Somaroo M. v Salt Lake Resorts Ltd

2023 IND 2

Cause Number 773/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil side)

In the matter of:

Maleegaiye Somaroo

Plaintiff

v.

Salt Lake Resorts Ltd

Defendant

Ruling

In this amended Plaint, it is not disputed that –

1. Plaintiff started employment ever since I May 2010 with Defendant and has ever since been in continuous employment with Defendant.

2. Plaintiff has occupied several positions and finally she was employed as HR payroll clerk and was earning a terminal monthly salary of Rs 11,745.

3. On or about 30.7.2016, she was suspended by Defendant and on or about 16.8.2016, she was requested to attend a Disciplinary Committee. The latter started on 29.8.2016 and continued on 14.9.2016.

4. On or about 20.9.2016, she has received a letter of dismissal and as at September 2016, she has reckoned 6 years and 4 months of continuous service.

Plaintiff has averred that her dismissal was unjustified.

Thus, Plaintiff is claiming from Defendant the sum of Rs 288,975.93/- representing end of year bonus, 3 months wages in lieu of notice and severance allowance at the punitive rate as per the breakdown given in the amended plaint.

Defendant, for its part, in its plea which has remained the same following the amendment of the plaint, has denied that the dismissal of Plaintiff was unjustified and has averred the following:

(a) Plaintiff was duly informed of the charges laid against her in writing;

(b) She was convened before a Disciplinary Committee in the course of which she was legally represented and answered the charges;

(c) The Disciplinary Committee concluded that all charges laid against her had been proved;

(d) Following the Disciplinary Committee, Defendant, acting as a reasonable employer and in good faith, had no other alternative but to terminate Plaintiff's employment on ground of gross misconduct.

Thus, Defendant has denied being indebted to Plaintiff in the sum claimed or in any other sum whatsoever.

The trial has started and the case has been closed for the Plaintiff after she has deposed as sole witness.

In the course of the *examination in chief* of Defendant's representative, the latter stated that Plaintiff has never complained of her duties or the work assigned to her while she was in the HR Department. She further stated that Plaintiff was principally involved in the Payroll Department

but her assistant verified the entries once a month to see to it that the entries were properly made and there was also the Finance section.

She further explained the procedure at the Payroll during a month namely that as there were about 10 departments, she asked Plaintiff that each day for the course of one week, she had to verify for two departments only. Thus, she took two departments and verified the overtime and attendance sheets.

Subsequently, learned Counsel appearing for Plaintiff objected to that line of *examination in chief* as that had not been put to the Plaintiff in cross-examination although Plaintiff gave extensive details of the several procedures.

Learned Counsel for Defendant replied that the Defendant's representative was only explaining the HR Department and he had every right to explain the process for the payroll through his line of *examination in chief* and he could not see why he should not be allowed to put that question.

Learned Counsel for Plaintiff went on to say that those alleged instructions that the witness is attempting to say right now were never put to his client and she has been cross-examined about the wrong entries but nothing as regards the alleged instructions that the person gave to his client.

Learned Counsel for Defendant contended that he was not bound or restricted to his course of cross examination and that Defendant should be allowed to explain what is the process and actually how the payroll is done at the Hotel. It was simple as that.

The objection of learned Counsel for Plaintiff was maintained as according to him, it concerned alleged instructions or orders in the performance of Plaintiff's duty. His point was that whatever has not been elicited in cross-examination of his client cannot be put in *chief*. The matter was fixed for arguments.

The main thrust of the argument of learned Counsel for Plaintiff is that the question was put to the witness to explain in detail the proceedings in respect of the payroll. Plaintiff has deposed as to various stages as to when the final payroll is finalized after having been re-sent to the accounting department. So, the client has explained as a payroll clerk her assignment. She must do it in concurrence with the HR and once this is done, it is sent again to the vetter as we have the HR and we have the Senior person in charge of her who ultimately became the HR.

So, therefore, there are several print outs of the payroll and the Plaintiff has explained in detail when it was first sent to her again under the observation of the representative of Defendant and after the correction sent it again to the accounting department and again after correction the final print out. So, his contention is that the point in cross-examination was never put to the Plaintiff as regards any irregularity and she has explained the rule. Learned Counsel for Defendant cannot travel outside to what has cropped up in cross-examination of Plaintiff.

The main thrust of the argument of learned Counsel for Defendant is that the question was put to the representative of Defendant regarding the payroll process and she gave her answer which is not to the liking of his learned Friend. The Plaintiff has explained what she has been doing as payroll clerk. That is what he calls quantum bias.

I have given due consideration to the arguments of both learned Counsel. True it is that such evidence was not put to the Plaintiff and it did not crop up in the course of her cross-examination by learned Counsel for Defendant and indeed such fact was even accepted by the said learned Counsel.

The point that I have to decide is whether such questioning of the representative of Defendant having for effect to have evidence ushered in which did not crop up in the course of cross-examination of Plaintiff, can be allowed or not.

It is worthy of note that there is nothing to suggest at *face value* that this line of *examination in chief* is not relevant to the charges leveled against Plaintiff at the Disciplinary Committee so that although she was not cross-examined on other relevant issues in Court, it does not necessarily mean that the Defendant has to confine itself to issues which cropped up in the course of her cross examination only and which are also relevant.

However, such questioning will not be allowed if it will in that manner cause an infringement of the **Northern Transport Principle** endorsed in the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** **[2011 PRV 9]** an extract of which reads as follows:

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

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

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

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

*23. The Board would endorse the approach adopted in both of these cases. The question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal. (…). " (**all the above underlining is mine)***

Thus, it is abundantly clear that the **Northern Transport Principle** endorsed in the Privy Council case of **Smegh**(supra) applies both to the employee and employer in that they cannot go counter to the case they had already run at the Disciplinary Committee but could only support such facts by way of corroborative evidence before a Court of law.

Therefore, the objection of learned Counsel for Plaintiff would have been meaningful had such line of *examination in chief* of the representative of Defendant had for effect of going counter to the case already run by Defendant at its Disciplinary Committee by, for instance, bringing in other allegations of misconduct unrelated to the 5 charges leveled against Plaintiff at the said Committee or that such evidence being adduced could not form *"the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal"* following the finding of the said Committee (see- **Smegh**(supra)).

Thus, such objection emanating from learned Counsel for Plaintiff could have for effect having Defendant debarred from discharging successfully the burden of proof that rests upon it pursuant to Section 38(2)(a)(i) of the Employment Rights Act 2008 in that at the time of the

dismissal of Plaintiff following the finding of its Disciplinary Committee, it could not in good faith have taken any other course of action on the basis of the material of which it is or ought reasonably to be aware at the time of the dismissal so that the termination of her employment was not unjustified (see- **Smegh**(supra)). At this stage, I deem it important to reproduce Section 38(2)(a)(i) of the Employment Rights Act 2008 applicable to the present case which reads as follows:

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

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

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

(i) he cannot in good faith take any other course of action;"

Indeed, Section 38(2)(a)(i) of the Act has to be interpreted in accordance with the principles propounded in **Smegh**(supra) and not in accordance with the material touched upon in evidence elicited in Court in the course of cross-examination of Plaintiff.

This is because what is relevant is material that Defendant was aware or ought to have been reasonably aware at the time of the dismissal of Plaintiff by it following the finding of its Disciplinary Committee and as such in Court Defendant would be expected to support the case it had already run before that forum in line with the **Northern Transport Principle**.

Again, the simple reason for this is that because the Disciplinary Committee does not have the attributes of a Court of law and it cannot decide on whether Plaintiff's dismissal was justified or unjustified even if it finds that the charges leveled against Plaintiff are proved (see - **Smegh** (supra) and **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343]), the safeguard as per the **Northern Transport Principle** is preserved in the course of the evidence being ushered in at the trial for the adjudication by the Court as to whether the burden of proof that rests on Defendant has been successfully discharged or not as per the principles propounded in **Smegh** (supra).

Now, as per the objection so couched by learned Counsel for Plaintiff, there is nothing to suggest that such an outcome was forthcoming namely to have the **Northern Transport**

Principle infringed. Furthermore, it would be misconceived to object to the line of *examination in chief* of the Defendant's representative as to how the process of Payroll operate and the involvement of Plaintiff at the material time as far as the work assigned to her on a weekly basis was concerned which is obviously within the ambit of material which Defendant knew or ought to have reasonably known at the time it dismissed Plaintiff following the finding of its Disciplinary Committee.

For all the reasons given above, I am unable to uphold the objection which is, therefore, overruled.

The matter is accordingly fixed *proforma* to 17.1.2023 for both learned Counsel to suggest common dates for continuation.

S.D. Bonomally (Mrs.) *(Vice President)*
11.1.2023