken against him in relation to the charge and no warning as well was given to him following his explanations given. In Court, he admitted that he took the Rs 603 which was the cause of the shortage in the petty cash reconciliation statement remitted to his Finance Manager, Mr. Sanjay Bhunjan, by him.

Charge 2: *You are charged with having threatened to do bodily harm to Mr. Sanjay Bhunjan, Finance Manager of the company on 14 May 2013.*

Particulars of the charge: *When questioned about the reason as to why you took the Rs 603 (as detailed in charge 1 above) without any authorization whatsoever, you became aggressive and threatened to hit the said Mr. Sanjay Bhunjan with a whisky bottle (which the latter had gifted you some years ago as end of year gift) in front of your colleagues, Mrs. Sheetal Ramtohul and Mr. Chetan Seeburn. As a result of that incident, Mr. Sanjay Bhunjan gave a precautionary measure to the police on 15 May 2013 and the police came to the factory premises and warned you about your conduct.*

Evidence: At the disciplinary committee, Plaintiff stated that it was a false declaration made against him by Mr. Sanjay Bhunjan. The latter gave him a bottle of whisky about the year 2010 which he left it in his drawer and was looking for an occasion to return it to him because he bore a grudge against him. The said Finance Manager sent him an email concerning the petty cash reconciliation statement on 14.5.2013 and which he replied shortly after on the same day and also returned to him the bottle of whisky through a colleague of his namely Mr. Chetan Seeburn as it was the appropriate time for him to do so. His office was separate from that of Mr. S. Bhunjan and then, there was no communication with the said Finance Manager and he did not accept the charge. That incident occurred on 14.5.2013 and he was informed about the charge on 3.6.2013 when he was asked to appear before a disciplinary committee. The charge was not serious as he did not threaten to hit Mr. Sanjay Bhunjan with a whisky bottle. Mr. S. Bhunjan was a witness for the company meaning the Defendant and Mrs. S. Ramtohul who also said at the disciplinary

committee that he threatened to hit him. If it was true it was very serious. Mr. S. Bhunjan had been working for the company prior to him having joined. He had no idea whether Mr. S. Bhunjan was threatened in the past.

Charge 3: *You are charged with late banking of company money contrary to established practice.*

Particulars of the charge: *During the enquiry on 31 May 2013, it has come to the attention of the company that on 26 December 2012, you have received from Mrs. Veena Mudhoo (Expatriate in Charge) the sums of Rs 31,550 [representing amount paid for their air tickets from Mr. Dulal Sarder(Rs 20,550) and Rs 10,000 from Miss Uppal Pavani and work permit fees of Rs 1,000 for Mrs. Sajeda Kathun] and that instead of banking the said Rs 31,550 in the bank account of the company immediately or as soon as reasonably practicable thereafter, you banked the sum of Rs 31,550 on the 31 March 2013. Annex. A1, A2 and A3 refer.*

Evidence: Plaintiff accepted that as per an enquiry done, on 31 May 2013 it has come to the attention of the company that on 26 December 2012, he received the various sums of money from those persons as per that charge. He did not agree that he did not bank those amounts immediately or when free and that the sum of Rs 31,550 was banked on 31.3.2013. The ledger account was not exact as 31.3.2013 was a Sunday and the Bank was closed on that day as per a copy of the calendar produced by him for the year 2013 as per Doc. E. Indeed, he took the liberty to write on Doc. C. emanating from Defendant under Charge 3 that 31 March 2013 was a Sunday. However, Doc. E. produced did not mention for which year the 31st of March was a Sunday. There was a handbook meant for the employees and which he did receive as per Doc. G. containing the rules of the company but it did not mention anything as regards petty cash he said. In the ledger report, it was not mentioned when the money was banked as it was only at the level of the Bank that one would know when he banked the money. When he received the money, part of it he used as petty cash even for a sum of Rs 31,550 as only the sum of Rs 20,000 was banked. The charge was not serious.

Charge 4: *You are charged with having taken money from the petty cash which was entrusted to you by the company and which was under your custody and control in your capacity as assistant accountant of the company without any authorization from and to the prejudice of the company and given it as 'loan' to other company employees like Pravin Sohatee and Hervet J.R. Frederic.*

Particulars of the charge: *During the enquiry on 31 May 2013, it has come to the attention of the company that you have on numerous occasions and without any authorization whatsoever taken money from the petty cash which was entrusted to you and you have given therefrom monies to staff members, among others namely Pravin Sohatee and Hervet J.R. Frederic on terms and conditions best known to yourself and without any authorization from the company.*

Evidence: It was a current practice which Plaintiff continued as was done by his predecessor. He asked his former Director who told him that there was no need for it to be done officially so long as the money could be obtained back. He gave his explanations in that respect following a letter dated 19.7.2012 namely Doc. F. to the Finance Manager as being a current practice to give loans from the petty cash money to the members of staff and even to the Finance Manager on several occasions. He did not agree with that charge at the disciplinary committee. It was a current practice to use that money to give petty cash to 2 other persons and he was authorized to do so by the former Director of the company namely Mr. Devraj Caullee about 1998-2000 and he continued to do that till 2013. He did not have the permission of Mr. S. Bhunjan as he was not supposed to be answerable to him but to the Director.

Charge 6: *You are charged with having threatened Mr. Pardeep Sharma the security officer who had found you sleeping and who had reported same to Factory Manager on Wednesday 15 May 2013 in the presence of Mr. Rakesh Chakoree. The said Mr. Pardeep Sharma gave a statement to that effect as a precautionary measure at Goodlands Police Station on 17 May 2013.*

Evidence: On 15.5.2013, because Plaintiff was stressed on the eve, when he gave the reconciliation statement, he was tired and he went to have some rest in the store and Mr. Pardeep Sharma followed him and then revealed that to the Director. The latter turned up in the company of the Factory Manager and Shipping Officer and he was sitting and was having a rest and woke up immediately. The Director asked him what he was doing there and that he was sleeping and he replied that he just came as he was not feeling well. The Director told him that if he was not feeling well he had to go to the hospital. While he was on his way to the hospital, he told Mr. Pardeep Sharma that what he did was not correct and that was all. Mr. Pardeep Sharma made a declaration to the police on 17.5.2013 as a precautionary measure. He did not have the right to sleep but he was having a rest by sitting on a chair in the store and he did not lie down. He did not seek permission from anyone and the

place was used by the store keeper and his helper. Between 15 May 2013 and 3 June 2013, there was no other letter sent to him, for example, a letter of warning in relation to the charge. The charge was not serious as he did not commit it.

Charge 7: *You are charged with having used company vehicle(s) for your own private use without the authorization of the company on several occasions and in particular on 8 and 15 May 2013 during working hours and whilst you were on duty.*

Evidence: He did not agree to the charge as it was a current practice because the former Director, Mr. Deoraj Caullee, authorized him to use such vehicle which he did for about a hundred times as per the log book during his 13 years' employment. He said at the disciplinary committee that it was a current practice. They were aware as before collecting the key for the vehicle, no one asked him whether he had authorization to do so. He had a driving licence and the keys for the vehicles belonging to the company were found in security shed. The security guards were responsible for the security shed. Those who were higher in the hierarchy could take the vehicles including him as he was never prevented from doing so. He was Assistant Accountant and it was a current practice for him and he was not stopped by anyone as he talked about that to the former Director, Mr. Deoraj Caullee in 2000. It was a current practice since then. He was answerable to the Director at that time, Mr. D. Caullee, and then to Mr. Anil Caullee. He did not ask the latter's authorisation as no one stopped him as it was a current practice.

Charge 8: *You are charged with having, without any authorization whatsoever from the company, unlawfully copied and abstracted confidential information belonging to the company and to its prejudice by the use of 'usb mass storage device(s)'.*

Particulars of the charge: *For the purposes of the enquiry, on the 28th May 2013, Mr. Arvind Kumar Souky, IT Manager of the company examined the computer officially allocated to you. The said personal computer (PC) is known as CCA3 and IP address 192.168.1.175 is allocated to it.*

Mr. Arvind Kumar Souky created a replica of registry user Ramke on the 29th of May 2013 and:

*(a) Software **USBDeview 2.2** was used to extract from the registry all data associated to usb mass storage device(s) connected to that PC prior to 29th May 2013. Mass storage devices were found to be connected on 5/04/2013,*

28/03/2013, 24/01/2013 to the computer this year and same is highlighted in the file 'mass storage jpg' at ***Annex B1****. USBDeview 2.2 simplifies registry navigation for non-technical users and provides a clear view of specific data users are looking for shielding investigator from irrelevant data.*

(b) *Software* ***User Assist 2.4.3.0*** *was used to find out applications executed prior to 29th of May 2013. Document "freecell. png" at* ***Annex B2*** *is a snapshot of the investigation result. Freecell was found to be examined on 13th of May 2013 and 30th of April 2013.*

Evidence: Plaintiff did not agree. His explanations were that in his PC there was not even an accounting software and there were no details. He had to input his data to reconcile his petty cash for the letters that he was sending. He did mostly clerical works not as Assistant Accountant. He was never offered the Pastel course in relation to an accounting software. The PC given to him was for reconciliation of petty cash and emails that he sent. As per Annex. B1 and B2, on 13 May and 30 April there was a usb connected to his PC which were in relation to games were free cell. He was playing games on those two occasions. As per Annex B1, he asked his colleague from the IT department to download 1-2 free software which he did. He was never told that Annex. B1 and B2 by the company that they were confidential information. In relation to that charge, it was a current practice. There were games played by everybody. It was a current practice to play games on the PC of the office. His computer was private to the Defendant for petty cash and he was not allowed to put a pendrive in it and he was not the one who did it. He asked his colleague from IT department to download 2-3 manuals. He did not ask Mr. Caullee if he had the right to copy the programs. He did not ask Mr. Sookhee if he could do so and he was playing a game known as Freecell during working hours but it was for a short while. He was not aware that games could have virus. He used a pendrive belonging to the company, his colleague uploaded from his department and downloaded it on his PC. He wanted to learn more and he found that normal.

Although he denied the charges1,2,3,4,6,7 and 8 at the disciplinary committee, on 17 June 2013, he received a letter of termination as per Doc. D. namely "*Based on the evidence adduced during the said committee and on the findings of the chairperson of the said committee, you are hereby informed that you have been found guilty of gross misconduct.*"

His contract of employment was terminated and which he considered to be unjustified. Subsequently, he went to the Labour Office at Rivière du Rempart and gave a statement wherein he denied the said charges made against him.

Therefore, he made his claim as detailed in his second amended plaint in the sum of Rs 951,461.54. His termination was unjustified as it was due to a grudge against him by the Finance Manager as he had reported him to the Director in the past and those charges made against him were not justified.

In cross-examination, he stated that he started working for the Defendant since 1998 and until the year 2013 there was no problem. The Finance Manager and he were in only one department. As from 2013, he had to appear before a disciplinary committee. As per Doc. B, he was suspended by Defendant and the latter was investigating and that he would be kept informed as it did not wish to take an action immediately. Following the investigation, the Defendant leveled charges against him in relation to which he had to explain. He did not agree that the charges were serious as he did not commit them and as regards charge 1 such thing could happen. At times there was a surplus and at times a shortage in petty cash money. For him all the charges were not serious. At the disciplinary committee he accepted charge 1 as he said he accepted that it was possible that he used that Rs 603. There was a shortage and he admitted that he took that money as it could happen. He did that job for 15 years with the trust of the Director. It was the first time that the Finance Manager asked him to do a reconciliation statement and it was premeditated.

He did not agree that based on the seriousness of all those charges, the Defendant had no choice but to dismiss him.

The Defendant's case was as follows.

Mr. Arvin Kumar Sookhee in his capacity as Manager gave evidence in Court. He had been working for the Defendant for more than 15 years. He remembered that there was an issue concerning IT at Defendant in 2013. He was shown Doc. C. in relation to Charge 8 which he said were entries from the computer. When that incident happened, his Director called him and asked him to do two things namely to make a research as to whether there were usb pendrives put in a particular CPU and whether there were games open and which were played during working hours. He investigated the PC concerned and printed reports which he submitted to his

Director. The reports showed that there were usb pendrives inserted in PC with dates mentioned and on which days games were opened and used by the PC. In practice, a person was not allowed to put a pendrive from external in the CPU belonging to Defendant as pendrives could have virus that could come into their network and which was still the case. He did not know who put the pendrives but as per his report he knew that the pendrives came from external and that were put and it was in relation to the Plaintiff who was also known as Ramke by him. That report was made in relation to the incident regarding Plaintiff and he investigated on that. It was serious as if a virus entered the PC, all production would be paralysed meaning stopped for a few days in order to restore same.

In cross-examination, he said that he received instructions to enquire from Mr. Anil Caullee but he could not remember the date on which he received such instructions to examine the computer and to make a report in relation to it. He agreed that the report as per Doc. C did not contain anything to show that it emanated from which computer but it could be identified that it was from a PC from Defendant's office. He agreed that there was no transfer in that PC in terms of a program, for example, as per the report in terms of an extract from that program. So, he could not confirm if there was confidential information copied from a usb pendrive transferred from a confidential program in relation to the PC of Plaintiff. The FreeCell X was installed by default in all computer windows. His report showed only that it was run on 13 May and that there were a usb pendrive was used 3 times to connect to a computer and a program was opened. That document showed only an external device was used and to connect in the computer. That document showed that there was a breach and there was a risk that it could be serious.

Mr. Abdool Cassam Jharee in his capacity as Transport Officer gave evidence in Court. He had been working for Defendant for 19 years and he was working as Transport Officer for Defendant. If someone needed a vehicle, he had to revert to the Transport Officer who would confirm from Human Resource if the vehicle could be given or not or whether it was available or not. In 2013, there was a charge against Plaintiff in relation to the vehicle taken by him which he could not do without following the procedure of going through the Transport Officer or the Human Resource as it was the procedure of the Defendant company because it could happen that he did not have a driving licence at that time or he was indulged in an accident. But in 2013, he was not a Transport Officer and was not responsible for the vehicles belonging to the Defendant. He did not depose before the disciplinary

committee against Plaintiff. According to him the rules were still applicable at the Defendant company in relation to company vehicles in 2013 as he was aware of same in his capacity as Driver.

Mr. Krishnaduth Bhujun gave evidence in Court in his capacity as Finance Manager of Defendant. He was Finance Manager since November 1990 meaning about 32 years and his function on a day to day basis was supervision of accounting system, payments, receipts, reconciliation and reporting to Management on a monthly basis. He had about 10-12 persons working under his responsibility. He had a personal office for him and there was another outer office where all clerks were seated. In 2013, his office was at the same place in Goodlands and he knew the Plaintiff who started working at their place since 1998 if he was not mistaken. Plaintiff's job concerned a bit like looking at payments from suppliers, payments of petty cash in the sense that he had to ensure that there was a purchase order for a supplier, the latter's bill and then he would check and then process to make the payment. Normally in one day, Plaintiff handled about Rs 5,000 to Rs 10,000 and it was in relation to small expenses for the company and he needed to have cash in hand. In the beginning his relation with Plaintiff was alright but then it degenerated with time as he did not follow the instructions too much.

As per Doc. C on 3.6.2013, Plaintiff had a problem in relation to petty cash in the sum of Rs 603 which was Charge 1. It was a routine every fortnight, he would ask Plaintiff through his clerks all his petty cash expenses for the company to be verified prior to having same recorded on the system. On 14.5.2013, his Director came in his office and asked him to check the petty cash for Plaintiff although he said it was already checked. Then, he sent an email to Plaintiff to that effect and the cash account was given by Plaintiff. Given that there was a shortage of Rs 603, his explanation was that it was possible that he used it for his own personal use as he did not have any receipt or voucher for that amount. He could not use the company's money for his personal use unless he was authorized to do so.

As regards Charge 2, when Plaintiff gave to him that cash account report, he appeared a little vexed and there were the clerks and assistants sitting together in the same department. Plaintiff's office was not too far from his. He appeared very vexed as there was a bottle of whisky which he gave to him as an end of year gift a few years ago, he heard him saying to his assistants to take the bottle and sell it or else he would smash it on his head. He took that as a threat as it was confirmed by one of his assistants, Mr. Chetun Seeburn. He felt a bit frightened as it was a gift

given to him and which he kept for years and that he wanted to aggress him. He did not know that he bore grudges against him as he did have professional clashes but he did not have grudges against anyone. The reaction of Plaintiff was not justified as there was no such behaviour at the office level and he was trying to do something which was a bit violent.

As regards Charge 3, he said that there was late banking of the company's money as far as he could remember. For late banking Plaintiff needed to have authorization from the Director or from him and it was not a current practice and it was serious as the company's money was being used impeding the process of reconciliation and control to be taken care after by the Auditor. He confirmed that there was a slight delay in the banking.

Equally for Charge 4, Plaintiff needed to have authorization to do so. He was not aware that Plaintiff had the authorization from Mr. Caullee, a former Director since 1998-2000. If authorized, it would have been a current practice in relation to the loan issue.

In cross-examination, he stated that he was representing the company in Court and he worked in collaboration with the Directors of the company in relation to its day to day running and as to what to do with regard to Plaintiff. Since 1998 till 2013 when he was dismissed, there was no great problem but there were professional clashes but nothing personal.

As for Charge 1, on 14.5.2013, the Director asked him to do the petty cash reconciliation which was handled by Plaintiff since 1999. Eversince, there were delays for the reconciliation in relation to the handling of petty cash and he showed resistance. All what happened on 14.5.2013 in relation to petty cash in the sum of Rs 603, he reported to the Director immediately. Plaintiff was not accused of larceny at all. It was an error in the accounting which was accepted by Plaintiff. He had to refer the matter to the Director who would have taken the decision to suspend him as the Director was following all that was happening as they were reporting to him. When to suspend Plaintiff depended on the Director.

He stated that Plaintiff threatened him in relation to Charge 2. He was in his office when Plaintiff gave to his colleague, Mr. Chetun Seeburn, that bottle of whisky and he heard what Plaintiff said. He agreed that in his statement given to the Labour Office he said that Mr. C. Seeburn told him that Plaintiff removed that bottle of whisky

from his drawer and asked him to return it to him in an aggressive tone. Plaintiff did threaten him in the past again and there was a police report. He heard Plaintiff saying to take that bottle of whisky and return it otherwise he would smash it and he confirmed that with his assistant. He did not know that the bottle was with Plaintiff and that was why he asked his staff, it was what for as it was being brought in his office. The incident happened on 14.5.2013. It was something serious and Plaintiff had to be suspended immediately according to him. But it was the Director and the Human Resource who had to take those things into consideration in relation to his suspension. Only on 28.5.2013 that he was suspended and between 14 May to 28 May there were more than 10 days. He already gave his statement to the Director concerning that incident as he was instructed by Mr. Caullee to verify the petty cash and the banking.

In relation to Charges 1 and 2, the company was aware since 14.5.2013. As for Charge 3, it was only when the banking was delayed that they would know there was a problem and then Plaintiff would be put any question in that respect.

As for Charge 4, it was a request from the Director. As regards the other charges which did not concern accounts, he was not aware as he was deposing in his capacity as Finance Manager. He did not agree that Plaintiff's dismissal was unjustified and with the monetary claim of Plaintiff.

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

The contention of learned Counsel for Plaintiff is that as per the letter of termination as per Doc. D., it was not specified which charge was proved by the disciplinary committee and which was the result as to why Defendant found that Plaintiff was guilty of gross misconduct. No proper reason was laid forward by Defendant as to why the employee's contract was terminated inasmuch as in its plea it was a bare denial and that Plaintiff was given a hearing as provided by law.

It is significant to note that the Defendant was not restricted only to the charges proved at the disciplinary committee following the evidence adduced there, in order to dismiss the Plaintiff. This is because the Defendant will have to rely on the evidence adduced at the said committee as well as the evidence of which it ought to have been reasonably aware at the time of his dismissal (see- **Smegh (Ile**

Maurice) Ltée v Persad D. [2011 PRV 9])). Therefore, there is no need for all the evidence that ought to be relied in Court to have been canvassed at the said committee as the latter is only a forum where Defendant will have to provide 7 versions of facts to establish misconduct in relation to the 7 charges levelled against Plaintiff and the latter will have to establish dissuasion to prevent his dismissal by relying on his 7 versions of facts sufficient enough for the committee to come to a finding of guilty or not guilty of gross misconduct. As illustrated in the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]), there were 2 witnesses who did not depose at the disciplinary committee for the Plaintiff employee but who deposed at the trial and whose testimonies were decisive in reaching a conclusion by the Court. The Board concluded that their testimonies did not depart materially from the case run by the Plaintiff at the disciplinary committee and that they formed part of material of which Defendant knew or ought to have reasonably been aware at the time Plaintiff was dismissed so that the dismissal was unjustified.

The relevant extract from **Smegh**(supra) reads as follows:

"24. Thus, if Mr Persad succeeded before the Industrial Court on the basis of a case which he did not run before the committee and/or of which Smegh was not and could not reasonably have been aware at the time of the dismissal, then the Northern Transport principle would have been infringed by the Court and the appeal should have been allowed.

25. There is no suggestion that Mr Persad changed his account in a material respect in relation to any of the 3 charges. (…)

26. In the argument before the Board, much was made by counsel for Smegh of the fact that Mr Persad called witnesses who had not given evidence before the committee, notably Mr Cooroopdass and Mr Rajkumarsingh. It is true that the Magistrate was impressed by the evidence of these witnesses and relied on it as corroborating the account given by Mr Persad. But the Board does not consider that this means that there was an infringement of the Northern Transport principle. First, the principle should not be extended to preclude a worker from relying in court on fresh evidence which does no more than support the case which he has always run. As was said in G. Planteau De Maroussem, an employer's disciplinary committee is no substitute for a court of law. It is the court which is given the power to decide whether a dismissal was justified. In the present case, the fresh evidence did no more than corroborate Mr. Persad's account which, in material respects, the

committee had rejected and the Magistrate accepted. Secondly, at the time of the dismissal, Mr Cooroopdass and Mr. Rajkumarsingh were senior executives of the Group of which Smegh formed part. They gave evidence about matters which lay within their own spheres of responsibility. Their knowledge of such matters must be imputed to Smegh. In any event, Smegh could have taken statements from them and called them to give evidence before the committee. In these circumstances, Smegh cannot be heard to say that it was unaware of what they could say.

Conclusion

27. The appeal must be dismissed. The Magistrate reached a conclusion on the facts which was plainly open to him. He heard the witnesses and made an assessment of their evidence. His decision was not perverse or manifestly ill-founded. Indeed, the contrary was barely argued before the Board. The only point of substance that was pressed on the Board was that to some extent the Magistrate based his findings on evidence that was not deployed by Smegh before the committee. But for the reasons given, this cannot avail it on the facts of this case. Since the decision of the Magistrate cannot be impeached, the Court of Appeal was right to dismiss the appeal."

Thus, it is clear that there is no need to rely on all the facts at the said committee that will be used at the trial but only on sufficient facts so that the committee could come with a finding and such facts can be corroborated by further evidence before a Court of law which is the only forum to decide whether the dismissal of the employee by its employer is justified or unjustified. This is because the finding of the disciplinary is not conclusive as the committee does not have the attributes of a Court of law and it is only a forum to afford the Plaintiff employee an opportunity to answer the charges made against him and it cannot entertain any point of law like the issue of breach of statutory delay, for example. The Defendant employer is not bound by the finding of the committee when dismissing the Plaintiff employee (see- **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343]).

Based on the evidence borne out by the record, there was no material departure in Court from the case run by Defendant at the disciplinary committee in relation to the 7 charges of misconduct and the case run by Plaintiff in relation to his dissuasion exercise in relation to the said charges so that he could keep his job at the said

committee. Plaintiff has denied the charges despite his admissions on the basis that it was common practice, such occurrence could happen, he was authorized leading to the conclusion according to him that the charges were not serious in the sense that he did not commit them.

Therefore, it can safely be inferred that both Plaintiff and Defendant corroborated the cases they had already run before the disciplinary committee in Court so that there was no infringement of the Northern Transport Principle. The relevant extract from **Smegh** (supra) is given below:

"19. (…) In G. Planteau De Maroussem v Dupou [2009] SCJ 287, the Supreme Court of Mauritius held that the question whether an employee has been unjustifiably dismissed was a matter for the court and not the employer's disciplinary committee. The court said:

"*The aim of a disciplinary committee, as we have said, is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the disciplinary committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court.*"

20. The Board agrees. It would be remarkable if the exclusive jurisdiction to decide whether a worker has been unjustifiably dismissed in a particular case were to be vested in the employer. The denial to workers of the right of access to a court to decide such a question could only be achieved by the clearest statutory language. (…) It does not provide that the findings of a committee are conclusive. The obligation to afford an opportunity to be heard is no more than an obligatory part of the employer's internal procedure for dismissing an employee.

21. (…) Rather, the argument focused on a principle which found expression in The Northern Transport Co Ltd v Radhakisson [1975] SCJ 223 and has been restated more recently in Mauritius Co-operative Savings and Credit League Ltd v Khulshid Banon Muhomud [2012] SCJ 107. In Northern Transport, the worker who had been dismissed gave one account of the facts to his employer (on the basis of which the employer dismissed him) and a completely different account to the Court

which was deciding whether the dismissal had been unjustified. The Supreme Court said:

"The Magistrate in finding for the respondent accepted the version given in Court by the respondent which is contrary to the one he gave to his employer on the day of the occurrence and which led to his dismissal. In so doing the Magistrate made a wrong approach to the problem posed to him as the issue he has to decide was whether the appellant was justified, on the facts before him at the time, to dismiss the respondent."

22. In Mauritius Co-operative Savings, the employer sought to rely on allegations before the Magistrate which did not form part of the charges which were considered by its disciplinary committee. The Supreme Court applied Northern Transport and held that the Magistrate had been right not to have regard to the new allegations in deciding whether the termination had been justified.

23. The Board would endorse the approach adopted in both of these cases. The question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal. If the dismissal is justified on that material, it is not open to the worker to complain on the basis that there was other material of which the employer was not, and could not reasonably have been, aware which, if taken into account, would have rendered the dismissal unjustified. The Board does not understand the correctness of this principle to have been in issue in the present case." ***(emphasis added)***

Now, as regards Charge 4, there was no evidence adduced by the Defendant that Plaintiff was not authorized to take money from the petty cash to give it as loan to other employees of the company as from the year 1999-2000 by a former Director of Defendant, Mr. D. Caullee so that the testimony of Plaintiff remained unchallenged. Furthermore, as far as Charge 7 was concerned, Plaintiff's testimony remained unrebutted that he was authorized by the same former Director around the year 1999-2000 for him to use company vehicle for his private use during working hours whilst on duty and no one asked him whether he had permission to do so till the year 2013 although such privileges were meant for officers higher in the hierarchy of Defendant. Indeed, the Defendant's witness Mr. A.C. Jharee was of no help to the

Court in that respect as he did not deny the fact that Plaintiff was authorized to act the manner he did by that former Director and which was a current practice in relation to him.

Now, finding himself in a privileged position by his former Director, it is abundantly clear that Plaintiff has extended that privilege in relation to other crucial matters without authorization pertaining to acts of misconduct as per the remaining charges and being prejudicial to the Defendant as per the following:

1. Following the bank reconciliation statement provided by Plaintiff to his Finance Manager on 14.5.2013 showing a shortage of Rs 603 as there were no receipts or vouchers, he admitted that he used that money and it was for his own personal use without authorization in view of Plaintiff's own admission and the unshaken testimony of the said Finance Manager. Clearly that shortage of Rs 603 would not have benefited the company the more so as he arrogated to the fact that it could happen meaning that it could have happened before as well that there were shortages like that and then eventually payment would be made by him and obviously would have an impact on late banking of petty cash money impeding the work of the Auditor of the Defendant.

2. In the same breath, Plaintiff started extending the use for petty cash from bigger amounts like from the sum of Rs 31,550 without authorization and thus causing a delay in the banking of such money as there was obviously the possibility of using it for his own personal use or giving loans to employees and indeed there was a delay for such banking of larger sums as per the unrebutted testimony of the said Finance Manager and in relation to which Plaintiff admitted having used part of it for petty cash expenses and for which he did not receive any authorization as per Charge 3 let alone that he took the liberty to write on Doc. C. ,a document emanating from Defendant in that 31 March 2013 was a Sunday when the copy of the calendar produced by him namely Doc. E. failed to mention for which year the 31st of March was a Sunday.

3. Now, on the same day namely on 14.5.2013 when he admitted that he used the Rs 603 for his own personal use as per the shortage found in the bank reconciliation statement provided by him to his Finance Manager upon his request, he found it an appropriate time to return the bottle of whisky given to

him by his said Superior as an end of year gift through a subordinate of that Superior. Clearly, that was a sign of disrespect to return a gift given to him about 2-3 years ago in his possession to his Superior through the latter's subordinate.

4. Plaintiff admitted that because he was stressed in relation to the bank reconciliation statement remitted on 14.5.2013, on the following day he went to rest for about 10-15 minutes although he was not lying down and sleeping but was on a chair in the fabric store without authorization. He further admitted that when he was seen by his Superiors in such activity, he told Mr. P. Sharma who had followed him to that store that it was not right what he did while he was leaving for the hospital as ordered by one the said Superiors when he told him that he was not feeling well.

5. Clearly, he extended his privileges gradually without authorization and responded without delay towards those who discovered his blunders and who reported same to higher management level like the Finance Manager and Mr. P. Sharma. Thus, I find it plausible, that Plaintiff did threaten the Finance Manager on 14.5.2013 as it remained unrebutted that the said Manager heard him asking one among the employees found in his office to return that bottle of whisky to him or else he would smash it on his head which the said Manager confirmed from his assistant and the bottle was returned to his office on the 14.5.2013 itself. Indeed, Plaintiff conceded that both the Finance Manager and one S. Ramtohul deposed at the disciplinary committee that he did threaten to do him bodily harm and it remained unchallenged that he did threaten the said Manager in the past. Therefore, it is also plausible that he did threaten Mr. P. Sharma to do him bodily harm on 15.5.2013 as he was not happy that he reported him to his Superiors that he went to rest in said store which he admitted was without authorization as he told him that what he did was not right while he found himself with no choice but to leave for the hospital.

6. He admitted that given that according to him he was doing mainly clerical works which he considered were not expected from an Assistant Accountant, he asked another employee of the company to install an Accounting software with 2-3 manuals and Free Cell games without authorization in his PC belonging to Defendant meant for the petty cash transactions let alone that he

further arrogated to the fact that he did play the free cell games without authorization on two occasions during office hours.

Therefore, it is plain enough that the trend adopted by Plaintiff in his capacity as Assistant Accountant, there was no limit as to what he could arrogate to do by extending his privilege by engaging in increasing unauthorized acts detrimental to the Defendant employer hoping that they would be condoned as a current practice as he did not need authorization to use vehicles meant for high ranked employees of Defendant for his personal use during office hours as he was given the green light by one former Director Mr. D. Caullee and he was never questioned as from 1999-2000 to 2013 which explained why he denied the charges following his admissions as it was hoped to be construed by Defendant as being a current practice in relation to him only at the disciplinary committee and obviously it cannot be construed in that manner because the element of trust between the Defendant Employer and the Plaintiff employee cannot realistically continue to exist.

Thus, it is abundantly clear that the burden of proof that rested on the Defendant employer has been discharged on a balance of probabilities following the finding of the disciplinary committee and on the basis of the material of which it was aware or ought to have been reasonably aware at the time of the dismissal of Plaintiff, it in good faith had no other course of action but to terminate his employment so that his dismissal was not unjustified (see- **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343] and **Smegh**(supra)).

Now, it was not imperative for the Defendant to specify which charge or charges that was or were proved at the disciplinary committee in terms of gross misconduct in order for Defendant to infer that his dismissal was justified as the finding of the said committee in respect to any charge is not conclusive as it is does not have the attributes of a Court of law but is merely the result of an obligatory procedure as per the law allowing the Plaintiff an opportunity to be heard in relation to those 7 charges and which is not binding on the Defendant employer when the decision is taken by it to dismiss the Plaintiff as it is for the Court to decide whether his dismissal was justified or unjustified in the sense that whether Defendant has discharged the burden of proof laid upon it or not. Thus, it was not fatal that the Defendant did not specify which charges were proved before the Defendant's disciplinary committee concluding a finding of guilty of gross misconduct on the basis of which the Defendant *"sic"* dismissed him. Furthermore, it would be misconceived to invoke that the issue of statutory delay was not canvassed before the said

committee as it does not have the attributes of a Court of law but it is simply a forum where Plaintiff is given an opportunity to explain his version of facts in order to dissuade his employer so that he could keep his job and no more. It is relevant to quote an extract from the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343] which reads as follows:

*"Now, it is trite law that a Disciplinary Committee is not a Court of law and does not have its attributes (see **Planteau de Maroussem** as endorsed in **Smegh**). It is set up by the employer as "an obligatory part of the employer's internal procedure for dismissing an employee" (see **Smegh** at paragraph 20). There is nothing improper therefore in the appointment by the employer of the Chairperson and any member of the Disciplinary Committee.*

*We fully agree in that regard with the following pronouncement of the Supreme Court in **Planteau de Maroussem**, which was cited with approval in **Smegh**-*

"The aim of a Disciplinary Committee (…) is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a Court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the Disciplinary Committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court."

*The Disciplinary Committee therefore operates as an obligatory mechanism for the employer to provide an opportunity to its employee to give his version in relation to the charges laid against him pursuant to the law (in this case, **section 38(2)(a) of the Employment Rights Act**) and to attempt to dissuade the employer from dismissing him. The findings of the Disciplinary Committee are not conclusive and the employer may still come to a different conclusion. It is then for the Industrial Court to determine if any termination of the employee's employment was justified or not on the basis of the evidence that was or ought to have been available to the employer at the time.*

*An employee does not therefore enjoy the same rights before a Disciplinary Committee set up by his employer as he does before an independent and impartial tribunal set up to determine the extent of his civil rights and obligations pursuant to **section 10(8) of the Constitution**. Indeed a disciplinary hearing is not conducted*

with the same formality as a trial before a Court or tribunal. The employee should however be given a fair opportunity to put forward his defence and give his version before the Disciplinary Committee. As the Supreme Court noted in ***Drouin v Lux Island Resorts Ltd*** *[2014 SCJ 255] and* ***Cie Mauricienne d'Hypermarchés v Rengapanaiken*** *[2003 SCJ 233], in relation to provisions of the Labour Act akin to those of section 38(2) of the Employment Rights Act, the disciplinary hearing is not meant to be a mere "procedural ritual" to pay lip service to the requirement under the law that an employee be given a genuine opportunity to provide his explanations to his employer with a view to keeping his job (see also* ***Bissonauth v Sugar Fund Insurance Bond*** *[2005 PRV 68])".(****emphasis added****)*

However, those individual charges of misconduct would be fatal if the statutory delay has not been complied with in relation to each of them. Indeed, the contention on behalf of learned Counsel for the Defendant is that from the perspective of Plaintiff nothing was serious and the test as to whether Defendant has waived its right to invoke justified dismissal was when Management became aware of the misconduct as the enquiry continued until 28.5.23.

I find it useful to reproduce the provisions of Section 38(2) of the Employment Rights Act 2008 which are applicable (although Plaintiff's terms and conditions of employment were governed by the Export Enterprises [Remuneration Order] Regulations 1984, GN 191 of 1984):

"***38. Protection against termination of agreement***

(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;"

At this stage, the relevant issue that I am called upon to decide is whether Defendant has waived its right to invoke that the dismissal of Plaintiff was justified in that Plaintiff was not notified within 10 days of the day on which Defendant became aware of the individual charges of misconduct made against the Plaintiff.

It is appropriate to quote an extract from the Privy Council case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [2006 PRV 33]:

""15. Of course, it may seem strange to describe the termination of an employee's employment for established misconduct as "unjustified" merely because the necessary notice reaches the employee eight, rather than seven, days after the completion of the disciplinary hearing. Nevertheless, the legislature has adopted a policy of laying down a fixed time-limit - clearly, with the Recommendation of the ILO in mind and with the aim of ensuring that both parties know where they stand as quickly as possible. See Mahatma Gandhi Institute v Mungur P [1989 SCJ 379] where the Supreme Court described the time-limit as being based on sound principles and added:

"Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct."

(…) The courts must respect the policy which lies behind the time-limits that the legislature has imposed.

27. (…) But the legislature was entitled not only to lay down a time-limit but – subject, of course, to any relevant provisions in the Constitution – to prescribe the penalty that is to attach to a failure to comply with that time-limit. In this case, the legislature chose, as it was entitled to, a single, undifferentiated, sanction."

Thus, in the present case, should the Defendant employer not having notified the Plaintiff worker of the charges made against him within 10 days of the day on which he became aware of the said acts of misconduct, his dismissal would be

deemed to be unjustified upon a plain meaning of Section 38(2)(a)(iii) of the Employment Rights Act 2008 as per **Mauvilac** (supra).

True it is that since 14.5.2013 in relation to charges 1 and 2, and also in relation to the other 5 charges there was no communication with the Plaintiff by the Management of Defendant for the purposes of the internal enquiry.

However, it does not necessarily mean that the internal enquiry was completed on the 14.5.2013 in relation to the first 2 charges so that it can be inferred that Defendant became aware of them on that day so that when Plaintiff was notified by Defendant on 28.5.13, the said Defendant was outside delay.

The reason being in relation to those 2 charges of misconduct as well as the remaining ones, Plaintiff was not needed for the purposes of Defendant's internal enquiry which was conducted by Defendant as there was sufficient information gathered at its end following its final reports having been communicated to it from different levels of Management concerned in that internal enquiry following which Defendant became aware of each *prima facie* charge of misconduct made against the Plaintiff on the day or days it received the final report in relation to each charge. Hence, Plaintiff failed to establish when exactly that internal enquiry conducted by Defendant was over in relation to the first 2 charges as well as the remaining ones so that it can safely be inferred that Defendant became aware of the relevant charges of misconduct more than 10 days before they were notified to Plaintiff and had thus breached Section 38(2)(a)(iii) of the Employment Rights Act 2008.

Therefore, it is plain enough that Plaintiff cannot invoke that Defendant has waived its right to claim that the termination of his employment was justified.

Now, as per his second amended plaint, Plaintiff has claimed wages in lieu of 7 days untaken annual leave in line with his pay slip namely Doc. A. Although his terms and conditions of employment were governed by the Export Enterprises [Remuneration Order] Regulations 1984, GN 191 of 1984, on the issue of refund, Section 25(5) of the Employment Rights Act 2008 will apply:

*"**25. Payment of remuneration due on termination of agreement***

(5) Where an agreement is terminated by an employer otherwise than on grounds of misconduct, and at the time of termination the worker has not taken any of the annual leave to which he is entitled to under section 27 or any other

enactment, the employer shall in lieu of leave, pay to the worker the remuneration to which the worker would have been entitled if he had worked." (**emphasis added)**

Hence, Plaintiff is not entitled to the refund of his untaken 7 days annual leave let alone that he took unauthorized leave as per Doc. A.

For all the reasons given above, the case for the Plaintiff should fail. The plaint is dismissed with costs.

S.D. Bonomally (Mrs.) *(Vice President)*
4.4.2023