

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

CLAIM NO. CV2017-01279

BETWEEN

Dhanesh Kumar

Claimant

AND

The Trinidad and Tobago Civil Aviation Authority

Defendant

Before the Honourable Madam Justice Donaldson-Honeywell

Delivered on April 3, 2019 In Chambers

Appearances

Mr. Avory Sinanan SC and Mr. Travers Sinanan and Mr. Leon kalicharan for the Claimants

Mr. Russel Martineau SC, Mr. Bronock A. Reid and Mrs. Krystal Richardson-Dumitriu for the Defendants

Ruling

on Evidential Objections

A. Introduction

1. On February 28, 2019 the parties filed evidential objections by exchange. The submissions therein were considered. At a hearing on March 25, 2019 my preliminary views were expressed as to rulings on the objections. Then oral submissions were

heard within the time allocated. Thereafter, the parties were granted permission to file further written submissions by April 1, 2019.

2. Having considered the objections and submissions made orally and in writing by the parties. my decisions on the objections are set out in this Ruling.

B. Defendant's Objections to Claimant's Witness Statements

Witness Statement of Dhanesh Kumar

3. Paragraph 15 from "This I verily.....set forth" is struck out as speculative opinion, of no relevance or probative value.
4. Paragraph 17 (1)(a) and the document attached as D.K.2B [which in the version on the Court file is an extract from the Facebook Help Centre headed "What are the primary settings for groups"] are not struck out.
5. Paragraph 17(l) (iv) is struck out as hearsay.
6. Paragraph 25 from "which clearly....a sham" is not struck out. Although it is an opinion it is that opinion which, as a matter of fact, led to this Claim. The Claimant must be permitted to testify as to why he felt aggrieved.
7. Paragraph 26 lines 3 and 7-8 are struck out as speculative.
8. Paragraph 28 line 6 is not struck out. The Claimant's case is that the process was unfair. He must be allowed to testify as to why this is so.
9. Paragraph 29 is struck out as it speculates regarding the Defendant's long term intentions quite apart from the challenged suspension.
10. Paragraph 30 is struck out as it amounts to a legal submission.

11. Paragraph 32 is not struck out. This was pleaded and seems to relate to providing a reason for the Facebook post, based on which to argue that the suspension was not justified. It is not an opinion but a statement of fact as to how the Claimant felt, that gave rise to his post on Facebook.
12. Paragraph 33 is not struck out. The Claimant can be cross-examined as to whether the comments were made to him.
13. Paragraph 35 lines 2-3 and line 4 are not struck out. These are statements of fact. The Claimant can be cross-examined about why he believed, as a matter of fact, the things said here which made the process/suspension unfair.
14. Paragraph 36 is not struck out. It was pleaded and disclosed.
15. Paragraph 38 from "Becauseexercise" is struck out as hearsay. Paragraph 39 of the Witness Statement confirms that this is hearsay.
16. Paragraph 39 from "I have\$95,000." is struck out as hearsay.
17. Paragraphs 40 and 41 are struck out because although the information therein is addressed in the Claimant's Statement of Case it is not relevant to the challenged unfairness of the suspension and disciplinary process.

Witness Statement of Jerome Martin

18. Paragraph 5 is not struck out. It is admissible as to the fact that the statements were made.

Witness Statement of Augustus McIntosh

19. Paragraph 8 from "Unlike.....counterparts" is struck out as hearsay and/or opinion without foundation.

20. Paragraph 8 from “Board....positions” is struck out as opinion that is speculative and without foundation.

21. Paragraphs 13 and 17 are struck out as irrelevant, not pleaded and scandalous.

C. Defendant’s Objections to Claimant’s Witness Statements

Witness Statement of Ramesh Lutchmedial

22. Paragraph 4 is not struck out – It is not in dispute that finding out about Facebook posts is what the challenged disciplinary proceeding was based on. Accordingly this evidence is admitted in relation to that fact.

23. Paragraph 5 is not struck out. It comprises statements of fact as to his own reasons for making a report and he can be cross-examined about it.

24. Paragraph 9(v) is not struck out for the same reason as stated above.

25. Paragraph 12 is not struck out. The Witness is speaking in relation to paragraph 6(i) of the Defence. As Director-General this witness can speak on behalf of the organization he leads based on his knowledge, experience and management role. This evidence, along with certain other points made in the Witness Statements of other Defence Witnesses concerning the Terms and Conditions, is not admitted as an opinion of law or as expert evidence in any other respect. Instead, as in **American Life Insurance Company et al v RBTT Merchant Bank cv2008-00215 at para 12**, it is admitted because it is rendered “as a statement of fact, made by a person who can speak to matters within or allegedly within his personal knowledge”. Here that would be knowledge that an executive manager would be expected to have on the terms and conditions applicable to employees of the corporation. The witness can be cross-examined about the factual basis for his statement.

Witness Statement of Rohan Garib

26. Paragraph 3 is not struck out. The Facebook post is admitted into evidence neither as to the truth of its contents nor as to the fact that the Claimant posted it but because of the fact that it was the genesis of the challenged disciplinary action.
27. Paragraph 5 is not struck out because the witness was a member of the secret Facebook group and can speak to the rules, as a matter of fact, based on his own knowledge. He can be cross-examined about whether what he knows as a fact is correct and/or as to how it affects whether the information had to be kept secret.
28. Paragraph 6 from "I consideredPost" is not struck out. The witness can speak to his own factual belief as to what his duty was explaining why he reported the matter.
29. Paragraph 6 is not struck out. This is a statement of fact based on Garib's experience in air navigation services and his responsibility as a manager, which he can be cross-examined on.
30. Paragraph 9 is not struck out. The Defendant must be allowed to rebut, from the factual observation of its own witnesses, the Claimants factually held view that he was ill-treated after the suspension.
31. Paragraph 10 from the words from "dealt.....act" and from "TheyDefendant" are not struck out. These parts are admitted as a statements of fact as to the witness's knowledge of the terms and conditions, not as an expert opinion of law.
32. Paragraph 10 from "he should have been aware of it" is struck out as speculative opinion.

Witness Statement of Kenneth Dalip

33. Paragraph 3 is not struck out. This concerns the Facebook posts in relation to which the Claimant was disciplined. The evidence is admitted not as to the truth or authorship of the contents but as to the fact of it being the basis for the suspension.
34. Paragraph 14 from “the Claimantdo so” is not struck out. This witness’s non-recusal is one of the challenged issues regarding fairness of the disciplinary process. He must testify factually as to why he did not recuse himself.
35. Paragraph 14 from “the Claimantnot do so” is not struck out. This is admitted as a statement of fact, from Mr. Dalip’s observation, not a submission on law. He can be cross-examined as to the veracity/credibility and or implications of his observation. Then the parties’ submissions on law after the trial will be considered.

Witness Statement of Alexis Braithwaite

36. Paragraph 3 is not struck out. The Facebook post and information about it is not hearsay as it is only admitted regarding the genesis of the disciplinary action. It is the basis of the proceedings the Claimant is challenging.
37. Paragraph 4 from “It is essential.....corruption” is not struck out. It is admitted as a statement of fact based on the experience and supervisory role of the Witness as Manager of Air Traffic, Air Navigation and Safety.
38. Paragraph 16 is not struck out as it is necessary for the Defendant to rebut the Claimant’s version of events from the factual observation of other witnesses.
39. Some of the words at paragraph 17 objected to are struck out i.e. from “and have been accepted.....staff”. This part is speculative, without foundation and hearsay regarding what others accepted.

40. Paragraph 17 from the words “so he.....aware of it” are struck out as speculative

Witness Statement of Sunita Pabaroo

41. Paragraph 4 from “The said.....employment”; paragraph 5; Attachment “SP1”; paragraph 6 and paragraph 11 from “provision 1.2....harassment” are not struck out. The Witness, as human Resource Manager for the Defendant, can state the factual position of the Defendant based on her own experience. The evidence is admitted as to the fact of her knowledge and experience as to the Defendant’s stance on what terms govern its employees. It remains for the Court to determine any issue as to what is included in the terms and condition as a matter of law, if it arises, for final decision at Trial.

42. At Paragraph 8 not all the words objected to must be struck out. The substance is pleaded at 6(ii) of the Defence. However, from “andBraithwaite” is struck out as hearsay.

43. Paragraph 8 from “Additionally.....intranet” is struck out as speculative. Even if the Witness has seen the information on the intranet, she cannot speak for anyone else, including the Claimant.

44. Paragraph 9 from “the Defendant....called for” is struck out as there is no pleading that others were suspended without pay. Further there is an element of legal/industrial relations submissions in this evidence, without the expertise of the Witness having been established.

45. Paragraph 10 from “that calledBoard” is not struck out. It is admitted into evidence, not as to the truth of the opinion about what could be inferred from the Facebook post, but as a statement of fact as to why the Defendant took umbrage with the Facebook post.

46. Paragraph 13 the words “he made” are not struck out. This is simply a statement of fact as to what, from the Defendant’s perspective, led to the Claimant being suspended. The question whether this was rightly or wrongly done can be ventilated at trial by cross-examination and legal submissions.

47. Paragraph 22 from “to make his.....Defendant” is not struck out. It is admissible as to the fact of the Defendant’s reason for not charging the other two gentlemen, though they were part of the Facebook group.

48. Paragraph 30 from “Mr. Justice.....recognition” is struck out as it seeks to give an interpretation of a Court Judgement, without any expertise/foundation for same.

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Eleanor Joye Donaldson-Honeywell

Judge