

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF  
GUYANA  
(REGULAR JURISDICTION)

**2019-HC-BER-CIV-SOC-80**

BETWEEN:

PHALYANJEE KUMAR NANDKUMAR

Claimant

-and-

GUYANA POWER AND LIGHT  
INCORPORATED

Defendant

The Honourable Justice Navindra A. Singh, Puisne Judge

Mr. Arudranauth Gossai for the Claimant

Messrs. Timothy Jonas and Adrian Anamayah for the Defendant

**Delivered September 25<sup>th</sup> 2020**

DECISION

The Claimant was employed by the Guyana Electricity Corporation in May 1998 and after the Defendant took over the Guyana Electricity Corporation continued in his employment with the Defendant [**Exhibit “A”**].

The Claimant was instructed by the Defendant in writing to proceed on administrative leave on July 27<sup>th</sup> 2015 pending an investigation into alleged impropriety committed by the Claimant in the course of his employment [**Exhibit “F1”**].

That instruction was then withdrawn by written correspondence dated July 28<sup>th</sup> 2015 [**Exhibit “G”**].

On August 4<sup>th</sup> 2015 the Claimant was informed in writing that a Disciplinary Committee had been set up to investigate the allegations levelled against him and that he is required to meet with the Disciplinary Committee when summoned [Exhibit “H”].

On August 26<sup>th</sup> 2015 the Claimant was directed by the Defendant, in writing, to proceed on administrative leave from August 27<sup>th</sup> 2015 to facilitate the conduct of the investigation [Exhibit “K”].

By written correspondence dated September 1<sup>st</sup> 2015 the Guyana Public Service Union sought to engage the Defendant with respect to the allegations levelled against the Claimant and the composition of the Disciplinary Committee, to wit, that the Disciplinary Committee comprised of staff that were junior to the Claimant [Exhibit “L1 - L2”].

A new Disciplinary Committee was formed on October 13<sup>th</sup> 2015 and by written correspondence dated February 4<sup>th</sup> 2016 the Claimant was invited to attend an interview on February 8<sup>th</sup> 2016 to discuss the reports of the investigation of the Disciplinary Committee [Exhibit “N”].

The Claimant testified that he attended the meeting, accompanied by a representative from the Guyana Public Service Union, and he was informed by the an agent of the Defendant, namely, Mr. De Roy, that the Defendant had aborted the investigation and disciplinary process against him.

It is noted that, though not pleaded, the Claimant has clearly accepted that Mr. Deroy also informed him and his representative that a new process would be started.

In any event the Claimant testified under cross examination that based on advice from the representative he refused to participate in the interview.

The Defendant then served nineteen written notices of disciplinary charges dated March 14<sup>th</sup> 2016 on the Claimant with requesting that he show cause in writing by April 1<sup>st</sup> 2016 why disciplinary action should not be taken against him for the alleged infractions [**Exhibits “R1 - R19”**].

Based on the evidence the Claimant did not show cause in writing or at all in response to the nineteen notices.

By written correspondence dated June 6<sup>th</sup> 2016 the Claimant was invited to hearing on June 14<sup>th</sup> 2016 to give him another opportunity to answer the said charges [**Exhibit “S”**].

Based on the evidence the Claimant did not avail himself of this opportunity.

By letter dated June 29<sup>th</sup> 2016 the Claimant was then summarily dismissed by the Defendant, effective July 1<sup>st</sup> 2016 [**Exhibit “E”**].

The Claimant instituted this Claim on June 28<sup>th</sup> 2019 claiming that he was wrongfully dismissed. The Claim is based on two grounds, **firstly**, that the Defendant did not follow the procedure that it was contractually bound to follow in arriving at its decision to dismiss the Claimant and, **secondly**, that the Claimant did not engage in serious misconduct justifying his dismissal.

The Defendant contends that the Claimant was dismissed lawfully for serious misconduct in accordance with the terms of his contract of employment.

## **ISSUE I**

Did the Defendant fail to follow the procedure that it was contractually bound to follow in arriving at its decision to dismiss the Claimant.

## **FACTS**

The Claimant contends that the Agreement between the Defendant and the Guyana Public Service Union “For the Recognition and Avoidance and Settlement of Disputes” [Exhibit “C1 - C11”] [hereinafter referred to as the Agreement] provides a specific procedure under Clause 6 for dealing with the circumstances of the Claimant’s dismissal.

The Defendant contends that Clause 4(i) of the said Agreement specifically reserves the customary rights of Management to determine disciplinary action and in any event Clause 13 of the Agreement provides that an allegation of unjustifiable disciplinary action must be dealt with at arbitration.

## **ANALYSIS**

The Court finds that Clause 6 of the Agreement is inapplicable to this case.

Clause 6 is intitled “Representation Procedure” and therefore must be read in conjunction with Clause 5 which is intitled “Representation”.

It is clear that Clause 5 does not contemplate issues such as the issues involved in the investigation of the Claimant, to wit, serious misconduct in carrying out his duties.

Clause 5 seem to contemplate disputes between employees of the company by the use of the words “Both sides shall strive for immediate settlement **on the scene or near the scene** as possible”.

This is irrefutable when the words of Clause 6 “... raised by or on behalf of any employee ...” is considered.

These clause are clearly laid out to deal with disputes between employees raised by an employee.

The first step in the procedure, laid out in Clause 6(a) provides, “The question shall be referred **by the employee** or employees to the immediate supervisor ...”

Clause 13 cannot make Clause 6 applicable since Clause 4(i) reserves the issues raised by the Defendant against the Claimant to be dealt with by Management.

In any event, it is clear that at all stages, up until June 14<sup>th</sup> 2016, the Defendant, through the Disciplinary Committee, was involved in an investigative process, investigating allegations made by customers against the Claimant.

In this regard the Defendant made several attempts to involve the Claimant in the investigative process, to ensure that he was given an opportunity to answer the allegations made, however, the Claimant, by his own admission in testimony, chose not to avail himself to those opportunities.

The fact that the committee was called a Disciplinary Committee does not change the fact that all that the committee did was investigate the allegations made against the Claimant and Management decided the action to be taken based on the findings of the investigation.

This is clearly established upon an examination of **Exhibits “E”, “H” and “N”**.

## **CONCLUSION**

The Defendant was not bound contractually by any procedure to investigate the allegations made by its customers against the Claimant and having conducted its investigations, the Defendant was entitled to act any action it deemed appropriate.

## **ISSUE II**

Was the Defendant justified in dismissing the Claimant for serious misconduct.

## **LAW**

In making a determination as to whether an employer (the Defendant) was justified in dismissing an employee (the Claimant) for serious misconduct, the Court is not concerned with whether the Claimant is in fact guilty or innocent of the misconduct/ offence alleged by the Defendant.

The question for the Court is whether the Defendant entertained a **reasonable belief** that the Defendant was guilty of the misconduct/ offence alleged at the time of the dismissal.

The nature and extent of such a review by the Court was succinctly set out, as follows, by the Hon. Justice Arnold sitting in the United Kingdom Employment Appeal Tribunal in British Home Stores Ltd v Burchell [1978] IRLR 379:

*“What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that*

*misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”*

*“It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances.”*

Though this approach was set out in the United Kingdom Employment Appeal Tribunal, it was subsequently approved by the Court of Appeal in Weddel and Co Ltd v Tepper [1980] IRLR 1996 and confirmed again in Foley v Post Office; HSBC Bank PLC (formerly Midland Bank PLC v Madden [2001] 1 All ER 550.

The principle that what is relevant to the Court in considering whether the decision to summarily dismiss an employee was wrongful is the evidence that the employer had in its possession and relied upon in deciding to summarily dismiss was also propounded by Chang J.A. in Michael Scotland v Guyana Electricity Corporation [2001 - 2002] GLR 337 @ 348.

## **FACTS**

The facts are as stated above and contained in **Exhibit “Z1 - Z314”**.

## **ANALYSIS**

The Claimant contends that the allegations made against him were unfounded and has attempted to so prove in this trial, however, this is immaterial at this trial since this Court is only tasked with determining whether the Defendant entertained a **reasonable belief** that the Defendant was guilty of the misconduct alleged at the time of the dismissal, as explained above.

The Defendant asserts that it carried out a proper and sufficient investigation of the allegations made against the Claimant and contends that on completion of the investigation it was concluded that the Claimant had engaged in activity that amounted to misconduct that was sufficiently serious to warrant his dismissal and so he was dismissed.

The Defendant provided the Claimant with ample opportunities to present his evidence and explanations to refute the allegations, which was the appropriate time for him to so do, but which he unfortunately chose not to avail himself.

Indeed, had the Claimant done so and still found himself dismissed, then he certainly could have challenged that decision to dismiss him as being unreasonable based on the evidence.

The contention by the Claimant that according to the letter of dismissal [**Exhibit “E”**] he was dismissed for lack of cooperation with the Defendant’s disciplinary proceedings is unfounded.

The letter of dismissal is perspicuous that the investigation in to the allegations established the legitimacy of the allegations and there was nothing, whether from the Claimant or otherwise, to contradict those findings.



The Defendant has provided the Court with evidence that it carried out a proper and sufficient investigation of the allegations made against the Claimant through the testimony of the witness Wayne Watson and **Exhibit “Z1 - Z314”**, which the Court finds clearly establishes on a balance of probabilities that a proper and sufficient investigation was carried out and further that the Claimant was given every opportunity to contest the findings of that investigation.

### **CONCLUSION**

Based on the foregoing the Court finds that the Defendant carried out a proper and sufficient investigation into the allegations made against the Claimant and having carried out such investigations became seised of evidence that was sufficient to entitle it to reasonably come to the conclusion that the allegations against the Claimant were well founded.

In the circumstances the Court finds that the Claimant’s employment was properly terminated and the Claimant was not wrongfully dismissed.

Based on the quantum claimed by the Claimant, the Court awards costs to the Defendant in the sum of \$1,000,000.00.

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Justice N. A. Singh