Naikoo D.V.R. v Belle Riviere Hotel Ltd

2023 IND 14

Cause Number 294/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Dundassy Veer Raj Naikoo

Plaintiff

v.

Belle Rivière Hotel Ltd

Defendant

Judgment

Plaintiff was Head of Security department at Defendant as he held the post of Security Manager following his employment by Defendant as Assistant Security Manager from 13.9.2010.

A *"lost and found item"* namely a sum of Rs. 2,000 comprising of 2 bank notes of Rs.1,000 which was found in the VIP corner of Le Flamboyant Restaurant of Defendant by one Melisa was remitted to Mr. Rajesh Namah, Plaintiff's subordinate, for safe keeping on 8.1.2019.

The unrebutted evidence of the witnesses for the Defendant, namely Mrs. Jessica Sola, Mr. Rajesh Namah and Mr. Vinod Boumah and the admissions and contentions of Plaintiff are essentially to the following effect:

Mr. Rajesh Namah had remitted the said sum of Rs.2,000 and a purse emanating from the *"lost and found items"* to Plaintiff at his request on 14.1.2019. As it was an internal transaction within the same department, he made an entry in the log book to that effect that the money so received by him from Melisa was remitted to Plaintiff for his safe keeping for follow up.

The log book or any related document concerning the said sum of Rs.2,000 did not bear the signatures of neither Melisa, nor Rajesh Namah and nor the Plaintiff as such signatures were only required when that item was handed over either to its owner or to another department. Such procedure was put in place by Plaintiff himself as Head of Security as also further admitted by him at some point.

Mrs. Christine Bilquez, the Director, went to the office of Plaintiff in the presence of the Talent & Culture Manager, Mrs. Jessica Sola, on 9.2.2019 after having failed to obtain the said sum of Rs.2,000 namely the *"lost and found item"* from the cupboard of the security office which was the 'control room' from Mr. R. Namah who told them that it was remitted to Plaintiff and thus, she asked Plaintiff the said sum. Being surprised, Plaintiff stood up and after a while closed the door of his office and told her that the money was not in his possession as he had spent it and that he would replace it afterwards following his apologies. As per the procedure in place, a statement was recorded from him to that effect by Mrs. Cecile Subramanien, the Finance Manager, in their presence at his request as he did not want to have his statement recorded by a subordinate and which was voluntary. His statement was read over to him and after he was satisfied that he had nothing to modify, he signed it and they all signed afterwards as witnesses.

Plaintiff admitted that he did not remit the said sum of Rs.2,000 to Mrs. C. Bilquez on that day. She was no longer working for the Defendant at the time of trial and was not convened as a witness.

Subsequently, Plaintiff was suspended with pay from his work on Monday 11.2.2019 pending his hearing before the disciplinary committee of Defendant.

On 14.2.2019 around 2.30 p.m. he refused to attend a meeting scheduled for the same day at 4.00 p.m. when convened verbally by Mrs. Jessica Sola, the Talent & Culture Manager on behalf of Management on the ground that he was not convened in writing being on suspension. The meeting was part of an ongoing

investigation on which Management wanted to hear his explanations. His terms were not accepted. So, he did not attend.

On the same day, by a letter dated 14.2.2019 itself, he was called upon to appear before a disciplinary committee on 25.2.2019 which was postponed to 26.2.2019 at his request as he retained the services of Counsel in order to answer the following charges levelled against him viz.:

(a) *You have misappropriated a sum of Rs 2,000(i.e. 2 notes of one thousand Rupees) which was found by a team member in the VIP corner of Le Flamboyant Restaurant of the Hotel on 8.1.19 and remitted to you for safe keep as part of "Lost & Found property/item" on 14.1.19.*

(b) *You demonstrated insubordinate behavior on 14th February 2019 around 2.30 p.m. by refusing to attend a meeting scheduled for the same day at 4 p.m. to which you were convened by the Talent & Culture Manager on behalf of Management. The meeting was part of an ongoing investigation on which Management wanted to hear your explanations.*

At his hearing before the disciplinary committee, he did not say anything in relation to both charges but just said that he did not agree with what was reproached of him therein although witnesses Mrs. Jessica Sola, and Mr. Rajesh Namah among others deposed on behalf of Defendant at the said committee because, he claimed he was surprised and thus, chose to remain silent.

The said committee found both charges proved against Plaintiff on the same day he was heard namely on 26.2.2019.

On 1.3.2019, Defendant following the finding of its disciplinary committee which found both charges proved against him and in the light of the evidence adduced at the committee and the material of which he was aware or ought to have been reasonably aware on that day, it dismissed Plaintiff with immediate effect as per a letter of termination dated the 1.3.2019 itself.

Mrs. J. Sola, remitted that termination letter concerning Plaintiff on the 1.3.2019 to the Purchasing Manager at that time, Mr. Kavish Raghoonundun who was an ex-staff, as per the procedure in place to dispatch a driver of Defendant to remit the said letter personally to Plaintiff at his place at Kunpur Street, Nouvelle France.

The said Purchasing Manager, Mr. K. Raghoonundun, phoned Plaintiff on 1.3.2019 itself late in the afternoon which Plaintiff said the reason was that he was asking him how he was keeping as he was under suspension having nothing to do with his termination letter.

On 4.3.2019 which was a Public Holiday namely the Maha Shivaratri festival, the driver, Mr. Vinod Boumah, went to his place at Nouvelle France before noon, knocked at his wooden gate and waited for about 5 minutes and Plaintiff did not come out although he said that since his suspension with pay he was at home and that if the driver whom he knew came at his place, he would have known.

The representative of Defendant, Mrs. J. Sola, contended that since the 1.3.2019 Defendant had tried through its Purchasing Manager to give Defendant personally his termination letter and having not been able to do so till the 4.3.2019, it had no other alternative left but to post that letter on 5.3.2019.

Plaintiff received his termination letter by post on 7.3.2019 which was outside the prescribed delay following the completion of his hearing at the disciplinary committee. At the time he became aware of his termination of employment on the 7.3.2019, he was in receipt of a total monthly remuneration of Rs 56,635.

It is worthy of note that it was only in Court, that Plaintiff stated that there was bad blood between him and Mrs. C. Bilquez prior to 9.2.2019 and that the first charge was set up against him by her for that reason and he was made to sign a blank paper. Furthermore, there was no acknowledgment of receipt that he received the said sum of Rs. 2,000 from Mr. R. Namah on 14.1.2019 by way of his signature. As regards the second charge he did not refuse to attend the meeting but only asked for a written convocation as he was under suspension and same was not done so that he did not attend.

Plaintiff has claimed that his dismissal by Defendant is wrongful, unjustified, unfair and without any good cause and/or justification and that he did not receive a fair hearing as Mrs. Cecile Subramanien, the Director of Finance, was part of the Executive Committee by representing Defendant throughout the hearing of Plaintiff at the disciplinary committee and was the one who prosecuted the charges against him at the said committee.

He has, therefore, claimed from Defendant the sum of Rs. 1,556,359 comprising of one month's salary as indemnity in lieu of notice, severance allowance, prorated end of year bonus for year 2019 and prorated Head of Department Bonus.

Defendant, on the other hand, has denied liability and has denied being indebted to Plaintiff in any sum whatsoever and that Plaintiff evaded personal service in relation to his termination letter and was at fault for having received the said letter outside the statutory delay and had benefited from a fair hearing at the disciplinary committee in relation to the 2 charges levelled against him.

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

Both Plaintiff and Defendant at some stage have travelled outside the bounds of their pleadings. Plaintiff departed from the averments of his plaint wherein he mentioned that he was made to confess in writing to the first charge without being given an opportunity to verify his records, whilst in Court he stated that he was adamant that he was made to sign a blank document by the representatives of Defendant primarily by Mrs. C. Bilquez. Defendant as well, has departed from the averments of its amended plea where it was averred that needful was done to have the letter of termination remitted to Plaintiff personally on 2.3.2019 through its driver namely Mr. V. Boumah after it was remitted to its Purchasing Manager, Mr. K. Raghoonundun. Furthermore, both parties travelled outside their pleadings when it was established that Plaintiff was given a copy of his termination letter through his brother, Mr. Vishal Dundassy Naikoo who was working in the canteen department of Defendant and which was remitted to Plaintiff on 7.3.2019. Thus, the Court will not give weight to such evidence being *ultra petita*.

On the issue of fair hearing verging on motive namely bad blood, I find it relevant to quote an extract from the Supreme Court case of **Nutcheddy Sakoontala v Hemisphere Sud Ltd** [2008 SCJ 210] where it was highlighted that there was no need for the complainant like in the present case for Mrs. C. Bilquez to be called at the disciplinary committee on the basis of her allegation that the first charge has been levelled against Plaintiff for which he was being heard at the disciplinary committee provided that the substance of the allegation was put to him to furnish his explanations:

"We find that the Magistrate's conclusion on this issue, namely that the failure to call the client in the course of the disciplinary proceedings had not denied the Appellant a fair hearing, is justified.

We find it pertinent at this juncture to refer to the comments made in the case of ***A.I. Mamode v De Speville*** *[1984 SCJ 172] –*

"The hearing is not required to be conducted with the formality and all the exigencies, whether procedural or evidential, appropriate to a court or tribunal (vide Tirvengadum v. Bata Shoe (Mauritius) Co. Ltd. [1979 MR 133]……..

There is the situation where all the witnesses are the employees of the same employer and it is, in this situation, practicable for the employer to call them at the hearing just as the employee may call fellow employees as his witnesses. There is, however, the other situation where a person who might be a witness has nothing to do with the employer. That person cannot be compelled to depone……..

……..In domestic hearings or enquiries of this kind, failure to call a person as a witness is not necessarily a breach of natural justice in the conduct of the hearing or the enquiry, if the substance of the allegations of that person is otherwise put to the person in respect of whom the hearing is being conducted and the latter is given the opportunity of explaining his conduct and putting forward his version of the facts.""

Thus, Plaintiff was expected to explain his conduct and put forward his version of facts in relation to the 2 charges made against him purely and simply irrespective of whether or not they were the substance of the allegations out of spite or malice of a person in authority. Thus, the contention of Plaintiff that the first charge was set up against him by Mrs. C. Bilquez because of the bad blood between them prior to 9.2.2019 is untenable.

On the issue of fair hearing akin to the impartiality imposed by Section 10(8) of the Constitution, the following passage from the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd [2020 SCJ 343]** is relevant:

"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])".*

Therefore, although Mrs. C. Subramanien could have represented the Defendant at Plaintiff's hearing before the disciplinary committee, it was immaterial because the said committee did not have the attributes of a Court of law and what was important and expected from Plaintiff was to dissuade his employer in relation to both charges levelled against him by way of explanations provided so that he could keep his job which he completely failed to do before that forum although he was assisted by Counsel which was the reason why his hearing was postponed for one day at his request. Thus, such contention on the part of Plaintiff is misconceived.

Moreover, it remained uncontested that the case run by Defendant in Court did not run counter to the case it had already run before the disciplinary committee. Indeed, material evidence remained unrebutted through the said Defendant's witnesses that Plaintiff candidly admitted both charges in the sense that he did not remit the said sum of Rs.2,000 to Mrs. C. Bilquez on 9.2.2019 as he had spent it and the absence of his signature in relation to that sum remitted to him in any document pertaining to that *"lost and found item"* was because he was the one who put that procedure in place as Head of Security as the item was remitted within the same department. As regards, the second charge, Plaintiff admitted that he did not attend the meeting while being on suspension with pay as the Talent and Culture Manager, Mrs. J. Sola acting on behalf of Management did not bend to his terms to have him convened for the said meeting in writing and not verbally. Now, when Plaintiff appeared before the disciplinary committee, he did not give any version of facts in relation to the said charges. Thus, I find nothing sinister for the disciplinary committee to have found both charges proved against him on the same day of his hearing. However, the disciplinary committee has no power to decide whether his dismissal was justified or not which is the sole province of the Court. Therefore, it is abundantly clear that the Plaintiff for the first time in Court tried to dissuade his Defendant employer by way of evidence so that he could keep his job in that the first charge was set up against him because of the bad blood between him and Mrs. C. Bilquez , the first charge was not proved against him as there was no acknowledgment of receipt by way of his signature on his part in relation to the Rs.2,000 and that he did not refuse to attend to the meeting as regards the second charge but did not want a verbal convocation as was made but one in writing and as same was not done so he did not attend. Clearly, Plaintiff has run counter to the case he had already run before the disciplinary committee in relation to both charges levelled against him by not dissuading his employer at all so that he could keep his job before that forum, while in Court, he did the opposite which is an infringement of

the Northern Transport Principle and cannot be condoned (see- the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]). It is also pertinent to note that it was held in the Supreme Court case of **Plaine Verte Co-operative Store Society v Rajabally** [1991 SCJ 227] that the refusal of an employee to offer his explanations when convened before a disciplinary committee is construed as an act of defiance and justified the employer to dismiss him summarily on that account.

Thus, I am convinced on a balance of probabilities that the Defendant has discharged the burden of proof that rested upon it in that following the findings 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 on 1.3.2019, it in good faith had no other course of action but to terminate his employment so that his dismissal was justified (see- **Moortoojakhan**(supra) and **Smegh**(supra)). As regards the issue of bonus, namely the prorated end of year bonus for year 2019 and the prorated head of department bonus, no evidence was adduced by the Plaintiff on the basis of which he could rely to infer such claims as per his plaint. Thus, both claims for bonus fail.

However, at this particular juncture, the point that I have to decide is whether Defendant has waived its right of invoking that the dismissal of Plaintiff was justified as it is not disputed that Plaintiff received his termination letter outside the statutory delay following the completion of his hearing at the disciplinary committee.

Now as regards the statutory delay as illustrated in the Supreme Court case of **High Security (Guards) Ltd v Fareedun S.M.H** [2009 SCJ 48] namely pursuant to the Interpretation and General Clauses Act, *"where a statute provides that something must be done within…….days from any event, the **dies a quo** must now be counted."*, there is no dispute that the last day within the prescribed delay was 5.3.2019 as provided in Sections 38(1)(a) and 38(1)(d) of the same Act as follows:

> ***"38. Computation of time***
>
> *(1) In computing time for the purposes of any enactment or document-*
>
> *(a) Where the time limit for the doing of an act expires or falls on a Saturday or a public holiday, the act may be done on the following day that is not a public holiday;*
>
> *(b) (…)*

(c) (…)

(d) Where there is a reference to a period of time specified to run from a given date, the period of time so specified shall be calculated so as to include the given day."

Now Section 38(2)(a)(v) of the Employment Rights Act 2008 provides-

*"**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 –

(iv) 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;"

Now, it is important to lay the background in order for the Court to adjudicate on the issue as to whether the Defendant has waived its right to claim justified dismissal for having breached the statutory delay of 8 days from the day of completion of Plaintiff's hearing to the day he received his termination letter.

(a) The material fact remained unrebutted that on 1.3.2019 which was the day when Defendant took the decision to dismiss Plaintiff with immediate effect while he was under suspension with pay and following the finding of the disciplinary committee where the 2 charges were proved against him on the very day of his hearing on 26.2.2019, his termination letter dated 1.3.2019 itself was given to Mr. K. Raghoonundun, the Purchasing Manager, on 1.3.2019 by Mrs. J. sola to dispatch a driver who reported to him to have the letter delivered to Plaintiff personally. Indeed, Plaintiff admitted that he received a phone call from Mr. K. Raghoonundun on 1.3.2019 itself late in the afternoon but who was asking him how he was keeping as he was under suspension having nothing to do with his letter of termination.

(b) I do not accept what Plaintiff said as if Mr. K. Raghoonundun would have treated him as a hero following his suspension with pay by Defendant and his dismissal by the said Defendant on the 1.3.2019 with immediate effect so that his termination letter was given to him on that very day itself for him to do the needful to give it personally to Plaintiff. It is obviously more plausible for Mr.

K. Raghoonundun to have asked him on 1.3.2019 when he could dispatch a driver namely Mr. V. Boumah to come to his place at Nouvelle France in order to give him personally his termination letter at the earliest given that he was still benefiting from his suspension with pay until notified of his dismissal.

(c) Furthermore, this explains why Defendant did not choose the postal route straight away following that phone call of Mr. K. Raghoonundun on 1.3.2019 with Plaintiff, because he dispatched the driver, Mr. V. Boumah, to go to his place of residence on 4.3.2019 which was on the day of Maha Shivaratri festival and which was still within the prescribed delay of 8 days.

(d) Reaching there, the driver after having knocked at his wooden gate and waited for about 5 minutes, yet Plaintiff did not come out bearing in mind that Plaintiff stated in Court that he was all the time at home at the disposal of his employer following his suspension with pay. The Plaintiff even ventured to say that had the driver, Mr. V. Boumah, whom he knew called at his place within the prescribed delay, he would have seen him as he was at home.

(e) Thus, the inescapable conclusion is that Plaintiff was evading personal service of his letter of termination leaving the Defendant with no choice but to opt for the postal route on the 5.3.2019 still within the prescribed delay which unfortunately did not reach him on the same day but after the statutory delay.

At this stage, I find it relevant to quote an extract from the Supreme Court case of **Andre J F v Pointe aux Piments Hotel Ltd** [2022 SCJ 256]:

> *"12. In **North Island Investments Ltd v Valamootoo K.M.** [**2010 SCJ 226**], a decision relied upon by counsel for the appellant, the decision in **Mauvilac Industries Ltd v Ragoobeer** was referred to, itself citing **L'Acte Juridique Unilatéral**, namely: 'l'acte réceptice atteint donc as perfection lorsque la manifestation parvient à la connaissance du destinataire', and it was held that it was "clearly incumbent, for the purposes of a notification under section 32(1)(b)(ii)(A), (of the Labour Act 1975, couched in similar terms to those of section 38(2)(a)(v) of the ERA) that the appellant should have ensured that the respondent had **effectively received** the notice of her dismissal within seven days of the completion of the hearing"[Our emphasis].*
>
> *13. Such "effective reception" is in fact the only requirement for the notification to be valid, i.e., the notification of termination of employment*

should be brought to the knowledge of the employee in order for it to be lawful under the ERA."

At this particular juncture, I find it important to reconcile the reasoning in **Andre**(supra) with the reasoning in the Supreme Court case of **North Island Investments Ltd. v Valamootoo K.M.** [2010 SCJ 226] which reads as follows:

"We feel bound in that respect to follow the construction placed on section 32(1)(b)(ii)(A) by the Judicial Committee of the Privy Council in ***Mauvilac Industries Ltd. v Ragoobeer****[2007 MR 278]*.

The first reason which defeats the argument of learned Counsel for the appellant is that the effective date of dismissal is when the respondent is notified of her dismissal which is the date on which she actually receives the letter and not on the date when it is posted by the appellant. This point was authoritatively determined by the Judicial Committee of the Privy Council in ***Mauvilac Industries Ltd. v Ragoobeer*** *when it stated the following:*

'10. Clearly, dismissal is a unilateral act: to take effect, it does not require any action by the person who is dismissed. Some unilateral acts are effective without the person affected having to be told about them (actes non-réceptices), others only when the person affected is told about them (actes réceptices). See ***J. Martin de la Moutte****. L'Acte Juridique Unilatéral (1951 p. 189, para. 197]: l'acte réceptice atteint donc sa perfection lorsque la manifestation parvient à la connaissance du destinataire', cited with approval by the Supreme Court in* ***Happy World Marketing Ltd v Agathe*** *[2005 MR 37], 39.* ***(Emphasis added)****.*

It is significant to note that the learned author quoted above further evokes at paragraph 203 of 'L'Acte Juridique Unilatéral' instances of how the 'destinataire' of the letter of dismissal may try purposely to evade taking cognizance of l'acte unilatéral' informing him of his dismissal. Such conduct on the part of the 'destinataire' would not operate to defeat the employer's rights where the 'destinataire' is shown to have been 'en faute'. There is, therefore, ample limitation placed in the application of the seven day time limit prescribed under section 32(1)(b)(ii)(A) in order to prevent any of its wrongful evasion or abusive use by an employee."

Thus, in the present case, I am convinced that it has been established on a balance of probabilities that the conduct on the part of the *'destinataire'* namely the

Plaintiff if condoned would operate to defeat the employer's rights because the *'destinataire'* of the letter of termination has been shown to have been *'en faute'.*

I, therefore, hold that this is a fit case where the limitation placed in the application of the seven day time limit prescribed under section 38(2)(a)(v) of the Employment Rights Act 2008 couched in similar terms to those of section 32(1)(b)(ii)(A) of the defunct Labour Act 1975, should apply in order to prevent its wrongful evasion or abusive use by the Plaintiff employee.

It is plain enough that Plaintiff wanted to benefit from a suspension with pay for a maximum period leading to the prescribed statutory delay having been passed by purposely evading personal service so that Defendant would be deemed to have waived its right to claim that his dismissal was justified so that it would necessarily be amenable to pay severance allowance to him among the other items pressed and that such an abusive use by Plaintiff cannot be condoned.

In the circumstances, I hold that Defendant has not waived its right to claim justified dismissal.

For all the reasons given above, the case for the Plaintiff has fallen short of being established on a balance of probabilities and the plaint is accordingly dismissed with costs.

S.D. Bonomally (Mrs.) *(Vice President)*
28.2.2023