ROBERTS FRANCOIS RHAINSLEY REMY VS TRAIT D'UNION

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Cause Number:- 753/16

THE INDUSTRIAL COURT OF MAURITIUS

In the matter of:-

ROBERTS FRANCOIS RHAINSLEY REMY

Plaintiff

VS

TRAIT D'UNION LTEE

Defendant

JUDGMENT

Introduction

This is a case of unjustified dismissal. The Defendant is claiming from the Plaintiff the sum of Rs 388,101.72, which sum is made up as follows:

(a) One month's wages as indemnity in lieu of notice	Rs 14,112.79
(b) Severance allowance for 106 months of continuous employment	Rs 373,988.93

The facts

The Plaintiff was in the continuous employment of the Defendant as a handyman since the 1st March 2007. He was employed on a 6 day week basis and was remunerated at monthly intervals at the terminal rate of Rs 14,112.79, as evidenced by a copy of the contract of employment of the Plaintiff as well as his salary slip duly produced in Court. Following an incident which occurred on the 12th January 2016, the Plaintiff was suspended from work. By way of letter dated the 13th

January 2016, which the Plaintiff produced in Court, he was convened to a disciplinary committee on the 22nd January 2016 to answer to the following charges of misconduct:

(i) Vous avez agi grossierement a l'encontre du Directeur Monsieur D.Mariette;
(ii) Vous avez eu des propos raciste a l'encontre du Directeur Monsieur D.Mariette;
(iii)Manque de collaboration et de performance dans votre travail.

The Plaintiff testified that he attended the disciplinary committee where he denied all the charges levelled against him. It is his contention that he was not given a fair hearing in as much as he was not given an opportunity to cross-examine the witness at the disciplinary committee. He testified that the said witness is Mr Mariette who attended the disciplinary committee and refused to answer his question.

By way of letter dated the 27th January 2016, produced in Court by the Plaintiff, the Defendant informed the Plaintiff that the disciplinary committee found the Plaintiff guilty on the first 2 charges and terminated the Plaintiff's employment with immediate effect. The Plaintiff considered the termination to be without notice and without justification, and therefore claimed from the Defendant the sum of Rs 388,101.72, representing one month's wages as indemnity in lieu of notice and severance allowance for 106 months.

In cross-examination, the Plaintiff explained the incident which brought about his dismissal. He narrated that he was called for a meeting on the 12th January 2016, whereby Mr Mariette, Mr Maunick and Mr Naiken were present. The meeting touched the delay in work performance. At the said meeting, the Plaintiff conceded that he got angry and raised his voice but he could not remember whether he also punched the table.

He acknowledged that the disciplinary committee heard three witnesses on behalf of the Defendant company. They were Mr Mariette, Mr Maunick and Mr Naiken. Mr Maunick reported to the committee that the Plaintiff used the following words in the meeting of the 12th January 2016: "*Dix ans mone travail ar blanc mais ici li different avec 1 noir. Et j'ai quitte une compagnie de blanc pour travailler avec un noir*". Mr Naiken who also deposed before the disciplinary committee reported the exact same thing.

The Plaintiff conceded that he was very angry on the day of the incident. He also agreed that at the disciplinary committee, the representative of the Labour Office who represented him duly cross-examined the witnesses. He was given an opportunity to give his version of events and to be heard, such that the disciplinary committee was conducted in due form. However, the

Plaintiff denied having used racist words to the address of Mr Mariette who left before he was cross-examined at the disciplinary committee. He contended that he told Mr Mariette that he had worked at Dina Robin, Robert Lemaire, Beachcomber and had the necessary work knowledge. He alleged that it was Mr Mariette who replied *"ki to pe dire, mo ene noir. Sa noir la mem ki ine faire to paye tous les ans sa…"*.

The Defendant, for his part, denied being indebted to the Plaintiff in the sum claimed or in any sum whatsoever. In its plea, the Defendant averred that the disciplinary committee, after hearing all parties, all witnesses and the submissions of the parties, found charges (i) and (ii) held against the Plaintiff, proved. It further averred that it was duly cross-examined at the disciplinary committee and the Plaintiff never raised an issue of unfair hearing. According to the Defendant, there was a gross misconduct on the part of the Plaintiff and given the circumstances, in good faith, had no other alternative than to terminate the Plaintiff's employment with immediate effect.

In Court, the Defendant was represented by Mr Naiken who was called as a witness. Mr Naiken testified that he was present at the meeting held on the 12th January 2016. The meeting was in the normal course of business at work. Many people were present at the meeting, including Mr Mariette, Mr Maunick, the Plaintiff. According to Mr Naiken, at one point, the Plaintiff got angry, punched the table. Mr Naiken reported that the Plaintiff said : "*10 ans mone travail cot ene blanc, ici cot ene noir li pas pareil"*. The words were uttered in the presence of Mr Naiken and other people. This brought an immediate end to the meeting.

At the disciplinary committee, Mr Naiken narrated exactly what happened. In Court, he claimed to be an employee of the Defendant company and had no reason to tell a lie against the Plaintiff, whose attitude shocked him. He explained that the employees of the Defendant company came from different communal background. He was duly cross-examined at the disciplinary committee and averred that there was no reason which could justify the reaction of the Plaintiff in the course of his employment.

Observations

The Law in force at the time of the present offence is **THE EMPLOYMENT RIGHTS ACT.** For the purposes of the present case, I shall consider the versions of the parties, the nature of the misconduct and the termination of the employment.

I shall first deal with the version of the Plaintiff. The whole contention of the Plaintiff, in so far as his plaint is concerned, is that he was not given a fair hearing at the disciplinary committee as he was not given an opportunity to cross-examine witnesses. This has been denied by the Defendant. In Court, the Plaintiff contended that he could not cross-examine Mr Mariette.

At this juncture, I find it very pertinent 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])".*

A reading of the above case law makes it clear that the purpose of the disciplinary committee is to provide an opportunity to the Plaintiff to put forward his version of events. 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).**

Applying the law to the facts of the case, I have noted that the Plaintiff conceded in cross-examination and in re-examination, that he was given full opportunity to give his explanations

before the disciplinary committee in relation to the charges against him. He was represented by a Labour Officer who did the needful to question and cross-examine witnesses, namely Mr Maunick and Mr Naiken who were called by the Defendant at the disciplinary committee. I therefore find that the disciplinary committee held on the 22nd January 2016 served its purpose when the Plaintiff was given an opportunity to question the charges against him and to offer his version of the facts alleged against him. He was given a fair hearing. The fact that one witness Mr Mariette could not be cross-examined does not taint the validity of the disciplinary committee. It was only after hearing all the witnesses that the disciplinary committee found the charges proved against the Plaintiff. I therefore find that the Plaintiff was afforded a fair hearing at the disciplinary committee.

I shall now consider whether on the facts of the case, the Plaintiff committed a gross misconduct. I shall 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 fault attributed to the Plaintiff is that the disciplinary committee found that he used words of racist connotation. The impugned words which the Defendant alleges were said by the Plaintiff are: "*Dix ans mone travail ar blanc mais ici li different avec 1 noir. Et j'ai quitte une compagnie de blanc pour travailler avec un noir"*. The Plaintiff, for his part, denied that he used these words but averred that it was the Defendant, as represented by Mr Mariette, who said: "*"ki to pe dire, mo ene noir. Sa noir la mem ki ine faire to paye tous les ans sa…*".

On this score, I have paid special attention to the version of Mr Naiken. I have found that Mr Naiken came across as a credible witness. He told the Court what the Plaintiff said to the address of Mr Mariette and these words were to the effect that the Plaintiff had worked for 10

years with white people but at the Defendant company, it was different to work with a black person. Mr Naiken's version remained consistent with what he told the disciplinary committee and with the version of Mr Maunick who also deposed before the disciplinary committee.

I find no reason why Mr Naiken would utter a lie against the Plaintiff. Mr Naiken was another employee without any interests to serve. The words were said in the presence of other employees, amongst whom Mr Maunick was present. Mr Naiken gave a vivid and detailed picture of events in Court as he recalled how the Plaintiff punched the table twice at the meeting of the 12th January 2016 before uttering the words which became the charge against the Plaintiff at the disciplinary committee. He described the Plaintiff as angry and aggressive at the time. The Defendant stood up to cross-examination without waver and struck the Court as a reliable witness.

In fact, the Plaintiff's version lent truthfulness to the version of Mr Naiken as he admitted that he got very angry at the meeting and raised his voice. The state of mind of the Plaintiff at the time of the offence suggests the aggressivity which must have permeated from the Plaintiff. I find that the version of Mr Naiken does not hold any doubt as to the sequence of events which took place on the 12th January 2016.

I have borne in mind that "*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.** In the present case, having found that the version of Mr Naiken is credible, trustworthy and reliable, I am satisfied that the Plaintiff uttered the words alleged by the Defendant on the 12th January 2016 for which the Plaintiff was called before a disciplinary committee to answer the charges against him.

The question to be answered is whether the utterance of these words amount to a gross misconduct? It is to be remembered that the Plaintiff was an employee at the Defendant company. He was in the midst of a meeting, in the presence of many employees when he used words which held a totally improper and racist connotation. I find that the acts and doings of the Plaintiff amount to a serious fault, which constitute enough evidence to prove the charges levelled against the Plaintiff at the disciplinary committee and which establishes a gross misconduct on the part of the Plaintiff. I find that the Defendant has established on a balance of probabilities that the Plaintiff committed a gross misconduct.

I have also considered whether, in light of the circumstances of the present case, the Defendant acted in good faith and could not take any other course of action. It was laid down in the case of **BATA SHOES (MAURITIUS) LTD VS MOHASSEE (1975) SCJ 146,** on the issue of good faith by the employer, that:

> "*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*".

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, it is not disputed that the Defendant duly suspended the Plaintiff, called him before a disciplinary committee where the charge was levelled against the Plaintiff who had an opportunity to answer to same. Therefore, the Defendant acted in all good faith in upholding the rights of the Plaintiff.

Nonetheless, in view of the serious gross misconduct on the part of the Plaintiff, the employment relationship between the Plaintiff and the Defendant has been severed. 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".*

In the present case, the use of words which held an improper and racist connotation amounted to a *"cause reelle et serieuse"* 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)**. The employment relationship could no longer continue to exist. 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).**

Conclusion

After taking into consideration all the evidence in this case, the version of the parties, the nature of the misconduct and the mode of termination of the employment, I find that the dismissal was not unjustified.

I find that the Plaintiff has failed to establish its case on a balance of probabilities. I dismiss the Plaint.

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

Judgment delivered on: 20th July 2023