Rajkomar A.T. v Airports of Mauritius Co Ltd

2023 IND 26

Cause Number 108/19

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Aarti Tina Rajkomar

Plaintiff

v.

Airports of Mauritius Co Ltd

Defendant

Judgment

The averments of this plaint are as follows namely Plaintiff was in the continuous employment with Defendant at all material times from August 2006 to December 2018 as the Human Resource Manager.

She was drawing a monthly basic salary of Rs 134,115/- and monthly emoluments totaling Rs 214,397 as per the breakdown given in her plaint.

At all material times, she had discharged her duties in a fair, proper and competent manner and in good faith without any ulterior motive. All her acts were subject to scrutiny by the Chief Executive Officer ('**CEO**') and the Board of Defendant at all material times and all decisions were taken by management through the Chairman and the CEO.

By way of a letter dated 9.11.2018, she was informed by the Officer in Charge that she had been suspended from her post with immediate effect following an internal investigation of charges levelled against her, namely, that the Plaintiff had caused a car loan/cash grant which had been granted to an employee who had passed away, one Mr. Shyam Soobhow, in the aggregate sum of Rs 426,505/- to be waived without the approval of the Board of the Defendant.

Plaintiff was convened to attend a Disciplinary Hearing on 23.11.2018.

On 21.12.2018, she received a letter dated 20.12.2018 whereby she was informed by the Board of Directors of the Defendant that her contract of employment has been terminated with immediate effect.

Prior to receiving the letter of suspension and/or charges dated 9.11.2018, she was never informed by any officer of Defendant of any contraventions of the Airports of Mauritius Co Ltd ('**AML**') Terms & Conditions of Employment or regulations or policies regarding the write-off of the car loan/cash grant of late Mr. Soobhow.

The aforesaid termination of employment was unfair, unjustified, arbitrary and in utter bad faith without any basis whatsoever and in breach of her rights inasmuch as:

(a) She was hand- delivered the letter of suspension and/or charges on 9.11.2018 at her place while she was on vacation leave and she was convened to a Disciplinary Hearing to be held on 23.11.2018.

(b) She was not given any opportunity to submit any written explanations prior to the Disciplinary Hearing which is against the disciplinary procedures provided under the AML Procedural Agreement 2010.

(c) She was suspended against all expectations and in a frivolous manner. She was further subjected to humiliation and excessive behaviour from Defendant when she was denied access to her email account and mobile number with immediate effect; such actions are taken when the employee is deemed to having manipulated evidence at the work site, which is not the case for the Plaintiff. As a result, the Plaintiff has been deprived of access to information in order to prepare her defence at the Disciplinary Hearing.

(d) The letter of suspension and/or charges was signed by one Mr. Chellen who has been temporarily appointed Officer in Charge/acting CEO of the Defendant. Mr. Chellen who holds the substantive position of Internal Auditor acted while being in conflict of interest inasmuch as the Internal Auditor should not sign a suspension letter based on an inquiry which he has himself conducted.

(e) With a view to intimidate her, one Mr. Permal who introduced himself as '***huissier de la cour' and purporting to act on behalf of the Defendant****, was sent to her home in order to coerce her to sign the letter of charges.*

(f) Defendant acted in such a way as to bring disrepute to, and to discredit her by causing unwarranted publicity in the wide press and effecting misleading publications and undue exposure of the purported proceedings against Plaintiff through the press and this in breach of their duty of fairness and of requirement of discretion such as would amount to intimidation of the Plaintiff as a lady employee.

The said car loan/cash granted to late Mr. Soobhow was waived by the then CEO of Defendant, Mr. Bhoyroo, as per his prerogatives and with the approval of the Chairman. Plaintiff merely made recommendations as Human Resource Manager to consider waiver on humanitarian grounds as Mr. Soobhow had passed away whilst in employment and as his widow was unemployed and which said recommendations were approved by the previous CEO namely Mr. Bhoyroo.

In fact, Defendant has acted oppressively and in an arbitrary manner ever since the appointment of the new CEO in an acting capacity, namely Mr. Chellen, in replacement of the previous CEO, Mr. Bhoyroo. The latter was not subjected to any disciplinary procedure nor contradicted upon his due explanations on the said issue.

Defendant had dealt with her in a discriminatory manner and was in breach of her legitimate expectations to be treated fairly and equitably by the Defendant.

The disciplinary proceedings instituted against her by the Defendant were in breach of the rules of natural justice and due process which in turn lead to a tainted disciplinary hearing and proceedings which at all material times were in the nature of a calculated stratagem set up to dismiss the Plaintiff in the aforesaid manner and that the charges were unwarranted and, at most, not established.

The disciplinary proceedings were a sham and were set up in bad faith by Defendant in order to malign the reputation of the Plaintiff in addition to a tendentious press campaign designed to give undue publicity to the Plaintiff and cause her prejudice in such a way as to give her a bad name before finally dismissing her abusively from employment.

As a result of her unfair and unjustified dismissal by Defendant, the latter is indebted to her in the sum of Rs 9,418,449/- comprising of one month's remuneration in lieu of notice, severance allowance for 12.33 years of service for unjustified dismissal, accumulated passage benefits, cumulated vacation leave, end of year bonus for December 2018 and allowance due (equivalent to one increment) – additional responsibilities as HR Manager.

She has prayed for judgment condemning and ordering Defendant to pay to her the sum of Rs 9,418,449 with interest from the date of termination of employment to the date of final payment.

Defendant in its plea has averred that Plaintiff was offered employment as Manager Human Resources with Defendant on a probationary period of six months effective from 16 August 2006. Pursuant to a letter dated 11 August 2006, she occupied the post of Manager Human Resources until 21 December 2018, whereby she was dismissed by way of letter dated 20 December 2018.

Plaintiff was drawing a monthly salary of Rs 134,115. It has denied that Plaintiff's emoluments amounted to Rs 214,397 as alleged.

Plaintiff has caused a car loan/cash grant facilities granted to late Mr. Shyam Soobhow in the aggregate sum of MUR 426,505/- to be waived without the approval of the Defendant's Board, in breach of Clause 15.6.8 of the Terms and Conditions of Employment of the Defendant and the regulations and policies made by the Defendant's Board.

Plaintiff in her capacity as the Manager Human Resources of Defendant had the power, duty and obligation to make recommendations in line with the Terms and Conditions of the Employment of Defendant and to ascertain that the procedures laid down therein are complied with, particularly in the present matter where the issue of waiver of a car loan and cash grant facilities are concerned and ought to be referred to the Defendant's Board for prior approval before any decision is taken. However, Plaintiff failed to adhere to same and instead recommended the writing-off of the car

loan and cash grant facilities granted to late Mr. Shyam Soobhow to the then CEO of the Defendant, following the demise of Mr. Shyam Soobhow, without seeking the prior approval of the Defendant's Board to that effect.

Defendant acted in accordance with the Terms and Conditions of Employment of Defendant and the provisions of The Employment Rights Act to issue the letter detailing the charges to the Plaintiff and the latter was also afforded a reasonable opportunity to furnish her explanations and answer the charges levelled against her by the Defendant at an Independent Disciplinary Hearing scheduled on 23.11.2018.

Following the Independent Disciplinary Hearing and the conclusions of the Chairperson, the Plaintiff was justifiably issued with her letter of dismissal dated 20.12.2018.

A preliminary investigation was conducted internally by the Defendant in February 2018 in conformity with its regulations and policies, and following the conclusion of which, the findings were communicated to the Defendant's Board on 31.10.2018. After the Board considered the findings and sought clarifications on the issue of writing-off of car loan/cash grant facilities without the Board's approval, the letter dated 9.11.2018 was signed by Mr. Siven Chellen, in his capacity as the Officer-in-Charge at the material time, pursuant to the Terms and Conditions of Employment of the Defendant and the aforesaid letter was issued to the Plaintiff containing a summary of the charges levelled by the Defendant.

Plaintiff was convened to an Independent Disciplinary Hearing with the possibility of being assisted by legal representatives of her choice whereby she was afforded a reasonable opportunity to answer the charges leveled against her by the Defendant, in conformity with the disciplinary procedures under AML Procedural Agreement 2010 and the Terms and Conditions of the Employment of the Defendant.

Plaintiff was in fact and in truth suspended pending the determination of the Independent Disciplinary Hearing and had access to any work resources and/or amenities during the suspension period except to her basic pay. There was at no point in time, any request from the Plaintiff for access to any of her work resources and/or amenities. Furthermore, Plaintiff did not avail herself of any remedy under the Terms and Conditions of Employment against her suspension.

The letter of charges dated 9.11.2018 was served by a registered usher, Mr. Harold Iyempermall, upon Plaintiff inasmuch as the Plaintiff was not in office at the material time and had deliberately refused to accept the letter initially when served through dispatch by the office personnel of the Defendant. In these circumstances, Defendant had no alternative than to cause the letter to be served by a registered usher to ascertain personal service of same.

Plaintiff is trying to play the victim when in fact and in truth, she has breached the Terms and Conditions of Employment of Defendant, particularly Clause 15.6.8, by not providing the proper recommendation to the then CEO of Defendant, in her capacity as the Manager Human Resources who ought to be aware of the applicable terms and conditions of Defendant and ascertain compliance thereto to ensure that the correct decision is taken. The Plaintiff has also written to the National Transport Authority in connection with the removal of the lien on the car offered as collateral by late Mr. Shyam Soobhow, without the Board's approval.

Plaintiff in her capacity as the Manager Human Resources had the duty to make recommendations in line with the Terms and Conditions of the Employment of Defendant and to ascertain that the procedures laid down therein are complied with for each dossier being handled, particularly with regard to the writing-off of a car loan and cash grant facilities. Each dossier is to be treated independently and in conformity with the Defendant's regulations and policies.

Following Plaintiff' s dismissal by letter dated 20.12.2018, and after deduction of her accumulated benefits within the Defendant's company, she owes the sum of Rs 382,776.65 to Defendant as at 21.12.2018 from her car loan and cash grant balance as detailed in its plea.

Defendant has moved that the plaint be set aside with costs.

The Plaintiff's case rested on the evidence given by Plaintiff herself, Mr. Johnny Thierry Dumazel, ex-Chairman of AML and Mr. Swaraj Kowlessur, Acting Head of Corporate Services of AML.

Plaintiff gave evidence in Court. She has entered a plaint against Defendant and has made her claim from Defendant as per the breakdown given in her plaint in Court. She was employed at all material times at Defendant from August 2006 until her dismissal in December 2018 as Human Resource ('**HR**') Manager. She produced her letter of appointment as per Doc. P1. She was employed under the

terms and conditions of employment of Defendant and her employment was also governed by the procedural agreement of the Defendant company. The procedural agreement was an agreement between the AML Employees Union hereinafter called "the union" and the AML hereinafter called "the company" and it also included a paragraph on disciplinary procedures as per Doc. P2. Then, she produced a booklet containing the terms and conditions of employment of Defendant namely AML dated 2017 as per Doc. P3. She was employed at all material times as the HR Manager of Defendant from 2006 to 2018 until she was dismissed. At the beginning of 2017, she was assigned other duties like to head the payroll function. So, in addition to her responsibilities as HR Manager, she was leading the payroll function from 2017 until her dismissal. From January 2016 to October 2018, she was heading the HR Department of both Airports of Mauritius and Airport Terminal Operations Ltd (ATOL). She had been working at AML with at least 10 CEOs. However, from January 2016 to October 2018, when she was overseeing both companies HR departments, she was under the administrative control of the CEO and reporting to the CEO of AML who was Mr. Rumesh Bhoyroo at that time until 2018. After his departure, there was an acting officer in charge who was Mr. Chellen the Internal Auditor.

As far as her duties were concerned as HR Manager, she reported to the CEO and her role was to lead the HR Department and seek approval of the CEO for implementation of any decision that regarded and pertained to the HR Management. She could not give directives to the CEO in the discharge of his duties as he was her boss and she did not give directives to her boss.

She was recruited following a recruitment exercise and her position was advertised and she applied for that position. There was a Board of interviewers who interviewed her representing both management and Board representatives and she was recruited in 2006. From 2006 till she was dismissed from her position, at all material times, she discharged her duties in all good faith in the interests of both Defendant company and the employees. She had given her full capacity and was qualified and competent in that field. She had 20 years' experience in HR and her past jobs testified of her competencies and what she had accomplished. While she was at AML, she had the opportunity to be at the negotiation table. So, all the salary negotiations that were happening and revision of terms and conditions of employment, she was in the forefront to negotiate with the union and at all times, all the reports, all the projects she and her department had worked with employees and management, they had all been approved by the management and the Board

whatever HR project she and her department had worked and been implemented in toto.

Now when she said about the rules of the company, she was party to the formulation of the rules. The terms and conditions of employment were the responsibility of the HR Department and it was herself and her department that were fully involved in the review of that document. There were many Chairmen, but at the time of the case of Mr. Soobhow, a decision was taken to waive all the outstanding amounts of late Mr. Soobhow who passed away. Mr. Johnny Dumazel was the Chairman until February 2018. After that Mr. Ken Arian was the Chairman of AML until, she left. All decisions were taken between the Chairman and the CEO generally meaning they did consult each other and she might not always be present. But the CEO reported to the Board. When the decision was taken at the level of CEO and that of the Board, usually the CEO was going to inform her of the Board decision if it went to the Board. If a decision was taken in there, instructions to her would come through the CEO as regards its implementation. Mr. Shyam Soobhow was employed at Airfield section of AML and he passed away in September 2017 after 35 years of service with no negative report. Mr. Soobhow passed away while he was in office and he had actually a loan that he had not yet paid that was outstanding at that time as according to his wife he had taken a loan for his car from AML and also benefited from a cash grant which was the duty element to buy a car from Defendant as per his rights. According to HR procedures, whenever an employee had passed away, the HR department that she was heading would have the responsibility to compute any amount that the employee owed to the company and what the employer owed to the employee who passed away. In the case of Mr. Soobhow, the Finance Department of Defendant was approached because it would have all the data. The outstanding balance owed to late Mr. Soobhow was put in writing because the then CEO was approached by the widow of Mr. Soobhow as she was not in gainful employment and had 2 kids under her responsibility. The CEO informed her that he was approached by the widow of Mr. Soobhow asking for all the dues to be waived because she did not have money to pay for them and which did not happen in her presence. It was the then CEO, Mr. Bhoyroo, of AML who reported same to her. Mr. Soobhow passed away on 19.9.2017. On 21.9.2017, Mr. Bhoyroo, CEO of AML had a discussion with Mr. Johnny Dumazel, the Chairman. That discussion happened in her presence where the CEO, Mr. Bhoyroo, was explaining to the Chairman that the widow had asked for a waiver. He discussed with the Chairman the possibility of waiving on humanitarian grounds and the

Chairman approved it in her presence. She did not participate in the deliberations but she was instructed by the CEO to put that in writing because the CEO who had the authority to waive that outstanding balance could not give her a verbal instruction. For the HR Department or the Defendant to implement any decision, it had to be in writing. As part of the process, she was requested to submit to him a memo so that he could indicate his decision in writing for the waiving of the loan. There was a memo that she herself submitted from the HR Department to the CEO. That memo would comprise of a summary profile of late Mr. Soobhow, his years of service, whether he had any negative report and the amount that he owed like a form which existed at the HR. She made her recommendation for his approval for the waiver and the next part B of the memo needed the authorization of the CEO and which was his prerogative. There was a tick box and he would return the memo to the HR with an indication of whether he had approved or not. There was also another part in the memo where it was written "remarks". So, if the CEO had any reservation or he had any further instruction to give, he was going to put in the remarks whatever he asked her on the blank lines. The CEO could have asked for anything, for legal advice, for board papers for keeping that decision on hold. But in that particular case he approved. She did not disapprove the decision of the CEO. Her input was her recommendation to the CEO because it was discussed with the CEO and Chairman in her presence and she also concurred on humanitarian grounds to consider the waiver because their Terms and Conditions of employment were totally silent on what to do when an employee passed away. She was happy with that process.

On 9.11.2018, while on vacation leave, she was surprised to have the visit of the driver/messenger, Mr. Paghu, from AML, coming to hand deliver to her a letter of charges indicating that she was suspended from her duty with immediate effect signed by Mr. Chellen, officer in charge, as per Doc. P6. Then, she had the visit of Mr. Permal early afternoon and who he introduced himself as Court Usher and he insisted that she took a second copy when she had already a first copy in the morning. She took both copies collectively as per Doc. P7. The 9.11.2018 was a Friday and she was expected to resume duty on the Monday as per her approval letter of her vacation leave as per Doc. P8 dated 6.9.2018 under the approval of Mr. Chellen.

Thereafter, she was not told that she was going to be investigated in her conduct or that she would be subjected to disciplinary proceedings. Before her letter of 19.11.2018 nobody indicated or hinted to her that there was an investigation going

on. She was not informed after that letter of vacation saying that there was an investigation against her and that she would have to answer for the investigation and to give explanations. She attended the disciplinary proceedings on 23.11.2018 which was the first meeting. Following her disciplinary proceedings, she received on 21.12.2018, a letter dated 20.12.18 whereby she was informed by the Board of Directors of Defendant that her contract of employment had been terminated with immediate effect as per Doc. P9. She denied the charges at the disciplinary committee. For the first meeting on 23.11.2018 through her Counsel they highlighted to the Defendant's representative that in her opinion, not only she refused all the charges, but the process itself was questioned because she said that it was unjustified and illegal. She made a representation for that disciplinary committee not to go ahead. The disciplinary committee was presided by the Legal Manager of ATOL.

The charge referred to Clause 15.6.8 of the Terms and Conditions of employment of AML 2017 as per Doc. P3. Reference was made to termination of employment and termination of employment is not related to demise of employee and this is clearly defined. Termination of employment as per HR is either voluntary or involuntary. Voluntary termination is when the employee goes on retirement or resigns. It is involuntary if the employer terminates the employment by dismissing the employee or laying off the employee. There is a definition of the termination of employment in the terms and conditions of employment itself. At para 3 dealing with termination, it is said termination on retirement on medical ground and so on and demise is not mentioned at all in that paragraph. It means termination of employment is not at all linked to a demise. There are only 3 places in the terms and conditions where death or demise is mentioned namely at para.12.1.4 wherein on death of an employee, heirs shall be allowed to cash "in toto" all the monetary value of passage benefit accruing to the deceased, 17.7.1 salary upon death where a full month salary is paid to the heirs of an employee on his demise, irrespective of the number of days he has been in service during that month and 17.8 where AML shall grant an ad hoc payment of Rs 11,500 to the family of a deceased employee. If demise would have been part of the waiver, demise would have been put there in para.3. There was no confusion in the terms and conditions of employment. When talking about resignation, retirement, dismissal or deceased employee all are very clearly spelled out. So, under the para.3 of termination of employment, demise is not mentioned there. So, demise could not be part of termination of employment. It was for that reason that she concurred with the CEO that he was right to entertain a

request from the widow of the deceased employee. Firstly, because whatever was not mentioned in the terms and conditions of employment, as per para.1.1.1. of that same Doc. P3, any such issue shall be resolved by the CEO after consultation with the union in accordance with Law. Secondly, there were precedent cases where employees had passed away, the CEO was the one who took the decision regarding any waiver. For those 2 reasons she was comforted in supporting the views of the CEO. The third reason was that the discussion happened between the Chairman and the CEO and the Chairman approved in her presence. Everybody concerned was consulted. The HR Department was mandated to collaborate with every department in the company and also the Finance department. At no point did any officer from AML challenged or highlighted any wrongdoing. That has been the practice at AML and the precedents were the cases of Mr. S. Venkatesu, Miss Poonam Alkoo although the extent of the amount waived differed from that of Mr. Soobhaw. There was no reservation from Management in that respect. That was why she said that she was of good faith and followed what was in practice at AML. She rejected the charges and she had a clean record at AML. There had never been a case where a single employee or Board member or Senior management had told her ever in her 12 years plus of service that she had faulted in a whatsoever manner.

Both the terms and conditions of employment of AML and the procedural agreement viz. Docs. P3 & P2 respectively clearly spelled out the steps in case somebody failed in her duty. Firstly, the person should be informed that she had failed and she was never informed at any point in time that a case which happened in 2017, there was any contention or any kind of worry regarding that and as per the process she was supposed to be informed to ask for her explanations. She was never asked for her explanations before she was convened to appear before a disciplinary committee. There was an elaborate process in the rules and regulations before convening her to a disciplinary committee. None of the rules were followed in her case and that was why she felt that the decision was biased especially when she received a suspension letter, she was surprised that AML had totally flouted its own procedure in the case of termination of employment or disciplinary measure. The company did not follow any rule in her case and she had a clean record, never had any warning or reprimand ever in her career. She had other officers working in her department junior to her and she followed the rules. The third charge did not mention what regulations she had contravened. So, the disciplinary committee was not impartial. The outcome of the disciplinary committee only reflected the opinion of the Internal Auditor. The CEO viz. Mr. Bhoyroo was asked to give his explanations

on the same matter and which he did in March 2018 to Mr. Ken Arian as the Chairman of AML. Mr. Bhoyroo was neither suspended nor convened before a disciplinary committee. From February 2018 until her suspension 9 months after, nobody indicated to her of any qualms on that issue. As CEO, Mr. Bhoyroo shared those explanations he gave to her. They had 10 days to tell her and they took 9 months to do so. She was asked to attend the disciplinary committee after the departure of Mr. Bhoyroo and who was given all his dues. The report of Mr. Chellen was tabled at the Board in February 2018. She was not asked for explanations. So, after the CEO gave his explanations, her understanding was that the matter was settled. There was no reason for her to discuss and she was not in office as she was suspended. To her knowledge there was no report after that from Mr. Chellen.

In cross-examination, she agreed that she was the guardian of Docs. P1, P2 and P3 within the framework of the company as they were documents concerning the HR Department. As part of her duties, she collaborated with consultants that reviewed and drafted those documents. She was familiar with Doc. P3. There was a Board of directors which was the ultimate decision making in the Defendant company. She would not know if the Board of Directors was made aware of the final contents of the report of the audit committee on 31 October 2018. As per the answers to particulars of her plaint, she could not deny that she said that it was to her knowledge that the Board took cognisance of the findings of the enquiry on the 31 of October 2018.

She appealed in writing to the Board of AML against the decision of management to terminate her contract of employment within 15 days' delay as prescribed. She got a reply from AML after 7 months of her appeal. She filed the present plaint as she did not get a reply yet. She attended the disciplinary committee and there were 2 sittings. She did not object to the composition of the board of the disciplinary committee but her Counsel did highlight that procedures were not being followed. At the first sitting of the disciplinary committee, her representative highlighted very discretely that procedures were not followed and there was no reason to have a disciplinary committee against her as procedures were not followed and the AML representative came back to say that AML Management decided to proceed with the disciplinary committee. She was not allowed not to appear before a disciplinary committee. So, she appeared. Had there been a serious enquiry as stated by management, then Mr. Chellen should not have approved her vacation leave but should have asked her to stay in office because an enquiry was ongoing

she might be required to submit her explanations. The vacation was approved on 6 September as per Doc. P8. She could not have known at what stage the enquiry had evolved when she was on vacation. She was not asked written explanations. She was called before a disciplinary committee where the hearings spanned over 2 days. It was the prerogative of the employer to suspend or not to suspend an employee. Her contention was that her suspension was done in a frivolous manner. She had already accepted a first copy of her suspension letter which was also the letter of charges and there was no need for a second one. She was aware of very strict rules with regard to notification of an employee of a disciplinary committee. Everybody at AML was provided with a *communiqué* that she was suspended from the Officer in Charged dated 9 November 2018 and addressed to all staff to everybody working at AML which reads: *"this is to inform you that further to an internal investigation, Mr. Tina Rajkomar, Manager Human Resources has been suspended from duty, with effect from today, 9th of November 2008 until the determination of disciplinary proceedings".*

When she was asked to depone at the disciplinary committee, she was surprised by the delay that was taken by management to act upon an incident which happened in 2017 and which was openly discussed with the union and with the heads of departments. Undue publicity was given that she was to appear before a disciplinary board. Management acted in breach of their duty of discretion to treat her fairly as there was a provision in the terms and conditions of employment.

Mr. Johnny Dumazel gave evidence in Court. At the material time, he was the Chairman at the AML regarding the present case. He was Chairman from April 2017 till February 2018 as far as he could remember. Then he was replaced by another new Chairman, Mr. Ken Arian. He was part of the discussion with the ex-CEO, Mr. Bhoyroo and the issue of Mr. Soobhow was fully canvassed and he approved. There was not dispute on that issue. As regards the report concerning that issue, he confirmed that he was aware that one Mr. Chellen made a report as auditor. As far as he could remember during his presence there and the presence of the CEO, there was no proceeding going on against Plaintiff nor against Mr. Bhoyroo. According to him, Plaintiff was someone very professional and very meticulous in the treatment of all her files including the one concerning the present case.

Mr. Swaraj Kowlessur in his capacity as Acting Head of Corporate Services at AML gave evidence in Court. He had in his possession a copy of a letter signed by

Mr. Bhoyroo addressed to Mr. Chellapermal, Chairperson, Audit and Vice-Management Committee of AML as per Doc. P16.

The Defendant's case rested on the evidence given by Mr. Fayzal Mohung, Manager Human Resources of AML. He confirmed that there was an agreement between late Mr. Soobhow and AML namely the Defendant. It concerned a cash grant and a loan for the purchase of a car and that document it seemed that there were only 4 pages to same and according to Plaintiff that document should be around 2015 which he agreed. He confirmed that Doc. P10 concerned the very agreement between late Mr. Soobhow and the Defendant. He also conformed from Doc. P11 that there was a request from late Mr. Soobhow for premature retirement in June 2017. He confirmed that a few days after there was letter to withdraw such request as per Doc. P12. As per Doc. P13 viz. letter dated 22 September 2017, addressed to the CEO and signed by Plaintiff wherein she recommended that the outstanding car loan and refund on cash grant amounting to Rs 426,505 be waived in her capacity as Manager Human Resources. It was done 3 days after the demise of Mr. Soobhow as he passed away on 19.9.2017. There were 2 previous precedents that were discussed namely those of Mr. Venkatesu and Ms Alkoo. He confirmed that those documents were sent by the Plaintiff through the Director of Finance and Administration to the CEO. Plaintiff confirmed that their financial positions were not the same as in the case of late Mr. Soobhow. For the latter there were dues to the family and were paid to the family and the loan and cash were not deducted. That stand was not to erase the loan and the cash grant in the circumstances. Because it had always been that any dues had been recouped from the benefits of the person concerned and any balance either it is being refunded if ever or it goes to a Board for the waiving. When looking at paragraph 15.6.8 of Doc. P3, he agreed that it had to be imperatively waived by the Board and in case of termination for any reason in his opinion would include death. It was not proper in the circumstances to have avoided the Board. He confirmed that there was hand delivery of the suspension letter of Plaintiff while she was on vacation. He did not find anything exceptional about that. He confirmed that Plaintiff was invited to attend a disciplinary committee which sat on 2 occasions. Full opportunity was given to her to give her explanations. He confirmed that the suspension letter was Doc. P6 and which was also the letter of charges and wherein she was suspended with immediate effect as Manager of HR. It was not out of context. He also agreed that Mr. Chellen was an Auditor of the company and he was the one to submit the audit report which was presented to the Board on 31.10.2018. The convocation for the Plaintiff to attend the disciplinary

committee was served by an usher. He was not aware that Plaintiff was also served with another convocation for that purpose. He confirmed that there was a *communiqué* which was published subsequent to the letter of suspension being handed over to the Plaintiff.

In cross-examination, he stated that he did not depone at the disciplinary committee on behalf of Defendant. He was not involved in the investigation in the present case as regards the offsetting of loan and grant by AML. The *communiqué* said that she had been suspended in order for every staff to know that Plaintiff as Manager of HR was suspended so that there would be no dealings with her for the time being. The CEO formed part of the Board and was the person who was in charge of the administration and of all staff of AML by virtue of regulations. There was a procedural agreement regarding the procedure when disciplinary matters were maintained. Any matter that related to the staff had to go through the CEO. He agreed that any matter regarding disciplinary proceedings they should emanate either from the CEO or the Chairman. The procedural agreement bound the AML. In that section for termination there was no provision for death or demise and it had to be decided by the CEO. He agreed as to rule 1.1.1. in the absence of specific rules, the CEO decided to his discretion unless where it was mentioned the Board. Disciplinary action might include a warning, training or put on probation again for poor performance and not necessarily stepping down. Plaintiff was in employment with Defendant for more than 12 years and was on good terms with everybody and there were no disciplinary proceedings against her before. The termination of an employment depended on the CEO. Mr. Chellen who became CEO was the head of Internal Audit and then became Officer in Charge. He was actually the Manager of HR. Mr. Dumazel left the company in August 2018.

I have duly considered all the evidence put forward before me and the submissions of learned Counsel for the Plaintiff and learned Senior Counsel for the Defendant.

The provisions of the law applicable to the present case are to be found under Section 38(2)(a) of the Employment Rights Act 2008 which read 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;*

(ii) *the worker has been afforded an opportunity to answer any charge made against him in relation to his misconduct;*

(iii) *he has within, 10 days of the day on which he becomes aware of the misconduct, notified the worker of the charge made against the worker;*

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

(v) *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;"* (**emphasis added)**

An important aspect covered by the submissions of learned Counsel for Plaintiff is that of statutory delay namely Defendant failed to notify Plaintiff of the charges made against her within 10 days of the day on which it became aware of the acts of misconduct as per the letter of charges viz. Doc. P7 and which is of the essence in the present matter and which cannot be excused by any Court of Law irrespective of the merits or demerits of the charges of misconduct being proved or not at the disciplinary committee.

In fact, Doc. P7 was the letter of the charges made against Plaintiff by Defendant and wherein she was also suspended from duty with immediate effect and the relevant parts are reproduced below:

"Pursuant to an internal investigation, the findings of which the Board of Directors of AML("Board") has taken cognizance on 31 October 2018, you are hereby convened to attend a Disciplinary Hearing which will be held on 23 November 2018(…) to answer the following charges:

(i) *You have caused a car loan/cash grant granted to late Mr. Shyam Soobhow in the aggregate sum of MUR 426,505/- to be waived, without the AML Board's approval, in contravention of Clause 15.6.8 of the Terms and Conditions of Employment of AML and in breach of the regulations and policies made by the Board;*

(ii) In so doing, you have engaged in a conduct which the Board deems to constitute failure or inability or unfitness of an employee to perform the duties of the office;

(iii) You have further contravened the regulations made by the Board; and

(iv) Your acts and doings amount to gross neglect of duty.

(…) In the meantime, you are suspended from your post as Manager Human Resources of AML with immediate effect."

Under para 9.4 of the Plaint, Plaintiff has averred *" The Plaintiff avers that the letter of suspension and/or charges was signed by one Mr. CHELLEN who has been temporarily appointed Officer in Charge/acting CEO of the Defendant. Mr. Chellen who holds the substantive position of Internal Auditor acted while being in conflict of interest inasmuch as the Internal Auditor should not sign a suspension letter based on an inquiry which he has himself conducted."* and as per the demand of particulars Q.22: *"When and by whom was the inquiry, referred to therein, conducted?",* her answers were as follows:

> *"A. 22 The inquiry was conducted by one Mr. Dewananda CHELLEN, Internal Auditor and Officer in Charge/Acting CEO of the Defendant. The Plaintiff is not in possession as to when the inquiry started, however it is to the knowledge of the Plaintiff that the Board of the Defendant took cognizance of the findings of the inquiry on 31 October 2018."*

As per her own answers to particulars, Plaintiff has delimited her plaint by the fact that the Board of Defendant became aware of the findings of the internal inquiry on 31.10.2018 which is in line with the letter of charges as per Doc. P7. She could have said that it was in February 2018 and not on 31.10.2018 but which she failed to do. It means that she has acquiesced to the fact the Defendant became aware of the findings of the internal inquiry on 31.10.2018 and she is bound by such delimitation of the averments of her plaint and cannot travel outside such delimitation by way of her own *ipse dixit* in Court which is clearly misconceived. Therefore, the issue of breach of the statutory delay of 10 days which is mandatory (see- Privy Council case of **Mauvilac Industries Ltd v Ragoobeer Mohit** [2006 PRV 33]) cannot be successfully invoked as the material averments of Plaintiff's plaint have already been delimited by way of particulars on that issue to be within such delay forming precisely the case that the Defendant has to meet by the evidence.

Thus, Defendant has not waived its right to invoke that the dismissal of Plaintiff was justified because it can be construed that it acted within the mandatory delay of 10 days in conformity with the provisions of Section 38(2)(a)(iii) of the Employment Rights Act 2008.

Plaintiff has denied all the charges leveled against her both at the disciplinary committee and in Court and there is nothing to suggest that she departed materially from the case she had already run in terms of her version of facts in relation to the said charges before the disciplinary committee, in Court so that it can be inferred that the Northern Transport Principle as propounded in the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9]) has been complied with by way of corroboration in her dissuasion exercise in order to keep her job. True it is that there is no contest that there was a *communiqué* issued by management that she was suspended at AML and the explanations given by the witness for the Defendant was that in order for employees and staff at the AML to refrain from dealing with her as Manager of HR because they would not know otherwise that she was suspended. However, regrettably, it had the ripple effect of undue publicity cutting a poor picture of her. Furthermore, she was on approved vacation leave which was her right and she was hand given her letter of charges twice on the same day viz. on 9.11.2018 although one would have sufficed. But in the same breath, it is important to consider that a delay of one more day after 9.11.2018 would have been fatal as then it would have been 11 days in the notification of Plaintiff from 31.10.2018 because "*the **dies a quo** must now be counted"* as highlighted in the Supreme Court case of **High Security (Guards) Ltd v Fareedun S.M.H** [2009 SCJ 48]). It would have meant that Defendant would have been outside the mandatory delay of 10 days as per Section 38(2)(a)(iii) of the Employment Rights Act 2008 and Defendant would have been deemed to have waived its right to invoke justified dismissal.

Moreover, the composition of the Board of the disciplinary committee of Defendant will not have any meaningful effect as the disciplinary committee of Defendant does not have the attributes of a Court of law so that it does not require the degree of fairness or impartiality of a Court of law as enshrined in Section 10 of our Constitution. Its findings are not conclusive and are not even binding on the Defendant but it is merely an obligatory procedure in order to give Plaintiff an opportunity to dissuade her employer by way of her version of facts so that she could

remain in employment prior to a decision being taken by Defendant whether to dismiss her or not. It is relevant to quote an extract from **Smegh** (supra) as follows:

"19. (…) In G. Planteau De Maroussem v Dupou [2009] SCJ 287, the Supreme Court of Mauritius held that the question whether an employee has been unjustifiably dismissed was a matter for the court and not the employer's disciplinary committee. The court said:

"*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 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.*"

20. The Board agrees. It would be remarkable if the exclusive jurisdiction to decide whether a worker has been unjustifiably dismissed in a particular case were to be vested in the employer. The denial to workers of the right of access to a court to decide such a question could only be achieved by the clearest statutory language. (…) It does not provide that the findings of a committee are conclusive. The obligation to afford an opportunity to be heard is no more than an obligatory part of the employer's internal procedure for dismissing an employee." ***(emphasis added)***

It is also appropriate to quote an excerpt from the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd [2020 SCJ 343]** which reads as follows:

"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."* ***(emphasis added)***

Therefore, it would be misconceived to invoke that the findings and composition of the Disciplinary committee were biased or unfair as it is not binding on Defendant as it is for the Court to decide as to whether the dismissal of Plaintiff was justified or unjustified and not the Defendant's disciplinary committee (see- **Smegh**(supra) and **Moortoojakhan**(supra)).

This leads me to consider the crucial issue as to whether the dismissal of Plaintiff was justified or not.

Now the Defendant has relied on a contravention of *Clause 15.6.8* of the Terms and Conditions of Employment of AML and in breach of the regulations and policies made by the Board *and as such constituted failure or inability or unfitness on*

her part to perform the duties of the office amounting to gross neglect of duty which boils down to the charges leveled against her.

Clause 15.6.8 of the Terms and Conditions of Employment of AML 2017 as per Doc. P3 encompassing its policies is reproduced below:

"15.6.8 Reimbursement of loan

In case of termination of employment, for any reason, beneficiaries of loan facilities should reimburse any outstanding loan before the date the contract comes to expiry as per existing financial procedures unless waived by the Board."

The contention of the Plaintiff is that it has not been specified in that Clause that *termination of employment, for any reason,* would include death or demise. True, it is that it is not covered in paragraph 3.0 dealing with such *termination* which included retirement on medical ground but not death. There are only 3 instances in the Terms and Conditions of Employment where specific reference are made to demise as rightly pointed out by Plaintiff so that the issue of demise or death ought to have been specified as it was done in the 3 instances. So, this is where Clause 1.1.1 comes into play which reads as follows:

"1.1.1 The general terms and conditions of employment as outlined in this document are not exhaustive. Any issue not covered therein by the terms and conditions shall be resolved by the Chief Executive Officer (CEO) after consultation with the union and in accordance with Law."

Now as per the Procedural Agreement 2010 viz. Doc. P2 as per **Article II - Disciplinary Procedures**, Clause 2 reads as follows:

*"**2. Gross misconduct leading to dismissal***

1. *The term "gross misconduct" shall be deemed to include inter alia: refusal to obey rightful orders, insubordination, gross negligence, use of abusive language, assault, dishonesty and other offence of similar gravity or criminal.*

2. *Whenever the Company becomes aware of a serious misconduct or breach of his/her condition of employment by an employee, the latter shall be asked to give a statement in writing and an inquiry shall be conducted to ascertain whether the employee has committed a gross misconduct. When the misconduct has been confirmed, the employee shall be issued with the*

alleged charges with particulars and shall be given an opportunity to exculpate himself before a disciplinary committee"

It is abundantly clear that the charges levelled against Plaintiff as per the letter of charges viz. Doc.P7 are based on Clause 15.6.8 of the Terms and Conditions of Employment of AML viz. Doc.P3 and also as per the Procedural Agreement 2010 as per Doc.P2.

Therefore, the Plaintiff has not benefited from the specified first step as per Article II, Clause 2(2) of the Procedural Agreement namely as per Doc. P2 to give a statement in writing in relation to a potential contravention of Clause 15.6.8 prior to being confronted with the *prima facie* charges of acts of misconduct made against her following the completion of the internal inquiry conducted by Defendant. She has been deprived of her input as per the specified first step which could have avoided her being convened before a disciplinary committee and being suspended but only being inflicted with a warning, for example. It was imperative for the Defendant to have asked her to give a statement in writing in that manner for whatever it was worth as it was specified in the Procedural Agreement. It is significant to note that it remained unrebutted that such specified first step was afforded to the CEO concerned namely Mr. Bhoyroo whereby he gave his written explanations as per Doc. P16 in line with what Plaintiff has explained in Court that essentially demise or death was not covered in Clause 15.6.8 for a Board decision in relation to a waiver of loan repayments and cash grant for a deceased employee but rested within the prerogative of the CEO after consultation with the union of employees and in accordance with the law as per Clause 1.1.1. of terms and conditions of employment namely Doc.P3 let alone the law of the parties is the intention of the parties namely of management and the union of employees of AML pursuant to the procedural agreement viz. Doc P2 and that he was neither suspended nor convened before a disciplinary committee. Thus, it is abundantly clear that Clause 2(2) of Article II of the procedural agreement viz. Doc P2 stipulating that first step with specificity cannot be overlooked.

Indeed, it remained unrebutted that at the first sitting of the Disciplinary committee, Plaintiff made a representation to the Defendant in that her representative highlighted very discretely that procedures were not followed and that there was no reason to have a disciplinary committee against her and that the AML representative came back to say that AML Management decided to proceed with the disciplinary committee.

In that manner, she has been deprived of having the points of disagreement be dealt with in accordance with the processes set out in a list of other avenues of sanctions **[**in the procedural agreement as per Article II(1) the more so as she was Manager of HR with an unblemished track record for past 20 years in HR having worked with at least 10 CEOs and being party and fully conversant of the terms and conditions of employment, policies and regulations,**]** under the guise that full opportunity has been given to her to give her explanations in relation to the charges made against her before a disciplinary committee in accordance with the law namely the Employment Rights Act 2008. It is not contested that she made recommendations for the waiver of the outstanding loan repayments and cash grant to be waived as per her memo sent to the then CEO, Mr. Bhoyroo who had prior to that deemed it proper to approve same with the concurrence l of the then Chairman, Mr. Dumazel on humanitarian grounds as the widow of Mr. Soobhow was not in gainful employment and had two kids and that such practice had been done in 2 previous cases where there was waiver upon demise but not to the same extent as in the present case. It remained uncontested that Mr. Soobhow was employed with Defendant at the Airfield department for 35 years and had an unblemished track record and passed away while he was still in employment with Defendant. It remained also unrebutted that Plaintiff was someone who was very professional and meticulous in dealing with all her files including the present one.

On the other hand, Defendant has relied on an unspecified Clause namely Clause 15.6.8 as per Doc. P3 in order to infer that in case of death, the surviving spouse, heirs, successors or *ayant cause* of the deceased employee benefiting from the facilities of such a loan had to make good for the repayments of the outstanding amount owed by him before the date the contract comes to expiry unless waived by the Board.

Now, the irresistible conclusion is that when Plaintiff having complied with the said specified provisions contained in Docs. P3 and P2 and then to have such an exercise being construed as gross misconduct or gross neglect of duty leaving no alternative to the Defendant but to dismiss her, it could not be in good faith. Because the Defendant has relied on a breach of that unspecified Clause among other breaches of unspecified regulations made by the Board as per the letter of charges viz. Doc.P6 to terminate her employment following the findings of its disciplinary committee and completely overlooked the specified Clause namely the specified first step as per Article II, Clause 2(2) of the Procedural Agreement viz. Doc. P2 where an

alternative to dismissal would clearly have been a possibility by way of an input by Plaintiff by way of written explanations prior to the completion of the internal inquiry conducted by Defendant and prior to the charges being levelled against her.

For all the reasons given above, I find that Defendant has not successfully discharged the burden of proof laid upon it on a balance of probabilities because on the basis of the material Defendant was aware or of which it ought to have been reasonably aware at the time of dismissal of Plaintiff following the findings of its disciplinary committee, it in good faith had other options than to dismiss Plaintiff so that her dismissal was unjustified (see- **Smegh**(supra)). Plaintiff is therefore entitled to severance allowance. It is appropriate to reproduce paragraph 2 of the plaint below:

"2. The Plaintiff was drawing a monthly basic salary of Rs 134,115/- and monthly emoluments totaling Rs 214,397/- as particularized below:

(a) Monthly basis salary	*Rs 134,115*
(b) Passage benefit (7%)	*Rs 9,388*
(c) PMS Bonus	*Rs 13,412*
(d) End of Year Bonus	*Rs 11,176*
(e) Fuel Allowance	*Rs 14,254*
(f) Welfare & Meal subsidy	*Rs 2,100*
(g) Pension (14% employer contribution)	*Rs 18,776*
(h) USL/UCL	*Rs 11,176*
Total Monthly Emoluments	***Rs 214,397*** *"*

It is not disputed that Plaintiff's monthly basic salary was Rs 134,115. Section 46(12) of the Employment Rights Act 2008 reads as follows:

*"**46. Payment of severance allowance***

(12) For the purposes of this section, a month's remuneration shall be –

(a) the remuneration drawn by the worker for the last complete month of his employment; or

(b) an amount computed in the manner as is best calculated to give the rate per month at which the worker was remunerated over a period of 12 months before the termination of his agreement inclusive of payment for extra work, productivity bonus, attendance bonus, commission in return for services and any regular payment, whichever is the higher."

The relevant pay slips in conformity with Section 46(12) subsections (a) and (b) of the Act not having been produced by Plaintiff in Court, I cannot infer that she was earning a monthly remuneration of Rs 214,397 but I can only rely on her basic monthly salary of Rs 134,115 which is not disputed for the computation of her severance allowance.

Plaintiff has claimed that Defendant is indebted to her as a result of her unfair dismissal in the sum of Rs 9,418,449/- made up as follows in Court in line with para.15 of her plaint:

" ***(a) 3 months' remuneration per year of service***

Years of service:12.33

One month remuneration	*Rs 214,397*
Severance allowance for unjustified dismissal	
(Rs 214,397 x 3 x 12.33)	*Rs 7,930,551*
Accumulated Passage Benefits	*Rs 112,657*
Cumulated vacation leave	*Rs 396,249*

(b) End of year Bonus for December 2018 Rs, 134,115

(c)Allowance due (equivalent to one increment)-additional responsibilities as HR Manager

AML-Payroll (May 2007 – October 2018)	*Rs 327,440*
ATOL-Administration (October 2012-October 2018)	*Rs 303,040*

Estimated Total Payable Amount *Rs 9,418,449."*

Now neither the *Accumulated Passage Benefits* and nor the *Cumulated vacation leave* under item **(a)** and none of item **(c)** under ***Allowance due (equivalent to one increment)-additional responsibilities as HR Manager*** can be granted to the Plaintiff as she is not qualified a worker for such items under Section 2 of the Employment Rights Act 2008 as her basic wage is at a rate in excess of 390,000 rupees per annum and thus, the Court has no jurisdiction to entertain those items.

As regards item (**b) *End of year Bonus for December 2018*** which is governed by the End of Year Gratuity Act, Plaintiff is not qualified by virtue of section 3(2) of that Act as her contract of employment was terminated on 21.12.2018, that is, on the day she received the letter and it was not terminated on the ground of redundancy and the relevant provisions are given below:

*"**3. Payment of gratuity***

(1) Subject to subsection (4), the gratuity payable to an employee who reckons continuous employment with his employer –

(a) for the whole or part of the year and who is in his employment on 31 December, shall be equivalent to not less than one twelfth of the monthly basic wage or salary of the employee payable in respect of the month of December, multiplied by the number of months during which he has worked in that year;

(b) for only part of the year and –

(i) whose employment has been terminated by reason of redundancy; or

(ii) who retired in the course of the year in compliance with the provisions of any agreement or enactment,

shall be equivalent to not less than one twelfth of the monthly basic wage or salary of the employee payable for the last month of his employment multiplied by the number of months during which he has worked."

Accordingly, I order Defendant to pay to Plaintiff the sum of Rs 5,096,370/- representing one month's wages in lieu of notice in the amount of Rs 134,115/- and severance allowance for 148 months' continuous service (Rs 134,115 x 3 x (148/12)

years): Rs. 4,962,255 with interest at the rate of 12% per annum on the amount of Severance Allowance payable from the date of termination of agreement to the date of payment. With Costs

S.D. Bonomally (Mrs.) *(Vice President)*
28.4.2023