

EMPLOYMENT RELATIONS TRIBUNAL

DETERMINATION

ERT/ RN 60/24

Before

Indiren Sivaramen	Acting President
Bhawantee Ramdoss	Member
Dr Sunita Ballah-Bheeka	Member
Muhammad Nayid Simrick	Member

In the matter of:-

Mr Shiam Krisht Thannoo (Complainant)

And

Central Electricity Board (Respondent)

The above case has been referred to the Tribunal under the direction of the Supervising Officer acting under Section 69A(2) of the Workers' Rights Act, as amended. Both parties were assisted by Counsel. The point in dispute in the terms of reference reads as follows:

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

The Tribunal proceeded to hear the case, and the Complainant deponed before the Tribunal. He stated that he joined the Respondent in 1985 and held different positions until he was appointed as Officer in Charge, then General Manager on a contractual position and General Manager on a permanent basis. After the general elections of 2014, he was requested to step down from his position of General Manager. He was asked to step down to the position of Non-Utility Generation (NUG) Manager, which later became CAM/NUG Manager (as Head of Department). His salary was reduced from Rs 185,000- to Rs 118,000- monthly though he added that he did not agree with the reduction of his salary. He made a complaint to the 'Ministry of Labour' and eventually after several meetings, the Respondent was asked to reinstate his salary as General Manager. On 13 December 2022, the Respondent restored his salary to the level of General Manager. He suggested that his salary of Rs 185,000- was even increased to Rs 205,000- in December 2022. However, later in January 2023 he was

told that he could not be paid Rs 205,000- (the revised salary for General Manager at the relevant time) and his salary was reduced to Rs 185,000-. He stated that when his contract of employment was terminated, his terminal salary was Rs 185,000-monthly. He stated that management had asked him for his comments on the procurement of three cars and on the employment of a Public Relations Officer (PRO) on contract following a Management Letter from the Director of Audit. He stated that he had sent a reply but was later informed by email that his comments on the queries raised had not been consolidated in the reply sent by the Respondent in relation to the said Management Letter. He stated that the Respondent had set up a Board of Enquiry to look into the abovementioned issues of procurement of three cars and employment of a PRO on contract.

Complainant averred that the Board of Enquiry submitted a summary of its findings to the Respondent on 11 October 2016. He suggested that the Respondent thus had already knowledge of the findings of the Board of Enquiry since 11 October 2016. However, he agreed that the report of the Board of Enquiry was only submitted in November 2016. He added that by virtue of the internal rules and regulations of the Respondent, he should have been asked for his written explanations before any disciplinary action was taken against him. He stated that the Respondent had 10 days to ask for his explanations, which the latter never did. He added that even if the report from the Board of Enquiry was allegedly received on 7 November 2016, he was never asked for his written explanations before the letter of suspension dated 7 November 2016 was issued to him. A letter of charges dated 15 November 2016 (Annex J to the Statement of Case of the Complainant) was issued to him and there were five charges in all levelled against him. Complainant suggested that another letter of charges was then issued against him several years later on 21 June 2022. He stated that he appeared before three differently constituted disciplinary committees since the said disciplinary hearings were not concluded. He referred to the first disciplinary committee where the members thereof ultimately resigned and the second disciplinary committee which had to be reconstituted. He stated that he was suspended for around seven years.

Finally, the relevant disciplinary committee held disciplinary hearings on 9 May 2024 and 16 May 2024, and he was asked to proceed to the Respondent on 22 May 2024. There were only two charges levelled against him (out of the five initial charges which included the two charges maintained against him) at the last disciplinary proceedings. He received a letter of termination whereby he was informed that the first charge against him had been dismissed and that the second charge had been proven against him. As per the internal rules and regulations of the Respondent, he appealed against the decision of the Respondent. His appeal was heard on 21 June 2024. By way of a letter dated 28 June 2024 (Annex P to the Statement of Case of the Complainant), he was informed that his appeal was dismissed. He suggested that the termination of his contract of employment was not in order. He stated that the disciplinary committee had overlooked certain elements and that it could not find Charge 2 proved if it had

found Charge 1 not proved. He also suggested that the charge found proved against him (Charge 2) was different from the charge levelled against him in the disciplinary committee.

Complainant stated that the Board of directors had approved the retention allowance paid to the PRO. The Complainant stated that he has a clean disciplinary record and has never faced a disciplinary committee. He stated that if the Respondent had listened to him when he provided his written explanations there would not have been any disciplinary committee set up against him and no such harsh sanction against him. He averred that the Respondent wanted to get rid of him and that the termination of his employment is not justified. He added that even if the second charge had been proven against him, this would not have been enough to terminate his contract of employment.

In cross-examination, Complainant stated that the Respondent terminated his employment without good faith. He identified the letter of charges which was produced before the disciplinary committee and this document was produced and marked Doc A. He stated that in the case of the PRO, Mr Elahee, it was the document concerning employment on contract which was 'valid' and not the document dealing with review of conditions of employment of staff of the Respondent. He stated that he had not entered any case before the Court in relation to any 'demotion'. He also stated that as soon as he received the letter whereby he was informed that he would be entitled to the conditions of NUG Manager, he wrote a letter to the Chairman complaining about his salary and referred to the internal rules and regulations of the Respondent, which, according to him, were to the effect that the salary of someone in a substantive position could not be reduced. He agreed that he was reverted back to the position of Head of Department NUG as from 2 February 2015. He was then questioned on the salary he was deriving as General Manager and the salary which was granted to him in 2015. He confirmed that he received the letter dated 25 January 2023 whereby he was informed that his salary was restored from Rs 118,000 to Rs 185,000 (only) for the period 1 February 2015 to 30 June 2017 and from Rs 136,125 to Rs 185,000 (only) for the period 1 July 2017 to date.

Complainant stated that the report on the remuneration for Senior Officers duly approved by the Board of directors included conditions which appear in the Collective Agreement and conditions in the report of the salary consultant. He read part of these conditions (which in fact emanate from the report of the salary consultant – Remuneration for Senior Officers (copy of extract produced as Doc B before the Tribunal)). He stated that the observations of the National Audit Office were not correct and that he did state so clearly in his explanations provided to the then CFO. He was later informed by the then CFO that his explanations had not been taken into consideration by the Board of directors. He agreed that observations put to him were made by the National Audit Office, but he did not agree with the said observations. He stated that the National Audit Office should have gone to the remuneration system for officers on contract and that there was a negotiable salary provided within a salary

range recommended for the grade. He stated that in the present case, the top salary was Rs 101,000 and that this salary was not exceeded. He agreed that the Respondent replied to the observations made by the Director of Audit (as mentioned to him by Counsel) by stating that it was going to set up a Board of Enquiry to look into the matter. He agreed that in the document he had annexed as Annex G to his Statement of Case, that is, a document purporting to be a Summary of findings and recommendations of the Board of Enquiry, the figure of an alleged overpayment was not mentioned (left blank with dots on the annexed document). Complainant maintained that, according to him, the Respondent was aware of the findings and recommendations of the Board of Enquiry since 11 October 2016. He was lengthily questioned on the findings of the Board of Enquiry as per Annex H to his Statement of Case. He then stated that the charge as found proved against him in the report of the disciplinary committee was different from the charge in the letter of charges. Complainant was also lengthily cross-examined in relation to various circumstances which would have contributed to the disciplinary proceedings lasting over a long period of time including reconstitutions of the whole panel and/or replacement of one member on the panel. He was also questioned in relation to his handwritten note on Doc D.

The Senior Human Resource Executive of the Respondent deposed at another sitting of the Tribunal and he stated that he was a witness at the disciplinary committee held in the present matter. He stated that the contents of the Statement of Defense of the Respondent are true. He identified a document which he stated had been produced before the disciplinary committee and had there been marked Doc B. The document was produced and marked Doc I. He explained the rationale for the Special Professional Retention Allowance (SPRA) which was recommended in the report of BCA Consulting, and which was eventually approved by the Board of directors and included in the Collective Agreement for the period 2013-2017. He confirmed that Doc G (already produced earlier as Doc B) also emanated from the same BCA Consulting report (although the report was in different volumes). He referred specifically to paragraph 4(d) at page 12 on Doc B and to paragraph 7 at page 13 of the same document. He suggested that it was provided in the report that the SPRA for relevant contract officers be set in the range of 10% to 25% of salary. He identified on Doc E the salary scale CEB (S) 10 Rs 66500 x 2500 – 89000 x 3000 – 101000 which concerned the salary of the Public Relations Officer (amongst others). He suggested that the topping of the salary of Mr Elahee (former PRO) and the retention allowance paid to the latter had not been approved. He prayed that the present application be set aside.

In cross-examination, the Senior Human Resource Executive agreed that initially there were five charges against the Complainant and that eventually only two charges were maintained against the latter. He stated that the report of the disciplinary committee (chaired by Mr N.Pillay) was communicated to the Complainant. The first charge against the Complainant had not been proved against the latter. He agreed that the Respondent terminated the contract of employment of the Complainant only on the

basis of the second charge which had been found proved by the disciplinary committee. The Senior Human Resource Executive however did not agree that the termination of the contract of employment of the Complainant was not done in good faith. He did not agree that the second charge could not be found to be proved if the first charge had not been proved. He accepted that the Complainant joined the Respondent as Meter Reader and had 39 years of service. He agreed that Complainant had put in a lot of work and was even appointed General Manager of the Respondent in a substantive capacity. The Complainant had no disciplinary issues before the letter of suspension which was issued to him in 2016 in relation to the present matter. When it was put to the Senior Human Resource Executive that the Respondent paid compensation to the former PRO based on the salary of Rs 101,000, the latter stated that it was not justified for the Respondent to reduce the salary of the PRO. He did not agree that the disciplinary committee was a mere sham, and that the Respondent had already decided to terminate the contract of employment of the Complainant.

When questioned in relation to the long delay as from when the Complainant was suspended in 2016 and the disciplinary committee which heard evidence on 9 May 2024 and 16 May 2024, the Senior Human Resource Executive stated that there were factors which were beyond their control. He did not agree when it was put to him that there was an inordinate delay and abuse of process, and that the Respondent should not have terminated the employment of the Complainant. He stated that the Respondent has 'officially' been communicated with the findings of the Board of Enquiry in November 2016. When he was asked whether the Respondent should have sought the explanations of the Complainant when it became aware of the findings of the Board of Enquiry, the representative stated that the Complainant was allowed to give his explanations before the disciplinary committee. He did not agree when it was put to him that the Respondent had not acted within a period of 10 days as from when the Respondent had knowledge of the findings of the Board of Enquiry. He did not agree that the termination of employment of the Complainant was unjustified, and that the latter should be reinstated.

The former Acting Human Resource Manager of the Respondent then deponed before the Tribunal and he identified the handwriting of the Complainant on Doc D. He stated that following the handwritten note of the Complainant addressed to him, he sent the letter to the then Principal Human Resource Officer for necessary action. In cross-examination, he stated that in the light of the note from the then General Manager, he did not go and make any verification. He is personally not aware if there was a board decision.

The Senior Accountant at the Respondent then deponed and she was questioned on the letter of charges dated 14 December 2022 which referred to an alleged overpayment of Rs 839,541-. She stated that she worked out the figures and arrived at a figure of Rs 838,820- instead. She stated that her calculation was based on a period of 26 months and 24 days so that the figure was calculated on a pro rata basis

instead of being a round figure. In cross-examination, she stated that she is not personally aware if there was actually an overpayment and would not be aware if the General Manager had instructions to pay the said sum of Rs 101,000 to the PRO.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The Respondent has taken preliminary objections in relation to the jurisdiction of the Tribunal to entertain the present matter and these read as follows:

- (1) Ex facie the Complainant's Statement of Case, the Complainant is seeking reinstatement to a position which he did not hold at the time of termination of his employment. The prayer of the Complainant being outside the ambit of sections 69A of the Workers' Rights Act, and of section 70A of the Employment Relations Act, the Tribunal has no jurisdiction and/or lawful authority to entertain the present matter.
- (2) The Complainant cannot argue inordinate delay and/or abuse of process in the light of the applicable legislation which is the Employment Rights Act.

On the basis of the nature of the objections raised and bearing in mind the short period of time which the Tribunal has, as per section 70A(2) of the Employment Relations Act, to give its determination in 'reinstatement' cases such as the present one, the Tribunal ordered that the objections raised be taken together with the merits of the case. In relation to the first objection taken, it is apposite to note that Counsel for the Complainant moved to amend paragraph 25 of the Statement of Case of the Complainant so that the said paragraph would now thus read as follows:

The Complainant therefore prays for the determination by the Employment Relations Tribunal of the following point in dispute as referred to it by the supervising officer of the Ministry of Labour, Human Resource Development and Training by way of letter dated 24th June 2024 "whether the termination of employment of Complainant is justified or not in the circumstances and whether Complainant should be reinstated or not".

There was no objection on the part of the Respondent to the proposed amendment and the proposed amendment was granted by the Tribunal. The objection taken, in any event, could not stand since the jurisdiction of the Tribunal to hear the matter emanated from the referral of the complaint on behalf of the supervising officer of the Ministry of Labour, Human Resource Development and Training under section 69A(2) of the Workers' Rights Act. The terms of reference of the dispute referred is as follows:

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

This is clearly within the jurisdiction of the Tribunal, and by virtue of section 70A of the Employment Relations Act, the Tribunal had to proceed to hear the case and give its determination. "Reinstatement" is already defined in section 69A(3) of the Workers' Rights Act as follows:

“reinstatement” means the reinstatement of a worker, by his employer, back to the worker’s former position before the termination of his employment for any reason, other than reasons related to reduction of workforce or closure of enterprises under Sub-part III of this Part. (underlining is ours)

In Section 70A(6) of the Employment Relations Act, it is provided that

In this section –

“reinstatement” has the same meaning as in section 69A of the Workers’ Rights Act 2019.

Anyway, there was no objection to the proposed amendment to the Statement of Case of the Complainant, and this objection is set aside.

As regards the second objection, the “disciplinary proceedings” which has started under section 38(2) of the repealed Employment Rights Act, and which was still pending at the commencement of the Workers’ Rights Act shall be dealt with in accordance with the repealed Employment Rights Act (section 127(2)(a) of the Workers’ Rights Act). The second objection is clearly an issue which has to be considered on the merits of the case. The second objection thus cannot stand as an objection to the jurisdiction of the Employment Relations Tribunal and will be addressed as the Tribunal now proceeds to consider the merits of the present case.

The Complainant was suspended with immediate effect by way of a letter dated 7 November 2016 (Annex I to the Statement of Case of the Complainant). As per the letter, the Complainant was informed that

“Following communication of the report of Board of Enquiry in relation to the Management Letter for Year 2014 from the National Audit Office, the Board has reason to believe that you have been guilty of “gross misconduct”.

Consequently, you are suspended with immediate effect and disciplinary proceedings will be initiated on account of your misconduct.

A further correspondence will be forwarded to you in due course.

You are hereby requested to make arrangements for handing over of all CEB materials in your possession to the Officer in Charge of the Internal Audit Department.

Subsequently, you will only have access to CEB premises with the express authorization in writing from Mr H.Chummun, Chairman of the HR Committee.”

It is apposite to note that the Complainant was then CAM-NUG Manager as per the said letter of 7 November 2016. However, the Complainant had previously been appointed General Manager of the Respondent, on a permanent basis, by way of a letter dated 29 April 2014 (Annex A to the Statement of Case of the Complainant).

In Annex B to the Statement of Defense of the Respondent, there is an extract of a Special Board Meeting held on 2 February 2015 with the following:

Movement of Staff

Following the decision of Mr. S.K Thannoo to step down from his position of General Manager and to be reverted to his former position as Head of Department, the Board gave its approval to the following:

- (i) Mr. S. K. Thannoo be reverted back to the position of Head of Department in the Non-Utility Generation Department as from 02 February 2015;*
- (ii) ...*

- (iv) Mr. S.K. Thannoo to act as Officer-in-Charge temporarily.*

The Board resolved that (ii) and (iii) above will take effect as from the date that Mr. S.K. Thannoo will be discharged from the responsibility of Officer-in-Charge.

There was evidence adduced in relation to the salary of the Complainant which was reduced by the Respondent (to that attached to the post of Non-Utility Generation Manager as per Annex C to the Statement of Defense of the Respondent). Only later, the Respondent was informed by way of a letter dated 13 December 2022 (Annex B to the Statement of Case of the Complainant) that following his previous correspondences, and a meeting held at the Ministry of Labour on 28 November 2022, the Board of the Respondent had agreed that his salary be restored at the level of General Manager. From the evidence adduced, the salary of the Complainant was restored to the salary he previously enjoyed as General Manager. Payments effected to the Complainant for the months of November 2022 and December 2022 as well as the end of year bonus for 2022 were based on the then prevailing salary of the post of General Manager (which was Rs 205,000 as compared to the salary of Rs 185,000 which the Complainant was drawing as General Manager). The Complainant was later informed in writing by way of a letter dated 25 January 2023 (Annex G to the Statement of Defense of the Respondent) that his salary had in fact been restored to Rs 185,000 (and not a salary of Rs 205,000) and that any adjustments would be effected in the remaining balance which was going to be paid to him.

It is apposite to note that it is not disputed that the Complainant had no disciplinary issues before the suspension letter of 7 November 2016 (Annex I to the Statement of Case of the Complainant). The Respondent received a Management Letter from the Director of Audit for the year ended 31 December 2014 (copies of five pages of the said Management Letter were annexed as Annex C to the Statement of Case of the Complainant). There were no pages annexed in relation to any findings concerning the purchase of cars though the Tribunal bears in mind that there is evidence on record that there were observations from the Director of Audit on the purchase of three cars at the Respondent and that Annex D to the Statement of Case of the Complainant

does refer to comments sought from the Complainant in relation to the above. Be that as it may, there is evidence that the Respondent decided to set up a Board of Enquiry to investigate into the procurement of three cars and the employment of a Public Relations Officer on contract basis and related matters (vide Annex H to the Statement of Case of the Complainant) “in response to certain items arising in the Management Letter”. It is apposite to note that the Management Letter from the Director of Audit for the year ended 31 December 2014 appeared to contain some 34 pages (as per Annex C to the Statement of Case of the Complainant) and the Board of Enquiry was set up as per its terms of reference to enquire only in relation to the above mentioned items, that is, the procurement of three cars and employment of a Public Relations Officer on contract basis and related matters.

The report of the Salary Consultant – BCA Consulting, an extract of which was produced as Doc B before the Tribunal, catered for officers employed on a contractual basis. At page 12 of the said Doc B, we see the following:

Remuneration for Contract and Other Senior Officers

Employment on Contract

1. *The Terms of Reference requires the consultancy to make recommendations for revised compensation to officers employed on a contractual basis.*
2. *There are currently three officers who are employed on contractual terms and conditions. They occupy the positions of Chief Executive Officer (formerly General Manager), Deputy Chief Executive Officer (formerly Deputy General Manager) and Public Relations Officer.*
3. *The Chief Executive Officer (formerly General Manager) and the Deputy Chief Executive Officer (formerly Deputy General Manager) are substantively Heads of Department who have been given a Performance Contract on an assignment basis. The Public Relations Officer has been recruited from external candidates.*

Remuneration System

4. *Certain recommendations regarding the Remuneration System for contract officers were made in the last report. As these are still relevant and pertinent they are being reproduced below:*
 - (a) *The conditions of employment of contract officers should generally be negotiable and specified in the terms of the contract.*
 - (b) *The negotiable salary shall be a salary or a salary point within the salary range recommended for the grade considering the experience and/or alternative opportunities of the candidate. As a rule, the negotiated salary of contract officers should not exceed the top of the salary scale recommended for the grade.*
 - (c) ...

(d) In exceptional cases, on the basis of the qualification and experience of a “much sought after” incumbent or in very specific circumstances, an appropriate negotiable allowance may be paid particularly to ensure his enlistment/retention. It is advisable that this allowance be based on the expected/realised contribution of the contractual officer and be set in the range of 10% to 25% of salary.

Salary of Officers on Contract

...

7. The Public Relations Officer should continue to be pegged in salary scale 10 for established grades and his present salary of Rs 75,000 a month should be converted as per the conversion table for substantive grades.

The Senior Human Resource Executive stated that the conversion table mentioned in paragraph 7 above is the conversion table produced as Doc C before the Tribunal. Thus, as per the conversion table the recommended salary of the PRO would be converted to Rs 95,000 as from 1 July 2013.

The Tribunal will consider the procedure adopted by the Respondent in terminating the contract of employment of the Complainant. The Respondent received a Management Letter from the Director of Audit (extract at Annex C to the Statement of Case of the Complainant) dated 11 December 2015. The Tribunal will refer to the observations made by the Director of Audit under paragraph 20.4 of the letter:

Employment of a Public Relations Officer on contract

Mr. M. R (COY 4567) was employed on a contract basis as Public Relations Officer (PRO) on 18 May 2009 for a three year period and then further renewed for another three year period with effect from 16 February 2012 and to expire on 15 February 2015 at a revised monthly basic salary of Rs 75,000.

Board agreed to modify the existing contract on 02 June and a new contract of three years was offered to him, with effect from 03 June 2014 to last until 02 June 2017, at a revised monthly remuneration package, comprising inter alia, a monthly salary of Rs 101,000. A new benefit comprising a retention allowance at 25 per cent of monthly salary was included in the contract.

...

Observations

- (i) A retention allowance was also paid to an officer serving on contract.*
- (ii) The covering approval of the Board could not be produced of the new salary and the retention allowance of 25 per cent of salary.*
- (iii) No legal advice was sought regarding the cancellation of an existing contract in favour of a new one that contains more advantageous terms. By*

so doing, CEB has disbursed an additional sum of Rs 711,000 per annum and as per workings given in the table below:

.....

20.5 Retention allowance paid to PRO

In an extract of Special Board meeting dated 4 June 2014, the former General Manager in a written note dated 11 June 2014, informed the acting HRM to provide 25 per cent of salary as SPRA to the PRO stating that same has been discussed with the former Chairman.

Observations

- (i) Board approval for paying a retention allowance to the PRO could not be produced.
- (ii) Moreover, the payment of a monthly SPRA of 25 per cent of salary to the PRO on contract has not been recommended in the Remuneration for Senior Officers' Report, already approved by the Board.
- (iii) The officer employed on contract was entitled to SPRA at 25 per cent of the monthly salary and when he was not entitled to it.

...

It is apposite to note that, as per the Management Letter itself (at the Table under paragraph 20.4), this was not the first time that the contract of the PRO was renewed in favour of the PRO at more advantageous terms prior to the then existing contract coming to an end.

Be that as it may, the Board of the Respondent was perfectly entitled to decide to set up a Board of Enquiry to investigate into the abovementioned queries (and in relation to the purchase of three cars). The Board of Enquiry conducted its proceedings, and the Complainant had the opportunity to depone before the Board of Enquiry. In the light of the findings of the Board of Enquiry, the Respondent decided to issue a suspension letter with immediate effect to the Complainant. Complainant adduced evidence to the effect that a "Summary of findings and recommendations" of the Board of Enquiry would allegedly have been communicated to the Respondent in October 2016. The representative of the Respondent stated that the findings of the Board of Enquiry were communicated officially to the Respondent only in November 2016. A copy of the alleged 'Summary of findings and recommendations' was annexed as Annex G to the Statement of Case of the Complainant. The said Annex G was nothing more than what appears to be a draft document which very importantly was not signed by the maker/s thereof. It contained, for example, the following words: "*it is concluded that an amount of Rs ... [underlining is ours] has been overpaid to the incumbent as highlighted by the external auditors*". Even if Annex G to the Statement of Case of the

Complainant was indeed communicated, the Respondent certainly could not act on such an unsigned, incomplete summary. It was only when the Respondent took cognizance of the findings and recommendations of the Board of Enquiry (Annex H to the Statement of Case of the Complainant) on 7 November 2016 (as per Annex J to the Statement of Case of the Complainant) that Respondent became aware of the misconduct.

In the case of **Harel Mallac Travel & Leisure Ltd v Anne Marie Yanick Pellegrin 2024 SCJ 195**, the Supreme Court stated the following:

“Some similarity with the words ‘aware of misconduct’ can be found in article 133-4 of the French Code du Travail wherein the word ‘connaissance’ is employed and it reads:

«Aucun fait fautif ne peut donner lieu à lui seul à l’engagement de poursuites disciplinaires au-delà d’un délai de deux mois à compter du jour où l’employeur en a eu connaissance, à moins que ce fait ait donné lieu dans le même délai à l’exercice de poursuites pénales.»

In a decision of the **Cour de Cassation, Chambre sociale, du 17 février 1993**, the French Court of Appeal observed that the employer must have ‘*une connaissance exacte de la réalité, de la nature and de l’ampleur des faits reprochés...*’. These terms have been enunciated and applied in CA Fort-de-France, ch. Soc., 17 mai 2019, no17/00144. They were reiterated by the Cour de Cassation, civile, Chambre sociale, 7 décembre 2016, 15-24, 420.

In **Dalloz, Code du Travail, Chapitre II Procédure Disciplinaire, Section 2 Prescriptions des faits fautifs**, the following terms ‘connaissance exacte et complète’ are mentioned:

«Le délai court du jour où l’employeur a eu connaissance exacte et complète des faits reprochés»

We endorse this reasoning; an employer may become aware of a “misconduct” when it is reported to him. The date the employer “becomes aware” will depend on the facts and circumstances of individual cases and in some instances the employer may call for an enquiry or audit before deciding whether to charge the employee for an act or acts of misconduct.

Although the Privy Councillors did not elaborate, we observe in **Michel Lafraisière v New Mauritius Hotels Ltd [2022 PRV 23]**, that the Law Lords reproduced the terms used by the learned magistrate (Hon P. Kam Sing as he then was) about the employer having ‘*une connaissance exacte et complète*’.

It stems from the above that the employer must have with some degree of precision, information about acts which have given rise to the complaint.”

Now, it has been averred on behalf of the Complainant that the Respondent failed to comply with its own Rules and Regulations. The Complainant did not identify clearly

before the Tribunal the particular rules and regulations he was relying upon but a perusal of the written submissions submitted on his behalf shows that the Complainant is relying on Regulations 4.1, 4.2 and 20.4 of the Respondent's Revised Internal Regulations (Annex W to the Statement of Case of the Complainant). Regulations 4.1 and 4.2 of the Revised Internal Regulations read as follows:

4.1 When initiating disciplinary proceeding against an employee, the officer concerned shall ascertain whether there is a prima-facie case and has conducted a preliminary Enquiry which shall include the procedure whereby the employee concerned shall be allowed to state in writing or otherwise as to the facts of the matter and as to why Disciplinary Actions should not be taken against him.

In the light of the explanation/s furnished and depending on the seriousness of the matter, the CEB may either not pursue the matter any further or level charges against the accused employee within ten (10) days.

4.2 Once this exercise is completed the Board shall take Disciplinary Actions.

Written submissions have been submitted on behalf of the Respondent to the effect that in the present case the Board had set up a Board of Enquiry. Regulation 20.4 (under the heading "20. Board of Enquiry") of the Respondent's Revised Internal Regulations provides as follows:

20.4 If the findings of the Board of Enquiry reveal some shortcomings on the part of an employee, the General Manager may elect either to take disciplinary action against the employee concerned after having heard his explanation, or to treat the matter in accordance with the set disciplinary procedures.

In the present matter, the Complainant appeared before the Board of Enquiry and a perusal of the findings of the Board of Enquiry reveals that the Complainant did adduce evidence and provide explanations before the said Board. In the light of regulation 20.4 (see above), and since the Complainant had had the opportunity to provide explanations before the Board of Enquiry, the Respondent could thus decide, after being communicated with the Findings and recommendations of the Board of Enquiry, to proceed with the disciplinary proceedings and notify the Complainant of charges made against him. The letter of charges is dated 15 November 2016 (Annex J to the Statement of Case of the Complainant) and starts as follows: "*On the 7th of November 2016, the CEB took cognizance of the report of the Board of Enquiry set up to look into certain matters arising from a Management Letter received from the National Audit Office...*".

The Complainant was notified that he would be convened to attend a disciplinary hearing, and the letter contained five formal charges which were levelled against the Complainant. The Tribunal thus finds that the Respondent had within 10 days, on which he became aware of the alleged misconduct, notified the Complainant of the

charges made against him. The Tribunal has also not been impressed by the suggestion that the letter of charges of 15 November 2016 was a second suspension letter. It contained the charges levelled against Complainant though the Tribunal does note that there was a mistake in that letter in relation to the date of Complainant's suspension (mentioned as 8 November 2016 when it was 7 November 2016).

Evidence has been adduced lengthily on the disciplinary panels which were set up and which had to be reconstituted for reasons given. Though the Tribunal finds it most regrettable that disciplinary proceedings have lasted for so long, that is, from the suspension of the Complainant with immediate effect on 7 November 2016 up to the termination of his employment on 22 May 2024 (copy of letter of termination annexed as Annex N to the Statement of Case of the Complainant), the Tribunal notes that prior to the recent amendments brought to the Workers' Rights Act, there were no time limits provided in relation to the duration of a disciplinary hearing.

Indeed, the "disciplinary proceedings" in the present matter is governed by the provisions of the now repealed Employment Rights Act, as amended at the relevant time. The suspension letter in the present case is dated 7 November 2016 (Annex I to the Statement of Case of the Complainant), the letter of charges is dated 15 November 2016 and the disciplinary hearing started on 27 November 2017 where a preliminary objection taken on behalf of the Complainant was heard. The Respondent has annexed a copy of a ruling delivered by the then disciplinary committee following the said preliminary objection which was taken (Annex K to the Statement of Defense of the Respondent). As per the said Annex K, a first preliminary meeting was held by the disciplinary committee on 2 August 2017 where both parties were represented by counsel. The disciplinary committee had to be reconstituted and the disciplinary proceedings were set to proceed before a reconstituted disciplinary committee which itself had to be reconstituted anew later. Be that as it may, it is clear that "disciplinary proceedings" had started prior to the coming into force of the Workers' Rights Act and was still pending when relevant parts of the Workers' Rights Act came into force with effect from 24 October 2019. Section 127(2) of the Workers' Rights Act (under 'Savings and transitional provisions') provides as follows:

127(2)(a) Any disciplinary proceedings which has started under section 38(2) and (3) of the repealed Act and is pending at the commencement of this Act, shall be dealt with in accordance of the repealed Act as if this Act has not come into operation.

(b) Any disciplinary proceedings which has not started at the commencement of this Act shall be dealt with in accordance with this Act.

A disciplinary hearing however in fairness to the accused employee should be completed within the shortest delay and in any event within a reasonable time. In the case of **A.I Mamode v P M J P Doger de Speville, 1984 SCJ 172**, the Supreme Court stated, *obiter dictum*, the following: "We agree that there must be reasonable limits in terms of time between an alleged misconduct and a hearing." Explanations have

been given as to the long delay in the present matter and, very importantly, these were not challenged at all before us. There is even evidence on record whereby the disciplinary hearings had to be rescheduled on a number of occasions because the Complainant had to travel abroad or that his witness was abroad. There is no evidence of any prejudice which the Complainant would have suffered in relation to the availability or non-availability of evidence or witnesses on account of the delay in the conduct and completion of the disciplinary committee. The Tribunal may also take notice of the occurrence of the Covid-19 pandemic during the relevant period. There is also unchallenged evidence on record that the Complainant was suspended on pay during that period. The Tribunal, however, hopes that such a delay in the conduct and completion of a disciplinary committee will be something of the past with the recent amendments brought to the Workers' Rights Act, whereby a time limit is now provided under section 64(11) for the completion of a disciplinary hearing not later than 30 or 60 days of the date of the first oral hearing.

The Tribunal notes that ultimately the Complainant had the opportunity to answer the two remaining charges levelled against him before an independent disciplinary committee where he was assisted by a panel of counsel. Counsel for Complainant was allowed to cross-examine witnesses for the Respondent and to call witnesses in turn for the Complainant. Complainant was allowed to adduce evidence and was cross-examined. Counsel for Complainant was even allowed to raise preliminary objection before the disciplinary committee which considered the objection raised. The disciplinary committee (as lastly constituted) gave its findings whereby one of the two charges against Complainant was even dismissed. The Tribunal finds that the Complainant was duly afforded an opportunity to answer the charges levelled against him. The Tribunal cannot find the termination of employment of Complainant to be unjustified only because of the time taken for the disciplinary proceedings to be completed. This is the more so bearing in mind the aim and purpose of a disciplinary hearing whereby a worker is afforded an opportunity to answer any charge made against him.

Before the Tribunal considers the only charge, which was found proved against the Complainant (out of the two charges which were maintained against him in the disciplinary proceedings), it is apposite to deal with the point taken by the Complainant that the charge as found proved against him was different from the charge which was initially levelled against him in the letter of charges.

The relevant charge which was initially Charge 5 in the letter of charges of 15 November 2016 (Annex J to the Statement of Case of the Complainant) reads as follows:

That you gave instructions to give a monthly retention allowance equivalent to 25% of monthly salary to Mr R.Elahee, Public Relations Officer and to convert his salary to the top of scale 10, without obtaining the Board's approval. Consequently, there has been a total amount of Rs 839,541 which was overpaid to Mr Elahee.

The Complainant has been provided with a copy of the findings of the disciplinary committee by the Respondent and in the findings, the disciplinary committee refers to the following as being the charge against the Complainant:

That you have instructions to give a monthly retention allowance equivalent to 25% of monthly salary to Mr R.Elahee, Public Relations Officer and to convert his salary to the Top of Scale 10, without obtaining the Board's approval. Consequently, there has been a total amount of Rs 839,541 which was overpaid to Mr Elahee.

The only difference will be the word 'have' instead of 'gave'. The Tribunal has no hesitation in finding that this is a typo and that it has no bearing on the finding of the disciplinary committee. Indeed, such a charge as "*That you have instructions to give a monthly retention allowance equivalent to 25% of monthly salary to Mr R.Elahee, Public Relations Officer and to convert his salary to the Top of Scale 10, without obtaining the Board's approval. Consequently, there has been a total amount of Rs 839,541 which was overpaid to Mr Elahee*" would make no sense at all. Also, and very importantly, the disciplinary committee did find the charge proved, that is, that he did give (underlining is ours) instructions to give a monthly retention allowance equivalent to 25% of monthly salary to Mr R.Elahee, Public Relations Officer and to convert his salary to the Top of Scale 10, without obtaining the Board's approval. The Tribunal finds that this is a mere typo and is not fatal in the present matter. Also, the fact that evidence has been adduced on behalf of the Respondent that the alleged overpayment is Rs 838,820 and not Rs 839,541 is also in our mind not material. The difference in the two sums has been explained by the relevant witness and there is not a material difference between the two sums. The suggestion of alleged prejudice to the Respondent is still very much present and the evidence adduced was not to the effect that there was an increase in the sum alleged to have been overpaid. The purpose and aim of having a disciplinary hearing are "*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.*" (vide **G. Planteau de Maroussem v Société Dupou 2009 SCJ 287**)

The Complainant has also stressed on the fact that it was brought in evidence before the disciplinary committee that the Respondent had paid an out of court settlement to the then PRO and that same was based on a monthly salary of Rs 101,000 and not Rs 95,000. He thus suggested that the Respondent never disputed the salary of Rs 101,000 and cannot claim ignorance that the salary of the then PRO should have been Rs 101,000. The Tribunal has not been impressed with this argument and unless there was collusion between Complainant and the then PRO (which is not the case here), the then PRO, who had entered into a contract of employment with the Respondent signed by the Complainant as General Manager of the Respondent (copy marked Doc F), had a valid contract of employment. This in fact only demonstrates

the seriousness of the charge (the remaining Charge 2) which was levelled against Complainant whereby the Complainant had tied the hands of the Respondent without obtaining the Board's approval.

Also, the Tribunal has not been impressed by the argument that since the first charge maintained against the Complainant was found not proved, then the second charge also could not be found proved. Indeed, these were two different charges, and the second charge differed from the first one with the specific reference made to "without obtaining the Board's approval". The Tribunal must decide whether the Respondent, based on the findings of the disciplinary committee which found only the second charge proved against the Complainant, could not in good faith take any other course of action other than to terminate the contract of employment of the Complainant. It is trite law that the decision of the Respondent must be analysed based at the time that the decision to terminate the Complainant's employment was taken.

The Complainant was no longer General Manager at the Respondent and was only the CAM/NUG Manager (vide his letter of termination dated 22 May 2024, copy of which was annexed as Annex N to the Statement of Case of the Complainant).

For ease of reference, the only charge found proved against the Complainant is reproduced below:

That you gave instructions to give a monthly retention allowance equivalent to 25% of monthly salary to Mr R.Elahee, Public Relations Officer and to convert his salary to the top of scale 10, without obtaining the Board's approval. Consequently, there has been a total amount of Rs 839,541 which was overpaid to Mr Elahee.

The contract of the said Mr R.Elahee, PRO was renewed with the approval of the Board. The Tribunal has been provided with only an extract of the special board meeting of 3 June 2014 where this decision was taken. The Complainant did not call any witnesses to produce a copy of the minutes of proceedings of that special board meeting (or relevant extracts thereof). Only a copy of a certified true copy of the extract signed by the Ag. Secretary to the Board was produced as Doc D and it read as follows:

The Board gave its approval that the contract of employment of Mr. R. Elahee, PRO be extended for a further period of three years as from June 2014.

The Management Letter from the Director of Audit is a very important document and required immediate attention, where necessary, to ensure inter alia, accountability and that good governance prevails at the Respondent.

Having said that, it goes without saying that the Management Letter from the Director of Audit, however important and crucial for the proper management of an important institution like the Respondent, is dependent on whatever information and the adequate care and assistance which have been provided to the external audit to enable it to do its work properly. Complainant stressed on the fact that he was

requested to give explanations in writing in relation to the relevant queries in the Management Letter for the year ended 31 December 2014 and yet that these explanations were not consolidated in the reply of Respondent to the Management Letter. However, even before the Tribunal, the said written explanations of Complainant were not produced. From the evidence before us, the first charge against the Complainant was not found proved by the disciplinary committee. The first charge against the Complainant read as follows:

1. *That you gave instructions to pay Mr. R. Elahee, Public Relations Officer, a monthly retention allowance equivalent to 25% of monthly salary which was not in line with CEB's established regulations.*

Since Charge 2 against the Complainant was found proved by the same disciplinary committee, it is obvious that the disciplinary committee did not find that a monthly retention allowance equivalent to 25% of monthly salary to the PRO was against the Respondent's established regulations.

The recommendations of the Salary Consultant in fact provided that even for contract officers (underlining is ours) and other senior officers, that "*in exceptional cases, on the basis of the qualification and experience of a "much sought after" incumbent or in very specific circumstances, an appropriate negotiable allowance may be paid particularly to ensure his enlistment/retention. It is advisable that this allowance be based on the expected/realised contribution of the contractual officer and be set in the range of 10% to 25% of salary*" (copy of extract produced as Doc G). This is something which it appears that the Director of Audit was not properly assisted by the Respondent before the Management Letter was issued since in his Management Letter (Annex C to the Statement of Case of the Complainant) the Director of Audit observed that:

A retention allowance was also paid to an officer serving on contract.

The Tribunal will refer to the extract of the minutes of proceedings of the Board meeting of 13 August 2014 (Annex S to the Statement of Case of the Complainant) under the heading "Posts of Heads of Departments" :

The General Manager stated that Mr. Appanna has been requested to give explanations regarding the principle of giving 25% retention allowance to two officers namely Mr Mukoon and Mr Elahee and which has been approved by the Board. He added that Mr. Appanna has recommended that the 25% retention allowance be extended to all Heads of Departments.

The Tribunal notes that this minute of proceeding has not been challenged in evidence on behalf of the Respondent except that the Respondent is averring that this cannot be relied upon since this is a self-serving statement. In the absence of any challenge that this forms part of the approved minutes of proceedings of the Board Meeting of the directors of the Respondent held on 13 August 2014, the Tribunal finds that there

is at least some evidence which showed that there was indeed the Board's approval for a 25% retention allowance to be given to Mr Elahee.

The issue of the conversion of the salary of the PRO to the top of scale 10 without the Board's approval is more problematic for the Complainant. Indeed, the Tribunal notes that as per the review of pay structures and conditions of employment of the staff of the Respondent, the grade of Public Relations Officer was in the salary scale CEB(S) 10 with a salary scale of Rs 66500 x 2500 – 89000 x 3000 – 101000 (copy of extract produced as Doc E).

However, the salary consultant stated clearly at paragraph 7 of page 12 of Doc B that:

The Public Relations Officer should continue to be pegged in salary scale 10 for established grades and his present salary of Rs 75,000 a month should be converted as per the conversion table for substantive grades.

It is not disputed that the Public Relations Officer mentioned at the said paragraph 7 above is Mr R. Elahee. As per the said conversion table (and which it is not challenged before us, is Doc C), the salary consultant thus recommended that the salary of the then PRO should be converted to Rs 95,000 (which was within the salary scale CEB(S) 10). Any departure from such a specific (underlining is ours) recommendation would, no doubt, have required the approval of the Board of directors. The negotiable salary mentioned earlier in the same Doc B is a general (underlining is ours) provision – *The conditions of employment of contract officers should generally be negotiable and specified in the terms of the contract.* It had clearly no application in the case of the PRO who was already there and whose salary had been specifically determined as per paragraph 7 of page 12 of the document (see above).

The Complainant has not been able to show, even on a balance of probabilities that he had obtained the Board's approval or covering approval to give a higher salary to the then PRO than the salary of Rs 95,000 which was provided for the latter. The charge that he gave instructions to convert the salary of the then PRO to the Top of Scale 10 without obtaining the Board's approval was rightly found proved.

The Respondent was in presence of the finding of the disciplinary committee that the last charge against the Complainant had been proved. The Tribunal now must ascertain whether the Respondent could not in good faith take any other course of action than to terminate the employment of the Complainant. In the case of **United Docks Ltd v De Speville [2019] UKPC 28**, the Judicial Committee of the Privy Council stated the following on the requirement of good faith in the context of termination of employment:

24. A question whether the company had a valid reason to dismiss the respondent is obviously different from a question whether it could not in good faith take any other course than to dismiss him. The former asks only whether the misconduct was a ground for dismissing him. The latter asks whether in all the surrounding

circumstances the only course reasonably open to the employer was to dismiss him. In other words, was it, as the Board said in para 17 of its judgment in Bissonauth v The Sugar Fund Insurance Bond [2007] UKPC 17, “the only option”?

In the present case, the Complainant was informed by way of a letter dated 22 May 2024 (Annex N to the Statement of Case of the Complainant) that the disciplinary committee had found that (1) Charge 1 against him could not stand and (2) Charge 2 had been proven against him. The charges were recited anew in the letter and Complainant was informed that “In the light of the above, the Board has no other course of action but to terminate your employer as CAM/NUG Manager, with immediate effect, that is as from 22 May 2024”. The Tribunal hastens to add that the letter could have been better drafted and, more importantly, reflect the wording of section 38(2) of the Employment Rights Act. However, the Tribunal finds that this is not necessarily fatal. The Tribunal must be satisfied that in the light of all the circumstances of the present matter, the only course reasonably open to the Respondent was to dismiss the Complainant. The Respondent has to show that in the light of all the circumstances of the case, it could not in good faith take any other course of action. The Senior Human Resource Executive did not agree that the Respondent did not in good faith terminate the contract of employment of Complainant and he stated that though the words “good faith” were not mentioned in the letter of termination dated 22 May 2024 (Annex N to the Statement of Case of the Complainant), yet the element of good faith was implied.

In the case of **Ramessur v CIM Finance 2023 IND 53**, there was no mention in the termination letter that the defendant company could not, in good faith, take any other course of action. The learned Magistrate of the Industrial Court in that case stressed on the fundamental importance of these words and referred to the mandatory nature of the provisions of the Employment Rights Act. The learned Magistrate later stated the following: “*That being said, the Court is of the considered view that the duty placed on the employer to act in good faith, when it comes to the termination of employment of an employee, is one of substance rather than one of form.*”

In the case of **Michel Lafresière v New Mauritius Hotels Ltd (see above)**, the Judicial Committee of the Privy Council stated the following:

6. *The following principles as to the application of section 38(2) are common ground in this appeal. First, when a worker brings a claim for severance pay before the Industrial Court, that Court is required and entitled to investigate afresh the truth behind the allegations on which the employer relies to justify the dismissal of the employee. This was confirmed in the case of Smegh (Ile Maurice) Ltée v Persad [2012] UKPC 23 (“Smegh”).*

...

7. *It is also common ground that the only reasons on which the employer can rely before the Industrial Court to justify the dismissal are the reasons which it gave*

to the employee at the time of dismissal. Further, the Industrial Court is not entitled to consider evidence that may have emerged since the dismissal took place, whether that evidence supports or undermines the original decision to dismiss. The Board said in Smegh:

“23. .. 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.”

In the present case, the Tribunal finds that Charge 2 which was found proved against Complainant, even if the part dealing with the retention allowance is discarded, is indeed a “cause réelle et sérieuse” which held a bearing on the employer-employee relationship to the extent that it brought “un trouble profond dans le fonctionnement et la marche de l’entreprise” (Jurisclasseur Travail, Fasc 30, Note 163). The Complainant was at the relevant time the General Manager of the Respondent and was a member of the Board of Directors. As General Manager, he gave clear instructions to convert the salary of the then PRO to the top salary of the scale 10 and he wrote that this was “as agreed by the Board”. However, though the disciplinary proceedings lasted very regrettably for years, yet the Complainant never came up with any such evidence of this alleged Board approval. On the contrary, there is evidence that there was a specific recommendation that the salary of the said PRO should be converted to Rs 95,000 as per the relevant conversion table.

The Tribunal has carefully examined all the circumstances of the case including and mainly the very regrettable long delay in the conclusion of the disciplinary hearing (with the reconstitution of the panels on several occasions before they could conclude the proceedings), the stepping down of Complainant from the position of General Manager to that of Head of Department in the NUG Department (NUG Manager) bearing in mind the “lien de subordination” which existed all this time, the five charges initially levelled against him whereby ultimately only one charge was found proved (out of the two charges which were maintained against him) against him and the previous clean record of Complainant who was in the continuous employment of the Respondent for a long period of time. However, the giving of instructions by the Complainant, who was then the General Manager of the Respondent, to convert the salary of the PRO to the top of scale 10 without obtaining the Board’s approval is no doubt a gross misconduct which alone warrants the termination of the employment of Complainant. The Tribunal also bears in mind the relationship of trust that must necessarily exist between an employer and his employee, the more so when the employee is at Management level.

For all the reasons given above, the Tribunal finds that the termination of employment of the Complainant is not unjustified. The Complainant has failed to show on a balance of probabilities that he should be reinstated. The matter is thus set aside.

(SD) Indiren Sivaramen

Acting President

(SD) Bhawantee Ramdoss

Member

(SD) Dr Sunita Ballah-Bheeka

Member

(SD) Muhammad Nayid Simrick

Member

21 August 2024