

CARPEN Loganaden v/s BCP BANK (Mauritius) Ltd, (ex Banque des Mascareignes)

2020 IND 19

**THE INDUSTRIAL COURT OF MAURITIUS
(CIVIL JURISDICTION)**

C N 9/14

In the matter of :

CARPEN Loganaden

Plaintiff

v/s

BCP Bank (Mauritius) Ltd, (ex Banque des Mascareignes)

Defendant

JUDGMENT

Plaintiff is claiming from the defendant the sum of Rs 366 213.75 representing three months' wages as indemnity in lieu of notice; severance allowance at the rate of three months per year of service for 37 months continuous service together with interests at the rate of 12% per annum on the amount of severance allowance and such amount by way of compensation for wages lost and expenses incurred in attending court.

In an amended plaint dated 9 July 2019, the Plaintiff averred, *inter alia*, that he was in the continuous employment of the defendant as Assistant Moyens Généraux since 03.08.10; that he was remunerated at monthly intervals at the terminal rate of Rs 29 895. He was suspended from duty on 12.08.13; heard before a disciplinary committee on 30.08.19, 03.09.13 and 09.09.13 on an alleged charge of poor performance which he denied but his employment was nonetheless terminated on 13.09.13, without notice and without any justification.

In its amended plea dated 31 July 2019, the defendant averred, *inter alia*, that Plaintiff was in fact employed on an initial probationary period of 6 months as from 3 August 2010; that Plaintiff was informed by way of letter that disciplinary proceedings were being initiated against him for poor performance and failings in his duties. The amended plea then listed the following:

- (i) Several complaints had been received regarding Plaintiff's attitude towards the defendant's contacts (both within and outside the Bank) and Plaintiff made no effort to improve or make amends in this respect.
- (ii) Plaintiff has repeatedly showed a lack of diplomacy, as well as aggressivity in his dealings with the defendant's contacts.
- (iii) Plaintiff continuously failed to respect hierarchy within the defendant's set up and regularly challenged his superiors at work.
- (iv) Plaintiff's performance at work was inadequate despite all opportunities afforded to him.
- (v) Plaintiff did not meet the defendant's expectation and his general behaviour and attitude, and his lack of professionalism at work affected the services rendered by the Bank as well as damaged the Bank's image.

The defendant averred that, after the disciplinary committee found the charges were established, it had, in good faith, no alternative than to terminate the Plaintiff's employment with immediate effect on 13 September 2013. It therefore moved that the plaint be dismissed.

Plaintiff's Case

When the trial started, the Plaintiff was initially represented by Mrs Ramdoss, Labour Officer. Thereafter, at the subsequent sittings, he retained the services of Mr Ho Chan Fong, of Counsel and Mr Attorney Mallam Hassam. He then retained the services of Mr Yousouf Mohamed, SC, who offered submissions on his behalf. The defendant was represented by Mr A. Sunnassee, of Counsel assisted by Miss Somar, of Counsel and they were instructed by Mr Rajah, SA.

Plaintiff was the sole witness to depone in support of his case and he adduced the following evidence: he started by producing his contract of employment (DOC A) and his payslip (DOC B-B1). His duties as Assistant Moyens Generaux consisted in procurement and logistics – purchases for the bank, dealing with suppliers, invoices, asset maintenance, supplying the different branches of the bank across the island. As per his evidence, he had to maintain a Fixed Asset Register and he had a team under his command. He was suspended from duty on 12 August 2013 and convened before a disciplinary committee which was scheduled on three days (30th August, 3rd and 9th September 2013). He produced the letter of suspension dated 21st August 2013 (DOC C). Before attending the

disciplinary committee he sent a letter in reply to all the four charges he was facing and produced same (DOC D). He then produced his letter of termination dated 13 September 2013 (DOC E).

In his examination, he was asked to reply to the following charges in the letter of charges dated 12th August 2013, namely poor performance; failing in his duties; complaints about his attitude towards the contacts both inside and outside the bank and that he made no effort to improve. He stated that in his last performance evaluation he obtained 91 over 100 and he was commended for his attitude. (DOC F). As for the allegation of lack of diplomacy as per the defendant's plea, he replied that he is in regular contact with the suppliers of the bank and he had to put pressure on them because, in his words "*there are certain sensible things concerning the bank*". But he denied having used foul language or showed aggressivity.

As regards the allegation of showing no respect to his hierarchy and regularly challenging his superiors, he denied same and he stated that there could have been a personal problem with his superior because "*his father was discussing a case on my defaults and this cropped up with this*". He denied having damaged the image of the bank and answered that he has put up a lot of effort to see that everything goes well for the bank.

In **cross-examination**, it was put to the Plaintiff that he had no issue with the way the disciplinary committee was conducted. It was also put to him that he did not ask for a copy of the proceedings of the disciplinary committee to which he replied that he did not ask for them and that he saw them just before the trial. He was also shown the report of the Chairman of the disciplinary committee. The witness agreed that he was given a set of documents before the hearing (through his then counsel) and that he had kept them with him although he had been requested to return them to the bank. His then counsel then withdrew before the disciplinary committee and he was subsequently assisted by a labour officer. Learned counsel for the defendant then asked the witness whether a bundle of documents consisting of 102 pages and which included an email from another witness (Mr Alain Cheddy) was produced before the disciplinary committee. The witness agreed that these documents were in fact produced before the disciplinary committee and learned counsel produced that bundle without any objection (DOCS G-H). He was then questioned as to whether he objected to the transcript of the minutes of proceedings of the disciplinary committee of the 30 August 2013. He stated that he knew everything that was said before the disciplinary committee. DOC J1-J6 which were the first six pages of the aforesaid transcript were then produced.

Plaintiff confirmed that at the hearing of the disciplinary committee of 03 September 2013 Mr Gayan was called as a witness for the bank. He agreed that Mr Gayan was "le responsable des Moyens

Généraux” of the bank and he was also at that time his line manager. Several questions were put to the Plaintiff as to whether he agreed to the correctness of the excerpts quoted from the evidence of Mr Gayan before the disciplinary committee. Plaintiff did not answer the questions directly and chose to dispute the substance of the evidence rather than acquiescing to the correctness of the excerpts from the transcript of proceedings.

To the question that he had never been appointed as ‘responsable des moyens généraux’ the Plaintiff answered that he was supposed to be so appointed but another individual (i.e. Mr Gayan) got it. It was put to the Plaintiff that before the disciplinary committee, Mr Gayan had said that there was an incident at the time of the signing of a “fiche de poste” as the Plaintiff refused to sign the “fiche de poste” initially presented to him and wanted to sign the same ‘fiche de poste’ of another employee. Plaintiff denied that such incident occurred or that Mr Gayan did say so in the proceedings of the disciplinary committee.

In relation to his performance appraisal, the Plaintiff agreed that reference was made to it by Mr Gayan before the disciplinary committee and that a moderator, namely Mr Auleear was also involved in respect to this document. He confirmed that Mr Gayan explained the item “FAR” – Fixed Assets Register, but he denied that Mr Gayan mentioned any deadline before the disciplinary committee for this FAR. He stated that in fact he was not given a deadline to submit a plan for the completion of a Fixed Assets Register (‘FAR’); on the contrary he gave a deadline to Mr Gayan. Plaintiff denied that at the disciplinary committee Mr Gayan said that the Plaintiff had failed to start the exercise for the FAR. He agreed however, that he told Mr Gayan that there was a problem with the tagging machine. He stated that the reason why he was not able to complete the exercise by February 2013 was that tagging had to be done by each and every member of the department and not by him alone. He added that as there was a problem with the tagging machine, he had recommended the purchase of another one. He agreed that the Fixed Asset Register allows the bank to control its moveables.

He was adamant that there was no deadline in February and which deadline was reset to July. It was put to him that before the disciplinary committee Mr Gayan had said that the Plaintiff had, in March, presented the same report except for the dates which he had changed and that he had proposed to finish by May. The Plaintiff replied that he never talked with Mr Gayan about dates. He finally agreed that Mr Gayan did say, on the 3rd September 2013, before the disciplinary committee, that the exercise of FAR was not completed.

The Plaintiff denied that before the disciplinary committee Mr Gayan referred to his lack of initiative in relation to the tagging machine and that he himself i.e Mr Gayan found the solution. He however

admitted that Mr Gayan stated that his (plaintiff) proposal was that the bank had a new machine. He further denied that Mr Gayan had also said that he did not carry out 'le référencement' by Excel Sheet, which he contended was completed as well as the migration of the information onto the software Sicorax. He did not agree that he did not maintain the information on Sicorax up to date and this led to an unfavourable audit report for 'les moyens généraux'.

The Plaintiff denied that he had failed to complete the '*finalisation des aménagements des locaux d'archives à des fins d'archives PCA et formation*'. He further denied that his failure to complete the project had an impact on the budget of his department. He denied that Mr Gayan had explained this at the disciplinary committee. He maintained that he had finalized 'les aménagements' for that space. He did not agree that he was asked to put up a report on the "projets d'archives". He finally conceded that he sent a draft report to his superior, Mr Gayan but he did not know whether the latter sent that report unamended to Mr Daveau.

The Plaintiff agreed that Mr Gayan was trying to groom him to take over 'les moyens généraux'. He accepted that he was reproached about his management of the "projet agence de Port Louis" but did not accept that reproach, which was to the effect that he called several suppliers on site at the same time and which could result in collusion between the suppliers in quoting prices. Plaintiff stated that he did do so but that his ex-boss had done the same. He denied that such an approach was forbidden and he was not aware of it until he saw it in the Evaluation form. He further denied that before the disciplinary committee Mr Gayan also mentioned that specific instructions were given to him that quotes were to be obtained individually from suppliers. However when referred to an excerpt from the disciplinary committee where the 'responsable des moyens généraux' at that time, Mr Reejorun, had , in an email dated 19th August 2011, taken him to task for failing to follow his instructions, plaintiff admitted that same was referred to . He however did not accept that reproach which he considered was unfounded.

When referred to the letter 29th September 2011 wherein it was stated that "*nous vous rappelons que les manquements et que le non-respect des instructions constitue des fautes graves en exercice de vos fonctions et leurs répétitions peuvent conduire à des sanctions disciplinaires pouvant mener même à la rupture du contrat de travail* » Plaintiff stated that there were no instructions in so far as 'l'agence de Port Louis' was concerned. He then agreed that he had received another letter dated 13th January 2012 wherein he was again taken to task for failing to follow bank procedures but he maintained that he did follow the procedures.

It was also put to the Plaintiff that he failed to get quotes before issuing instructions for the refilling a generator in the Triolet Branch and that he failed to follow the bank's procedures before engaging the bank in financial expenses. He denied this allegation and explained that there was no need for any quotation as there were service agreements between the bank and the suppliers.

On the issue of 'relation professionnelle et plainte' it was put to the plaintiff that he was meant to ensure "un service irréprochable au service interne ainsi que le maintien des relations professionnelles et courtoises avec les prestataires de la banque" , but his relationship with his colleagues was conflictual to which he denied and stated that it was professional. As for the complaints from suppliers, with respect to the way he spoke to them, he stated that he was very professional and that if something was not done on time he will escalate to management. He further denied being aggressive or using swear words towards people and that Mr Gayan himself had heard him using swear words at work. He was referred to a letter addressed by SECUTEC wherein the latter had complained about the Plaintiff. He stated that SECUTEC was not doing anything regarding the cameras and that he escalated the matter to the general manager to talk to the latter. He admitted that it was a formal complaint against him and that SECUTEC asked the bank to have someone else at the bank to deal with them other than him.

Another complaint was showed to the Plaintiff from another supplier, MSM, by way of letter dated 18th May 2011, which plaintiff admitted was a formal letter written by Mr Ollivier Malavio to inform him of the complaint made against him by MSM. He further agreed that the complaint made mention of the manner he talked to them namely of his "indélicatesse verbale à leur rencontre". Plaintiff conceded that his aggressive tone and behavior had been on record since at least 2011.

A third letter dated 29th September 2011 was from the head of sales following Harel Mallac, who complained about the aggressivity of the Plaintiff when talking to her over the phone referring to plaintiff's "propos déplacés, décousus du contexte professionnel" .

He was referred to a 'lettre d'avertissement' in respect of the above complaint wherein he was warned that "les manquements et le non respect des instructions constituent des fautes graves dans l'exercice de vos fonctions et leurs répétitions peuvent conduire à des sanctions disciplinaires pouvant même mener à la rupture du contrat de travail". Plaintiff admitted that same was sent to him and that after he received that letter " *they come to me afterwards to explain the situation*".

A fourth letter dated 4th October 2011 was shown to the Plaintiff from Mr Denis Marie Louise addressed to the line manager of the Plaintiff at that time. Mr Louise , a colleague of the Plaintiff, had

complained that the Plaintiff had insulted him and it was not the first time that such an incident happened. He admitted that Mr Louise complained about his aggressivity

Complaints from other employees of the bank namely from one Jaya, then from one Kertika Sookhee from Human Resources were shown to the Plaintiff to which he stated that he had replied to all the complaints but he was denied access to his PC when he was suspended on the 12th. It was then put to him several times that he never requested for any document but he maintained that he did request same but it was verbal both on the 12th to the Human Resource Manager and to the chairperson of the disciplinary committee.

He was then referred to another complaint for having addressed one Mr Olivier Malavio in an aggressive manner after he was handed a letter of complaint on 29th January in respect of an incident which occurred on the 13 January. He was also referred to a complaint made by the same Mr Malavio on the 18 January 2012.

Plaintiff stated that he was returned to his post following the incident with Mr Malavio. But he considered that he was downgraded.

On 24th January 2012, he was given a letter where it is mentioned "*on vous donne une ultime chance*".

On 26th February 2013, another employee, Miss Sockalingum from the HR department complained that Plaintiff had used an inappropriate tone towards a 'stagiaire'. Plaintiff said that it was only the tone and no foul word was used.

Another complaint came from a supplier Central Business Equipment (CBE) that Plaintiff had 'mal parlé à un de leurs employés'. Plaintiff said that he 'forced [his] words but no foul words. When things have to be done they should be done.' Plaintiff added that he did reply to the mails but he was not given copies of these emails. He confirmed having received an email to that effect from Mr Gayan wherein he was reminded that though he promised to do better, complaints keep coming.

Another complaint, dated 6th May 2013, from the receptionist of Central Business Equipment to the effect that Plaintiff was abusive and used inappropriate language, which plaintiff admitted was again a complaint. He further agreed that the latest complaint from CBE was after the letter of 04 February 2013.

The cross examination continued on the 9th February 2018 whereby plaintiff was then assisted by Counsel, Mr Ho Chan Fong.

Plaintiff was referred to a complaint regarding the delivery of 50 out of 200 stationery items. He maintained that all the 200 items were in fact delivered and there was dual control.

He was then referred to his failing to follow up invoices from BRINKS which had threatened to stop service because of that. He explained that he took the initiative to ask an officer from BRINKS to forward the invoices to him and that he has asked “the guy from Finance to log it and the payment be done”. Thereafter he went on leave to prepare for his ACCA Exams. It was then put to him that Mr Gayan has sent him a mail to inquire about the unpaid invoices (about a hundred) and that a bundle of invoices was discovered in his “affaires” dating from January to May. Plaintiff replied that this mail was never sent as it is not possible for the sender to use a small phone to send such a long text. It was then put to the Plaintiff that he never challenged Mr Gayan on that score before the disciplinary committee; to which he replied that he did raise this with the panel.

The Plaintiff was then referred to an appraisal where he was marked at 50 and he answered that this was a bad and bias appraisal as four months earlier he was marked at 91 and that it was a personal vendetta. He did not agree that before the disciplinary committee Mr Gayan explained the circumstances in which he gave his previous rating namely to encourage him to improve his performance.

It was also put to the Plaintiff that at the time he was remitted the charge letter he acted aggressively towards the officer who remitted it to him and that the latter had to give precautionary measure to the police as she felt threatened. He denied that any such incident ever happened.

Plaintiff was referred to the evidence of **Mr Alain Cheddy** before the disciplinary committee. At first Plaintiff denied that the said person gave such evidence then he said that this person does not know how to handle a computer and he could not write a mail. DOC H was the email which was sent by Mr Cheddy and Plaintiff agreed that this was produced before the disciplinary committee. For the Plaintiff this email was fabricated. However, he did not raise this objection before the disciplinary committee. He further admitted that he did not have any complaint about the conduct of the hearing before the disciplinary committee chaired by Mr Oozeer, Barrister at Law. Plaintiff was then referred to a letter which he sent to the bank (**DOC K**) and which contained his explanations to the charges leveled against him. He agreed that he was dismissed as a result of the findings made against him in the course of the disciplinary committee but he stated that he did not agree with the said outcome.

In **re-examination**, the Plaintiff maintained that his appraisal in February 2013 showed that he was performing very well, He also referred to the issue of undelivered stationery items and maintained that these were duly delivered and that the accusation was completely false. He also explained that

the Fixed Assets Register was completed and that the only problem was with the tagging machine. As regards the issue on 'l'agence de Port Louis' the Plaintiff stated that he acted on a precedent from his former boss who used to call all the tenderers together to show them the part to be refurbished and that thereafter the tenders are sent and deposited at the head office. As for the issue of refilling of generators, there was no problem whatsoever as there is provision in the service agreement for the refilling and there the cost is provided in the contract. Regarding SECUTEC the Plaintiff denied having used bad words and that he only wanted the job done. He denied the complaints from Harel Mallac, Mr Marie Louise and the Central Business Equipment . He said that he was putting pressure on the suppliers for the benefit of the bank for which he worked and he never insulted them or used foul words.

Defendant's case

The first witness for the defendant, Mr Amrit Gayan deposed and testified as follows: He gave evidence before the disciplinary committee involving the plaintiff and at the material time he was "le responsable des moyens généraux" at the bank, the line manager Mr Carpen. But at the time that he started working for 'les moyens généraux', the Plaintiff was already working in that department as the second in command.

Mr Gayan explained that 'le service des moyens généraux' is the logistics team of the bank who look after the maintenance, security and air conditioning of the head office; to make sure that the different branches of the bank have the resources to operate and to look after the ATM service. When he joined the department an audit was carried out and the employees were requested to sign a job description form. The Plaintiff was requested to sign a 'Fiche de poste' which contained his job description but he was not agreeable to his position within the department. Mr Gayan said that there is a practice at the bank to hold two reviews of the employees: one is annual and the other half-yearly. In the review of the Plaintiff's performance, the witness said, *inter alia*, that there was an issue in relation to the Fixed Assets Register which is a key item for insurance and financial reporting purposes. The bank had, in that connection, purchased a tagging machine which made the referencing of assets easier and secure. He had asked the Plaintiff to complete the exercise of tagging in three phases within agreed deadlines. According to this witness the Plaintiff did not carry out the exercise within the agreed deadline and other employees had to be involved; the witness also added that he found a simple way of making the tagging machine work.

The witness was then referred to the item "Finalisation des Aménagements des Locaux a des fins d'archives PCA et Formation" which is second site which would provide the bank with training rooms

and business continuity planning, which in case of a disaster, allows the head office to remain operational. One of the audit recommendations was that the bank was paying for rent for a space which was not being efficiently used. He explained that in the appraisal of the Plaintiff it was mentioned that the latter did not carry out the said project according to a detailed plan. The non performance of this item had an impact on his department. Under the same item was the “fiche de decision” which is a report but the report which the plaintiff put up was not to the required standard to be able to put in a committee. It had to be completely re worked.

The next item referred by the witness concerned the ‘projet d’agence de Port Louis’ which is a branch which the bank has at Place D’Armes and which needed to be revamped. For this project the Plaintiff called all the suppliers at the same time contrary to the methodology which the witness had imparted to everybody in the team. Hence there was a complaint by his then line manager of a failure by the plaintiff to follow instructions.

The witness was then referred to a number of documents filed at the disciplinary committee where the Plaintiff had been accused of failing to follow the bank procedures.

The witness went on to refer to one particular complaint against the Plaintiff whereby the latter took financial commitments on behalf of the bank in relation to the refueling of a generator from Rey & Lenferna. The witness stated that the Plaintiff had no authorization to engage the bank.

The relationship of the Plaintiff with other staff members was also a matter which was adumbrated by the witness. He had received complaints from several departments (HR, Retail and external parties) about the language used by the Plaintiff and the witness had himself overheard the Plaintiff using swear words to an employee and to a supplier. There was one incident on the phone where he had to call him to order as well as an incident in the department where some bad language was used with other people. The witness also described an incident at the time the Plaintiff was remitted the charge letter and where the Plaintiff threatened him and other staff.

Mr Gayan referred to written complaints which he had received from a supplier (SECUTEC) and requested the witness to assign another staff to deal with that entity as the Plaintiff had adopted an insulting attitude towards the employees of that entity. He confirmed that as far back as 2011 there were already issues with plaintiff’s language and behaviour. He further referred to different instances where plaintiff was given formal warnings for the language he used namely with respect to a supplier, MSM ; to a staff member; to one Mrs Pamela Karupanen at Harel Mallac and to a member of the HR department, Mrs K Sookhee. There was also a complaint from Denis Marie Louise and Mr Yudish Gobin with respect to the way plaintiff spoke to another employee called Jaya,

The witness also mentioned a formal warning which was given to the Plaintiff in January 2012 following an incident with a former head of HR. Several other complaints of similar nature were referred of the plaintiff's use of abusive and inappropriate language.

The witness referred to another complaint he himself made against the Plaintiff in connection with the distribution of TOP100 Companies magazine which was done without proper record.

Mr Gayan was also referred to that part of the disciplinary committee where he had deponed about the unpaid invoices which were found in Plaintiff's drawer.

The witness was then referred to his appraisal where he gave the rating 91 to Plaintiff . He explained that Plaintiff had the skills and had shown some very good efforts in terms of improving the way he was working with his colleagues. So it was a way of giving him some encouragements for keeping up the good work and pursuing for the future. As he was grooming him to take over the department he had to show him that he could improve.

The witness was then referred to an email which he had sent to the Plaintiff to take the latter to task following a complaint of foul language used against an employee of CBE in May 2013.

In **cross examination**, witness was referred to the contract of employment of the Plaintiff and he agreed that the latter had the “ appreciations of [his] supérieures hiérarchiques” in February 2011; that he was grooming the Plaintiff to replace him because at that point in time he was satisfied personally that he could be groomed. The witness also agreed that in February 2013, he had awarded a 91 over 100 to the Plaintiff as he had a satisfactory performance at that point in time. He explained that the appraisal was for year 2012. He also agreed that the Plaintiff moved from a classification of T2 to T3 but he denied that this was a promotion although this resulted in Plaintiff getting a higher salary. In connection with the discussion which had occurred when the Plaintiff refused to sign the ‘fiche de poste’ the witness denied that the Plaintiff was demoted from T3 to T2 on this particular issue.

The witness agreed that on 9 February 2011 a letter was sent to plaintiff (Vide Doc.G) wherein he was informed that he was confirmed in his post of “Assistant Moyens Generaux” – classified as T2. It came out that on 20 February 2013, the bank issued a letter whereby the Plaintiff's position was termed as ‘Charge Moyens Généraux’ classified as T3. The witness was then referred to another document dated 26 June 2013 where the Plaintiff is termed as “Assistant Moyens Généraux” and it was put to the witness that this is the whole source of the problem. The witness answered that although there is a difference between “Charge Moyens Généraux and “Assistant Moyens

Généraux”, yet the responsibilities of the Plaintiff remained the same. The document was finalized in April 2011 and there might have been a mistake from the HR department. The witness denied that the incident which he related in his earlier deposition related to that issue but rather it was in relation to the comparison with another colleague.

It was put to the witness that the half-yearly review was aimed at ‘cornering’ the Plaintiff but the witness denied that this was so and that the process was applied to every one. In relation to the Fixed Assets Register, Mr Gayan denied that the exercise had in fact been completed and he stated that initially it was thought that only the tagging exercise was missing but after going into the details, it came out that there were discrepancies in numbers and the equipment. The witness also said that the Plaintiff was the only one familiar with a software known as **SICORAX** which was purchased before the witness had joined the bank but that the system was never properly used.

Regarding the business continuity plan (PCA -plan de continuité d’activités), Mr Gayan admitted that this matter arose prior to his joining the bank and that he had no personal knowledge about same. He had cognizance of same from discussions and meeting. Furthermore his responsibilities when he came to this department were to ensure that the space for which the bank was paying rent was being put to a better use. He further added that he was made aware that the project was delayed. He considered that plaintiff had some valid skills but there is an attitude element to be taken into consideration.

Regarding the meeting with all the suppliers for the revamping of Port Louis branch, the witness agreed that he was present too at that meeting but he did not do anything at that time because the suppliers were already there and hence the harm was already done. He stated that it might be true that the Plaintiff had followed a practice but that there was a methodology that was established when he joined that department to have independence in terms of valuation and proposals that the bank was getting. Although the bank has an approved list of suppliers, the witness added that the calling of everyone of them at the same time was not good practice and good governance. When asked whether he had any document to prove his statement, the witness stated that there was an excel sheet as well as a process but he did not have it in his possession.

The witness was then referred to the incident involving Mr Rijorun, a line manager, prior to him joining the department.

Regarding the refueling issue, Mr Gayan was asked whether request for quotes are made whenever there is an emergency. The witness stated that there cannot be any emergency in so far as generators are concerned because there is a monitoring in place and verification is done on a

monthly basis. He confirmed that there was a service agreement with Rey Lenferna for the maintenance of the generator but this does not concern the refueling. The witness disagreed with the suggestion that refueling would be a departmental commitment and not a financial commitment. He maintained that it is a financial commitment when the bank is required to pay a supplier outside the scope of services. Rey Lenferna was only responsible for maintenance and not for refueling.

On the issue of relationship with co-workers, Mr Gayan stated that he did stop the Plaintiff when the latter used swear words on the phone or to other staff. The witness agreed that he had previously said that the Plaintiff was "OKAY Except for his tone and attitude". The witness was referred to the complaints from suppliers, like MSM and Harel Mallac and he agreed that some of these complaints came in before he joined the bank. The complaints of Mr Denis Marie Louise; the complaint of Harel Mallac, by Mr Yudish Gobin, the issue of air tickets, the complaint from the HR and the complaint by Mr Vikash Rijorun were made prior to January 2012. The witness agreed that he was not in the department prior to April 2013.

Mr Gayan was re-examined on whether he would have given 91% to the Plaintiff if the incidents complained against the latter occurred in his presence, and he replied in the negative. The witness also referred to the Fixed Assets Register issue and that tagging involved only putting a sticker on a piece of furniture. He also stated that all the invoices received by the bank will go through the 'Moyens Generaux' and they are sorted out and send to the Finance department. The unpaid invoices were found in the drawer of the Plaintiff.

The defendant then called **Mr Alain Cheddy** who was working in the same department as the Plaintiff. He was referred to an email which he had sent regarding the directive from management that all employees had to make their own tea. Hence when the Plaintiff asked a lady to prepare his tea, he called that lady and the Plaintiff but the latter told that lady not to listen to Mr Cheddy. At that time, Mr Cheddy was the 'chef planton' and the lady was working under his supervision. On another occasion, when the Plaintiff requested for stationery to be brought to him, the witness delayed to deliver same and the Plaintiff called him and told him : *"Si to pa ti pou faire travail la, to pa ti pou capav faire travail la, to ti bizin ouvert to fesse to dire"*.

In cross examination the witness did not accept that the Plaintiff was his superior and maintained that he was the superior of the lady who had been asked to prepare tea for the Plaintiff. He had sent an email after the date the Plaintiff was suspended as he was requested by management to relate what had happened and he never thought of writing the mail by himself. But he added that the facts

contained in the email did in fact take place. He agreed to the suggestion that the Plaintiff could not have 'bafoué' whatever "autorité" he had as 'chef planton' as he was not the superior of the Plaintiff.

In re examination the witness maintained that the lady who was involved was one Mrs Kamla and she was working under his supervision.

The next witness for the defendant was **Mr Alain Aliphon**, Principal Labour and Industrial Relations Officer. His evidence is to the effect that he assisted the Plaintiff at the disciplinary committee and that there was no complaint from the Plaintiff in relation to the conduct of the hearing. He agreed that the evidence of witness Gayan took place over a whole session. He agreed that, at the disciplinary committee the Plaintiff produced a letter in reply to the charges. He also recalled that only one question was put to Mr Gayan at that hearing. He recalled that Mrs Ramlagun had deposed at the hearing and she said that she was threatened.

In cross examination he agreed that he was not present when the incident involving Mrs Ramlagun took place; and he did not recall the exact words used by Mr Carpen at the disciplinary committee.

The last witness for the defendant was **Mrs Veronique Liu King Fah**, HR manager, who just filed the findings of the disciplinary committee and she prayed that the case be dismissed.

Submissions

Mr Y.Mohamed , S.C. filed written submissions and also offered oral submissions , on behalf of the Plaintiff that:

- (a) Mr Gayan could not have given 91% rating to the Plaintiff if the latter was not performing well.
- (b) The Plaintiff had at times, replaced Mr Gayan when the latter was on leave.
- (c) He was promoted, but at the same time he was found to be a poor performer.
- (d) The Plaintiff was forced to sign a document to accept a demotion.
- (e) The Plaintiff was fighting to retain his promotion.
- (f) The defendant found fault with the Plaintiff who fought for the interests of the bank and who put pressure on third parties concerning deliveries.
- (g) The letters of the third parties should be disregarded as the latter did not depone in Court.
- (h) It is for the employer to establish 'la faute grave' of the employee.
- (i) There has been lots of irregularities which constitute a mistrial.

Mr Mohamed S C also referred to passages from Droit du Travail, Droit Vivant, of Jean Emmanuel Ray and quoted extensively from that book and referred the Court to the passage concerning "L'Evaluation des salariés". According to learned author, the employer cannot

evaluate the work of an employee without putting into place a 'dispositif d'évaluation' which has been brought to the attention of the employer. Learned Senior Counsel for the Plaintiff also referred to a passage from the abovementioned book to the effect that one must be careful to the existence of a 'détournement de pouvoir de direction' when the employer or the hierarchical superior, whilst taking care not to disrupt the description of the duties, allocates low quality duties to the employee and sidetracks the employee. He also referred to the fact that the Plaintiff chose to insist on the continuation of his employment on the same terms and conditions as initially agreed and that there should not be any unilateral modification of the contract of employment. He referred to a passage which read : "*Deux facteurs jouent un rôle important dans la qualification de la faute par les juges. Le niveau hiérarchique du salarié. Un cadre doit montrer l'exemple et surtout son ancienneté dans l'entreprise. Un salarié irréprochable depuis douze ans ne peut être licencié comme le dernier embauché.* »

For his part, Learned Counsel for the defendant also filed written submissions and also submitted orally that:

- (a) There is evidence that the Plaintiff acted aggressively and used foul language towards colleagues and service providers.
- (b) The Plaintiff threatened the witness Mr Gayan when the letter was delivered to him.
- (c) Instead of using the disciplinary committee as an opportunity to explain what happened the Plaintiff went in a completely different direction.
- (d) The Plaintiff was unwilling to address the complaints his employer had against him and showed no remorse when he was confronted with the use of swear words.
- (e) The Plaintiff had received a positive review from his superior but the Plaintiff sent written explanations where he made derogatory remarks towards Mr Gayan.
- (f) The incident regarding the preparation of tea highlighted his attitude towards rules set out by management.
- (g) There is no issue of demotion at all in this case.
- (h) The findings of the disciplinary committee have been put in to show what happened at that hearing.
- (i) The letters of complaints from suppliers are perfectly admissible to show the manner in which the Plaintiff was treating the suppliers.

Analysis

The plaintiff's employment having been terminated on the 13 September 2013, the applicable legislation is the **Employment Rights Act (ERA) 2008** as amended by Act No.6 of 2013 (hereinafter referred to as "The Act") which came into effect on the 11 June 2013. The ground upon which his employment has been terminated is one of poor performance, hence the relevant section of the Act is section **38 (3) of the ERA 2008** which is reproduced hereunder:

38. Protection against termination of agreement

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

(a) he cannot in good faith take any course of action;

(b) the worker has been afforded an opportunity to answer any charge made against him related to his alleged poor performance;

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

(d) 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.

In the case in hand, there is undisputed evidence that plaintiff was convened before a disciplinary committee to answer the different charges levelled against him. At the beginning he was assisted by counsel and thereafter by a Labour Officer and he was given the opportunity to give his explanations. It is to be noted that the question of the statutory delays as laid down in subsections (b) and (c) were not made an issue before this Court.

The only issue to be determined is whether the termination of the plaintiff's employment on the ground of poor performance was justified and that the defendant -employer cannot in good faith take any course of action. **Dr D. Fok Kan** in his book **"Introduction au droit du travail mauricien" 2ème édition** pg 383 -384 , considered that poor performance englobes two notions – that of "l'insuffisance professionnelle" and that of "faute professionnelle". He defines "l'insuffisance professionnelle" as being *"un juste motif de licenciement dès lors que l'allégation de l'employeur n'est pas 'absolutely frivolous, vexatious and made in bad faith"* – **Plaine Verte Co-operative Store Society Ltd v Goolrose Rajabally [1991] SCJ 227**. On the hand he considered that "faute professionnelle" is the *"négligence, l'imprudence, l'exécution défectueuse du travail ou de tout manquement lié a l'exécution du travail."*

Turning to the case in hand, the gist of the Plaintiff' case is that he was summarily dismissed without just cause. He claimed that the allegations raised against him at the disciplinary committee were fabricated and that his attitude towards his colleagues were motivated by his desire to work exclusively for the benefit of his employer. He has chosen to be professional all the way and he has adopted a tough attitude towards the suppliers when things were not moving fast enough. As regards the use of foul language vis-à-vis his colleagues and outsiders he denied the use of foul language although he agreed that he used strong language to obtain what was needed. The other charges relating to the failure of the Plaintiff to abide by management protocol regarding financial commitments towards suppliers and the failure to do a proper follow up for unpaid invoices were denied.

However, the Court is of the view that though the defendant has failed to come up to proof as far as many of the complaints allegedly made by co-workers were concerned inasmuch as the defendant relied exclusively on documents produced at the disciplinary committee, yet the Court cannot turn a blind eye to some of the complaints which were addressed to the defendant by the latter's suppliers and service providers. True it is that the makers of the letters were not called to depone before the Court but the Plaintiff never disputed that these letters were sent. He only said that those complaints were unjustified. It is also on record that there were letters of warning given to plaintiff namely in relation to his conduct towards the Head of Sales of Harel Mallac who complained about plaintiff's aggressive language (Vide Doc.G, pg 24), the letter of 24 January 2012 where he was informed by the management that he was given an "ultime chance" (Doc.G, pg 35) as well as the email from Mr Gayan addressed to the plaintiff for having used aggressive language towards the supplier CBE (Doc.G, pg 63). There is also evidence adduced by Mr Gayan that he himself overheard plaintiff using swear words to a supplier and to a staff and he had to call him to order. All these instances clearly demonstrate that the attitude of the plaintiff at work was not beneficial to the good running of the bank.

The fact remains that no employer can tolerate that those who deal with it have to suffer the humiliation of being shouted at, to say the least, by one of its employees. A succession of complaints from outsiders and a blunt accusation from another staff member of grossly abusive language when the latter delayed to bring stationery to the Plaintiff is well beyond acceptable standards in a bank. In the circumstances the Court is of the considered view that the unsatisfactory interpersonal relationship of the plaintiff and attitude at work amount to serious shortcomings in the performance of his work.

The Court has given due consideration to the submissions of learned counsel for the Plaintiff to the effect that the whole issue was triggered by the fact that the defendant was demoted. However, there is no evidence of such demotion, inasmuch as the Plaintiff has himself described his position as “assistant moyens généraux” and the only issue was that in one of the letters addressed to the Plaintiff he was classified as “charge moyens généraux” and classified as T3 when initially he was classified as T2. Apart from this issue, there is nothing on record nor has the Plaintiff adumbrated that he had considered himself as being demoted- except for a time when after having been warned for another act of misconduct, (which is not the subject matter of the present case) , he was assigned to work in the archives of the defendant. Moreover, no employer could tolerate that one of its employees stuff a number of invoices in a drawer whereas a service provider, which in the present case was Brinks, was awaiting payment for services rendered, and had threatened to stop service. There is undisputed evidence on record that there was not one but several invoices which were found to have remained unattended in plaintiff's drawer (Do.G, pg 66). The explanations of the Plaintiff are unconvincing on this aspect of the case as he said that it was not his responsibility to ensure payment whereas it is on record that all invoices are channelled through the department of the Plaintiff before being distributed to the other departments. Furthermore there is evidence on record as to the number of instances where plaintiff did not follow instructions and procedures regarding the works assigned to him. Such instances are clearly examples of the unsatisfactory nature of the work performed by the plaintiff and amount to “faute professionnelle” and any employer would not allow such a situation to continue to the detriment of the good running and success of its business. As held in the Supreme Court case of **Plaine Verte Co-operative Store Society Ltd v. Goolrose Rajabally** [supra] “*the Court should not substitute itself to the employer who keeps the last word as to how his business is to run and managed*”

It is also unacceptable for the Plaintiff, albeit angry after receiving a suspension letter, to raise his voice or threaten his superior, Mr Gayan and another staff member in the latter's presence. The submissions of learned counsel for the Plaintiff that this can be explained by the circumstances are untenable as nothing justified the use of threats in a work place. This piece of evidence from the defendant has remained unrebutted. Although this incident could have been a cause for dismissal on its own for gross misconduct, the Court finds that the termination of the employment of the Plaintiff on the ground of poor performance is justified for the aforesaid reasons.

Conclusion

Based on all the above reasons the Court is satisfied that the defendant has proved on the required standard of proof that being an institution which deals with different service providers and the public,

the general attitude and behaviour of the plaintiff, his lack of diplomacy at work as well as his failure to follow instructions given to him as to the conduct of his work, are not conducive to the smooth running of the bank and in effect amount to serious shortcomings in the plaintiff's work. Hence the defendant has established that it cannot in good faith take any other course of action than to terminate plaintiff's employment .

The plaint is therefore dismissed. I make no order as to costs.

This 25th August 2020

K. Bissoonauth (Mrs)

President, Industrial Court.