

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 16/2023

DETERMINATION

Before: -

| | | |
|--------------------------------|---|-----------------------|
| Shameer Janhangeer | - | Vice-President |
| Vijay Kumar Mohit | - | Member |
| Karen K. Veerapen (Mrs) | - | Member |
| Ghianeswar Gokhool | - | Member |

In the matter of: -

Mr Ramchurn CHATOO

Disputant

and

INFORMATION & COMMUNICATION TECHNOLOGIES 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 the Disputant should be reinstated or not.

Both parties were assisted by Counsel. Mr G. Bhanji Soni appeared for the Disputant together with Ms G. Yerriah; whereas Mr R. Yerrigadoo appeared for the Respondent together

with Mr A. Rajee instructed by Mrs S. Ori, Attorney-at-Law. Both parties have submitted their respective Statement of Case in the present matter.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant has notably averred that he joined the Information & Communication Technologies Authority (“ICTA”) on 1 August 2003 on a two-year contract and was confirmed in employment on 5 August 2004 occupying the position of Manager of Costing and Administration reporting to the Director of Finance and Administration. On 20 July 2022, the Disputant was conveyed before a Fact Finding Committee (“FFC”) inquiring into possible leakage of information in April 2022. He attended same on 21 July 2022, giving his version, and was not accused of any matter. On 29 July 2022, he was suspended from work in relation to an anonymous email dated 21 July 2022 sent to several recipients. On 3 August 2022, he was informed that he would have to furnish explanations before another FFC held on the next day. He was not given the opportunity of being legally assisted by Counsel of his choice and was accused of being the author of the anonymous email. The FFC found that, without any concrete evidence linking him to the email, that he was the author of same.

The Respondent then requested the Disputant to attend a Disciplinary Committee to answer almost the same charge by letter dated 11 August 2022. Following his suspension, the Disputant had fallen sick, undergone major surgery and was diagnosed with a disc bulge which put him in severe pain necessitating multiple medical visits. He applied for a postponement of the disciplinary hearing until he fully recovered and sent regular medical certificates in support. He was examined by Doctors retained by the Respondent on four occasions. Following the fourth examination, the Disputant was informed that he was considered to be faking his illness and was fit to attend the disciplinary hearing. The Disputant maintained that he was still suffering and was unable to sit for long hours or travel long distances as set in his Doctor’s medical report.

Despite the requests for an adjournment, the Disciplinary Committee disregarded his Counsel’s request for a change of date. The matter was fixed for the 15 and 16 of November 2022. The Respondent was informed that the Disputant was not well and had a medical appointment on 17 November 2022, that Counsel had prior court commitments and could not attend or assist the Disputant suggesting other dates for the hearing. The hearing took place in the Disputant’s absence on 15 November 2022. He was dismissed on 18 November 2022 on

grounds of serious misconduct and breach of trust in the absence of any proof that he was the author of the emails mentioned in the charge letter. The Disputant had not been in a position to give his version of events being medically compromised and could not attend the disciplinary hearing. He thereafter reported the matter to the Ministry of Labour and Industrial Relations. The Supervising Officer of the Ministry, being of the opinion that the Disputant has a *bona fide* case, has referred the matter to the Tribunal for determination. The Disputant is therefore praying for his reinstatement as from the date of his unfair dismissal.

THE RESPONDENT'S STATEMENT OF CASE

The Respondent has notably averred that the Disputant solemnly affirmed to an oath of secrecy upon his appointment in 2004. Following the completion of the disciplinary process and having taken cognisance of the report of the Disciplinary Committee dated 17 November 2022, the Respondent's Board decided to dismiss the Disputant on grounds of gross misconduct and breach of trust. An FFC, chaired by an independent legal practitioner, was set up following leakage of official and/or confidential and/or defamatory statements by staff which caused prejudice to the Respondent. The Disputant was heard on two separate occasions before the FFC. By way of letter dated 29 July 2022, he was suspended with full pay. On 11 August 2022, the Respondent took cognisance of the FFC's report. By letter dated 11 August 2022, the Disputant was convened to a Disciplinary Committee chaired by an independent legal practitioner.

It has been averred that the Disputant's Counsel, by email dated 17 August 2022, requested a rescheduling of the hearing for 23 August 2022 which was acceded to. Disputant's Counsel, by email dated 22 August 2022, requested a postponement as Disputant had been advised five days' rest for low back pain; Counsel was informed to make his request before the Chairperson of the Disciplinary Committee. The first sitting of the Disciplinary Committee was called on 23 August 2022 in absence of the Disputant but his Counsel was present. By email dated 24 August 2022, Counsel submitted a medical certificate dated 22 August 2022 whereby the Disputant was advised seven days' rest prior to planned surgery on 30 August 2022. By email dated 4 September 2022, Counsel submitted a medical certificate dated 1 September 2022 stating that Disputant had undergone surgery on 30 August 2022 and was granted seven days' post operation leave as from 2 September 2022. By email dated 8 September 2022, Counsel submitted a medical certificate dated 8 September 2022 granting Disputant fourteen days' leave as from 9 September 2022.

The Respondent, on 9 September 2022, appointed an Orthopaedic Surgery Specialist to counter-examine the Disputant. It was eventually arranged to examine the Disputant at his domicile in Goodlands. Disputant was examined on 13 September 2022 and the Specialist reported that he was fit to attend the Disciplinary Committee in three weeks as from the date of the examination. A further medical certificate was submitted on behalf of the Disputant on 26 September 2022. On 29 September 2022, Counsel informed that the Disputant was admitted at Clinique de Grand Baie and undertook to inform parties as to the latter's medical condition. By email dated 3 October 2022, a medical certificate dated 2 October 2022 was submitted stating that Disputant was unfit for work and required a weeks' rest. On 4 October 2022, the Respondent complained to the Medical Council in view of the numerous medical certificates submitted. On 6 October 2022, Respondent informed Disputant's Counsel that a counter-examination will be conducted on 7 October 2022; to which Counsel replied that the Disputant will be unable to attend. This was then rescheduled to be conducted at the Disputant's residence on 10 October 2022; as there was no reply, the counter-examination had to be rescheduled.

On 10 October 2022, the Respondent's Manager Service Regulation and Legal Affairs gave a precautionary measure at the Ministry of Labour to the effect that the Respondent believed that the employee was trying to evade disciplinary proceedings. A medical certificate was submitted on 10 October 2022 recommending a weeks' rest. On 11 October 2022, the Respondent appointed an Orthopaedic Surgery Specialist to schedule an appointment with the Disputant at his domicile for counter-examination on 12 October 2022 and informed Counsel by email. On 12 October 2022, Counsel informed that Disputant was agreeable to same. The Specialist proceeded with the counter-examination and submitted his report dated 16 October 2022 to the Respondent. By email dated 19 October 2022, the Chairperson of the Disciplinary Committee convened the next sitting on 26 October 2022 and thereafter on a day-to-day basis. By email dated 19 October 2022, Counsel informed that the Disputant's health had not improved and that he had to undergo spine surgery and a medical certificate would follow. On 22 October 2022, a Discharge Summary was communicated showing that Disputant was discharged on 19 October 2022. On 22 October 2022, a medical certificate was submitted stating that the Disputant would be fit to resume duty on 27 October 2022.

The Chairperson of the Disciplinary Committee, by email dated 25 October 2022, informed that the next sitting was fixed to 26 October 2022. This date was vacated in light of the most recent medical certificate but maintained for 27 October 2022. On the said date, Counsel submitted a medical certificate granting the Disputant two weeks rest as from 27 October 2022

and informed that he was taken up in court. The Chairperson vacated the date and proposed to fix the matter once he had heard from all parties. The Disputant, on 27 October 2022, was informed that the Respondent would conduct a counter-examination by panel of spine specialists at his domicile on 2 November 2022. This was done and the panel submitted their report dated 8 November 2022 to the effect that the Disputant was fit for work. Counsel was informed that the Disciplinary Committee would resume on 15 and 16 November 2022. Counsel replied that the dates were inconvenient to him and of the Disputant's ill health. By email dated 12 November 2022, the Chairperson of the Disciplinary Committee informed all parties that the sitting dates were maintained and that any further motions/requests must be done before the Committee. By email dated 14 November 2022, the Chairperson informed Disputant's Counsel that the sitting dates were maintained and that the hearing would start at 1600 hrs to accommodate Counsel's professional commitments.

On 15 November 2022 at 1600 hrs, the Disciplinary Committee started, in the absence of the Disputant and in the absence of any medical certificate from the latter justifying his absence, and concluded on the same date. On 17 November 2022, the Chairperson submitted his report to the effect that all charges against the Disputant were found to have been established on a balance of probabilities. By letter dated 18 November 2022, the Disputant was dismissed on grounds of gross misconduct and breach of trust. The letter of termination dated 18 November 2022 was served by Registered Usher on the Disputant's wife at the place of business after having repaired to Disputant's domicile without success on several occasions.

The Respondent has notably averred that the Disputant was convened to a Disciplinary Committee as a result of the FFC to respond to charges duly communicated to him. All due process and relevant provisions of the law were adhered to and the Disputant was afforded every opportunity to answer the charges levelled against him and the Respondent accommodated all of his requests to allow him to do so. The Disputant's attitude towards the Disciplinary Committee was fully tainted by his bad faith as opposed to the Respondent's good faith at all stages. The Disputant submitted nine different medical certificates authored by five different medical practitioners demonstrating a lack of uniformity in treatment of a singular ailment. In any event, the bond of trust between the Disputant and the Respondent no longer exists and their professional relationship has irretrievably broken down. This is not a fit and proper case for reinstatement and the claim is not justified.

THE EVIDENCE OF WITNESSES

Mr Chatoo was called to adduced evidence. He notably affirmed as to the correctness of his Statement of Case and to the genuineness of all the documents attached thereto. He worked at the ICTA for 19 years and his employment was terminated on 18 November 2022. He was not in a position to attend the disciplinary hearing on account of his health and the Committee proceeded to hear evidence and find him guilty. As per the letter dated 11 August 2022, two charges were laid against him, which he denies. He filed a number of medical certificates and emails were sent on his behalf to request for adjournments. As per a medical report at Annex Y of the Respondent's Statement of Case, Dr Gopal and three other specialists found that he was fit to resume duty. He was not fit to resume duty and was not fit to attend the Committee when it was held on 15 November 2022.

Regarding the report of Dr Gopal dated 15 October 2022 (Annex 9 to the Disputants' Statement of Case), it was stated that the Disputant's attitude left the Doctor in doubt concerning the severity of his illness. This is a very disparaging remark against his person and he found it to be unfair for the Doctor to come to his residence to examine him, he having undergone a major hernia surgery, and say that he was faking his illness. He was always willing to attend the medical committee set up by the Respondent. His request is to be reinstated as he is not guilty and is denying the charges. He needs to earn a living and his reinstatement is a test of his integrity. He has been dismissed without any evidence on medical conditions. He does not accept that the bond of trust no longer exists between him and the Respondent and that their professional relationship has broken down. The bond of trust is not with any person but with the institution and this has not been breached for him. It is still as good as when he joined the Authority and will always be the same.

Mr Chatoo was thoroughly questioned by Counsel for the Respondent. He notably stated that his position of Manager of Costing and Administration was important but not key. He agreed that the employer is a regulator set up by statute. He swore as to an Oath of Secrecy on 28 April 2024 and in the workings of the ICTA, confidentiality and secrecy are of utmost importance. He agreed that Board of the ICTA unanimously decided on his termination. He attended two FFCs. He was assisted by Counsel at the second FFC but not one of his choice. The report of the FFC was made available as part of the disciplinary process. He received the letter of charges dated 11 August 2022 on 15 August 2022 at home. He agreed that save where a postponement was not granted for a sitting of the Disciplinary Committee, on all other occasions requests for

postponements had been accepted. He was operated for hernia on 30 August 2022 and did not have spine surgery.

The Disputant also replied that Dr Gopal held a first counter-medical examination at his residence on 13 September 2022. He does not agree to the observations of Dr Gopal's report. The report of the second medical examination by Dr Gopal is dated 15 October 2022. He did not mimic falling down and was in pain when he was being examined by the Doctor. He did not agree with the opinion of the Doctor in the report. The hearings of the 26 and 27 October 2022 were vacated. Four spine specialists, Dr Gopal, Dr Limbajee, Dr Kissoon and Dr Laljee, conducted another counter-medical examination and their report is dated 8 November 2022. He disagrees with their opinion that he is fit to resume work as he was in a painful condition and not fit to resume work like in normal circumstances. He is aware that the Chairperson of the Disciplinary Committee maintained the dates for 15 and 16 November 2022.

The Disputant furthermore agreed that there was quite a lapse of time from the first scheduled sitting of the Disciplinary Committee on 22 August 2022 to the 14 November 2022. He agreed that the Committee was not in presence of any medical certificate to justify his absence on 15 November 2022 as his medical certificate had expired on 10 November. He had an appointment on 10 November but was informed by his Doctor that he had been reported to the Medical Council and the Doctor postponed the appointment to 17 November. This is when an email was sent to inform the Committee and the Respondent that he had an appointment on 17 November. He is aware that his Counsel had been communicated with particulars in relation to the charges. He appreciates that he was warned in the letter of charges that the Disciplinary Committee may proceed in his absence should he fail to attend without lawful, reasonable justification. He agreed that the Committee took place as scheduled.

Mr Jerome Louis, Officer-in-Charge of the ICTA, deposed on behalf of the Respondent. He swore as to the correctness of the Respondent's Statement of Case. The Disputant was suspended and convened before a Disciplinary Committee following a FFC. The medical reports of the Disputant's counter-examination were communicated to the latter and his Counsel. The Respondent had offered to have the Disciplinary Committee held by video conference, but the Disputant did not agree. Mr Chatoo did not formally object that Dr Gopal form part of the panel of Doctors who examined him. On 15 November 2022, the Disciplinary Committee proceeded in absence of the Disputant and his Counsel. The report of the Disciplinary Committee was submitted on 17 November 2022 to the ICTA and the charges were found to be established on a

balance of probabilities. He represented the employer before the Committee and deponed. The employer has acted in good faith as it has given all opportunity for the Disputant to reply to the charges before the Disciplinary Committee. There was bad faith on the part of the Disputant as there was no medical certificate for 15 November and he did not turn up. He believes that the Authority cannot trust the Disputant anymore.

Mr Louis was questioned by Counsel for the Disputant and notably stated that the fixing of the Disciplinary Committee is the prerogative of the Chairman, who decides and has taken cognisance of all the emails. Through his Counsel and colleagues, he may have taken cognisance of an email dated 14 November 2022 to the effect that Mr Chatoo was still feeling pain and had another medical appointment on 17 November 2022 to explain why the latter could not attend on 15 and 16 November. On being asked whether there was any independent evidence before the Committee that Mr Chatoo was the author of the anonymous email, he replied that there was the findings of the FFC, which enquired and came up with a report taken up by the Board.

Dr Dhanraj Gopal, Consultant-in-Charge of Orthopaedic Surgery and Regional Health Director, was called as a witness on behalf of the Respondent. He notably stated that when he first examined the Disputant, he was unfit because he had undergone hernia repair surgery. On the second occasion, he could not examine the Disputant, who refused examination and had recovered from the surgical procedure. Regarding the third examination, the MRI was clear meaning that the patient was fit, hence his conclusion. When cross-examined, Dr Gopal notably stated that there is a difference between inguinal hernia and herniated disc. It is a painful condition when you have not been operated; once repaired, it is not a painful condition. The MRI did not show any herniated disc. A disc bulge does not give chronic pain except if one does a heavy physical exertion and the pain is for a maximum of a week.

Dr Hemant Kumar Limbajee, Orthopaedic and Spine Surgeon, was also called on the Respondent's behalf. He confirmed the correctness of the medical report dated 8 November 2022, of which he was part of the panel of Doctors. When questioned by Counsel for the Disputant, he notably stated that the Disputant was clinically and physically fit in their opinion. If a patient is in pain for a disc bulge, it needs to be evidenced by clinical signs and symptoms, which were not present at the time. The way the Disputant was describing his symptoms, it should have appeared on the MRI.

Mrs Caroline Samy, Manager Regulation and Legal Affairs, also deposed on behalf of the Respondent. She notably stated that the Disciplinary Committee was set up following the findings of the FFC, of which she was the secretary. The Disputant deposed before the second FFC and was assisted by Counsel. She was the one corresponding with parties on behalf of ICTA. She had informed Disputant's Counsel that it was the prerogative of the employer to examine Mr Chatoo and they finally agreed on the panel. The email dated 8 November 2022 from her was sent following the report of the panel of Doctors. She was a witness before the Disciplinary Committee and it was not her prerogative to decide on the date or time. The Authority has decided that reinstatement is not possible.

When questioned by Counsel for the Disputant, Mrs Samy notably stated that the decision to adjourn was not hers and the Authority stood guided by the Chairperson of the Disciplinary Committee. The medical panel found Mr Chatoo fit and there was no other medical certificate stating that he was unfit on 15 November. The Chairman had invited Counsel to explain his predicament on 15 November before the Committee.

THE SUBMISSIONS OF COUNSEL

Learned Counsel for the Disputant notably submitted that the adjournment sought was turned down on one occasion as there was no medical certificate in support. Emails were exchanged. As per Dr Gopal's first report, the Disputant needed three weeks rest after surgery. In the Doctor's second report, it was remarked that the Disputant was mimicking his pain. Pain is a subjective matter and the Disputant stated that he could not attend on 15 and 16 November 2022 as he was feeling pain and had an appointment. The employer had even reported the Doctor to the Medical Council. As the Disputant had an appointment on the 17 November 2022 and if there was no medical certificate, the Authority would have been in their right to refuse any further adjournment. The dismissal therefore fails to pass the test of the law on this point of opportunity of answering to the charge.

Learned Counsel also submitted that assuming there was a valid charge before the Disciplinary Committee, there must be evidence. The Committee imported the whole of the FFC; this is not proper. The Committee must hear the person and the evidence brought against him. The charges were unsupported by evidence. At least, the Respondent should bring the evidence that triggers the dismissal. On what basis can the Disciplinary Committee find the Disputant guilty

if there is no evidence before it. Thirdly, it was also submitted that the bond of trust is not the sole province of the one or two persons at the Authority and there is no evidence that the Disputant has caused any disrepute to the Authority. We do not know where the email emanated from. It cannot be accepted that an Authority would accept an anonymous email coming from nowhere and pin it on the back of the Disputant. Nothing shows that there has been a breach of the bond of trust. The bond of trust stills lies with the Authority but not with the individual members who assisted the Respondent before the Disciplinary Committee.

On the other hand, Learned Counsel for the Respondent notably submitted that the present matter has been referred by the Supervising Officer under *section 69A* of the *Workers' Rights Act* and queried whether this section been complied with by the Supervising Officer. The Disputant has not shown any good cause for not being present before the Disciplinary Committee. The Disciplinary Committee was set up and proceeded within the time-frame provided under *section 64 (11)* of the *Workers' Rights Act*. The Doctors have provided expert evidence as to the Disputant's ability to attend the Committee. Counsel also submitted that the relationship with the Disputant has broken down, as it was the Board's decision to terminate the employment and that the employer has been of good faith.

THE MERITS OF THE DISPUTE

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 Chatoo is justified or not and whether he should be reinstated or not.

The Disputant took up employment with the Respondent Authority on 1 August 2003 and had over 19 years of service at the ICTA. He occupied the post of Manager of Costing and Administration and reported to the Director of Finance and Administration. The Disputant, on 21 July 2022, attended a FFC inquiring into possible leakages of information in April 2022. He was thereafter suspended from work on 29 July 2022 and was convened to another FFC on 3 August 2022, where he was accused of being the author of an anonymous email.

Following the second FFC, the Disputant was handed a letter dated 11 August 2022 convening him before a Disciplinary Committee on 22 August 2022. In the aforesaid letter, he

was charged firstly, for having breached the conditions of his employment by authoring, disseminating and publishing the anonymous email and secondly, for having breached the trust of his employer by sending the anonymous email. The letter further reproduced certain extracts of the findings of the FFC. The Disputant was unable to attend the Disciplinary Committee in view of his medical condition.

The Committee, after several postponements made on the Disputant's behalf supported by various medical certificates, eventually convened, sat and heard evidence on 15 November 2022 in the absence of the Disputant and his Counsel. By letter dated 18 November 2022, the Disputant was informed that the charges laid against him were established by the Disciplinary Committee and he was dismissed on grounds of serious misconduct and breach of trust. The Disputant is now before the Tribunal seeking his reinstatement after having made a complaint to the Supervising Officer of the Ministry of Labour, Human Resource Development and Training.

In its endeavour to ascertain whether the Disputant has been unfairly dismissed or not, it is incumbent on the Tribunal to see whether the Disputant was given the opportunity to answer to the charges levelled against him. The more so that this is mandatory requirement of the law (*vide section 64 (2) of the Workers' Rights Act*) in relation to any case of misconduct. It should be noted that giving the worker an opportunity to answer the charge made against him is a requirement of natural justice before any action is taken to deprive him of his employment (*vide Bundhoo v Mauritius Breweries [1981 MR 157]*).

As per the letter dated 11 August 2022, the Board of the ICTA decided to convene the Disputant before a Disciplinary Committee to answer to two charges as particularised therein. He was also informed, in the aforesaid letter, that the hearing shall take place in the ICTA boardroom on Monday 22 August 2022 at 10 am and that he may be assisted by a legal representative of his choice or by a member of his trade union or, in the alternative, by an officer of the Ministry of Labour, Human Resource Development and Training.

It is common ground that the Disputant never attended the Disciplinary Committee. He contended that he was sick suffering from a disc bulge putting him in severe pain necessitating multiple medical visits. It has not been denied that he sent regular medical certificates in support of his requests for postponements of the sitting of the Disciplinary Committee.

As per the Respondent's Statement of Case, the correctness of which has been sworn to by the Respondent's Officer-in-Charge in evidence, the hearing of the Disciplinary Committee was rescheduled to 23 August 2022 at the request of Counsel for the Disputant. On the latter date, the Disciplinary Committee sat in absence of the Disputant. Thereafter, three medical certificates were submitted on behalf of the Disputant by his Counsel, including one dated 1 September 2022 stating that the Disputant had undergone surgery on 30 August 2022. Dr Gopal was appointed by the Respondent to perform a counter-examination on the Disputant which was conducted at the Disputant's residence on 13 September 2022. As per Dr Gopal's report, the Disputant would be fit to attend the Committee in three weeks' time as from the date of his examination.

There was a series of exchanges between the Chairperson of the Disciplinary Committee requesting for an update and Counsel for the Disputant, whereby medical certificates were again submitted on the Disputant's behalf. The Respondent complained to the Medical Council in view of the numerous medical certificates submitted and eventually arranged for a second counter-examination by Dr Gopal on 12 October 2022 at the Disputant's residence. Following the examination, Dr Gopal submitted his report dated 16 October 2022 whereby he notably stated he was in doubt regarding the severity of the Disputant's illness.

The Disciplinary Committee was then convened for 26 October 2022 and on a day-to-day basis thereafter. However, another medical certificate dated 19 October 2022 was submitted stating that the Disputant would be fit to resume on 27 October 2022. The sitting of 26 October 2022 was vacated but was maintained for 27 October 2022, on which day another medical certificate was submitted granting Disputant two weeks rest. The hearing was thus vacated and the Chairperson proposed to fix the matter anew once he had heard from all parties.

A third counter-examination of the Disputant by a panel of four spine specialists, namely Dr Gopal, Dr Limbajee, Dr Kisson and Dr Laljee, was arranged at the Disputant's residence on 2 November 2022. The panel submitted its report dated 8 November 2022 with the opinion that the Disputant was fit to resume work. On 8 November 2022, Counsel for the Disputant was informed that the Disciplinary Committee would be held on 15 and 16 of November 2022 at 1330 hrs. Counsel for the Disputant informed that this was inconvenient in view of his professional commitments and the Disputant's ill health. On 12 November 2022, the Chairperson of the Disciplinary Committee informed parties that the sitting dates were maintained and that any

motions/representations/requests must be made before the Committee. By email dated 14 November 2022, the sitting dates were again maintained but the hearing was put for 1600 hrs to accommodate Disputant's Counsel's professional commitments.

On 15 November 2022 at 1600 hrs, the Disciplinary Committee started in absence on the Disputant and in absence of any medical certificate from him and concluded on the same date. On 17 November 2022, the Chairperson of the Disciplinary Committee submitted his report to the effect that all charges held against the Disputant were found to be established on a balance of probabilities. By letter dated 18 November 2022, the Disputant was dismissed for gross misconduct and breach of trust.

From the above recollection of events, particularly from the date of the letter of charges to the sitting of the Disciplinary Committee on 15 November 2022, it is clear that the Disputant made multiple requests for adjournments of the Disciplinary Committee supported by medical certificates and these requests were accommodated and acceded to. However, despite Disputant's Counsel's request for a postponement of the hearing of 15 November 2022 not being acceded and the hearing time being moved to 1600 hrs, it has not been disputed that no medical certificate was submitted on the Disputant's behalf nor was his Counsel present before the Disciplinary Committee.

It should be noted that the Disputant was examined by a panel of four spine specialists and found to be fit. Dr Gopal and Dr Limbajee were called to adduce evidence and were resolute in their testimony regarding the third counter-examination of the Disputant and in their opinion that he was fit, despite the Disputant's contention that he was in pain. It may also be noted that the Disputant was not questioning the competency of Dr Gopal. It cannot also be overlooked that Dr Gopal did find that the Disputant did require three weeks rest following hernia surgery following his first examination on 13 September 2022.

The Tribunal has also noted that the Disputant stated, in cross-examination, that he had an appointment with his Doctor on 10 November 2022 but this was postponed by the latter as he had been reported to the Medical Council. Bearing in mind that parties are bound by their pleadings, this version of events is not substantiated by any averment made by the Disputant in his Statement of Case. Moreover, as the Disputant had his next medical appointment on 17 November 2022, it was open for him to consult another medical practitioner to certify that his

condition did not allow him to attend the Disciplinary Committee on 15 November 2022 and he had ample time to do so. The more so, as it appears from the various medical certificates annexed to both Statements of Case, that the Disputant had been treated by several doctors.

If the Disputant was genuinely suffering from pain which precluded him from attending the Disciplinary Committee on 15 November 2022, he should have, at the very least, consulted with another medical practitioner to certify his painful condition. It has not been disputed that the Disciplinary Committee was adjourned whenever it was provided with a medical certificate on the Disputant's behalf. Furthermore, the Disputant did acknowledge that, as per the letter of charges dated 11 August 2022, he was warned that the Committee could proceed in his absence should he fail to attend without lawful, reasonable justification.

Likewise, his Counsel having been informed that any motions/representations/requests must be made before the Committee, it was open for him to have another Counsel replace him before the Committee to move for an adjournment on 15 November 2022. It cannot also be overlooked that the Committee was accommodating to Counsel in having moved the time of the sitting to 1600 hrs.

It would be apposite to note the following from *Moortoojakhan v Tropic Knits Ltd* [2020 SCJ 343] on the importance of the worker having his version put before a Disciplinary Committee:

*We fully agree in that regard with the following pronouncement of the Supreme Court in **Planteau de Maroussem**, which was cited with approval in **Smegh** –*

“The aim of a Disciplinary Committee (...) is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a Court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the Disciplinary Committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court.”

*The Disciplinary Committee therefore operates as an obligatory mechanism for the employer to provide an opportunity to its employee to give his version in relation to the charges laid against him pursuant to the law (in this case, **section 38(2)(a) of the Employment Rights Act**) and to attempt to dissuade the employer from dismissing him.*

The following may also be noted from *Plaine Verte Co-operative Stores Society Ltd v Rajabally* [1991 MR 240]:

In the present case there can be no doubt that there was discrepancies. Called to explain same the employee chose to follow the advice of her Counsel and refused to give any explanation to her employer. This act of defiance would by itself have justified the Appellant to dismiss her summarily. It chose however to ignore that part of her arrogance to concentrate only on the charge of bad performance at work to terminate her employment. In view of her lack of explanations and the attitude adopted by her, what else could any employer do? It cannot be said that the employer in bad faith when, after the Disciplinary Committee of the 7.12.87, it decided to terminate the Respondent's employment.

In view of the events that led to the sitting and conclusion of the Disciplinary Committee on 15 November 2022 in the absence of the Disputant, the Tribunal is satisfied that the Disputant was afforded every opportunity to present his case before the Disciplinary Committee, as is required under the law, to answer to the two charges laid against him as per the letter dated 11 August 2022. The Tribunal cannot therefore impute any wrongdoing on the Respondent in this regard.

Learned Counsel for the Disputant has moreover submitted that the Disciplinary Committee found the Disputant guilty in absence of any evidence. As per the evidence adduced on record, it has been established that witnesses were called before the Disciplinary Committee. Mrs C. Samy, in her testimony, clearly stated that she deponed before the Committee; Mr J. Louis stated that he represented the Respondent before the Committee and deponed and also stated that the findings of the FFC were before the Committee. Moreover, the letter of termination dated 18 November 2022 clearly states that the disciplinary hearing took place as scheduled (on 15 November 2022) and the Committee submitted its findings on 17 November 2022 to the ICTA. As per the aforesaid letter, the Disciplinary Committee found that the two charges were established on a balance of probabilities.

As per the evidence adduced, the Disciplinary Committee did conduct a hearing into the charges laid against the Disputant, albeit in his absence, and went onto communicate its findings to the Respondent. It would therefore be incorrect for the Disputant to assert that the Disciplinary Committee found the Disputant guilty in absence of any evidence, the more so he was not privy to the hearing of the Committee on 15 November 2022. In any event, it is trite law that the decision to terminate the Disputant's employment is that of the employer as can be

noted from what was held in *Planteau de Maroussem v Societe Dupou* [2009 SCJ 287] as quoted above in *Moortoojakhan* (*supra*).

It must also be noted that the Disciplinary Committee was held following two FFCs set up by the Respondent. The letter of charges dated 11 August 2022 alluded to the second FFC and extracts of its finding were reproduced therein. In fact, the law provides, at *section 64 (3)* of the *Workers' Rights Act*, that before a charge of alleged misconduct is levelled against a worker, the employer may carry out an investigation into all the circumstances of the case. *Section 64 (4)* moreover provides that the employer may formulate a charge against the worker where the investigation disclosed suspected misconduct. There is therefore nothing improper for the charges laid against the Disputant before the Disciplinary Committee to have been based on the findings of the second FFC as has been contended, in submissions, by Disputant's Counsel.

Counsel for the Disputant has also submitted on the bond of trust between the Disputant and the Respondent. It must be noted that there is no such averment regarding this issue in the Disputant's Statement of Case and it is trite law that parties are bound by their pleadings (*vide Compagnie Sucrière de Bel Ombre Ltée v Bungaroo & ors* [1996 SCJ 334]) and *Tostee v Property Partnerships Holdings (Mauritius) Ltd* [2015 SCJ 41]).

Furthermore, pursuant to *section 70A* of the *Employment Relations Act*, the Tribunal is only under a duty to consider if the relationship between the worker and the employer has not irretrievably been broken where it has found the claim for reinstatement to be justified. This may be amply noted as follows:

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.

In the circumstances and in view of the above, the Tribunal, having notably found that the Disputant was given every opportunity of answering to the two charges laid against him before the Disciplinary Committee and that the Respondent duly decided to terminate the Disputant's employment on 18 November 2022 following the sitting of the Disciplinary Committee on 15 November 2022, can only conclude that the Disputant's termination of employment is justified. Having found the termination of employment to be justified, the Tribunal cannot therefore find the Disputant's claim for reinstatement to be justified. Hence, there is no need for the Tribunal to consider whether it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken or not.

The dispute is therefore set aside.

.....
SD Shameer Janhangeer
(Vice-President)

.....
SD Vijay Kumar Mohit
(Member)

.....
SD Karen K. Veerapen
(Member)

.....
SD Ghianeswar Gokhool
(Member)

Date: 13th September 2023