

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 126/24

DETERMINATION

Before: -

Shameer Janhangeer	-	Vice-President
Anundraj Seethanna	-	Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Mr David Thierry LEBON

Disputant/Complainant

and

CITY AND BEACH HOTELS (MAURITIUS) LIMITED

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 "WRA"). The Terms of Reference of the dispute read as follows:

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

The Disputant was assisted by Mr J. Chummun, of Counsel. Whereas, the Respondent was assisted by Mr S. Dabee, who appeared together with Mr A. Kim Curran, both of Counsel. Both parties have submitted their respective Statement of Case in the matter. During the hearing of the dispute, the Disputant was called to adduce evidence and Mr Marie Joseph Noel-Etienne Sinatambou, lawyer and Mrs Veenabye Jeewanjee, District Councillor were called as witnesses

on his behalf. The Respondent adduced evidence through its representative and Head of Talent Experience, Mrs Chitra Brizmohun-Hawoldar.

Learned Counsel for the Disputant has put in written submissions in the present matter. Under the heading of *'Improper Procedure/Unfair Proceedings/Due process not followed'*, it has notably been submitted that the minutes of proceedings of the disciplinary committee is incomplete as essential elements during the course of proceedings were omitted in the minutes and even in the Chairperson's ruling. It is also contended that the Chairperson actually refused to allow the Disputant and his legal representatives to visit the locus where the incident occurred. The employer refused to tender its representative for cross-examination. There is a full list of procedural and other irregularities contained at paragraph 30 (a) to (g) of the Disputant's Statement of Case. It is also contended that the Chairperson refused to declare the employer's witness as hostile when she was refusing to answer questions. The second heading of the Disputant's written submissions refers to *'In relation to the specific charges themselves'*. Counsel for the Disputant proceeds to offer submissions on the each of the 5 charges that were laid against the Disputant before the disciplinary committee.

The third heading of the written submissions is titled *'The hearing before the Tribunal'*. Under this heading, Counsel for the Disputant has elaborated on various sub-headings. It was first submitted on *'Eye witnesses not called'*. None of the witnesses present at the time of the incident on 9 June 2024 were called before the Tribunal to state what actually happened at the locus *in quo*. It is also stated that the Disputant's statement was recorded by a Security Officer, one Lydia who was also a witness to the incident according to the testimony of Murvin Soneea. Following his suspension, the Disputant was instructed not to contact any member of hotel staff. The Disputant has thus been deprived of his right to defend himself properly and of his right to a fair hearing.

Submissions has also been offered under the second sub-heading of *'Right to a fair hearing and breach of section 97 of the Employment Relations Act'*. At the disciplinary committee, Murvin Soneea gave 10 names of those present at the time of the incident and not a single one of them were called before the Tribunal. Two additional witnesses were identified by witness Evans Letandrine before the disciplinary committee as well as two Security Officers, which makes 14 witnesses at the locus with not a single one of them being called before the Tribunal. This omission goes against the interest of the persons concerned, i.e. the Disputant, is in breach of the principles of natural justice and contravenes the principles and best practices of good employment relations under *section 97* of the *Employment Relations Act*. It is also mentioned

that the Respondent did not take statements from 8 witnesses; although it is up to the employer to conduct the investigation, it has to respect the rule of law and the principles of natural justice.

The third sub-heading refers to '*Testimony of Mrs Chitra Brizmohun Hawoldar*'. It is submitted that Mrs Hawoldar was the only witness called by the Respondent before the Tribunal. Her presence was objected to before the disciplinary committee on 19 September 2024. She was also present at all stages of the proceedings and heard all testimonies and evidence adduced before the Tribunal. Whatever evidence she gave about the incident should be inadmissible as she has no personal knowledge of what happened on the day. Under the fourth sub-heading '*Mrs Hawoldar producing statements of Nadal and Kallee*', it is submitted that she purported to produce two statements given by Shedrick Nadal and Swaraj Kallee. None of these two employees were called as a witness and it is submitted that anything adverse to the Complainant in those statements should not be admitted against him. The evidence of Mrs Hawoldar that there was a fight should be rejected.

Regarding the fifth sub-heading titled '*Mrs Hawoldar not recording statements from eye witness*', it was submitted that before the disciplinary committee Mrs Hawoldar stated that there were 9 witnesses (including the Disputant), that she was not aware of any more witnesses and she replied in the negative when put to her whether she tried to ascertain the identity of all those present. Yet, before the Tribunal, she stated that no statement was taken from other witnesses as they did not have anything to say or that they had not seen anything. It is submitted that the way she dealt with the issue of witnesses means that she cannot be treated as a witness of truth.

The sixth sub-heading is titled '*Giving evidence of video without producing the video*'. It has notably been submitted that a request was made for documents to be communicated as per Annex I of the Disputant's Statement of Case referring to *section 64 (5)* of the WRA. It transpired during the deposition of Mr Soneea at the disciplinary committee that there was a camera at the locus of the incident and a request was made on 19 September 2024 to communicate same when the employer's case was still open; the video was not communicated. The case of *Acquilina v Acquilina* [2023 SCJ 367] has been cited where it was held that a video annexed to an affidavit could be regarded as a document. It is clear that documents and information includes video footage. This was not communicated prior to the disciplinary committee starting despite the Disputant's request for particulars. The video, if provided at the right time, would have had a different impact on the disciplinary committee and ruling; it was instead shown after the close of the employer's case at the disciplinary committee and therefore its contents could not have been put to any of the witnesses in cross-examination when the employer's case was still open. The

video was not produced before the Tribunal by the Respondent and accordingly the evidence of Mrs Hawoldar regarding alleged events from a video is not receivable and ought to be rejected.

Under the seventh sub-heading titled '*Unfairness of Mrs Hawoldar's investigation*', it was submitted by the Disputant that Mrs Hawoldar stated that Lydia (the Security Officer) was not present at the material time of the incident; however during the disciplinary committee, the employer's witnesses all stated that Lydia was present at the material time of the incident. This is highly material as if Lydia were a witness, she should not have taken any statements from witnesses nor be involved in the investigation carried out. The Respondent has breached the rules of natural justice '*Audi alteram partem*'. The investigation carried out is also not complete as statements were not taken from all the witnesses; it is against the rule of natural justice. Before the Tribunal, Mrs Hawoldar has relied on Nadal's statement to explain what happened on 9 June 2024. There are material discrepancies in the testimony of Mrs Hawoldar before the Tribunal.

The last sub-heading refers to '*Outside hotel premises is not in the context of work*'. The Respondent is contending that the fight occurred in the context of work. Counsel for the Disputant referred to the evidence of Mrs Jeewanjee before the Tribunal whereby she notably stated that the parking space opposite La Pirogue does not belong to the hotel and that the road and pavement are not owned nor maintained by the hotel referring to a photograph. Her unrebutted testimony confirmed the Disputant's evidence that the incident on 9 June 2024 never occurred within hotel premises nor in the context of work. The pavement, road or the parking space outside La Pirogue hotel were outside hotel premises.

In addition to his written submissions, Learned Counsel for the Disputant has also submitted that Mrs Hawoldar did not recall certain swear words uttered by Mr Soneea towards the Disputant. This does not appear in the minutes of the disciplinary committee but as per the testimonies of Mr Sinatambou and the Disputant, both stated that the swear words were uttered before the disciplinary committee. There has been unfair treatment towards the Disputant as Mr Soneea has not been sanctioned.

Learned Counsel for the Respondent has also put in written submissions in the present matter. Counsel also orally submitted to the effect that the submissions of the Disputant are very much in the abstract. At no point in time has it been shown that prejudice has been caused to Mr Lebon. Under *section 64* of the *WRA*, the employer's obligation is to afford the employee the opportunity to give his explanations before an oral hearing, to allow him to be assisted by legal

advisors. Mr Lebon was given full latitude to give whatever explanations he wished to give but he did not. Counsel referred to the termination letter dated 16 October 2024. Mr Sinatambou was given a postponement to view the video. Despite there being no specific request, Mr Sinatambou referred to the letter dated 28 August 2024. The video was made available for viewing as per provisions of the *WRA*.

Counsel moreover submitted that another aspect of unfairness raised was regarding Lydia. We are not told what the person may have seen or not seen and where is the unfairness? Counsel cited the judgment of *Airports of Mauritius Co. Ltd v Rajkomar* [2024 SCJ 518] where the Supreme Court held that it cannot be said that the appellant was not afforded an opportunity to present her case as she had sufficient latitude to present her case before the disciplinary committee. The other issue is that Mr Lebon was forced to give his statement. The disciplinary process is not a process before an Assizes Court. The statement was not used against him. This does not lead to any unfairness. The employer may ask the employee to provide his explanations in writing under *section 64* of the *WRA*. Counsel submitted extracts of *Jurisclasseur, Travail Traité, Fasc. 18-1: Droits et Obligations des Parties* regarding the employer's *pouvoir de direction* and the *lien de subordination*.

On the aspect of Mrs Hawoldar not being tendered for cross, Counsel submitted that a motion was made on behalf of the employee have her come and depone as their witness and this was acceded to. Regarding hearsay, Mrs Hawoldar recorded the statement of Mr Nadal and it is not hearsay. Whatever evidence is given and not challenged in cross-examination is deemed to be admitted. Counsel put in the judgment of *Abdoolla v The Municipal Council of Port Louis & Anor.* [2009 SCJ 242] referring to an extract from *Murphy on Evidence*. Regarding the witness from the District Council, under the *Local Government Act 2011*, the Council is responsible for roads which is carried out under the authority and supervision of the Chief Executive. Mrs Jeewanjee is not the Chief Executive but an elected member. Reference was made to the English Court of Appeal case of *Armagas Limited v Mundogas S.A., 1984 WL 281667 (1984)*.

Counsel submitted that the act has taken place at the door of work and even if it takes place outside work, it is an issue and can be a breach of trust (*vide City Sport (Maurice) Ltee v Bundhoo* [2024 SCJ 282]). It cannot be denied that one person behaving violently towards another person is an act of violence, referring to *section 114* of the *WRA*. Mrs Hawoldar was not cross-examined on this aspect. Mr Lebon never explained why he should be reinstated to the Tribunal and never made the case for reinstatement. There is also no claim for severance allowance before

the Tribunal as per his Statement of Case. On the other hand, there is unrebutted evidence that he used violence at the door of the hotel.

In reply, Learned Counsel for the Disputant stated that the charges before the disciplinary committee were specific as to Mr Lebon initiating and engaging into a fight. Mr Sinatambou did ask for a postponement and the video was viewed. Regarding whether the Disputant had the opportunity of giving his version before the disciplinary committee, Counsel stated that Mr Sinatambou was asked to explain and he gave evidence as to the fact that the minutes were incomplete. Under *section 64 (5)* of the *WRA*, the documents and information must be provided before the holding of the disciplinary committee. Regarding the issue of hearsay, Mrs Hawoldar agreed that only Mr Nadal can confirm the veracity and contents of his statement when he questioned her.

THE MERITS OF THE DISPUTE

The first contention of the Disputant, as per the written submissions of Counsel, is that the minutes of proceedings of the disciplinary committee is incomplete. In relation to this, the Disputant's witness Mr Sinatambou notably stated that he did raise the issue of omissions before the disciplinary committee on 19 September 2024. It should be noted that Mr Sinatambou acted as the Disputant's legal representative before the disciplinary committee. It was notably stated that certain matters stated by Mr Soneea, such as that there was no fight and that he swore at the Disputant, did not appear in the minutes of the disciplinary committee. It must however be noted that the Disputant did recognise, when questioned by Counsel for the Respondent, that he has no proof to show that the minutes were modified although the point was raised before the committee.

It must be noted that a disciplinary committee is an independent body set up by operation of law under *section 64 (2)* of the *WRA*. In the matter of *Tyack v Air Mauritius Ltd & Anor.* [2010 SCJ 257], the purport of a disciplinary committee has been described as follows:

A Disciplinary Committee is not a teleguided machine to do the bidding of the employer. It is an impartial and independent body set up to determine whether disciplinary actions may be taken against an employee in a given situation.

The nature of a disciplinary committee has also been amply described in *Planteau de Marousseem v Société Dupon* [2009 SCJ 287] as follows:

The aim of a disciplinary committee, as we have said, is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a court of law, nor has it got its attributes.

It must be noted that the aforesaid passage from *Planteau de Marousseem* has been cited with approval by the Judicial Committee of the Privy Council in *Smegh (Ile Maurice) Ltée v Persad* [2012] UKPC 23.

Having noted that a disciplinary committee is no substitute for a court of law nor has it got its attributes and that it is an impartial and independent body set up to determine whether disciplinary actions may be taken against an employee in a given situation, the Tribunal cannot reasonably conclude that the minutes of the committee were incomplete based on the mere sayings of the Disputant and his witness. The Disputant having contended that Mr Soneea stated certain matters, it was incumbent on him to at least call Mr Soneea as a witness to have this established before the Tribunal. It should also be noted that the Disputant did recognise that he had no proof to show that the minutes were modified. It should be noted that the matter of whether the objective of the disciplinary committee was satisfied in giving the Disputant the opportunity of presenting his version of the facts shall be addressed at a later stage of this determination.

The Disputant has also contended that the Chairperson of the disciplinary committee refused to allow him and his legal representatives to visit the locus where the incident occurred. The Disputant's witness, Mr Sinatambou notably stated that he requested to visit the locus but his request was refused. This is the sole piece of evidence adduced by the Disputant with regard to this particular submission. The Tribunal has not had the benefit of being shown where in the minutes of proceedings, which are attached to the Respondent's Statement of Case, this request was refused. Nor has it been shown how the Disputant has been prejudiced by the Chairperson's refusal during the proceedings of the disciplinary committee. In any event, the Disputant did produce a photograph before the Tribunal whereby he showed the spot where the incident occurred. He was also lengthily questioned by Counsel for the Respondent as to where the incident occurred and notably stated that the incident occurred at the bus stop.

Another contention of the Disputant, as raised in submissions, is that the employer refused to tender its representative for cross-examination during the disciplinary committee. Although, Mr Sinatambou did state that they were not allowed to cross-examine Mrs Hawoldar before the disciplinary committee, he did acknowledge, when questioned by Counsel for the Respondent, that he did call her as a witness after having been refused the right to cross-examine her. The Tribunal must, once more, take note that no evidence has been adduced as to where in the minutes of proceedings of the disciplinary committee it has been shown that the Chair refused to have Mrs Hawoldar tendered for cross-examination. In any event, it cannot be said that the Disputant's legal representative, i.e. Mr Sinatambou could not question Mrs Hawoldar as he himself recognised that he was allowed to call her as a witness. Any unfairness caused to the Disputant by not allowing the Respondent's representative not to be cross-examined during the disciplinary committee has therefore been cured in allowing Mr Sinatambou to call her as a witness to question her.

The Disputant has also contended that the Chairperson of the disciplinary committee refused to declare the employer's witness as hostile when she was refusing to answer questions. The Tribunal has noted that the only reference to this, during the hearing of the matter, was made by Mr Sinatambou. He stated, when cross-examined, that they asked that Mrs Hawoldar be declared hostile but this is not allowed in civil proceedings. The Tribunal cannot therefore see what is the relevance of this particular contention nor has it been shown where or when did this happen before the disciplinary committee.

Under the heading of *'The hearing before the Tribunal'*, the Disputant has notably contended, in his written submissions, that none of the witnesses present at the time of the incident on 9 June 2024 were called before the Tribunal. It has also been submitted that Mr Soneea gave 10 names of those present at the time of the incident and not a single one of them were called before the Tribunal. Adding the 4 names given by Mr Evans Letandrine, which includes the two Security Officers, none were called before the Tribunal. It has been submitted that this goes against the interest of Mr Lebon and is in breach of principles of natural justice and practices of good employment relations under *section 97* of the *Employment Relations Act*.

The Tribunal notes that it cannot be disputed that witnesses to the incident of 9 June 2024 between Disputant and Mr Soneea were not called before it during the hearing of the present matter. In any event, the Disputant was free to call any witnesses it wished and was not impeded from doing so. In fact, two witnesses for the Disputant, namely Mr Hans Vicent Rose and Mr

Tobias Agathina, were present before the Tribunal but Counsel for the Disputant choose not to call them. On the other hand, it must be noted that the Disputant lengthily testified as to the incident at the hearing of the matter before the Tribunal.

The Tribunal cannot therefore see how the interest of the Disputant has been adversely affected by the witnesses not being called when he was at liberty to call witnesses in his favour. Likewise, the Tribunal cannot see how the principles of natural justice have been flouted as the Disputant was allowed to call any witness he chose and was allowed to put questions in cross-examination to the Respondent's sole witness, Mrs Hawoldar. It must also be noted that the Disputant did call one Mrs V. Jeewanjee, District Councillor to depose with regard the locus of the incident. The Tribunal also cannot see how this contravenes the principles and practices of good employment relations nor has the Disputant shown how is this to be so.

It has also been submitted that Mrs Hawoldar, being the sole witness of the Respondent, was present at all stages of the proceedings and heard all the evidence adduced before the Tribunal. Although the Disputant is contending that her evidence of the incident should be rejected, it must be noted that she was one who carried out an investigation into the incident of 9 June 2024. Although she did not adduce any direct evidence as to the incident, she notably gave evidence as to what she understood what had happened after a complaint of a fight between Disputant and Mr Soneea had been made by the hotel security on 10 June 2024. The Respondent cannot therefore be precluded from relying on the evidence of her investigation. In any event, she did agree that she was not present at the locus at the time of the incident on 9 June 2024. It must also be noted that there was no objection from the Disputant as to the evidence she gave as to what she saw from the video footage of the incident.

The Disputant has submitted that anything adverse to him contained in the statements of Shedrick Nadal and Swaraj Kallee should not be used against him. In fact, Mrs Hawoldar did produce and refer to a statement given to her by Mr Nadal on 13 June 2024 (Document B). However, it should be noted that this statement contains the version of Mr Nadal as recorded by the Respondent's witness and it cannot be deemed to be first hand evidence of the incident by Mrs Hawoldar, who in any event was not present at the material time of the incident on 9 June 2024.

The Disputant also submitted that before the disciplinary committee, Mrs Hawoldar stated that there were 9 witnesses and she did not ascertain the identity of all present. Before

the Tribunal, she stated that no statement was taken from other witnesses as they did not have anything to say. The Disputant is contending that because of the way she has dealt with the issue of witnesses, she should not be treated as a witness of truth. In this regard, it must be noted that it was never put to Mrs Hawoldar as to what she had supposedly stated before the disciplinary committee regarding other witnesses. As the Disputant is relying on her evidence before the disciplinary committee, this aspect must have at least been put to her when she was cross-examined. The Tribunal cannot therefore find that Mrs Hawoldar cannot be a witness of truth for this reason alone.

The Disputant has also submitted in relation to the video of the incident of 9 June 2024. They were not communicated with same as per their request for particulars dated 28 August 2024. They became aware of the video during Mr Soneea deposition at the disciplinary committee and made a request to be communicated with same on 19 September 2024. The Disputant is notably relying on *section 64 (5) of the WRA*, which provides as follows:

64. Protection against termination of agreement

...

(5) For the purpose of an oral hearing, the employer shall, at the request of the worker, make available for inspection to him or his representative, prior to the holding of the disciplinary hearing, such information or documents, as may be relevant to the charge, which the employer intends to adduce in evidence in the course of the hearing.

It has not been denied that the Disputant, through his Counsel, made a request for particulars dated 28 August 2024. However, it must be noted that this was made after the first sitting of the disciplinary committee which was on 26 August 2024 as the services of the Disputant's legal representatives had just been retained. It has also transpired that Mr Sinatambou made a request for particulars before the disciplinary committee on 26 August 2024 and was granted a postponement to obtain same. The particulars requested were provided as per email dated 10 September 2024.

From a perusal of the minutes of the disciplinary committee, Mr Sinatambou, on 19 September 2024, highlighted that they had asked to have access to all documents including the video, which they were not aware of. From the committee's sitting of 11 October 2024, it is apparent that the Disputant's legal team did view the video as has been confirmed by Mr

Sinatambou in his evidence before the Tribunal. It has also transpired, on 11 October 2024, that the Chair of the disciplinary committee ruled that she will allow the viewing of the video footage after having taken cognisance of Mr Sinatambou's objection for the video not to be produced as it is unfair to the employee. Mr Lebon also confirmed that he was given access to the video with his advisors at the disciplinary committee and also stated that he does not agree that he was going aggressively towards Mr Soneea in the video footage as the video is very blurred.

Under *section 64 (5)* of the *WRA*, the employer shall make available to the Disputant, prior to the holding of the disciplinary hearing, such information or documents, as may be relevant to the charge, which the employer intends to adduce in evidence in the course of the hearing. It has not been disputed that the video was not made available when the Respondent responded to the request for particulars dated 28 August 2024. However, the video was made available during the course of the disciplinary committee after Mr Sinatambou had taken cognisance of same through the evidence of Mr Soneea. It should be noted that, at that point in time, the video had not been produced or viewed before the committee. It is only after the Disputant and his legal representative had the opportunity to view the video that the Chair of the committee ruled that it should be viewed.

The Disputant has therefore, in all fairness, been given the opportunity to view the video before same was adduced in evidence before the disciplinary committee. The Disputant cannot therefore be said to have been taken by surprise by this piece of evidence as the video was made available to them prior to its viewing before the committee. After having viewed the video, Mr Sinatambou even stated, before the committee, that same should not be produced as it is unfair to Mr Lebon as he is unable to identify who is doing what. It should also be noted that it is incumbent on the Disputant to show that the information or document must be such which the employer intends to adduce in evidence in the course of hearing and no evidence has been adduced from Mr Sinatambou or the Disputant himself as to this particular element of *section 64 (5)* of the *WRA* before the Tribunal.

The Disputant has also submitted in relation to the unfairness of Mrs Hawoldar's investigation. It has first been submitted that the Security Officer, Lydia was present at the incident and being a witness she should not have recorded statements from witnesses and not be involved in the investigation. From the evidence on record, it has been borne out that Lydia recoded a statement from the Disputant regarding his version of the events. Whereas, from the evidence of the employer's witnesses during the disciplinary committee, Lydia was present at the

locus at the time of the incident. The Disputant contends that this is a breach of the rule of natural justice '*Audi alteram partem*'.

In this regard, the Tribunal must note that it has not had the benefit of Lydia's evidence to know for certain where she was at the material time of the incident. The Disputant is relying on the sayings of the employer's witnesses before the disciplinary committee to establish that Lydia was at the spot of the incident. However, none of these witnesses have been called before the Tribunal to substantiate same. It must also be noted that Mrs Hawoldar, when questioned by the Disputant's Counsel, did state and maintain that as per her investigation, Lydia was in her office and not on the spot. The Tribunal cannot therefore see how this has infringed the *Audi alteram partem* rule of natural justice, which implies the right to hear the other side and normally applies to courts and tribunals in their decision-making function.

It has also been submitted that the investigation is not complete as statements have not been taken from all the witnesses. The Disputant has notably relied on the evidence of Mr Soneea and Mr Evans Letandrine before the disciplinary committee to say that there were up to 14 persons present at the locus at the time of the incident. However as per Mrs Hawoldar's evidence before the Tribunal, she was informed by Security of who were involved and, as per her schedule, met with most of the people she had to meet and those she could not meet were met by the Security Officer. She also stated having recorded around 5 or 6 statements and did moreover explain that she did not record statements from other witness as they stated that they did not see anything.

It must be noted that the employer has a discretion to carry out an investigation into all the circumstances of the case before levelling a charge of misconduct against the employee (*vide section 64 (3) of the WRA*). It must however be borne in mind that the employer is not necessarily a professional investigative body nor can it be equated to an authority such as the Police. The Tribunal cannot therefore find any unfairness with regard to the investigation carried out by the employer in the present matter.

During the course of the hearing, the Disputant made it an issue that he was forced to give a statement against his will to the employer. Mrs Hawoldar notably stated that the purpose of taking a statement from the Disputant was to understand him, to know what had happened as everybody was given a fair chance to come and explain what happened on that day and he was given the same opportunity. Although the Disputant did not agree to giving the statement,

it has not been shown if this was used against him before the disciplinary committee. When asked of him if same was used at the disciplinary committee, he stated that he did not remember. As per *section 64 (9)* of the *WRA*, any written statement acknowledging guilt by a worker obtained at the instance of the employer is not admissible as evidence before a disciplinary hearing or any authority or any court. No prejudice has therefore been caused to the Disputant with regard to the statement he gave to the employer.

The Disputant has also submitted in relation to whether the incident occurred within the context of work. It is notably the case for the Disputant that the incident occurred outside the workplace and he has relied on the evidence of Mrs Jeewanjee, District Councillor, who notably stated that the parking space, the pavement and the road are not owned or maintained by the hotel. The Tribunal must treat the evidence of Mrs Jeewanjee with caution as she is an elected member of the District Council and is not the Chief Executive of the District Council nor is she his/her representative. She agreed that she does not perform any executive function nor did she produce any official document to substantiate her contentions.

The Disputant notably stated, in his evidence before the Tribunal, that on the day during work, he was provoked by Mr Soneea singing a certain song towards him. He eventually told Mr Soneea that they will talk about same after work. He finished work at about 4.30 pm, got changed, went outside and waited for Mr Soneea to ask him what he had to say to him. They then had a discussion and Shedrick Nadal came to separate them. He denied that there was a fight. When cross-examined, the Disputant stated that the incident occurred at the bus stop.

From the facts as set out by the Disputant himself, the incident originated from provocations by Mr Soneea towards him when at work. After finishing work, he waited for Mr Soneea which led to the incident. The incident clearly involves two of the hotel employees, i.e. the Disputant and Mr Soneea and they were separated by another employee, Mr Nadal. It has also not been disputed that there were other hotel employees at the spot of the incident as has been contended by the Disputant. As explained by Mrs Hawoldar, it does not show a good image with good relationship among colleagues at the workplace; and it gives a bad image of showing a fight between employees in front of the hotel premises. She also mentioned that they do not prone violence, animosity and anger as their values and this is not part of their normal behaviour. She also stated that clients of the hotel go through the bus stop. In taking these circumstances into consideration, the Tribunal has no difficulty in finding that the incident occurred within the context of work between two hotel employees although they were just outside hotel premises.

In additional written submissions, Counsel for the Disputant has contended that Mr Soneea stated that he swore at the Disputant before the disciplinary committee and that no sanction has been taken against him. The Tribunal notes that, when cross-examined, Mrs Hawoldar notably stated that when she came to know that Mr Soneea swore at Mr Lebon at the disciplinary committee, counselling was done and Mr Soneea kept his employment following the counselling session. She also explained that the investigation did not show that Mr Soneea was the one who went to harm the Disputant but that the latter came violently on the former and Mr Nadal coming to defend. The Tribunal cannot therefore find that the Disputant has been unfairly treated as Mr Soneea was given a counselling session in relation to the incident. Moreover, as per the version of the Disputant himself, he was the one who waited for Mr Soneea to come out after work. There is also no evidence of any complaint by the Disputant against Mr Soneea regarding provocations by the latter which allegedly occurred when both were at work on 9 June 2024.

Counsel of the Disputant has also submitted in relation to the five individual charges brought against the Disputant before the disciplinary committee contending that they have not been proven. It must be noted that the Disputant has not adduced evidence in relation to the five specific charges other than stating that he pleaded not guilty to same. The Disputant rather deposed on the incident that occurred, notably highlighting that it was outside the workplace and that there was no fight. He also highlighted certain omissions regarding Mr Soneea's evidence before the disciplinary committee and Lydia being a witness. These particular contentions of the Disputant have already been considered by the Tribunal in this determination. It should also be noted that the charges were brought before a disciplinary committee which decided on same after having had the benefit of conducting a full hearing into the matter.

On the other hand, the Tribunal has noted that following the two letter of charges dated 18 June 2024 and 5 August 2024 respectively, the Disputant was convened to a disciplinary committee scheduled for 26 August 2024. His legal representatives were granted a postponement to request for particulars. He was given ample opportunity to give his version before the disciplinary committee but chose not to do so. According to Mr Sinatambou, this was upon his advice; according to the Disputant, this was because of how the disciplinary committee proceeded. An Attorney was instead called to produce an affidavit on behalf of the Disputant before the committee. Following the last sitting of the committee on 11 October 2024, the Chairperson submitted her report dated 15 October 2024. The letter of termination of the Disputant's employment is dated 16 October 2024 (produced as Document C).

The main purpose of a disciplinary hearing is to afford the employee the opportunity to give his version of the events. This is embodied in *section 64 (2)* of the *WRA*, which reads as follows:

64. Protection against termination of agreement

...

(2) Subject to subsection (3), no employer shall terminate a worker's agreement –

(a) for reasons related to the worker's alleged misconduct, unless –

(i) the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;

(ii) the worker has been given an opportunity to answer any charge made against him in relation to his alleged misconduct –

(A) in an oral hearing only; or

(B) in an oral hearing following his answer in writing;

It is 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 Marousse**, 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 findings of the Disciplinary Committee are not conclusive and the employer may still come to a different conclusion.

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.

(The underlining is ours.)

It would also be appropriate to refer to the case of *Airports of Mauritius Ltd v Rajkomar* [supra], which was cited by Counsel for the Respondent in submissions, on the worker's opportunity to answer to the charge:

As rightly pointed out in Dr. D. Fok Kan's "Introduction au droit du travail Mauricien" under the subject "Opportunity to Answer the Charge" (Pg 429), "Whilst the deciding-body is under a duty to give a person an opportunity to make representations and to take stock of all relevant information before any decision affecting him is taken, the requirements and the nature of a fair hearing vary from case to case. The rules of natural justice as put by Lord Bridge in the case of Lloyd and others v Mchmahon [1987] AC 625, at page 702 'are not engraved on tablets of stone' and as per Lord Denning MR in R v Secretary of State for the Home Department, ex. Parte Santillo [1981] QB 778, at page 795 'the rules of natural justice – or of fairness – are not cut and dry. They vary infinitely'. The essence of the requirements of natural justice is the duty to act fairly in any given case. Some decisions require full adjudicative-type hearings; others only permit the mere right to make representations".

*In the present matter, it cannot be said that the appellant was not afforded an opportunity to put her case as she had sufficient latitude to present her case before the disciplinary committee. We agree with the appellant that the employee cannot be said to have been so prejudiced and on the strength of the case of **Air Mauritius Limited v Bezuidenhout J D (Captain)** [2011 SCJ 205], the skipping of this first step on the*

particular facts of the present case can be viewed as no more than a technical breach which does not vitiate the disciplinary proceedings.

The Disputant has not denied that he did not adduce any oral evidence before the disciplinary committee. When this was put to him by Counsel for the Respondent, he stated that all he had to say was in his affidavit. He did acknowledge that he was well assisted before the disciplinary committee and his legal representatives ensured that his rights were respected. Despite this he did not find the disciplinary committee to be an appropriate forum to give his version. Likewise, Mr Sinatambou did state that the Disputant upon his advice did not offer oral explanations. As noted from the case of *Plaine Verte Co-operative Stores Society Ltd [supra]*, the act of the worker not offering any explanations before the disciplinary committee can by itself justify summary dismissal.

It should also be recognised that the Respondent did take into account the Disputant's affidavit. In this regard, the following can be noted the termination of employment letter dated 16 October 2024 (produced as Document C):

Management has taken into account the report of the chairperson and the evidence that has been adduced at the oral hearing. Management has further taken into account the fact that you have chosen not to give any oral explanations before the committee, but have instead adduced evidence of an affidavit that you have sworn.

The statement made in your presence by your legal representative on 11 October 2024 is that this affidavit contains everything you wished to state at the oral hearing. It was further stated that you would not submit yourselves to any questions that the employer may have in order to better understand your explanations and/or version of facts.

It is the stand of management that you have committed the acts subject matter of the charges against you. Further, the contents of the affidavit do not satisfactorily address the facts contained in the charges letters and the evidence adduce during the oral hearing. It is thus the stand of management that your acts and doings on 9 June 2024 constitute acts of gross misconduct. As a result of this, management has no other alternative than to terminate, in good faith, your employment on the grounds of gross misconduct.

It must be noted that in relation to the aforesaid letter, Mrs Hawoldar confirmed that it states that Mr Lebon did not give any oral explanations; that in choosing not to do so, he had

deprived the employer of the benefit of his full explanations; and that he has prevented the employer from fully understanding his version of the facts. It must be noted that she was not cross-examined on same. The letter clearly shows that the Respondent has not solely relied on the findings of the disciplinary committee in coming to the conclusion to terminate the Disputant's employment. It is trite law that the decision to terminate is that of the employer.

The Tribunal has moreover noted that the Disputant, when deposing, has not made any claim to be reinstated. He notably stated that he has a lot of friends at the hotel and went over the reasons why he thought Mr Soneea made such a complaint against him but was silent as to whether he should be reinstated. It must also be noted that during the course of the hearing reference has been made to the hotel, La Pirogue as the employer. Whereas, as per the present matter referred to the Tribunal, the Respondent is City and Beach Hotels (Mauritius) Limited. No evidence has been adduced as to what is the link between La Pirogue hotel and the Respondent party in the present matter.

Having notably considered the grounds put forward by the Disputant in the present matter as well as the evidence adduced during the hearing of the matter and the submissions of Counsel, the Tribunal cannot find that the Disputant's termination of employment was unjustified and that he should be reinstated. The claim for reinstatement is therefore not justified.

The dispute is therefore set aside.

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

.....
(SD)Anundraj Seethanna
(Member)

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

Date: 31st January 2025

