Meeheelaul M. v Maubank Ltd (formerly known as the Mauritius Post and Cooperative Bank Ltd)

2022 IND 8

Cause Number 213/18

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Manish Meeheelaul

Plaintiff

v.

Maubank Ltd (formerly known as the Mauritius Post and Cooperative Bank Ltd)

Defendant

Judgment

The undisputed facts in this plaint reveal that Plaintiff was Defendant's Head of Private Banking Division after having occupied several posts of responsibility and after having joined it in October 2003 until 10 April 2018.

He was suspended from his duty from 5 October 2015 until 10 April 2018 because as Head of Private Banking, he failed to carry out a proper professional and careful credit appraisal on Rooplall Beerjeraz Group of Companies thereby putting the interest of the Bank at risk.

During the period of 5 October 2015 to 10 March 2018, he was on full pay.

A disciplinary committee was set up on 22 June 2016 under the Chairmanship of Mr. G. Bhanji-Soni to hear him.

After 7 sittings, on or about 12 January 2017, he was informed that a new disciplinary committee was set up to hear the case under the Chairmanship of Mr. Desire Basset SC.

At the sitting of 23 January 2018, Defendant's Counsel informed the committee that the 27,29 and 30 of March 2018 which were already scheduled for continuation of the hearing were not convenient. The matter had to be rescheduled but the hearing already fixed to the 10.3.2018 stood good.

On 7.2.2018, Defendant's Counsel replied that the Employer's stand would be that any postponement further to the 10.3.2018 would be without pay as per the provisions of the law.

On 8.2.2018, a special hearing was arranged by Mr. Desire Basset SC, Chairman of the committee at the request of the Plaintiff's Counsel following disputes between the parties whether the earlier dates of the 27,29 and 30 of March 2018 were vacated by the Defendant. He ruled on that very day that the 27, 29 and 30 of March 2018 "were therefore impliedly vacated" and understandably, Counsel for the employee had disposed of those dates although they were afterwards maintained by Defendant's Counsel with a change regarding the time.

Defendant's Counsel communicated that the stand of the employer had not changed and was in accordance with Section 38(7)(b) of the Employment Rights Act and did not share the view that the contract had been breached because of a non-payment of Plaintiff's remuneration following an exchange of emails between the parties' Counsel.

On 6.3.2018, the sitting scheduled for the 10.3.2018 was vacated by the Chairperson.

On 10.4.2018, Plaintiff wrote to Defendant claiming that his contract had been breached for non-payment of his remuneration. He has, therefore, claimed from Defendant the sum of Rs. 8,171,388.81 comprising of severance allowance, unpaid remuneration due and other benefits plus accrued interest.

Defendant in its plea has denied liability. Out of the 7 sittings chaired by Mr. G. Bhanji-Soni, 4 were procedural. Defendant has admitted the whole issue about the rescheduling of dates.

It has averred that since the beginning of the disciplinary hearing initiated by Defendant under the Chairmanship of Mr. D. Basset SC in January 2017, Plaintiff had been requesting for postponement on various grounds, including but not limited to the unavailability of his Counsel, to formulate motions and seek other avenues to object to and stay the sittings of the disciplinary committee, so that Plaintiff had, as per the provisions of the Employment Rights Act, effectively requested for an extension of more than 10 days.

The sittings of the disciplinary committee were being scheduled to accommodate the dates and availability of Plaintiff and his Counsel and the Defendant had been more than accommodating towards them to enable Plaintiff to answer the charge levelled against him.

On 7.2.2018, Defendant's Counsel informed Plaintiff's Counsel of its stand to the effect that any postponement further to 10.3.2018 would be without pay because pursuant to Section 38(7)(b) of the Employment Rights Act, it was entitled to stop payment as from 10.3.2018. However, it had proposed to continue with the sitting of the disciplinary committee in order to give Plaintiff an opportunity to answer the charge.

On 10.4.2018, Plaintiff claimed that his contract of employment had allegedly been breached for non-payment of remuneration pursuant to the Employment Rights Act which is denied.

Defendant has maintained that in accordance with Section 38(7)(b) of the Employment Rights Act, it was entitled to stop payment as from 10.3.2018 further to the request for extension of the delay of suspension made on behalf of Plaintiff.

The latter gave evidence in Court. There was a joint motion from both learned Counsel for the parties that issues have been narrowed down to the extent that a copy of the proceedings before the disciplinary committee chaired by Mr. D. Basset SC be produced as they were satisfied as to their accuracy (vide Doc. P1).

Plaintiff's testimony was in line with the undisputed facts. He was suspended on 5.10.2015 until he claimed the termination of his contract on 10.4.2018. A first disciplinary committee was set up in 2016 chaired by Mr. G. Bhanji Soni. The first hearing was scheduled on the 22.6.2016. After 7 sittings, in January 2017 when the sittings were already arranged before Mr. G. Bhanji Soni, Defendant informed him that the hearing would not be conducted and that he would have to appear before Mr.

Desire Basset SC for hearing following a new disciplinary committee having been set up chaired by that Senior Counsel. There were 21 sittings before Mr. Desire Basset SC. He was on full pay until 10.3.2018.

In relation to a sitting scheduled for hearing before the disciplinary committee chaired by Mr. D. Basset SC in 2017 when his Counsel's junior passed away, his Counsel moved for a change of date to attend the funeral which was not agreeable by Counsel for Defendant unless the matter be postponed subject to him being under no pay as from that particular date.

Plaintiff confirmed that for various reasons there were requests made for a particular hearing to be displaced or postponed by himself or his Counsel. But none of those requests were actually executed in the sense that no sitting scheduled was ever postponed because of him or his Counsel. He started with the first disciplinary committee and he produced 2 letters dated 10.10.2016 and 24.10.2016 (vide Docs. P2 & P3) emanating from the then Chairman, Mr. Bhanji Soni, while he was under suspension since October 2015 wherein it was mentioned that any further postponements therefrom requested by him or his legal representative would be on a no salary basis. Another letter followed from that Chairman dated 28.11.2016 as per Doc. P4 wherein the dates and time having been agreed upon by all parties for the following sittings of the disciplinary committee scheduled were mentioned namely 12,16 &18 of January 2017 and 2 & 6 of February 2017. Those hearings were discontinued by the Defendant.

Then, Plaintiff was called to appear for another hearing before Me Desire Basset SC as per a letter dated 13 January 2017 from Defendant as per Doc. P5 which he received on 28 January 2017.

The issue of postponement and no salary had been raised before Mr. D. Basset SC. As per the transcript of the disciplinary proceedings of 5.4.2017, there were 2 motions made by his Counsel namely that the proceedings be discontinued against him for the reasons put by his Counsel followed by a ruling of the Chairperson, Mr. D. Basset SC, who then told his Counsel to address other legal avenues to which his Counsel replied that it was time to do so. He highlighted that at the sitting of 5.4.2017 at page 20, his Counsel further replied that he thought that he needed some time to explore all avenues they had. Counsel for Defendant said that the stand of the employer was to the effect that as per Section 38(7)(b) of the Employment Rights Act, the suspension as from then would be without pay.

Since the very start, the arrangement for the sittings were done by all the parties present, that is, the Counsel for the Defendant, his Counsel and the Chair. So, common dates were being fixed by the three parties so that they had common dates and then the Chair would rule that those were the sittings that had been fixed. At the end of the day it was the Chair that was scheduling the sittings for the hearing.

Therefore, the dates scheduled for 27,29 & 30 of March 2018 were impliedly vacated as per Doc.P6.

Although the 10.3.2018 was already fixed for hearing, it was not conducted on that day as the sitting was vacated by the Chairman of the committee as per Doc.P7. The Chairman asked them to suggest dates in early April to enable the committee to complete its task.

When his salary was not paid in full at the end of March 2018, he sent a letter dated 10.4.18 to the Defendant as per Doc. P8 by way of an email. In the latter, he mentioned that Defendant failed to pay him his remuneration as Head of Private Banking due under the contract of employment from 11.3.18 to date. Consequently, he claimed that his contract had been breached. He meant that his employment contract has been terminated by Defendant because of non-payment of his salary and the disciplinary committee before Mr. D. Basset SC was never concluded. He went on to explain the sum claimed from Defendant namely Rs. 8,171,388.81.

In the course of cross-examination, he acknowledged a document that he took up employment as from 1.10.2003 in accordance with his letter of appointment as per Doc. P12 but he said that he started working as from 15.10.2003. He accepted that as per a letter dated 23.1.2008 viz. Doc. P13, he was appointed Head of Private Banking and on 5.10.2015, he was suspended as per a letter which he received containing the charge viz. Doc. P14.

The proceedings before Mr. D. Basset SC started on 18.1.2017. On that day, his Counsel as far as he could remember raised a point relating to the jurisdiction of the disciplinary committee as a previous disciplinary committee which had been set up, had discontinued its proceedings. At the end of the sitting of 18.1.2017, he conceded that his Counsel suggested to be given some time to actually look at the parameters of the law and then Counsel for the Defendant to communicate his stand. The case was postponed to 25.1.2017 which was the next sitting meaning it was fixed to that date.

The Chairman on that date said that he only had the letter of charge and that he had no other documents. So, he asked for the dates to be set up to start the deliberations on the matter itself. The chairman read the charge to the Plaintiff and asked him whether he accepted the charge or not.

Then, his Counsel intervened and made certain motions on that particular date namely the issue of jurisdiction of that committee as they wanted to know for the sake of clarity as to what happened to the previous committee and its fate. On that day, he admitted that his Counsel begged for a delay of a week to submit arguments in writing. Then, the matter was adjourned to 31.1.2017. On the latter day, the point on jurisdiction was fully argued and the Chairman gave his ruling on that point which was his first ruling. The motion was set aside and the proceedings were to continue.

On the next sitting on 1.3.2017, his Counsel made another motion which was argued on 2.3.2017. On 3.3.2017, the Chairman delivered a second ruling and set aside the second motion made by his Counsel which was to stay the disciplinary proceedings as they were dealing with the matters of the bank, its clients and the confidentiality part. The next sitting was held on 5.4.2017 and his Counsel raised 2 further objections upon which 2 further rulings were given by the Chairman each time setting aside the objections. Then, his Counsel moved for a postponement but upon being informed by his colleague for the employer that it would be without pay due to his motion, then examination in chief of witnesses began.

The matter was then adjourned to 12.5.2017 as his Counsel needed to have a look at the bulk of the documents to be produced at the disciplinary committee and which were not communicated to them. That date was fixed after the Chairman deliberated after having the dates from his Counsel and those from the Defendant's Counsel. The dates were 12 & 26 of May. The case continued on 8, 20,30 of June, all in 2017, then again, 5, 11 & 29 of September 2017, 11,13 & 27 of October 2017, 7,8,9 & 29 of November 2017.

On 22.1.2018, Plaintiff did not agree that he should have started giving his version because Counsel for the Defendant made a motion that he would not tender his witness for cross-examination and the Chairman made it clear that he could not compel anybody to answer any question. So, in the light of the ruling of the Chairman, he could not compel a witness to be called by the employer and it was upon him eventually to give his version. Therefore, his Counsel said that he had no problem with that but that he be given some time to prepare his examination in chief.

The case was adjourned to 23.1.2018 and after consultation with Counsel for the Defendant, he started his examination in chief on that day. It was not completed and it had to be adjourned anew on 10, 27,29 & 30 of March 2018. But the employer's Counsel said that he was not available on 27,29 & 30 of March 2018 and on another day said that arrangements could be made for those dates but with a change in the time which did not suit the convenience of his Counsel. On 7.2.2018 he got an email from Defendant stating that any postponement after the 10.3.2018 would be without pay. That was followed by an email on 7.2.2018 from his Counsel who asked for an urgent meeting which was in turn followed by an email from the Chairman suggesting a meeting at 13.00 hours on that particular day. The Chairman sent an email on 9.2.2018 to him stating that those 3 dates were vacated, but the 10.3.2018 was maintained.

An email from Defendant's Counsel on 8.2.2018 stating that any further postponement would be without pay was followed by an email from his Counsel on 9.2.18 viz. Doc. P15 and which was further followed by another email from Defendant's Counsel that there would be no pay after 10.3.2018. Then, there was an email from his Counsel dated 6.3.2018 wherein he stated that the withholding of his salary would amount to a breach of contract of employment as per Doc.P16. On the same date there was a reply from Counsel for Defendant rebutting that allegation from his Counsel. Subsequently, on the same day there was an email from the Chairman vacating the 10.3.2018. Then, his Counsel sent an email dated 7.3.2018 saying that Plaintiff would not be in Mauritius at the end of March, beginning of April but he could make it on 13 of April 2018 and then reiterating that there was a breach of contract if his salary was withheld.

Thereafter, there was another email on 10.4.2018 from him stating that there was a breach of contract and that he would not appear before the Disciplinary Committee as from then on. He did not agree that he had no right not to attend the disciplinary committee. He did not agree that there was no breach of contract.

No evidence was adduced on behalf of the Defendant.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Counsel. At the very outset, I find it appropriate to reproduce **Section 38(7) of the Employment Rights Act** below:

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

(7) Where an employer suspends a worker pending the outcome of disciplinary proceedings against the worker on account of the worker's misconduct or poor performance –

(a) any period of such suspension shall be on full pay;

(b) any extension to the delay provided for under subsection (2)(a)(iv), 2 (b)(iii) or (3)(c) made by or on behalf of the worker, shall be on full pay for a period not exceeding 10 days, where the worker is found not guilty of the charge made against him."

Now subsection (2)(a)(iv) reads as follows:

"(2) No employer shall terminate a worker's agreement-

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

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

Subsection 2(b)(iii) reads as follows:

"(b) unless, where an alleged misconduct is the subject of criminal proceedings –

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

Subsection 3 (c) reads as follows:

"(3) No employer shall terminate a worker's agreement for reasons related to the worker's poor performance, unless –

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

In the present case, it is not disputed that following the Plaintiff's suspension as per his suspension letter (vide Doc. P14), he was given at least 7 days' notice to answer the charge made against him at the disciplinary committee of Defendant encompassing the following as highlighted in the Supreme Court case of **Princes Tuna (Mauritius) Ltd v Liong Sook Pin C [2004 SCJ 292]**:

"The opportunity to answer a charge obviously includes adequate notice of the date, time and place when the charge is to be inquired into. A real as opposed to a semblance of opportunity must be given to a person charged, not only to appear physically at the hearing, but also to be legally represented, if he or she so wishes."

It is clear as per the above provisions of **Section 38(7)(b) of the Employment Rights Act**, no distinction is being made between more complex cases or less complex ones. The same limitation period of a minimum of 7 days' notice will suffice and will apply to any employee under suspension with pay to give his version at his employer's disciplinary committee.

However, this limitation period of at least 7 days' notice being sufficient for an employee to prepare and give his version does not apply to a trial or hearing before a Court of law viz. the Industrial Court where the rights of an employee are being decided upon. Thus, the hearing of Plaintiff at Defendant's disciplinary committee cannot be equated with the rigors of a Court of law given that it is still the disciplinary committee of Defendant.

The time limits pursuant to Section 38 of the Employment Rights Act in force at that time having its equivalent provisions in Section 32 of the then defunct Labour Act 1975 are mandatory as clearly buttressed by the Judicial Committee of the Privy Council in **Mauvilac Industries Ltd v Mohit Ragoobeer** **[2006 PRV 33]** given that the Legislature has adopted a policy of laying down a fixed time limit in line with the International Labour Organisation with the aim of ensuring that both parties know where they stand as quickly as possible. Thus, by virtue of that Section 38, the employer has to inform the employee within 10 days he became aware of his misconduct of the charge made against him and that employee should be given at least 7 days' notice to appear before the disciplinary committee to offer his explanation and after the conclusion of the disciplinary committee, within 7 days the employee should be informed of the outcome.

Therefore, the employee if he is not satisfied with the outcome of his employer's disciplinary committee, can seek redress before a Court of law as quickly as possible. So, it is abundantly clear that the Intention of the Legislator is to have a swift procedure and the exhaustive list of all possible points of law to be pressed before a Court of law cannot be expected to be pressed before the disciplinary committee of the Defendant. This has been confirmed by virtue of Section 38(7)(b) of the Employment Rights Act where an extension of a delay of more than 7 days is

being sought by the employee under suspension with pay, would entitle the employer to suspend him without pay and should he be found not guilty at the end of the disciplinary hearing, he will be given pay for 10 days' salary.

Be it as it may, whether the disciplinary committee of Defendant is being chaired by Mr. G. Bhanji Soni or Mr. D. Basset SC, still it cannot detract from the fact that it is Defendant's disciplinary committee and as such Defendant is necessarily acting as both "Judge" and "Party" which obviously is in breach of the rules of natural justice namely *nemo judex in causa sua*. But the Plaintiff is being given an opportunity to be heard which is in conformity with the rules of natural justice namely the *audi alteram partem* rule. At this particular juncture, I find it relevant to quote from the Supreme Court case of **Lafresière M v New Mauritius Hotels Limited** [2021 SCJ 244] where an extract from the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] at paragraph 19 was cited as follows:

"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****."*

Therefore, the employee will have to act quickly when being afforded an opportunity to give his version of facts why he must be kept in employment and by furnishing the material on which he is relying at the disciplinary committee of his employer so that should he not be satisfied with the outcome by being found guilty as the perception of bias cannot be disregarded, he can seek redress before an impartial Court namely the Industrial Court by using the same material relied upon at that disciplinary committee to prove that his contract of employment has been unjustly terminated by his employer. But there is also the possibility that the employer be persuaded that his employee has to be kept in employment irrespective of the fact that his own disciplinary committee has found him guilty of misconduct.

At this stage, I find it appropriate to quote an excerpt from the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343] while endorsing the principle laid down in **Smegh** (supra) and **Planteau de Maroussem v Société Dupou** [2009 SCJ 287] had this to say:

*"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 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]). "*

So, Plaintiff had at least the sufficient prescribed delay of 7 days following his suspension with pay to get in touch with his Counsel so that he could have his explanations viz. his version of facts why he should be kept in employment prepared and given with celerity in relation to the charge made against him at the disciplinary committee of Defendant when the hearing was initially fixed. Indeed, before the previous disciplinary committee chaired by Mr. G. Bhanji Soni, Plaintiff was made aware straight away of that provision of the law namely Section 38(7)(b) of the Employment Rights Act which would be implemented by the Defendant should a postponement be requested on his behalf so that he would be suspended without pay. The dates that were fixed for hearing were common to both Plaintiff and Defendant and were fixed by that Chairman. There is nothing sinister for the disciplinary committee already started to have been started anew chaired by a Senior Counsel this time meaning by someone vested with more experience than Mr. G. Bhanji Soni, namely Mr. D. Basset SC. It is imperative to note that Section 38(7)(b) of the Act does not apply when a postponement is being sought by the Defendant or its Chairman as it is the disciplinary committee of the Defendant. It means that any postponement on their behalf will entail the suspension with pay to continue for the Plaintiff.

However, it has remained unrebutted that instead of explaining his version at the earliest opportunity meaning at the first two sittings where Mr. Basset SC was sitting as Chairman, the Plaintiff chose to challenge the jurisdiction of the disciplinary committee as it did not continue before Mr. G. Bhanji Soni and then to move that the hearing of the disciplinary committee be stayed and more importantly he had moved for a postponement in relation to both motions to explore the parameters of the law and to file a written submission. That was totally misconceived as he acted as if he was appearing before a Court of law and by doing so he has impliedly moved for an extension of the 7 days delay so that Section 38(7)(b) of the Employment Rights Act could be invoked by Defendant. Clearly the Plaintiff was not interested in explaining his version by moving that Defendant's disciplinary committee had no jurisdiction to hear the matter or that it should be stayed when that committee does not have the

attributes of a Court of law and its decision is not conclusive (see- **Moortoojakhan**(supra)).

Indeed, ongoing issues in law unrelated to the Plaintiff's version were raised by his learned Counsel entailing rulings from the Chairman who overruled all his objections so that the examination in chief of Plaintiff only started on 23.1.2018 after a postponement was sought by his Counsel again to be given some time to prepare his examination in chief. On that day the matter was postponed again as Plaintiff's examination in chief was not over. Again, at this particular juncture, Defendant could invoke Section 38(7)(b) of the Employment Rights Act by suspending him without pay thereafter. But before that the dates scheduled should be convenient to all parties and their Counsel including the Chairman (see- **Princes Tuna (Mauritius) Ltd**(supra)). When the exercise of the rescheduling of the case was over, then Defendant rightly invoked that after the 10 March 2018 which was the next sitting not concerned with the rescheduling, it would be a suspension without pay as an extension of the delay provided by Section 38(7)(b) of the Act was being sought by Plaintiff to further continue to prepare his examination in chief when he had more than 2 years to do so let alone that the Defendant's disciplinary committee does not have the attributes of a Court of law. That meant that the Defendant wanted the hearing to be over within a short period of time so that the suspension period not be unduly prolonged which is in line with the Intention of the Legislator.

Thus, it is plain enough that there is nothing in the conduct of the Defendant which can be interpreted as an indication that Plaintiff was not given an opportunity to be heard. Had the Plaintiff explained his version after the case was rescheduled for hearing and that he would have been found not guilty of misconduct by the disciplinary committee, then he would have been refunded 10 days' salary by Defendant as per Section 38(7)(b) of the Act. But had he been found guilty of misconduct by the disciplinary committee, then he would not have been refunded any money.

It is abundantly clear that the Plaintiff has been in bad faith right from the start as his opportunity to be heard was his least priority. It is clear that his benefit for a monthly salary without work for as long as he could during his period of suspension was his priority. When, Section 38(7)(b) of the Act was being invoked so that he was suspended without pay, Plaintiff seized that opportunity not to continue with his examination in chief viz. not to give his version of facts and to claim that his contract was unjustly terminated by Defendant as he was not paid his salary justifying his

claim for severance allowance and other benefits plus accrued interest. It cannot be expected from an employer to have its employee who is on suspension with pay to benefit from full pay of his monthly salary for more than two years without working at all and then to allow him to take the liberty to have the matter postponed on account of his Counsel not being prepared for his examination in chief without invoking Section 38(7)(b) of the Act which to all intents and purposes cannot be construed as having been waived. Obviously, when that provision of the law was being rightly implemented by Defendant so that Plaintiff was suspended without pay, he cannot come and say that it was a breach of contract and that his contract was unjustly terminated by his employer by taking further the liberty not to appear before the disciplinary committee to explain his version so that the Defendant despite having paid his monthly salary for about 2 and a half years while he was suspended, its disciplinary committee could not complete its hearing in order to enable the Defendant to take a decision in relation to him.

Precisely, that is why there is no provision in the Employment Rights Act where Section 38(7)(b) of the Act is applied, it becomes a breach of contract because of a suspension without pay entailing the employee to treat his contract of employment as having been unjustly terminated by its employer leading him to a claim of severance allowance, because such an interpretation would lead to an absurdity. This is because, it would be too easy for an employee who has committed a serious misconduct to benefit from a long period of suspension with pay by exhausting all legal avenues obtained before a Court of law and after having failed altogether as expected, moves for a postponement to prepare his explanations so that as expected again when Section 38(7)(b) of the Act is being invoked by his employer, he does not give his explanations by not appearing before the disciplinary committee depriving the latter of coming to a decision in relation to him and in the same breath, he will be cleared in the absence of a finding of guilt by the committee and in that manner he could also reap the benefit of severance allowance and other items of remuneration inclusive of accrued interest.

It is opportune to note that in the Supreme Court case of **Kim Fong Sew Hee L v Gold Crest Hotels Ltd** [1999 SCJ 47], it has endorsed the reasoning in **Nayandoa v Kalachand**[1996 MR 235] where it was held that: "*an employee who severs links with his employer while his protest is under consideration thereby abandons his employment.*

Vide Camerlynck – Droit de Travail 2eme edition Vol. 1par.387

"la rupture par le salarié en cours de pourparlers lui en laisse la responsabilité"."

It was also held in the Supreme Court case of **Plaine Verte Co-operative Store Society v Rajabally [1991] SCJ 227** that the refusal of the employee to offer his explanations when convened before a disciplinary committee is tantamount to an act of defiance and justified the employer to dismiss him summarily on that score.

For all the reasons given above, I am unable to find that the case for the Plaintiff has been proved on a balance of probabilities. I, accordingly, dismiss the plaint with costs.

S.D. Bonomally (Mrs.) *(Vice President)*
11.2.2022