

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 13/2023

DETERMINATION

Before: -

Shameer Janhangeer	-	Vice-President
Raffick Hossenbaccus	-	Member
Abdool Feroze Acharauz	-	Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Mr Leeladhanjiv JHUBOO

Disputant

and

MAURITIUS CANE INDUSTRY AUTHORITY

Respondent

The present matter has been referred to the Tribunal for determination by the Supervising Officer of the Ministry of Labour, Human Resource Development and Training pursuant to *section 69A (2)* of the *Workers' Rights Act 2019*. The Terms of Reference of the dispute read as follows:

Whether the termination of employment of Disputant is justified or not in the circumstances and whether the Disputant should be reinstated or not.

Both parties were assisted by Counsel. Mr G. Bhanji Soni appeared for the Disputant instructed by Ms Y. Yerriah, Attorney-at-Law. Ms Maherally, Ag. Principal State Counsel appeared for the Respondent instructed by Ms S. Angad, Principal State Attorney. Both parties

have submitted their respective Statement of Case in the present matter. It should be noted that at the outset of the hearing, the Respondent did not insist with the Preliminary Objection raised *ex-facie* its Statement of Defence.

Both parties adduced evidence in relation to the present dispute. Mr Jhuboo was called to adduce evidence on his behalf. The Mauritius Cane Industry Authority (“MCIA”) elicited evidence through its Chief Executive Officer (“CEO”), Mr S. Purmessur as well as Mr D. Nursimulu, Secretary of the Audit and Risk Committee.

After having heard the evidence adduced by both parties in the matter, the Tribunal proceeded to hear submissions of Counsel. Learned Counsel for the Disputant notably submitted that the dismissal was effected in breach of the law. Moreover, there is no evidence that the Board was apprised of any shortcomings. The management letter has shown nothing pertinent relating to the Disputant’s alleged failures. The dismissal letter does not highlight the explanations and their contradictions. The Disputant does not know why he has been dismissed. As per the *Workers’ Rights Act*, the reasons for dismissal must be given to the worker. There must be reinstatement where there has been a clear breach of the law. The Code of Corporate Governance strictly says that Internal Audit should be dismissed with the agreement of the Audit and Risk Committee.

Learned Counsel for the Respondent has, on the other hand, submitted that the ground that the Disputant was dismissed because he entered legal proceedings against the MCIA is baseless. On the contrary, he was given all facilities to attend court and agreed he was given same. This has nothing to do with the present case. Regarding the need for an oral hearing, Counsel relied on the decision of *Drouin v Lux Island Resorts Ltd* [2014 SCJ 255] where it was emphasised that the worker must be given the opportunity to answer to the charge and this can take different forms as set out in law. The decision of the Industrial Court in *Benydin v Berlinwasser International AG Mauritius* (2015 IND 43), which was upheld by the Supreme Court ([2017 SCJ 120]) is to the same point. Regarding the issue that the Disputant had too little time to contact witnesses, it must be noted that he replied on 16 November to the letter of charges. Moreover, Counsel conceded that there was a breach of the law on procedure as the Disputant was told to reply to the charges within 7 days as per the letter of charges.

Counsel for the Respondent also submitted that the Disputant has a clean disciplinary record and that the Respondent had other avenues to adopt; but he has not mentioned any

which he considers could have been adopted by the Respondent. Reference was also made to principle 7 of the National Code of Corporate Governance on an effective and independent internal audit function in an organisation. Counsel also alluded to the International Professional Practices Framework regarding confidentiality and integrity. The case is not against the CEO but against the MCI A referring to the *Mauritius Cane Industry Authority Act*. There is no provision for appeal at the MCI A despite the aforesaid *Act* but there has been compliance with the *Workers' Rights Act*.

It was further submitted by Counsel for the Respondent that pursuant to *section 70A* of the *Employment Relations Act*, the Tribunal will have to see whether there has been any breakdown in the relationship. The same parameters regarding unjustified termination under the *Workers' Rights Act* will have to be adopted. It was notably submitted that the termination is unjustified because of non-compliance with procedures. But is this a reason to reinstate the worker? The Tribunal will have to see whether the bond of trust still subsists. According to the Disputant, this still subsists. This is a case of poor performance and not misconduct. It was also admitted that there was a mistake in the letter of charges on the date in relation to the second charge. Breach of trust is an objective test and the Tribunal will have to carry out a balancing exercise between the interests of the Disputant and the organisation. A decision of the Australian Fair Work Commission in *Steed v Active Crane Hire Pty Ltd (2023 FWC 15)* was submitted where the worker was not reinstated despite the dismissal being unfair. Counsel ended her submissions moving that the Tribunal make an order for severance allowance and not for reinstatement.

As per the Terms of Reference of the present matter, the Tribunal is being asked to enquire into whether the termination of employment of Mr Jhuboo is justified or not and whether he should be reinstated or not.

The Disputant joined the MCI A as Internal Auditor/Senior Internal Auditor on 16 January 2017 on a permanent and pensionable basis and was confirmed to the post a year after. He reported administratively to the CEO and was also responsible towards the Audit Committee and the Respondent's Board. On 15 November 2022, he received a letter from the Respondent whereby he was informed of two charges against him and was requested to submit written explanations within 7 days as to why, on account of his poor performance and attitude, his employment should not be terminated. The Disputant thereafter submitted his explanations to the two charges in a letter dated 16 November 2022. He also submitted two further replies

dated 21 November 2022 and 13 December 2022 in relation to the letter of charges from the Respondent.

The Respondent, by letter dated 5 January 2023, stated that it was not satisfied with his explanations and could not in good faith take any course of action other than terminate his employment with immediate effect. The Disputant, by letter dated 9 January 2023, notably stated that he wished to exercise his right of appeal against his unfair dismissal. It was however replied, on 18 January 2023, that the exercise of such right could not be granted as he had not shown the legal basis for any such right. The Disputant is now before the Tribunal seeking his reinstatement.

In determining whether the Disputant's termination of employment was justified, the Tribunal would need to consider whether the procedure adopted by the Respondent complied with the requirements of the law. It is common ground that the Disputant was charged and dismissed for *inter alia* poor performance as per the letter dated 15 November 2022 and the letter of termination dated 5 January 2023 respectively.

It would be therefore be pertinent to refer to the provisions of the *Workers' Rights Act* (prior to its recent amendment in July 2023) regarding termination of employment for poor performance, notably *section 64 (6)* as it was at the material time:

64. Protection against termination of agreement

...

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

(a) *the worker has been given an opportunity to answer any charge made against him in relation to his alleged poor performance and the worker has been given at least 7 days' notice to answer any charge against him –*

(i) *in writing;*

(ii) *in an oral hearing; or*

(iii) *in an oral hearing following his written explanations;*

(aa) *for the purpose of paragraph (b)(iii), where a worker is given an opportunity to answer any charge in an oral hearing*

following his written explanations, the 7 days' notice shall be counted only in respect of the written explanations;

- (b) the worker has been given at least 7 days' notice to answer any charge made against him;*
- (c) he cannot, in good faith, take any other course of action;*
- (d) the termination is effected not later than 7 days after the completion of the hearing under paragraph (a).*

It is apposite to note that *section 64 (6)(a)* provides that the worker must be given at least 7 days' notice to answer any charge relating to his poor performance as per the three options provided therein (i.e. in writing; oral hearing; or oral hearing following written explanations). The following can be noted from *Dr D. Fok Kan in Introduction au Droit du Travail Mauricien, 1/Les Relations Individuelles de Travail, 2ème ed. 2009, p. 431*, on the form of answering to the charge that the employer affords to the worker:

Eventuellement le choix entre ces deux formes de 'opportunity to answer the charge', écrite ou verbal, revient à l'employeur. Celui-ci doit toutefois s'assurer que dans tous les cas l'employé a pu bénéficier d'une procédure qui soit 'fair' selon les circonstances de l'espèce.

Likewise, the following may be noted from the Judicial Committee of the Privy Council decision in *Bissonauth v The Sugar Insurance Fund Board [2007] UKPC 17*:

After all, the employer can decide on the basis of what the employee says in his reply, whether there should be a hearing, or whether the employer can reach a decision without further ado.

In the present matter, the employer opted to ask for explanations in writing as is provided under *section 64 (6)(a)(i)* and the Disputant was requested to submit this within 7 days of the receipt of the letter dated 15 November 2022 as per the same letter. As per *section 64 (6)*, the employer cannot terminate a worker's agreement for reasons related to poor performance unless the worker has been given at least 7 days' notice to answer any charge made against him. The time limit that the Disputant was afforded to provide his explanations is clearly in breach of the notice of at least 7 days provided under the aforesaid subsection to

allow the worker to answer to the charge. This significant lapse on the part of the Respondent has moreover been recognised by their Counsel in her submissions.

As per the chronology of events, the Disputant gave his explanations to the two charges in a letter dated 16 November 2022 and in two further replies dated 21 November 2022 and 13 December 2022. However, it was by the Respondent's letter dated 5 January 2023 that he was notified of his termination of employment. This material aspect of this letter reads as follows:

Termination of Employment on the Ground of Poor Performance

Please refer to our letter dated 15 November 2022 concerning the above and your explanations dated 16 November 2022, 21 November 2022 and 13 December 2022.

2. *After going through the documents, the Management of the MCI is not satisfied with your explanations regarding your poor performance, especially since February 2021 and cannot in good faith take any course of action other than terminate your employment with immediate effect.*

3. *In the circumstances, it has been decided to terminate your employment with immediate effect.*

Although the worker was not given a hearing to answer to the charges laid against him and was only asked to provide written explanations, the Respondent has clearly notified the Disputant of his dismissal more than 7 days after he last provided his explanations on 13 December 2022. Indeed, the following can be noted from *Dr D. Fok Kan (supra)*, p. 452:

En cas de représentation écrite, faisant application des règles en matière d'acte unilatéral, les sept jours courent à compter du jour où l'employeur reçoit celle-ci.

Moreover, the following may be noted from the decision of *Happy World Marketing Ltd v Agathe [2004 MR 37]*:

If an employer does not dismiss a worker within the mandatory statutory limit of seven days, he is deemed to have waived his right to dismiss the worker for serious misconduct and not to pay severance allowance (section 35(1) of the Act) so that any subsequent dismissal becomes unjustified and attracts severance allowance at the punitive rate, irrespective of whether he has or not a valid reason to discontinue with

the employment of the worker, with or without payment of severance allowance at the normal rate – vide section 36(7) of the Act. In this connection, we may refer to paragraph 11(3) of the International Labour Organisation Recommendation No. 119 which states as follows –

“An employer shall be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct”.

Although the above decision related to dismissal for serious misconduct, the analogy which must be retained is of the employer having waived his right to dismiss the worker in not having respected the mandatory statutory limit of 7 days. In the present matter, as per *section 64 (6)(d)* of the *Workers’ Rights Act*, the employer cannot terminate the worker’s agreement unless the termination is effected not later than 7 days after the completion of the hearing under paragraph (a). This vital procedural lapse has moreover been acknowledged by the Respondent’s CEO, in evidence, when he agreed that the dismissal was not effected within the time frame of 7 days as required by law.

It is therefore apposite to note the following from *Mahatma Gandhi Institute v Mungur* [1989 SCJ 379], where the statutory delay of 7 days to dismiss the worker was exceeded:

This is not a time limit which it is in the power of the courts to extend and it is based on sound principles. Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct.

In her submissions, Counsel for the Respondent notably alluded to a mistake as to the date referred to in the second charge of the letter dated 15 November 2022. The second charge refers to the period of November 2020 to mid-December 2021 as being when the Disputant stated he was on vacation leave. However, as per the Respondent’s Statement of Defence, at paragraph 27 (d)(ii), the actual period is November 2020 to mid-December 2020. This clearly shows that the second charge laid against the Disputant was wrongly worded.

An issue has also arisen as to whether the Disputant was properly dismissed as per the wordings of the termination letter dated 5 January 2023. Counsel for the Disputant notably

submitted that the reasons for dismissal must be given to the worker. The letter, in fact, refers to the management of the Respondent not being satisfied with the Disputant's explanations regarding his poor performance and cannot take any course of action other than terminate his employment. The letter does not specify which of the two charges was found to be proved against the Disputant and under which specific charge he is being dismissed. As per *section 63 (2) of the Workers' Rights Act*, it is mandatory for the employer to state the reason of the termination when notifying the worker of his termination of employment.

As per the *Mauritius Cane Industry Authority Act*, the power to appoint employees rests with the Board of the MCI (vide *section 12* of the aforesaid Act) and the Board shall make provision to govern the conditions of service of its employees and to deal with *inter alia* the dismissal of employees (vide *section 13 (2)* of the aforesaid Act). Moreover, the Respondent's CEO was adamant that he was instructed by the Board to effect the Disputant's termination of employment. However, it is clear from a perusal of the letter dated 5 January 2023, that the letter does not however make any mention of the Board in the decision to dismiss the Disputant.

In the circumstances and in view of the above, the Tribunal has no other alternative than to find that the Disputant's termination of employment by the Respondent is unjustified. Therefore, the Disputant's reinstatement is justified. The Tribunal must now however determine whether it can order that the Disputant be reinstated to his former position as Internal Auditor/Senior Internal Auditor at the MCI.

In this respect, it would therefore be appropriate to refer to *section 70A (3) & (4)* of the Act:

70A. Referral by supervising officer

...

(3) Where the Tribunal finds that the claim for reinstatement of a worker is justified, the Tribunal shall –

- (a) subject, to the consent of the worker; and
- (b) where it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken,

order that the worker be reinstated in his former employment and, where it deems appropriate, make an order for the payment of remuneration from the date of the termination of his employment to the date of his reinstatement.

(4) Notwithstanding subsection (3), where the Tribunal finds that the claim for reinstatement of a worker is justified but the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been broken, it shall order that the worker be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act 2019.

It would therefore be incumbent on the Tribunal, in deciding whether to make an order for reinstatement, to ascertain that the relationship between the employer and the worker has not irretrievably been broken. Despite the Disputant's evidence to the effect that the bond of trust still subsists, the Tribunal has noted, *ex facie* his Statement of Case, that there is no averment regarding the relationship between himself and the Respondent that would support his prayer for reinstatement. Although, there are averments regarding his excellent relationship with staff and management of the MCI (vide paragraph 8 of the Disputant's Statement of Case), this has not been averred in the context of the relationship being irretrievably broken down nor in the context of reinstatement. Moreover, the staff, including management, cannot be taken to be the employer. It is common ground that the MCI is a statutory body governed by its Board.

It is trite law that in civil cases, a court cannot travel outside the pleadings (*vide Compagnie Sucrière de Bel Ombre Ltée v Bungaroo & ors [1996 SCJ 334]*). In *Tostee v Property Partnerships Holdings (Mauritius) Ltd [2015 SCJ 41]*, the following was notably held:

Counsel for the petitioner is, in view of those authorities, right in his submission on it not being possible for a party or permissible for the Court to rely on evidence on matters not pleaded in order to come to a finding of fact.

...

In practice, our courts have also been guided by French and English authorities to reach the conclusion that the court should only consider matters which have been introduced in the pleadings. It is the responsibility of the defendant/respondent to aver matters in its plea that will enable the respondent to avail himself the benefit of having his version considered by the court, especially if it is a matter of fact which is supported by the law.

Likewise, in *Ramjan v Kaudeer* [1981 MR 411], it was notably held as follows:

Be that as it may, once a party has stated the facts on which he relies, these facts are binding and the court cannot ground its judgment on other facts which may come to light in the course of the trial.

Although the Tribunal is not strictly a court of law, it has been equated to a court of law by the Supreme Court in *Sooknah v CWA* [1998 SCJ 115]. Moreover, in *Greedharee v Mauritius Port Authority* [2016 SCJ 111], it was notably held that the decision of the Tribunal is, for all intents and purposes, a judgment.

On the other hand, it has been noted that the Respondent has duly pleaded in its Statement of Defence, notably at paragraph 38, that there has been a breach of the relationship of trust that existed between it and the Disputant and that the Disputant cannot be reinstated to his former post.

The evidence of the Respondent's CEO, Mr Purmessur is pertinent on the issue of whether the relationship has irretrievably been broken and he was adamant that the Respondent's Board was not satisfied with the Disputant's work and that the Board did not want the Disputant as an employee. He also stated that the Board took a considerate decision not to continue with the Disputant and gave him an opportunity to provide his explanations; however, the explanations were not to the level of their expectations. He made it clear that the Board does not have confidence in the Disputant nor in his work. It should be noted that a relationship works both ways and it is clear from Mr Purmessur's evidence that there has been a breakdown in the relationship with the Disputant as far as the Respondent is concerned.

In the circumstances, the Tribunal only find that the relationship between the Disputant and the Respondent has irretrievably been broken. Consequently, the Tribunal cannot make any order for reinstatement in favour of the Disputant. The Tribunal can only therefore order that the Disputant be paid severance allowance at the rate specified in *section 70 (1)* of the *Workers' Rights Act* as is provided under *section 70A (4)* of the *Employment Relations Act*.

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(SD)Shameer Janhangeer
(Vice-President)

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(SD)Raffick Hossenbaccus
(Member)

.....
(SD)Abdool Feroze Acharauz
(Member)

.....
(SD)Ghianeswar Gokhool
(Member)

Date: 15th September 2023