STEEL M. A. v LATERAL HOLDINGS LTD

2023 SCJ 494

Record No. 114360

THE SUPREME COURT OF MAURITIUS

In the matter of:

Mark Andrew STEEL

Plaintiff

v

Lateral Holdings Ltd

Defendant

JUDGMENT

The plaintiff was employed by the defendant as Sales Manager from 25 November 2013 until 12 February 2015 for a monthly salary of Rs 50,000 and a housing allowance of Rs 8,000. The plaintiff was also entitled to one return ticket from Mauritius to London after the completion of one year employment with the defendant and to reimbursement of his utility bills.

It is the case for the plaintiff that the defendant has committed a breach of contract and/or made an abuse of its rights in suspending him and terminating his contract of employment without valid cause and justification.

He is therefore claiming the total sum of Rs 2,296,300 for breach of contract, moral damages, loss of earning, responsibilities allowances, utility bills, a return air ticket to London and a clinic bill.

The plaintiff gave evidence. He stated that he had vast experience in the field of marketing and he was thus employed as Sales Manager by the defendant. He was assigned the United Kingdom and the China market as well as the Australia and the South Africa market. His direct boss was Jiri Benes who was the Director of Sales and Marketing.

He was happy with his job until a General Manager, Michael Jensson, was appointed. The latter was rude and aggressive towards the employees and humiliated him in front of his colleagues. On 28 October 2014, although not keen, he signed a document which mentioned that he would now look for emerging markets in the Middle East. Dubai market was identified as a key area and he was thus sent to Dubai in November 2014 on a sales trip to promote the defendant's hotel. He had a meeting with Emirates Holidays in Dubai and it was agreed that there was an opportunity for the defendant's hotel to be included in the Emirates Holidays brochure. He communicated with his boss Jiri Benes and told him about all the issues but he did not get any response from the latter. When the plaintiff did his presentation to Michael Jensson about the trip to Dubai, the latter queried him about the status of the Emirates Holidays brochure whereupon he told him that it was too late for the defendant's hotel to be included in the Emirates Holidays 2015 brochure.

On Saturday 31 January 2015 at 14.00 hours, the Human Resources Manager remitted a suspension letter to the plaintiff.

The plaintiff was requested to attend a disciplinary committee scheduled on 12 February 2015 to answer a charge of having failed in his duty to do a proper follow up on the inclusion of the defendant's hotel in the brochure of Emirates Holidays.

The plaintiff did not attend the hearing of the disciplinary committee.

In a letter dated 14 February 2015 the plaintiff was informed by the defendant that the latter took note of the refusal of the plaintiff to attend the hearing of the disciplinary Committee although he was given the opportunity to answer the charge against him and the defendant had thus "*no other course of action than to terminate*" the contract of employment of the plaintiff.

The defendant's version is that the plaintiff had limited experience working in marketing-intensive hotel establishments. He could not adapt and cope with the fast pace and rigorous work environment of the luxury hotel industry. No formal report was made or caused to be made by the plaintiff on the alleged abuse inflicted upon him by Michael Jensson, the General Manager. The elementary tasks such as making relevant sales enquiries or adequate email follow up of meetings were not satisfactorily carried out. The sales trip to Dubai to promote the defendant's hotel had been a wasted opportunity. The plaintiff's contract was thus terminated after he was called upon to attend a disciplinary committee that was set up following a procedure undertaken lawfully by the defendant.

Now, the evidence adduced has revealed that the reason for the termination of the contract of employment of the plaintiff relates to the failure of the plaintiff to do a proper follow up in respect of the Emirates Holidays brochure as is apparent from the suspension letter dated 31 January 2015 sent by the defendant, convening the plaintiff to attend a hearing of the disciplinary committee to answer the following charge –

> *"You failed in your duty to do a proper follow up with Mr Manica Radjou on brochure inclusion with Emirates Holidays which was in having our Resort featured in their 2015 brochure and which lead to a final decision by Emirates Holidays not to include InterContinental Mauritius Resort in their 2015 brochure which consequently put our Management in an uncomfortable position with Emirates Holidays and such situation is causing prejudice to our company."*

It is to be noted that during the trial, in cross examination, the plaintiff conceded that as part of his contractual obligation, when he was assigned a project, he had to ensure that the project was completed. He agreed that he sent an email on 24 November 2014 to Manica/Taruna, in respect of the Emirates Holidays brochure to inform them that he has raised all issues that they discussed and would let them know of the outcome after "*it has been talked about back in Mauritius"*. He conceded that he did not communicate again with them until 19 January 2015, that is nearly 2 months later, when he sent an email "*to catch up regarding the brochure as we have not received any invoice for the inclusion price that we agreed"* but it was then too late to include the defendant's hotel in the brochure to promote the hotel.

It is worth highlighting that in an email sent on 26 January 2015 by Manica Radjou to the plaintiff and Jiri Benes, it is mentioned that following the meeting with the plaintiff in November 2014, she explained to the plaintiff that the brochure was nearly finalised but if they reached an attractive deal/contract within 7 days, Emirates Holidays would surely consider featuring the hotel in their 2015 brochure. She also referred to some issues in the past with the defendant's hotel and the plaintiff promised to resolve the issues. She confirmed in that email that the plaintiff replied to her on 24 November 2014 and said that he would get back to her.

It is therefore abundantly clear that the plaintiff was sent to Dubai, on a sales trip, on a specific mission to promote the hotel and that the plaintiff did not act diligently. He did not get back promptly to Manica Radjou and thus failed in his duty to do a proper follow up in respect of the Emirates Holidays brochure project and this lead to a final decision by Emirates Holidays not to include the defendant's hotel in the 2015 brochure. The plaintiff has thus failed to do the task he was assigned to perform. In that respect it is

interesting to refer to the following extract in **Encyclopédie Dalloz – Droit Civil vol. I, V° Contrat de travail** quoted in **Fraser (Captain) A. S. v Air Mauritius Ltd [2011 SCJ 373] –**

> *"100 La première obligation du salarié est d'accomplir la prestation de travail qui est l'objet même de son engagement. Il doit occuper le poste qui lui a été confié, remplir la fonction à laquelle il a été appelé, dans le lieu qui a été convenu. Il manque à cette obligation s'il cesse le travail avant l'expiration du contrat, ou s'il s'absente sans autorisation. Il peut encourir alors la résiliation à ses torts et griefs. Il y manque aussi s'il n'a pas la capacité professionnelle requise pour tenir l'emploi qu'il a accepté."*

Insofar as the plaintiff 's version to the effect that it was his manager Jiri Benes who was responsible for the failure of the Emirates brochure project and not him, although he was not legally bound to attend the hearing of the disciplinary committee, he was given an opportunity to explain that he was not to be blamed for the failure of the project and to convince the defendant that he should not be dismissed.

It is worth highlighting that at the material time sections 38(2) and 38(3) of the Employment Rights Act 2008 provided that no employer could terminate a worker's agreement for misconduct or poor performance unless the worker had been afforded an opportunity to answer any charge made against him in relation to his misconduct or to his alleged poor performance. Sections 38(4) and 38(4B) provided that where the opportunity afforded to a worker to answer any charge made against him is the subject of an oral hearing the worker and the employer could, during the oral hearing, negotiate for the payment of compensation with a view to promoting a settlement.

It is also to be noted that under section 32(2)(a) of the Labour Act which was repealed by the Employment Rights Act 2008, an employer had the obligation to afford an opportunity to an employee to give his explanation concerning the charge against him.

The purpose of the hearing of the disciplinary committee as explained in **Bissonauth Premchandra v The Sugar Insurance Fund Board [2007] UKPC 17** is **"***to give an employee an opportunity of dissuading his employer from dismissing him in circumstances where he might otherwise be dismissed. In other words, the primary purpose of section 32(2) is to afford an employee the opportunity of keeping his job."*

Now, since it is the version of the plaintiff that it was his Manager Jiri Benes who was responsible for the failure of the Emirates Holidays project it was incumbent upon him to give his explanations during the hearing of the disciplinary committee and to convince the

committee that it was Jiri Benes who was responsible for the failure of the project and not him. Since he failed to attend the hearing of the disciplinary committee and to give his explanations, the defendant was entitled to reach the conclusion that the charge was proved. The plaintiff himself conceded that since the disciplinary committee did not have his version of facts as he deliberately refused to attend the hearing this had an adverse effect on him.

It is also to be noted that it is stipulated in the contract of employment of the plaintiff at clause 23.1 that –

> *"It shall be deemed to have occurred a breach of the terms of employment should you at any time from the date of this appointment;*
>
> *23.1.1 Fail to faithfully and diligently perform such duties and responsibilities as may from time to time be assigned to you by the company and at all times to endeavour to the utmost of your ability to promote and advance the interests of the company."*

In view of all the evidence adduced, I find that the decision of the defendant to suspend and ultimately to terminate the contract of employment of the plaintiff was not made without valid cause and justification as contended by the plaintiff. Indeed, the plaintiff's employment was obviously terminated because of his shortcomings at work. It is the plaintiff who actually acted in breach of clause 23.1.1 of his contract of employment by failing to diligently perform his duties and by failing to do his utmost to promote the interest of the defendant.

Insofar as the issue of harassment is concerned, I have not been convinced by the plaintiff that damages are warranted. Indeed, had it been such a serious issue for him and had he suffered prejudice he would have made a formal complaint to the defendant concerning the behaviour of its general manager. The plaintiff conceded that he did not make any formal complaint to the defendant about this issue. He did state that he went to the Labour Office to complain but he did not make any follow up. I find that no cogent evidence has been adduced by the plaintiff to establish his claim for damages for harassment.

Concerning the clinic bill amounting to Rs 16,500 which he is claiming from the defendant, no evidence has been adduced to establish that it was for the defendant to pay for such bill. In respect of the claim for unpaid responsibilities allowances no evidence has been adduced by the plaintiff to substantiate such claim.

Insofar as the payment of an air ticket to London and utility bills are concerned, since it is accepted and this was clearly mentioned in the contract of employment that the plaintiff would be "*provided with one two way vacation ticket (Economy class) after the completion of one year service (Mauritius/London/Mauritius)"* and that his utility bills (electricity and water) were to be paid by the defendant and since there is no evidence that such payments have been made, I accordingly order the defendant to pay the sum of Rs 70,000 for the air ticket and the sum of Rs 9,800 for the utility bills. The plaint is otherwise dismissed. I make no order as to costs given the circumstances.

V. Kwok Yin Siong Yen
Judge

24 November 2023

For Plaintiff **: Mrs S. B. Jaddoo, Attorney-at-Law**
Mr A. R. Jaddoo of Counsel

For Defendant **: Mrs F. Maudabocus-Moolna, SA**
Mr N. Boolell of Counsel together with Mrs U. Boolell, SC