

Nagawa N. v Rogers Capital Corporate Services Ltd

2024 IND 56

Cause Number 455/2020

**IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)**

In the matter of:-

Mr. Navin Nagawa

Plaintiff

v.

Rogers Capital Corporate Services Ltd

Defendant

Ruling

The averments of Plaintiff in this Plaintiff with Summons are essentially to the effect that Plaintiff was in the continuous employment of Defendant from 5.5.2011 to 3.9.2020. He was last remunerated at a monthly interval at the rate of Rs 82,000 as basic pay notwithstanding other additional remuneration benefits.

On 3.9.2020, at the time of his dismissal, his job title was Business Development Manager.

Paragraph 5 of the plaint is reproduced below:

“On 3rd September 2020, the Defendant terminated the Plaintiff’s employment without any good cause or justification and without notice.”

Thus, he has claimed from Defendant wages as indemnity in lieu of notice, severance allowance for alleged "unjustified termination of employment" for the months (May 2011 – August 2020) among other remuneration allegedly due in the sum of Rs 3,921,777.25.

The plaintiff was lodged on 10.11.2020. In answer to Demand of particulars dated 4.2.2021, the Answers were provided on 30.6.2021 as follows:

"Under Paragraph 5 of the Proecipe

Q.6. *How did the Defendant terminate the Plaintiff's employment: verbally or in writing? If this was in writing, the Defendant moves for communication of same. If it was done verbally, what officer of the Defendant, where, and in the presence of whom if any was such decision imparted to the Plaintiff?*

A.6. *In writing, same is available for inspection at the office of the Undersigned Attorney.*

Q.7. *The Defendant moves for detailed particulars of all the facts on which the Plaintiff relies when averring that the termination of his employment was effected "without any good cause or justification and without notice" as alleged. (b) The Defendant also moves for communication of all documents in support of same.*

A.7. Same are matters of evidence. Evidence will be produced on the day of Trial.

Following Defendant's Demand of further and better particulars dated 27.8.2021, the Answers provided by Plaintiff are as follows:

"Under Paragraph 5 of the Proecipe

Q.1 *The Defendant insists on a complete and proper answer to Question 7 of the Demand of Particulars.*

"Q.7. The Demand of Particulars moves for detailed particulars of all the facts on which the Plaintiff relies when averring that the termination of his employment was effected "without any good cause or justification and without notice" as alleged. (b) The Defendant also moves for communication of all documents in support of same."

A.1. The charges levelled against the Plaintiff have not been proved.

The Plaintiff again maintains that these are matters of evidence. Evidence will be produced on the day of Trial.

In any way, it is for the Employer (i.e. Defendant) to prove that the termination was with good cause or justification.”

Defendant, thereafter filed its plea wherein it admitted that Plaintiff was dismissed on 3.9.2020 and was last remunerated at monthly intervals in the sum of Rs 82,000 as basic pay in his capacity as Business Development Manager.

However, it has denied that Plaintiff's employment was terminated without any good cause or justification as it was terminated following a disciplinary committee, on grounds of gross misconduct, all the charges laid against Plaintiff as per the Defendant's letter dated 24.7.2020 having been proved before the disciplinary committee. The Defendant, acting in good faith and as a reasonable employer, had no other alternative in the circumstances but to dismiss the Plaintiff with immediate effect.

It has denied being indebted to the Plaintiff in the sum claimed or in any other sum whatsoever and has prayed that the proecipe be dismissed.

Subsequently, Plaintiff sought to amend his plaint by - *averring that there were several meetings on 2,3,6,13,14 July 2020 with the high ranked officers and the Finance Team of Defendant in relation to an alleged budget shortfall so that it materialized that Plaintiff's explanations were not satisfactory and that his alleged actions amounted to a Ponzi scheme and that further actions needed to be taken by Defendant.*

On 15.7.2020, during a meeting with high ranked officers of Defendant, he was requested to choose between going through a disciplinary hearing which could end with a dismissal or accept a warning letter and a possible demotion.

On 15.7.2020, Plaintiff emailed the Defendant and accepted his warning and possible demotion, stating that he had no choice but to accept that option.

On 17.7.2020, the Human Capital Business Partner emailed Plaintiff seeking his explanations in relation to his clocking in and out of work. Plaintiff replied on 20.7.2020 with his explanations and further requested to opt for flexi-time and was told to submit his flexi-time form to HR for records.

On 19.7.2020, Plaintiff requested through email of providing a more detailed explanation on the issue of the alleged budget shortfall and requested Defendant to review its decision in relation to the warning which he accepted under duress for fear of losing his job.

On 20.7.2020, Plaintiff was suspended from work and on 24.7.2020, he was formally notified of 5 charges leveled against him as follows:

1. *Plot up to 20th of July 2020, to overstate the revenues for the year ended 30th of June 2019 in order (i) to be promoted from your initial capacity as Team Leader as from 1st October 2019, (ii) to maintain your current position as Manager, thus acting in a most fraudulent and dishonest manner.*
2. *Acting in a very irresponsible, non-proactive and unprofessional manner, in all bad faith, by concealing the correct figures which would not have been achieved and causing the Company to close its accounts for the year ending 30th June 2019 with the wrong statement of revenues. Thus, causing serious regulatory, reputational, administrative and financial prejudice to the Company and the Board of Directors thereof.*
3. *Failure to timely inform the Management of the targeted budget for the year ended 30th of June 2020 would not be achieved. Thus, attempting to, in all dishonesty and fraudulently, place the Management, the Company and the Board of Directors of the Company before an erroneous account for the year ended 30th June 2020.*
4. *Misleading and deceiving the Management and the Board of Directors of the Company, thus amounting to a clear breach of trust between and the Company.*
5. *Regular lateness at work at start of the day and unaccounted time of arrival and/or departure. Regular early departure from work at the end of the day as per attendance records.*

On 3.9.2020, Defendant terminated his employment without any good cause or justification and without notice inasmuch as:

- (a) *The Defendant had been aware of the alleged act of misconduct, relating to Charges 1. to 5., on the 14th of July 2020 but it had failed to notify the Plaintiff*

of the said charges within 10 days of its awareness of the alleged misconduct as required by law.

(b) The issue arising in Charge 5 had already been resolved in relation to clocking in and out of work above. The said charge did not amount to a gross misconduct warranting a termination of his employment.

Learned Counsel for Defendant has objected to those proposed amendments to the proeclipe dated 10.11.2020 on the grounds that the amendments constitute an abuse of process and are prejudicial to the Defendant inasmuch as:

- (1) the pleadings were already joined and closed;
- (2) the motion was only made when the case was already in shape and postponed twice for trial due to the Plaintiff's absence on the first time and due to weather conditions on the second time;
- (3) the only purpose of the motion for amendment is not to clarify matters but to enter and add an action by way of an amendment in order to have capacity to enter and add the said action which Plaintiff did not have in the original plaint and to raise a new distinct defence for the first time; and
- (4) lastly, to grant the motion to the Plaintiff would not serve any useful purpose and would only delay and protract matters unduly to the prejudice of the Defendant by, in all bad faith and strategically, introducing elements of surprise. The amendments would interfere with the state of play and integrity that goes with every stage of the procedural process of the Court.

Arguments were accordingly heard.

The main thrust of the argument of learned Counsel for Defendant is as per the grounds of objection. Thus, by way of amendment, there is a cause for Plaintiff's termination of employment by Defendant contrary to what was averred that his contract of employment was terminated without cause or justification. The only purpose of the motion for amendment is not to clarify matters but rather to enter and add new elements and a new cause of action as well as to raise new distinctive defence for the first time. Such an amendment would interfere with the state of play and integrity that goes with every stage of the procedural process of the Court as per the case of **Monroe J. v SBM [2008 SCJ 73]**. A motion for amendment should be done in good faith and there should be good timing. Secondly, there should be a

necessity for the amendment to clarify issues. Thirdly, it should not cause prejudice to the other party and shall serve a useful purpose. The plaint was lodged on 10.11.2020 and pleadings were joined and closed on 17.3.2022. The motion for the proposed amendment was made more than 2 years and 3 months after the plaint was drafted and lodged and more importantly when the case was coming for trial for the second time on 20.2.2023. Thus, the Court should not grant the amendment.

She has relied on the case of **Joomun v Kissoondharry** [[1977 MR 256](#)] at page 3: “*The Court will not readily allow at the trial an amendment the necessity for which was abundantly apparent months ago and then not asked for.*”

The cause of action as drafted in the original proecipe reads at paragraph 5:

“*...The Defendant terminated the Plaintiff's employment without any good cause or justification and without notice.*” In all bad faith, the original proecipe decides consciously not to make reference to the whole procedure and cause and justification and notice which led to the termination of Plaintiff's employment and which were abundantly apparent before the proecipe was even lodged. Those new facts as stated in the proposed amended plaint have allegedly occurred in July 2020 namely on 2,3,6,13,14,15,17,19,20 and 24. She relied on the case of **Compagnies Des Magasins Populaires Limitee v The Government of Mauritius & Anor** [[2012 SCJ 2001](#)]. It is a well-established principle in our law that an amendment, the purpose of which is for the Plaintiff to come up with a distinct defence should not be granted. In the present case, the fight of Plaintiff is no more than there is no cause, no justification and no notice. The fight is now of that same Plaintiff, his distinctive defence from the original defence is that there is a cause, there is a justification, there is a notice but as stipulated in the proposed amended proecipe at paragraph 15(a) and (b), the Defendant –

“*failed to notify the Plaintiff of the said charges against him within 10 days of its awareness of the alleged misconduct as required by the law.*” This 10 days defence comes up for the very first time and paragraph 15(b): “*the aforesaid charge did not amount to a gross misconduct warranting a termination of his employment*”, implying there was the whole procedure that was followed as per the law in industrial matters, but there was a notice when the same Plaintiff said there was no notice, there was no cause, there was no justification, nothing.

Thus, the amendment sought would change the action into one of a substantially different character, which would more conveniently be the subject of a new action. She has relied on the cases of **Bhadain v ICAC** [[2004 SCJ 33](#)], **Beeharry S S v Bojnanun A P & Ors** [[2009 SCJ 358](#)] and **Maigrot I. v The State and Anor** [[2015 SCJ 418](#)].

The main contention of learned Counsel for Plaintiff is that the Plaintiff has claimed Severance allowance in his plaint for unjustified termination of his employment by Defendant and that without cause or justification means unjustified termination of his employment. He relied on the case of **ABC Motors Co. Ltd & Ors v Ngan Hoy Khen Ngan Chee Wang & Ors** [[2008 SCJ 25a](#)] whereby an amendment to pleadings was granted after the trial had started and where the preoccupation of the civil Courts is the determination of the real issue between the parties. He also relied on the case of **Marday C. & Ors v Marday B** [[2008 SCJ 30](#)] whereby an amendment was granted 9 years after the plaint had been lodged and 7 years after the defence had been filed. The Plaintiff was only seeking by way of amendment as to what is the real question in controversy between the parties and it is a matter of unjustified termination of employment. Based on the authority of **Harel Freres Ltd v Veerasamy and Anor** [[1968 MR 218](#)], the burden of proof in a matter of unjustified dismissal lies on the Defendant to show that the termination was justified. Not only the Defendant has to show that the grounds of termination was justified but also that the charges against the Plaintiff were proved amounting to gross misconduct warranting a termination. As per Section 64 of the Workers Rights Act, certain timelines are to be respected when terminating an employee. He also referred to the case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [[2006 PRV 33](#)] where those delays are mandatory. There is no new cause of action, as it remains the same, unjustified dismissal. The trial has not started yet and the Defendant is fully entitled to ask for particulars of the amended plaint. There are no new elements and in the course of the trial the Defendant will be able to rebut those matters of facts so that there is no prejudice being caused to the Defendant. He relied on the cases of **Hems Apparels v State Bank of Mauritius Ltd and Ors** [[2009 SCJ 419](#)], **Hurnam D v Commissioner of Police** [[2014 SCJ 87](#)] and **Bawamia H M v Tranquille M R G C & Ors** [[2013 SCJ 237](#)].

I have given due consideration to the arguments of both learned Counsel in relation to the proposed amendments. The provision of the law as regards

amendment of pleadings is under **Rule 48 of the District, Industrial and Intermediate Court Rules 1992** as follows:

"48. The District Magistrate may, at all times, amend all defects and errors, both of substance and of form, in any proceedings in civil matters, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; all such amendments may be made with or without costs, as to the Magistrate may seem fit, and also such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties shall be so made."(**emphasis added**)

Furthermore, **Rule 1** of the said Rules provides:

"1. These rules –

- (a) may be cited as the District, Industrial and Intermediate Court Rules;**
- (b) shall regulate the practice and proceedings of District Courts in the exercise of their civil jurisdiction and, where appropriate, the practice of Industrial and Intermediate Courts in similar matters."**

It is of relevance to quote the following extract from the case referred to by learned Counsel for the Plaintiff namely **Marday C. & Ors v Marday B [2008 SCJ 301]**:-

"It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings." (see - per Jenkins L.J. in G.L. Baker v. Medway Building & Supplies Ltd [1958] 1 W.L.R. 1216, p.1231; [1958] 3 All E.R. 540, p.546).

... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding

*matters in controversy, and I do not regard such amendment as a matter of favour or grace...It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right."(per **Bowen L.J. in Copper v. Smith (1883) 26 Ch. D 700.** pp.710-711, with which observations A.I. Smith L.J. expressed "emphatic agreement" in **Shoe Machinery Co. v. Cultam [1986] 1 Ch. 108, p.112).***"

In **Hems Apparels v State Bank of Mauritius Ltd and Ors [2009 SCJ 419]**, referred to by learned Counsel for the Plaintiff, it was stressed that "... However blameworthy (short of fraudulent or in bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late in the day the motion for amendment is made, it should, in general, be allowed, provided the amendment will not cause injustice to the other party. There is no injustice to the other party if he can be compensated by the appropriate order for wasted costs..."

In the present case, I take the view that the entire amendment sought by the Plaintiff is fraudulently made or is intended to overreach or is made in bad faith thus, causing an injustice to the Defendant which cannot be compensated by an award of costs by the Court for the reasons given below:

1. The amendments sought are to show that the spanning over a stretch of ongoing days starting from 2 to 14 July 2020, officers of higher management had several meetings with Plaintiff in relation to an alleged budgetary shortfall which materialized that Plaintiff's explanations were not satisfactory and that his alleged actions amounted to a Ponzi scheme so that further actions needed to be taken by Defendant. Thereafter, he was given the option of either to accept a warning and demotion or to appear before a Disciplinary

Committee where he ran the risk of losing his job. He chose to accept the warning and the demotion for fear of losing his job should he be convened to offer his explanations before a disciplinary committee.

2. Subsequently, by way of amendment, he tried again to avoid a disciplinary committee hearing by requesting by way of email, that the warning inflicted upon him be waived, as he took the decision under duress for fear of losing his job and that he wanted to give a more detailed explanation.
3. As rightly pointed out by learned Counsel for the Defendant, that the amendment is being sought to bring in new elements as he has departed from the averments of the original plaint that his contract of employment was allegedly terminated without good cause or justification, as now it is clear that Plaintiff has shown by his conduct that he avoided being heard before a disciplinary committee. It means that he knew that he would not be able to persuade his employer before that committee in order to be able to keep his job.
4. Now the Ponzi scheme is not reflected in the 5 charges levelled against Plaintiff for which he had to appear before a disciplinary committee eventually, in order for him to infer that the Defendant was well aware of the 5 charges against him on 14.7.2020 which was precisely the day it materialized that Plaintiff's actions amounted to such a scheme, so that he could invoke that the Defendant was outside the statutory delay of 10 days to notify him of the said 5 charges.
5. Therefore, the decision taken by Defendant to formulate the 5 charges against the Plaintiff had nothing to do with the Ponzi issue. Nor was the decision to terminate his employment at the material time by Defendant based on the issue of Ponzi scheme. Had the latter been relevant, it would

have been formulated as a charge. Hence, such amendments will not reflect the real issues in controversy between the parties in the present case.

6. Defendant has averred in its plea that Plaintiff was dismissed after all the charges have been proved against him before the disciplinary committee as opposed to Plaintiff's contention in his answers to particulars that the charges were not proved against him. At no point did he say then, in his answers to particulars that there was a breach of statutory delay of 10 days for the charges to be levelled against him by Defendant so that his termination of employment by the said Defendant was unjustified. (see- **Mauvilac Industries Ltd v Ragoobeer Mohit** [\[2006 PRV 33\]](#) and **Manish Meeheelaul v Maubank Ltd** [\[2023 SCJ 281\]](#)).
7. Indeed, as per the answers to demand of particulars, no detail was given about "without good cause or justification" leading to his alleged unjustified termination of his contract of employment as it was a matter of evidence save and except that the charges were not proved against him. Now, Plaintiff has resorted to an alleged Ponzi scheme indulged by him which is obviously an act of misconduct by way of amendment which was detected by Defendant after several days until 14.7.2020, so that he could invoke that Defendant was outside the statutory delay of 10 days as it was aware on 14.7.2020 of the 5 charges of misconduct levelled against him for which he had to appear before a disciplinary committee let alone that the Ponzi issue is not one of them.
8. Therefore, by way of amendment, Plaintiff is trying to forestall all the answers he gave in answers to particulars above by relying on irrelevant facts to invoke that his dismissal was unjustified. It would mean that although the Defendant discharges the burden of proving that following the findings of the Disciplinary committee that the 5 charges were proved against him and on the

basis of the material it knew or ought to have reasonably known at the time of dismissal of Plaintiff, it could not in good faith take any other decision but to dismiss him, so that the termination of his contract of employment by Defendant was not unjustified (see - **Smegh (Ile Maurice) Ltée v Persad [2010 UKPC 23]**), Plaintiff would be successful in invoking a breach of statutory delay to infer unjustified dismissal by relying on an irrelevant Ponzi issue.

9. Such a course will go against the averments relied upon by Plaintiff in his original plaint delimited by the particulars given by him. It will definitely cause injustice to the Defendant as such an injustice cannot be compensated by an order for costs by the Court as it concerns the right of the Defendant existing at the stage the motion for amendment was made where in its plea, it has averred that all the 5 charges were proved against Plaintiff at the Disciplinary Committee and that he was found guilty of gross misconduct. Therefore, it is abundantly clear that the obvious purpose of such an amendment of the plaint is to forestall the plea of Defendant that all the 5 charges have been proved against the Plaintiff at the disciplinary committee. As was rightly stressed in **Beeharry S S v Bojnanun A P & Ors [2009 SCJ 358]**:

“No good and valid reason, acceptable to the Court, has been given by plaintiff’s counsel as to why this amendment was being proposed at such a late stage....

By its very nature, the proposed amendment relates to issues which should have been to the knowledge of the plaintiff all along and could not have struck his mind all of a sudden subsequent to the filing of the plea.”

10. Now as highlighted in **Maigrot I. v The State and Anor [2015 SCJ 418]**, by trying to raise a new or substantial issue for the first time, which in the present

case is the Ponzi scheme which is not reflected in the 5 charges levelled against Plaintiff and which therefore does not reflect the real question in controversy between the parties, the amendment is trying to import a new cause of action into a plaint and which cannot be condoned, an extract of which reads as follows:

“In Reekoye v. Mauritius Union Assurance Co. Ltd [2004 SCJ 66], which was quoted in Island General Insurance Co. Ltd & Anor v. Government of Mauritius [2011 SCJ 87], it was held that a Court would not allow an amendment of pleadings which raises a new or substantial issue for the first time. I have no doubt that an amendment trying to import a new cause of action into a plaint is one which raises a substantial issue for the first time.”

11. It is also relevant to quote an excerpt from **Compagnie des Magasins Populaires Limitee v The Government of Mauritius & Anor [2012 SCJ 200]** as follows:

“..... “There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time”.

*.....The Court will not readily allow at the trial an amendment the necessity for which was abundantly apparent months ago and then not asked for.-*vide Joomun v Kissoondharry[1977 MR 256].**

12. The principles relating to amendment of pleading were aptly highlighted in **Harel and anor v Société Jean Claude Harel and Cie and ors and Société du Patrimoine[1993 SCJ 464]** as follows:

*“(1) The court is more strict in granting applications for amendment at the trial than before the trial. An amendment which is substantial and raises new issues which are inconsistent with those found in a statement of claim will not be granted – *Tive Hive Ors v Kam Tim [1953 MR 80].**

*(2) The Court will not readily allow at the trial an amendment, without any explanation as to why it could not have been moved for earlier, the necessity for which was abundantly apparent months ago, and then not asked for – *Joomun v Kissoondharry 1977 MR 256 and Hipgrave v Case (1885) 28 Ch D 356.**

(3) *The Court will not allow an amendment which will prejudice the rights of the opposite party as existing at the time of the amendment since the other party will suffer an injustice or injury which could not be compensated for by costs or otherwise – Tildesley v Harper (1878) 10 Ch D 393, Ketteman v Hansel Properties Ltd [1987] AC 189.*

(4) *Any amendment allowed by the Court dates back in general to the time of the original issue of the claim and the action continues as though the amendment has been ab initio – Warner v Sampson [1959] 1 QB 297.”*

13. Therefore, upon an application of those principles to the facts of the present case, no explanation has been given as to why such amendments could not have been moved for earlier by Plaintiff, the necessity for which was apparent well before and then not asked for.

14. The proposed amendment is being made after the Defendant has filed its plea to the effect that all the 5 charges have been proved against Plaintiff at the Disciplinary committee so that his dismissal was justified. The substantial amendment sought by Plaintiff in order to raise for the first time the Ponzi issue, shows that it is inconsistent with the issues pertaining to the 5 charges for which the original plaintiff was concerned so that the termination of Plaintiff's employment was allegedly without cause or justification and which is in turn inconsistent with raising an issue to clarify the issues in controversy between the parties.

15. Therefore, the objection of learned Counsel for the Defendant is well taken inasmuch as the motion for amendment in its entirety is made in bad faith, as its obvious purpose is to forestall the plea of the Defendant that the 5 charges have been proved against the Plaintiff at the Disciplinary committee so that his dismissal was justified and would have then in that manner, be interfering with the state of play and integrity that goes with every stage of the procedural process of the Court(see- **Monroe J v SBM [2008 SCJ 73]**) and the prejudice thus caused to the Defendant cannot be compensated by an award of costs by the Court to the Plaintiff.

For the reasons given above, the objection of learned Counsel for the Defendant is upheld. The matter is accordingly fixed *proforma* to 23 October 2024 for both learned Counsel to suggest common dates for trial.

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

16.10.2024