Mungroo O.N. v Lateral Holdings Limited

2022 IND 11

Cause Number 560/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Oobrika Nittshy Mungroo

Plaintiff

v.

Lateral Holdings Limited

Defendant

Ruling

In this second amended plaint, it is common ground that Plaintiff has been in the continuous employment of Defendant as Sales Manager from 16 January 2012 to 13 June 2015.

Plaintiff has made the following averments namely that on 29 October 2014, she was the victim of a larceny whilst being on duty at the premises of Defendant whereby unspent money per diem belonging to Defendant as well as her personal money was stolen.

Following an internal inquiry carried out by the Management of Defendant, on or about 31 January 2015 she was suspended from her employment with pay with immediate effect.

She was requested to appear before a disciplinary committee which was tainted with major irregularities so that on or about 13 June 2015, following the findings of the said committee, her employment was terminated with immediate effect.

That disciplinary hearing was a sham as Defendant had failed to establish any of the charges levelled against her and/or there was absolutely no evidence to establish any of the charges levelled against her.

Thus, she believes that the termination of her employment was unjustified and she has claimed from Defendant the sum of Rs. 567,286.25 comprising of severance allowance among others.

Defendant in its plea has essentially denied liability by averring that its money was in the possession of Plaintiff and it was under her sole responsibility. It has admitted that on or about 31 January 2015, Plaintiff was suspended from her employment and was requested to appear before a disciplinary committee. Defendant acted on the basis of the recommendations found in the report drawn by the chairperson of that disciplinary committee wherein it was found that the charges being tantamount to misconduct against the Plaintiff were established and proved. It could not, in all good faith and for the reasons set out in its letter dated 13 June 2015, have taken any other course but to terminate Plaintiff's employment.

Prior to the case being heard on its merits, learned Counsel for Plaintiff has moved for the communication of the minutes of the disciplinary hearing held by the disciplinary committee of Defendant.

Learned Counsel for Defendant has objected to the motion on the ground that at the material time viz. in 2015, it was the Employment Rights Act 2008 which was in force and not the Workers' Rights Act 2019 which makes it a requirement under Statute. Arguments were accordingly heard.

The main thrust of the argument of learned Counsel for Plaintiff is that in the year 2015, under the Employment Rights Act 2008 then in force, although it was not specifically and expressly provided therein that an employer has a duty to communicate within a certain number of days a copy of the minutes of the proceedings of the disciplinary committee when asked by its employee or by the representative of that employee, it was "good practice" to do so as per the Privy Council decision in the case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV

9]. That good practice was not applied by Defendant in the present case although it has now been given the force of law following the enactment of the Workers' Rights Act 2019.

It was following the hearing at the disciplinary committee that Plaintiff's contract of employment was terminated by Defendant on the basis of its findings. The employer and employee were present and witnesses were called, cross-examined and it was recorded and transcribed in the minutes. The latter represent a reflection of what took place and the employer had a duty to keep an accurate record of them. Thus, Plaintiff is being deprived of a vital part of the proceedings in this particular matter not only to be used in the course of her testimony in Court but also all throughout the trial especially when time will come for the cross examination of the representative of Defendant.

The main contention of learned Counsel for Defendant is that there was no legal provision at that time in 2015 for such communication as the present case is governed by the then Employment Rights Act 2008. It is only under the Workers' Rights Act which came into operation on 24 October 2019 that contains specific provisions as per Section 64(10) namely that an employer shall within 7 days of receipt of a written request on behalf of the worker give a copy of the minutes of proceedings of the disciplinary committee to the worker or to the person assisting the worker.

That requirement was not under the Employment Rights Act 2008 and there is no obligation for an employer to keep records of the minutes of the disciplinary committee and to communicate same to the worker. It was not mandatory and he relied on the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343]. Thus, a dismissed employee before the enactment of the Workers' Rights Act 2019 could not claim that he had a right to a copy of the record of the disciplinary committee when he was legally represented. In that case, the Supreme Court clearly stated that they could not say that at that time meaning before the enactment of the Workers' Rights Act 2019, that the employee had a right to be communicated with a copy of the record of the disciplinary committee by its employer. That was probably why in **Smegh** (supra) the Judicial Committee said no more than it would be "good practice", and not that it was a mandatory requirement under the law at that time for the employee to be provided with a copy of the record of the disciplinary proceedings as soon as possible after completion of the hearing. The Supreme Court interpreted the conclusion in **Smegh** (supra) and stated that it was only good practice and it was

not mandatory. He further relied on the case of **Innodis Ltd v Jean Louis Marianen** [2013 SCJ 356] at page 3, 2nd paragraph:

"The burden of proof rests on the appellant as employer to establish that termination of the respondent's employment was justified. It is incumbent on the appellant to prove on a balance of probabilities the gross misconduct of the respondent."

It was for the Defendant to do its case to show that the termination of the employment of Plaintiff was justified and it was not for the Plaintiff to fish for evidence to better her case by being provided with a copy of the disciplinary committee's minutes. Thus, the motion of Plaintiff cannot be granted.

Learned Counsel for Plaintiff replied that following the case of **Smegh** (supra) there has been a subsequent amendment in the law which made it mandatory, it cannot be in the vague. It is clear that **Smegh** (supra) imposes a responsibility on the employer to have the minutes of the proceedings. The Judicial Committee stated that it was a matter of "good practice" and it was not done in that Privy Council case.

Learned Counsel for Defendant further replied that in **Smegh** (supra), the Law Lords only stated that it was important and that there was not an obligation on the employer to the record.

I have given due consideration to the arguments of both learned Counsel. It is common ground that there is no statutory requirement that a copy of the minutes of the hearing of Plaintiff before the Defendant's disciplinary committee, has to be given to the Plaintiff as at the material time in 2015, the Employment Rights Act 2008 was in force and which was only repealed in the year 2019 following the enactment of the Workers' Rights Act 2019.

That "good practice" as propounded in the Privy Council decision in the case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] stems from the fact that it will reduce the scope for subsequent dispute when the record of the disciplinary committee is being kept in an incomplete, inaccurate and incomprehensible manner. Thus, by being made a Rule of Practice in the absence of a statutory provision to have the record of the minutes of the proceedings of the hearing of Plaintiff by the disciplinary committee to be communicated to her, there will be an incentive on the part of Defendant to have it kept in an accurate, complete and comprehensible manner. Hence, it will reduce the scope for subsequent dispute in the sense that

both parties namely the employer and employee will avoid infringing the **Northern Transport principle** by not departing in material respects from the cases they had already run at the disciplinary committee by way of facts or material brought in before that committee, in the course of the trial before the Industrial Court (vide - **Smegh** (supra)).

Now, even if the disciplinary committee of Defendant has found that the charges made against Plaintiff have been proved and Defendant has acted on that basis and dismissed Plaintiff, the said committee still has no power to decide whether the charges were proved in order to justify the termination of her employment by Defendant. The findings of the disciplinary committee of Defendant are not conclusive and are not even binding on Defendant as that committee does not have the attributes of a Court of law and in that manner, it has no power to decide as to whether the charges made against Plaintiff were proved justifying her dismissal from employment, as such power is only vested in the Industrial Court having the exclusive jurisdiction to do so unless otherwise provided by Statute (see- **Smegh** (supra)).

At this stage, I find it most relevant to quote an extract from the Privy Council case of **Smegh (Ile Maurice) Ltée v Persad D.** [2011 PRV 9] at pages 6,7,8 and 9 and at paragraphs 19 to 28 which reads 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.

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

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

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

23. The Board would endorse the approach adopted in both of these cases. The question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal. If the dismissal is justified on that material, it is not open to the worker to complain on the basis that there was other material of which the employer was not, and could not reasonably have been, aware which, if taken into account, would have rendered the dismissal unjustified. The Board does not understand the correctness of this principle to have been in issue in the present case.

24. Thus, if Mr Persad succeeded before the Industrial Court on the basis of a case which he did not run before the committee and/or of which Smegh was not and

could not reasonably have been aware at the time of the dismissal, then the Northern Transport principle would have been infringed by the Court and the appeal should have been allowed.

25. There is no suggestion that Mr Persad changed his account in a material respect in relation to any of the 3 charges.(…) This was a serious allegation. It is inherently unlikely that Mr Persad did not give evidence on this important point. It is unfortunate that the report contains no reference to what Mr. Persad said about the allegation of lack of authority. But as already stated, the report does not purport to be comprehensive.

26. In the argument before the Board, much was made by counsel for Smegh of the fact that Mr Persad called witnesses who had not given evidence before the committee, notably Mr Cooroopdass and Mr Rajkumarsingh. It is true that the Magistrate was impressed by the evidence of these witnesses and relied on it as corroborating the account given by Mr Persad. But the Board does not consider that this means that there was an infringement of the Northern Transport principle. First, the principle should not be extended to preclude a worker from relying in court on fresh evidence which does no more than support the case which he has always run. As was said in G. Planteau De Maroussem, an employer's disciplinary committee is no substitute for a court of law. It is the court which is given the power to decide whether a dismissal was justified. In the present case, the fresh evidence did no more than corroborate Mr. Persad's account which, in material respects, the committee had rejected and the Magistrate accepted. Secondly, at the time of the dismissal, Mr Cooroopdass and Mr. Rajkumarsingh were senior executives of the Group of which Smegh formed part. They gave evidence about matters which lay within their own spheres of responsibility. Their knowledge of such matters must be imputed to Smegh. In any event, Smegh could have taken statements from them and called them to give evidence before the committee. In these circumstances, Smegh cannot be heard to say that it was unaware of what they could say.

Conclusion

27. The appeal must be dismissed. The Magistrate reached a conclusion on the facts which was plainly open to him. He heard the witnesses and made an assessment of their evidence. His decision was not perverse or manifestly ill-founded. Indeed, the contrary was barely argued before the Board. The only point of substance that was pressed on the Board was that to some extent the Magistrate

based his findings on evidence that was not deployed by Smegh before the committee. But for the reasons given, this cannot avail it on the facts of this case. Since the decision of the Magistrate cannot be impeached, the Court of Appeal was right to dismiss the appeal.

28. The Board would merely add that much of the difficulty raised by this case has resulted from the fact that the record of the hearing before the committee was incomplete in material respects. It is important that employers accurately record what is said at disciplinary hearings so as to reduce the scope for subsequent dispute. It is also good practice to supply a copy of the record to the worker as soon as possible after the completion of the hearing. That was not done in the present case." (**emphasis added**)

In the same breath, the opportunity to be heard is not just lip service for the Plaintiff when she is being called upon to explain in relation to the charges of misconduct made against her before the disciplinary committee of Defendant. The reason is that the onus is on her to be able to dissuade the Defendant as regards those charges made against her in relation to her misconduct so that she could keep her job. To be able to do so, she has to rely on facts or material on which she believes are sufficient enough and which form the basis of the case she runs before that disciplinary committee although there is no obligation on her to bring in all of them but provided that before the trial Court, she will rely on evidence corroborating her case by not departing in a material respect from the one she had already run before that committee thereby not infringing the **Northern Transport principle** (see- **Smegh** (supra)). Thus, by being made a Rule of Practice, the communication of the record of the minutes of the proceedings of the hearing of Plaintiff before the disciplinary committee, to Plaintiff upon her request finds all its importance.

It is appropriate to quote an excerpt from the Supreme Court case of **Moortoojakhan R. v Tropic Knits Ltd** [2020 SCJ 343] at pages 5 and 6 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).*

(…) *"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 (…)."*

(…) *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. (…) It is then for the Industrial Court to determine if any termination of the employee's employment was justified or not on the basis of the evidence that was or ought to have been available to the employer at the time.*

(…) *An employee does not therefore enjoy the same rights before a Disciplinary Committee set up by his employer as he does before an independent and impartial tribunal set up to determine the extent of his civil rights and obligations pursuant to* ***section 10(8) of the Constitution****. Indeed a disciplinary hearing is not conducted with the same formality as a trial before a Court or tribunal. The employee should however be given a fair opportunity to put forward his defence and give his version before the Disciplinary Committee. As the Supreme Court noted in* ***Drouin v Lux Island Resorts Ltd*** *[2014 SCJ 255] and* ***Cie Mauricienne d'Hypermarchés v Rengapanaiken*** *[2003 SCJ 233], in relation to provisions of the Labour Act akin to those of section 38(2) of the Employment Rights Act, the disciplinary hearing is not meant to be a mere "procedural ritual" to pay lip service to the requirement under the law that an employee be given a genuine opportunity to provide his explanations to his employer with a view to keeping his job (see also* ***Bissonauth v Sugar Fund Insurance Bond*** *[2005 PRV 68])".(****emphasis added****)*

It is significant to quote an extract from the Supreme Court case of **Nutcheddy Sakoontala v Hemisphere Sud Ltd [2008 SCJ 210]** where it has been highlighted that there was no need for the complainant to be called at the disciplinary committee on the basis of whose allegations the charges have been made against an employee for which she is being heard at that disciplinary committee provided that the substance of those allegations are put to her to furnish her explanations and which reads as follows:

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

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

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

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

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

The relevant provisions of the Employment Rights Act 2008 applicable to the present case are to be found in Section 38(2)(a) of the Employment Rights Act 2008 which are reproduced below:

*"**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;"

At this particular juncture, I find it appropriate to consider the point relied upon by learned Counsel for Defendant that the burden of proof lies on Defendant to establish that the termination of the employment of Plaintiff was justified in the sense that it could not in good faith have kept her in employment. Thus, it being only a

good practice to provide Plaintiff with a copy of the record of the minutes of Defendant's disciplinary committee, Plaintiff in that manner will be fishing for evidence to better her case. The authority being referred to in that connection is the Supreme Court case of **Innodis Ltd v Jean Louis Marianen** [2013 SCJ 356] an excerpt of which is reproduced below:

"The burden of proof rests on the appellant as employer to establish that termination of the respondent's employment was justified. It is incumbent on the appellant to prove on a balance of probabilities the gross misconduct of the respondent ***(Harel Frères Ltd v Veerasamy and Anor [1968 MR 218], The Pamplemousses/Rivière du Rempart District Council v Hurbungs [2010 SCJ 382]).*** *Furthermore, the question whether an employer justifiably dismisses a worker must be determined on the basis of the material of which the employer is, or ought to be, aware at the time of the dismissal* ***(The Northern Transport Co. Ltd v Radhakissoon [1975 MR 228] and* Smegh (Ile Maurice) Ltée v Persad [2012 UKPC 23])**." (emphasis added)

Now, should the Defendant not adduce facts emanating from 2 witnesses, for instance, at the disciplinary hearing and which it knows not being in favour of dismissal of Plaintiff. Interestingly, the Plaintiff has failed to adduce those facts at the disciplinary committee but relied on other facts or material in order to dissuade Defendant in relation to the charges made against her with a view to keeping her job. Thereafter, following the findings of the disciplinary committee namely that the charges have been proved against her, Defendant acting on the basis of those findings dismisses her as in good faith it did not have any other option. Subsequently, in the course of the trial, as expected, Defendant does not call the 2 witnesses to adduce evidence which for obvious reasons will not testify in favour of Plaintiff's dismissal. Then, Plaintiff when calling those 2 witnesses before the trial Court, Defendant cannot successfully raise objection on the basis that the burden of proof lies on the Defendant to establish that the dismissal of Plaintiff was justified and not on the Plaintiff to prove that her dismissal was unjustified and that such facts were not brought in as part of her explanations at the disciplinary committee. This is because what Plaintiff is doing is that she is adducing evidence in order to dissuade her employer so that she keeps her job and she cannot be debarred from doing so at the trial provided that she does not infringe the **Northern Transport principle** (see - **Smegh** (supra) and **Moortoojakhan** (supra)). Indeed, the Privy Council in the case of **Smegh** (supra) covered that type of situation where 2 witnesses were called at the

trial by the employee and whose facts were not put in during the course of the disciplinary committee in relation to the 3 charges made against that employee. The Board of the Privy Council held that although those 2 witnesses were not called at the disciplinary committee, their evidence only corroborated or supported without departing from a material respect the case the employee had already run at that committee and thus did not infringe the **Northern Transport principle**. Indeed, in the case of **Smegh** (supra) , the Court of Appeal maintained the decision of the Magistrate who preferred the evidence adduced by those 2 witnesses to the evidence adduced on behalf of the employer at the trial so that it was held that the employee was unjustifiably dismissed and which was further maintained by the Privy Council given that- whether the burden of proof that lies on the employer has been discharged or not by the employer will have to be determined *on the basis of the material of which the employer is, or ought to be, aware at the time of the dismissal* (see- **Innodis**(supra)) and it means on the basis of material of which the employer is, or ought to be reasonably aware at the time of dismissal (see- **Smegh** (supra)). It means that Plaintiff is entitled to adduce evidence at the trial in order to dissuade her employer viz. the Defendant with a view to keeping her job provided that such evidence is within the ambit of *" the basis of the material of which the employer is, or ought to be, aware at the time of the dismissal"* and in so doing, Plaintiff does not infringe the **Northern Transport principle** in the sense that she does not depart from a material respect from the case she had already run before the disciplinary committee of Defendant.

Likewise, an employer cannot get away and cannot successfully invoke that the burden of proof lies on the employer to establish that the dismissal of its employee was justified and as such the employee is trying to fish for evidence by asking for a copy of the minutes of the proceedings of her hearing at the disciplinary committee.

The obvious reason being that because the Defendant equally cannot depart from *the material of which the employer is, or ought to be, aware at the time of the dismissal* before the trial Court to discharge that burden of proof that lies upon it by way of evidence and in so doing it cannot depart from the case it had already run before the disciplinary committee in a material respect because it cannot infringe the **Northern Transport principle**.

In the same breath, the Defendant cannot successfully invoke that because the burden of proof lies on the Defendant to prove that the dismissal of Plaintiff was

justified from *the material of which the employer is, or ought to be, aware at the time of the dismissal* it can infringe the **Northern Transport principle** by not keeping a complete, comprehensible and accurate record of the minutes of the disciplinary committee or not keeping it at all as it can refuse such communication from Plaintiff because it is only good practice as it is not a right derived by Statute is clearly untenable as it will go against the reasoning in **Smegh** (supra).

Indeed, it is clear enough that the purpose of a disciplinary committee is simply to record the cases ran by both the Plaintiff and the Defendant by getting them to adduce some facts as there is no need to adduce all of them provided that they do not depart in a material respect from those facts before the trial Court when evidence is being adduced be it in the form of parole or documentary evidence. Again, it is purely and simply because the disciplinary committee has no power to decide on whether the Plaintiff's dismissal was justified or not and even if it finds that it is so proved one way or the other, this power is vested only in the Industrial Court so that its findings are not binding on the Defendant as they are not conclusive as it does not have the attributes of a Court of law (see - **Smegh** (supra) and **Moortoojakhan** (supra)). Therefore, the purpose of a disciplinary committee is to meet the Statutory requirements under Section 38(2)(a) of the Employment Rights Act 2008 above without entailing an infringement of the **Northern Transport Principle** which can only be achieved by both the Defendant and the Plaintiff being in possession of a complete, comprehensible and accurate copy of the minutes of the proceedings in the course of the hearing of Plaintiff at the disciplinary committee of Defendant.

For all the reasons given above, I take the view that the keeping of a complete, comprehensible and an accurate record of the minutes of the proceedings of the hearing of Plaintiff before the disciplinary committee by Defendant and communicating same to Plaintiff if requested prior to the trial assumes all its importance (see - **Smegh** (supra)) and by good practice, **Smegh** (supra) compellingly meant that it should be adopted as a Rule of Practice in the absence of any statutory provision in that respect at the material time in 2015.

The motion of learned Counsel for Plaintiff is therefore acceded to and the objection overruled.

The matter is accordingly fixed *proforma* to 28 February 2022 for both learned Counsel to suggest common dates for trial.

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

23.2.2022