

JOSEPH BERTY ANTONIO BIJOUX CONSTANT VS FIBRE MARINE LTD

2023 IND 47

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Cause Number: 456/18

THE INDUSTRIAL COURT OF MAURITIUS

(Civil Side)

In the matter of:-

JOSEPH BERTY ANTONIO BIJOUX CONSTANT

Plaintiff

VS

FIBRE MARINE LTD

Defendant

Judgment

Introduction

This is a case in relation to a claim from the Plaintiff for unjustified dismissal by the Defendant. The Plaintiff is claiming from the Defendant the sum of Rs 356,875.20/- which is made up as follows:

a) Pro-rata end of Year bonus 4/12 x Rs 10,903	Rs 3,634.33
b) 3 months salary in lieu of notice 3 x Rs 9,474.11	Rs 28,422.33
c) Severance allowance at the punitive rate Rs(10,903x13)/12) x 3 x (110/12)	Rs 324,818.54

	Rs 356,875.20

The facts

The Plaintiff was in the continuous employment of the Defendant since February 2007. It is the Plaintiff's case that whilst being in employment with the Defendant, he occupied different positions and was as at February 2016, working as a cleaner, for and in consideration of a basic monthly salary of Rs 9,474.11 and with additional benefits amounting to a total monthly terminal salary of Rs 10,903. He produced 2 pay slips in Court.

Following an incident which took place at work on the 12th April 2016, the Plaintiff was informed by the Human Resource Manager, Mr Sudeven Chengenbroyen, on the 15th April 2016, that he was suspended from work. It was complained to the Plaintiff that following investigations, the Defendant noted that on the 12th April 2016, he took two fiberglass sheets from the Defendant company and threw same in the waste bin despite being aware that the sheets were not considered as waste. The Plaintiff acted without the approval of management. He was given a letter dated the 15th April 2016 to the effect that he would have to attend a disciplinary committee meeting on the 25th April 2016. The said letter was produced in Court.

The Plaintiff testified that he attended the place of work on the 25th April 2016. He went to the office of Mr Chengenbroyen where he met with two other persons in a room. These two other persons were unknown to the Plaintiff as he was never introduced to them. At one point, Mr Chengenbroyen asked him to sign a pre-typed letter. He added that he was not in any manner or form provided with an explanation pertaining to the contents of the pre-typed letter and was not well versed with the English language. After he remained standing refusing to sign the letter, the two other persons left the room and he was left alone with Mr Chengenbroyen. Although he asked Mr Chengenbroyen for a copy of the pre-typed letter in order to have someone explain to him the contents of the letter, the latter refused and told him that a copy would be communicated after signature only.

The Plaintiff could not tell whether the letter was a pre-typed or written one. According to the Plaintiff, Mr Chengenbroyen reassured him that there was nothing serious written in the letter and that he could sign same with trust. In the circumstances, the Plaintiff signed the pre-typed letter without being aware of the contents thereof and the implications. He was never communicated a copy of the letter.

It is the contention of the Plaintiff through his testimony in Court that there was never any disciplinary committee meeting involving 4 people, namely Mr Marday Cootigan, Mr Chengenbroyen, Mrs Vanessa Goinden and the Plaintiff on the 25th April 2016. His version in

Court is that after the 2 persons left the room and he was made to sign a letter by Mr Chengenbroyen, he left to go home. He never saw the other people again.

On the 29th April 2016, the Plaintiff was informed by way of letter signed by the Managing Director of the Defendant and produced in Court that he was being dismissed on the ground that he had taken two fiberglass sheets from the factory and threw same in the waste bin despite being aware that the fiberglass sheets were not considered as waste.

In cross-examination in Court, he denied that the charge of disposing 2 fiberglass sheets was ever put to him. He also averred that after he received the letter of suspension on the 15th April 2016, he never went back to work to attend a Disciplinary committee. He added that he would never have signed the letter of suspension had he been aware of the contents of the letter. It is the contention of the Plaintiff that he never apologized for his actions.

He testified that the dismissal was unjustified after he had been in continuous employment with the Defendant for about 9 years and 3 months. He therefore claimed the amount of Rs 356,875.20 from the Defendant, which amount is made up as follows:

d) Pro-rata end of Year bonus 4/12 x Rs 10,903	Rs 3,634.33
e) 3 months salary in lieu of notice 3 x Rs 9,474.11	Rs 28,422.33
f) Severance allowance at the punitive rate	
Rs(10,903x13)/12) x 3 x (110/12)	Rs 324,818.54

	Rs 356,875.20

The Defendant denied being indebted to the Plaintiff in any sum whatsoever. Mr Chengenbroyen was called in Court as a witness. He testified that he has been working at the Defendant company for 23 years, leaving in the year 2017. He explained that in April 2016, he encountered a problem with the Plaintiff as it was reported to him that the latter had disposed of 2 fiberglass sheets near a bin within the premises of the Defendant company. He described the bin as a lorry cabin which was on the floor. He, therefore, questioned the Plaintiff who told him that the driver of the Defendant company, Mr Mohaboob asked him to leave the fiberglass sheets thereat.

According to Mr Chengenbroyen, the sheets were meant to be used for production and were not meant to be thrown away. He talked to the Plaintiff for the first time in his office before

he issued to the latter the suspension letter dated the 15th April 2016. Mr Chengenbroyen averred that he explained the contents of the letter to the Plaintiff in creole and informed him that he would be convened before a Disciplinary committee. He could be accompanied by a legal adviser. The Plaintiff voluntarily acknowledged receipt of the letter.

Mr Chengenbroyen confirmed that a disciplinary committee took place on the 25th April 2016 in his presence and that of Mr Coutigan, Mrs Govinden and the Plaintiff. At the disciplinary committee, the charge was levelled against the Plaintiff who admitted the commission of the offence. When Mr Coutigan filed the findings of the disciplinary committee, the Defendant decided to terminate the Plaintiff's employment. The Plaintiff was issued the termination letter in person.

Mr Chengenbroyen denied that he was ever alone with the Plaintiff and made him sign a pre-typed letter. He maintained that the Plaintiff committed a misconduct and the termination was totally justified.

Observations

The present claim for unjustified dismissal is couched under the **Employment Rights Act** in force at the time of the dismissal. For a case of this nature, “*it is trite law that in an action for unjustified dismissal the plaintiff need only aver that his employment was terminated without any cause or justification because the burden of proof on that issue rested on the defendant employer (vide Harel Frères Ltd v. Veerasamy [1968 MR 218])*” – **TAHALOOD. R. vs CONSOLIDATED ENERGY CO LTD (2021) SCJ 160.**

I have therefore taken into account that the Plaintiff has averred that he has been unjustly dismissed. On the other hand, the Defendant has denied this contention, strongly arguing that all procedural requirements for the termination of the employment of the Plaintiff, have been duly and strictly adhered to.

The misconduct, the subject matter of the present case, is alleged by the Plaintiff to be found in the pre-typed letter which the Defendant caused him to sign on the 25th April 2016. On this score, I have noted with due care that such letter has remained nonexistent throughout the Trial proceedings. The Plaintiff could not produce same, alleging that the letter was kept by the Defendant and the Defendant claiming that there was never such a letter.

In the circumstances, I find that the Plaintiff's version of events has not been substantiated. Indeed, if the crux of the subject matter in the case would be a pre-typed letter signed by the Plaintiff amounting to the basis of the dismissal, it would have been important for the Court to be favoured with such a letter. This is not the case and hence sheds doubt on the version of the Plaintiff.

I have found that the Plaintiff came across as a heavily confused witness in Court and I say so for reasons expounded in this paragraph. Indeed in his Plaintiff, the Plaintiff averred that he was convened to a Disciplinary committee on the 25th April 2016. However, when he testified in Court, he stated that he attended work on the 25th April 2016 but there was no disciplinary committee held. Instead, he was made to sign a pre-typed letter, being the basis of his dismissal, following which he left to go back home. To make matters worse, he added in cross-examination that he never attended the disciplinary committee on the 25th April 2016, averring that he never attended his place of work after the 15th April 2016 when he was suspended from work.

In view of the inconsistencies in the version of the Plaintiff, it is difficult to believe his version as being true. On the other hand, I have found the version of the defendant to be trustworthy. Mr Sedeven Chengenbroyen, the Human Resource Manager, addressed the Court in a clear and credible manner and explained the procedural steps taken by the Defendant in the face of the misconduct by the Plaintiff.

Mr Chengenbroyen gave a detailed account of the problem encountered with the Plaintiff. He had no difficulty to explain how the action of the Plaintiff amounted to a misconduct as the latter disposed of 2 fiberglass sheets near a bin within the premises of the Defendant company, when in truth and in fact, the sheets were meant to be used for production and were not meant to be thrown away. He duly talked to the Plaintiff, queried the latter, issued a letter of suspension which he took the care to explain to the Plaintiff. He also clarified that the Plaintiff was explained his rights accompanying his convocation before the disciplinary committee.

In the circumstances, I find that it is far from credible that the Plaintiff is claiming in Court that he was unaware of the contents of the suspension letter, the moreso that he duly acknowledged receipt of the said letter by affixing his signature thereon. In light of the testimony of Mr Chengenbroyen, I find that the procedural steps were rightfully adhered to. Mr Chengenbroyen also explained that a disciplinary committee took place on the 25th April 2016

where Mr Coutigan, Mrs Govinden, the Plaintiff and himself were present. At the disciplinary committee, the Plaintiff confessed to the charge against him and tendered his apologies.

Consequently, the Defendant in this case adopted a course of action wherein there is no procedural irregularity which contravenes the Law. The Defendant was made aware of the alleged misconduct on the 12th April 2016. Within 10 days, that is after 3 days, the Plaintiff was informed of the misconduct complained against him. The Plaintiff was given at least 7 days, more specifically until the 25th April 2016 to answer the charge against him and his termination ended less than 7 days after the hearing of the disciplinary committee. It happened on the 29th April 2016. This is in line with the legal requirements couched under section 38 of the **Employment Rights Act**.

As far as the evidence goes, it lends credence to the version of the Defendant. There is no pre-typed letter dated the 25th April 2016 and had there been any, it would be reasonably foreseeable that the Plaintiff would have raised the issue before the Disciplinary committee. This did not happen, shedding much doubt on the version of the Plaintiff.

I have considered the misconduct complained against the Plaintiff. The subject matter of the misconduct was that the Plaintiff threw away two fiberglass sheets in the bin. I have noted that the Plaintiff conceded that he committed the act but claimed that he did so under the instructions of a driver called Mr Mohaboob. Mr Chengebroyen told the Court that an enquiry was carried out in relation to the case. Be that as it may, the important point to retain in this case, is that a disciplinary committee was held whereby the charge was found proved against the Plaintiff. In view of the findings of the disciplinary committee, the Defendant was left with no alternative but to terminate the Plaintiff's employment. In the circumstances, I have considered whether the action of the Plaintiff amounted to a gross misconduct.

I find it apposite at this juncture to refer to the case of **SOTRAVIC LTD VS CHELLEN J.C (2021) SCJ 425** wherein the Court had this to say:

"Indeed in Deep River Beau Champ Ltd v Beegoo [1988 SCJ 432], it was held that the degree and seriousness of the misconduct are valid considerations in deciding whether the misconduct warrants a termination of the employment so as to make it a justified dismissal. Gross misconduct or "faute grave" is therefore at the highest end of the spectrum of degrees of "fautes" and would alone justify summary dismissal, without payment of severance allowance (see also Barbev Shell Mauritius Ltd(supra). Moving downwards, the misconduct can either amount to "faute sérieuse" (which can

justify termination but may entail payment of severance allowance) or “faute légère” (which would not justify dismissal and would, in case there has been dismissal, result in severance allowance being payable to the worker)”.

In the present case, the Plaintiff has not contested the nature of the misconduct which was leveled against him. In fact, according to the findings of the Disciplinary committee, he admitted the charge against him, tendered his apologies and stated that he would not do anything which is against the interest of the company.

Taking into account the evidence, I have noted that the nature of the misconduct amounted to a disposal of fiberglass sheets in a bin without the consent of the Defendant. Mr Chengenbroyen was clear in his testimony that the Plaintiff acted beyond the established rules and procedures by committing an act which he was not entitled to, without the Defendant’s consent. I find that the act of the Plaintiff by throwing away the belongings of the Defendant without consent violates the rules and obligations of the contract of employment. Indeed, the fiberglass sheets were meant for production and the Plaintiff was not, in any way, warranted to dispose of the belongings of the Defendant without informing the Defendant or without the consent of the Defendant. I find that the facts and circumstances of the case in so far as the Plaintiff’s actions are concerned, constitute sufficient evidence as to sustain the charge levelled against the Plaintiff at the Disciplinary committee. I therefore find that the Plaintiff committed a gross misconduct through his acts and doings. I find that the Defendant, being the employer, has established on a balance of probabilities that the Plaintiff committed a misconduct warranting the latter’s dismissal.

The next issue which must be thrashed out is whether the Defendant acted in good faith and could not take any other course of action. *“The legal obligation for him to show good faith imposes upon him the duty to make certain that he is choosing the right course and one possibility of doing so is suggested by the law itself [section 7(1)] which provides that an opportunity should be given to the worker to exculpate himself”*. **(RE: BATA SHOES (MAURITIUS) LTD vs . MOHASSEE (1975) SCJ 146)**. The duty of an employer to give the employee an opportunity to exculpate himself is reflected by section 38(2)(a)(ii) of the **Employment Rights Act**. In the present case, in view of the clear, direct and credible version of Mr Chengenbroyen, coupled with documents produced, it has been established that the Defendant called the Plaintiff for a disciplinary committee where the charge was levelled against the Plaintiff who had an opportunity to answer to same. It was then that the Plaintiff admitted to the charge against him.

I find it apt to cite the decision of the **Chambre Sociale of the Cour de Cassation** (**Soc. 26 février 199, 88-44.908, Bulletin 1991 V No 97 p.60**) : "faute grave" was defined as "une faute résultant d'un fait ou d'un ensemble de faits imputable au salarié, constituant une violation des obligations du contrat de travail ou des relations de travail, d'une importance telle qu'elle rend impossible le maintien du salarié dans l'entreprise pendant la durée du préavis".

The Plaintiff, in this case, was responsible as an employee of the Defendant. In the midst of his duties, he went beyond the orders of management and his contractual obligations. I therefore find that the misconduct in this case amounts to a "cause réelle et sérieuse" which held a bearing on the employer-employee relationship to the extent that it brought "un trouble profond dans le fonctionnement et la marche de l'entreprise". (**JURISCLASSEUR TRAVIAL, FASC 30, NOTE 163**). In the circumstances, the Defendant could not in good faith take any other action, except than a dismissal. (**SBI (MAURITIUS) LTD VS ROUSSETY J B (2021) SCJ 420**).

I have further addressed my mind to the submissions of Learned Counsel for the Plaintiff to the effect that the disciplinary committee was not conducted properly. I have been apprised of the findings of the disciplinary committee and I am satisfied that the charge was leveled to the Plaintiff who understood same and tendered his apologies. There is no strict procedural formula attached to the conduct of a disciplinary committee. *"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 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".* ((**RE: SMEGH (ILE MAURICE) LTÉE V PERSAD D. (2011) PRV 9**)).

It would be apposite to refer to the case of **MOORTOOJAKHAN R. v TROPIC KNITS LTD (2020) SCJ 343** which lays down:

"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])”.

In the present case, I find that the evidence has not revealed anything sinister in the conduct of the disciplinary committee. In fact, the proceedings were fair with the charge levelled against the Plaintiff and accepted by the latter. The findings of the disciplinary committee stand as proof of a procedurally and legally sound committee.

Conclusion

In light of the above, taking into account all the evidence adduced and the documents produced, I find that the Plaintiff has failed to establish its case on a balance of probabilities. I dismiss the Plaintiff. With Costs.

Judgment delivered by: M.GAYAN-JAULIMSING, Ag President, Industrial Court

Judgment delivered on: 15th June 2023