Lutchanah V. v Island Management Ltd & Anor.

2022 IND 24

Cause Number 54/16

IN THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mrs. Vijayeluxmi Lutchanah

Plaintiff

v.

1. **Island Management Ltd**
2. **Island Fertilisers Ltd**

Defendants

Judgment

In this plaint, it is common ground that Plaintiff had been in the continuous employment of Defendants, as their Logistic Manager, from April 2004 until 30 December 2015 and was earning a monthly remuneration of Rs. 98,982.49 made up as follows:

(i) Monthly basic salary: Rs. 55,600;

(ii) Monthly pension contribution: Rs. 4,770;

(iii) Monthly transport allowance: Rs. 1,000;

(iv) Monthly medical insurance: Rs. 2,479.16;

(v) Use of motor vehicle: Rs. 30,000;

(vi) Telephone allowance: Rs. 500;

(vii) 13th month bonus: Rs. 4,633.33.

Defendant no.1 is a management company that manages Defendant No.2 and 3 other companies namely Island Renewable Fertilisers Ltd, Island Salt Limited and Topterra Ltd.

The Defendants, Island Renewable Fertilisers Ltd, Topterra Ltd and United Investments Ltd are related companies.

United Investments Ltd is the holding company of Defendant No.2. Harel Mallac Ltd is the holding company of Mauritius Chemical Fertilisers Industries Ltd hereinafter referred to as "MCFI". Both Defendant No.2 and MCFI are not profit- making companies.

In order for Defendant No.2 and MCFI to be profitable, the managements of United Investments Ltd and Harel Mallac Ltd came with a proposal to incorporate a company to manage and market the products of Defendant No.2 and those of MCFI so that Fertco Ltd was thus incorporated for that specific purpose.

The beneficial owners of Fertco Ltd are Harel Mallac Ltd and United Investments Ltd. It was decided by the managements of Harel Mallac Ltd and that of United Investments Ltd that all the employees of Defendant No.1 would be transferred to and would be employed by Fertco Ltd which had to cut costs.

Thus, there was a plan for the reduction of costs in relation to Plaintiff, Mr. Arnaud Leclezio, Mr. Joumont and Mr. Jeebodh who were employees of Defendants in different capacities. Initially they were all going to be transferred to the third Company namely Fertco Ltd and further to discussion, there was an agreement reached that they would leave Defendant No.1 provided a fair and just compensation be paid to them. At this stage, I find it proper to reproduce paragraphs 19,20 and 21 of the plaint below:

"19. During the said negotiations between Mr. Arnaud LECLEZIO and the Defendants, represented by Mr. Michel Guy Rivalland, the following agreement was reached that: -

(i) Mr. Arnaud LECLEZIO would be paid 1 1/2 months of severance allowance per year of service;

(ii) Mr. Jerry Joumont would be paid 2 months of severance allowance per year of service;

(iii) The Plaintiff would be paid 2 months of severance allowance per year of service; and

(iv) Mr. Jeebodh would be paid 2 months of severance allowance per year of service.

20. The Plaintiff accepted the payment of 2 months of severance allowance per year of service.

21. Mr. Joumont and Mr. Jeebodh have been paid the said 2 months of severance allowance per year of service."

Defendants in their amended plea have at paragraph 7 averred the following:

"7. The Defendants admit paragraphs 19,20 and 21 of the Plaint but aver that the agreement negotiated for the Plaintiff by Mr. Arnaud LECLEZIO was reached in respect of a contract of employment scheduled to terminate at the end of December 2015."

Plaintiff gave evidence in Court on behalf of herself and Mr. Michel Guy Rivalland in his capacity as Director of Defendants gave evidence in Court on behalf of Defendants.

It remained uncontested that:

1. Defendant No.2 paid to Defendant No.1 a management fee to pay the salaries of the employees of the first Defendant. Plaintiff was, therefore, employed by both Defendants.

2. The agreement reached by Mr. Michel Guy Rivalland on behalf of Defendants was brought to the knowledge of Plaintiff by Mr. A. Leclezio who was negotiating on behalf of himself, Plaintiff, Mr. Joumont and Mr. Jeebodh prior to 22 December 2015 where he would be obtaining payment of 11/2 months of severance allowance per year of service, Mr. Joumont, Mr. Jeebodh and Plaintiff would be obtaining 2 months of severance allowance per year of

service respectively. When Plaintiff was proposed 2 months of severance allowance per year of service in September 2015, she had accepted the agreement. Mr. Joumont and Mr. Jeebodh had been paid their 2 months of severance allowance per year of service.

3. Mr. Leclezio was the one giving them the feedback of the negotiations.

4. Mr. M.G. Rivalland was the Director of Defendants and the Executive Director of United Investments Ltd. A letter of resignation viz. Doc. A to be remitted to Plaintiff on the 22 December 2015 was drafted by United Investments Ltd, prepared by him and was given to Mr. Leclezio following earlier discussions prior to 22 December 2015 between Mr. Leclezio on behalf of himself, Plaintiff, Mr. Joumont and Mr. Jeebodh and they were to be made redundant upon payment of an agreed remuneration or compensation. Mr. Leclezio signed a letter of resignation on 22 December 2015 which was his last day of work although he was employed until 31 December 2015. He asked for Doc. A to be remitted to Plaintiff and which was given to him as he was the friend of Mr. M.G. Rivalland and a close collaborator for years.

5. On 23.12.2015, Mr. Leclezio remitted to Plaintiff the letter of resignation as per Doc. A for her to sign and which she did not. On the 23.12.2015 itself, she went to make a complaint at the Labour Office.

Now the case for the Plaintiff is that thereafter, she received a letter on 28.12.2015 from Defendants as per Doc. B containing 2 flimsy charges which have been made against her on 29 June 2015 and 7 July 2015 respectively. She was surprised and answered to the said Defendants by a letter dated 30.12.2015 as per Doc. C to say that the said charges and the setting up of a disciplinary committee were a colourable device to dismiss her as Defendants had already drawn up a resignation letter to be signed by her.

Thus, she considered that she was constructively dismissed as per her resignation letter dated 22.12.2015 viz. Doc. A. On the day she received the latter which was on 23.12. 2015, it was the last day she went to work and which was an end of year party. She was shocked as she never had the intention to resign purely and simply. She had an option either to remain in employment or to leave with a severance allowance of 2 months per year of service. The Defendants had already decided to dismiss her on 22.12.2015 and the disciplinary committee to be held on

28.12.2015 was not necessary. She did not appear before the disciplinary committee as she considered herself to have been constructively dismissed by them. Therefore, she was claiming the sum of Rs. 3,464,387.14 (Rs. 98,982.49 x 140/12 x3) as severance allowance from Defendants as averred in her plaint.

Now, the case for the Defendants is that the agreement negotiated for the Plaintiff by Mr. Leclezio was reached in respect of a contract of employment scheduled to terminate at the end of December 2015. Plaintiff accepted the payment of 2 months of severance allowance per year of service. It remained unchallenged that Island Salt Limited was not a related company of Defendants as they did not have any shareholding in that company.

Afterwards, it was discovered that she had committed serious acts of misconduct on 29 June and 7 July 2015 namely issuing quotes against the interest of Defendant No.2 involving Island Salt Limited, while still in its employment and acting in breach of her obligation of "non-concurrence". She was suspended from duties pending a disciplinary committee as from 28 December 2015 as per a suspension letter namely Doc. B dated 28.12.15 which contained 2 charges. She was requested to attend Disciplinary proceedings in relation to the charges made against her which she refused to do as per her letter dated 30.12.2015 namely Doc. C.

Thus, Defendants did not constructively dismiss Plaintiff. In the circumstances, in line with their amended plea, the agreement previously reached between the parties could no longer stand and that no compensation could be payable to Plaintiff. They therefore denied being indebted to her in any sum whatsoever and moved that the plaint be dismissed.

I have given due consideration to all the evidence put forward before me and the submissions of both learned Senior Counsel.

At this particular juncture, I find it useful and appropriate to quote an extract from the Supreme Court case of **Bastien – Sylva C. v SANLAM General Insurance Ltd [2020 SCJ 259]** which had this to say in relation to constructive dismissal:

"What the learned Magistrate had to decide was whether the appellant was constructively dismissed from employment when he tendered his resignation on 12 November 2008. The relevant test to address these issues was correctly applied by the learned Magistrate as referred to in ***Grewals (Mauritius) Ltd v Koo Seen Lin [2016 UKPC 11]****;*

"when constructive dismissal is in question, the acid test is not whether the employer intended to dismiss; it is whether he has by his conduct objectively judged, repudiated the contract. If he has, the employee is entitled, by accepting the repudiation to treat the conduct as constructive dismissal."

We also wish to stress on the dicta of Lord Denning in ***Wadham Stringle Commercials (London) Ltd v Brown [1983 IRLR 46]*** *which was referred to on appeal in the case of* ***Jugoo v Mircrowise Computer Mart Ltd*** *[2004 SCJ 69];*

"An employee would be entitled to consider that his employer has committed a fundamental breach of contract leading to the discharge of his duties if the employer's conduct is of such a serious and intolerable nature that he cannot reasonably continue working for that employer, or that it has affected him mentally or physically."

We found that the learned Magistrate addressed all the issues and correctly held that it was for the appellant then plaintiff to prove that it was impossible to continue working for the respondent. In deciding whether there was victimization, humiliation, pressure, belittlement or harassment, the learned Magistrate was right to hold that it should be an objective test and not a subjective test. It was not the personal feeling of appellant which should be considered but whether in the mind of the reasonable man, this would amount to victimization, humiliation, pressure, belittlement or harassment.

(…) In the case of Adamas v Cheung [2011 UKPC 32], at paragraph 30, the rule under the arrêt Société Roneo of the Cour de Cassation was adopted (31 October 2000, No de Pourvoi 98-44988 98-45118) "where the Cour de Cassation stated that modification of a contract of employment by an employer, for whatever reason that might be, requires the consent of the employee."

In the present case, when the company adopted a change in the duration of the lunch time period, appellant did not make an issue out of it and even consented to it. After having given his consent to it, appellant cannot rely on the change which occurred in 2007 to plead unilateral modification of the contract of employment in 2008. It is apposite to refer to the case of ***Periag v International Beverages Ltd*** *[1983 MR 108]:*

"the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded

as having elected to affirm the contract and will lose the right to treat himself as discharged."

And this was reiterated in the case of ***Joseph v Rey Lenferna Ltd*** ***[2008 SCJ 342]****."*

Furthermore, I find it relevant to quote an extract from the recent Supreme Court case of **Sunguth R v Keller Geotechnics (Mauritius) Ltd [2022 SCJ 24]** at paragraph 22 which reads as follows:

"As was held in ***Saint Aubin Limitée v Alain Jean Francois Doger de Speville [2011 UKPC 42]****, "constructive dismissal occurs if an employer imposes on an employee unilaterally, that is without the employee's consent, a substantial modification of the original contract conditions: Adamas Limited v Cheung [2011 UKPC 32]. The employee is entitled, though not bound, to treat such a change so imposed as a constructive dismissal."*

Therefore, the issue that this Court has to decide in the present case is whether the conduct of Defendants as gathered from the evidence adduced could establish a case of constructive dismissal against Plaintiff's employers viz. Defendants in the sense that whether when viewed objectively meaning whether from the mind of a reasonable man, her employers' conduct was of such a serious and intolerable nature that she could not reasonably continue working for those employers or whether the latter by their conduct had repudiated her contract (see- **Bastien – Sylva** (supra) and **Grewals (Mauritius) Ltd v Koo Seen Lin [2016 UKPC 11]**) by considering more importantly whether the modification of the agreement reached was substantial and without the employee's consent (see- **Sunguth**(supra), **Saint Aubin Limitée v Alain Jean Francois Doger de Speville [2011 UKPC 42]** and **Adamas Limited v Cheung [2011 UKPC 32]**).

It is abundantly clear that the agreement reached which was accepted by Plaintiff, Mr. Joumont, Mr. Jeebodh and Mr. Leclezio was not to be implemented at the end of December 2015 in relation to a contract scheduled to end at that time as it is common ground that both Mr. Joumont and Mr. Jeebodh were paid their agreed amount of severance allowance prior to 22.12. 2015 meaning prior to the end of December 2015 and that Mr. Leclezio's last day of work was on 22.12.2015 as admitted by Mr. Rivalland and not the 31.12.2015.

At this stage, I find it significant to reproduce the contents of the letter of resignation of Plaintiff dated 22.12. 2015 viz. Doc. A which reads as follows:

"I hereby tender my resignation with immediate effect.

I state that I have no claims of whatsoever nature to make against Island Management Ltd and Island Fertilizers Ltd and any of its directors, "préposés" and agents in their personal names in respect of my employment within the group.

I further state that I have received all my dues whilst I was in employment of the Group."

Therefore, had Plaintiff signed her letter of resignation (vide-Doc. A) dated 22.12.2015 remitted to her on the following day by Mr. Leclezio, the 23.12.2015 would have been her last day of work and not the 31.12.2015. It goes without saying that she attended work pending her being given her resignation letter as per the terms of the agreement reached and accepted by her.

Moreover, it remained unchallenged that Plaintiff after receiving her resignation letter namely Doc. A on 23.12.2015 by Mr. Leclezio, made a complaint to the Labour Office on that day itself and which was an end of year party at work and which was her last day she attended work. Thus, it cannot be construed that Plaintiff had continued to work for the Defendants after not having signed her letter of resignation (vide- Doc. A) received on 23.12.2015 so that the case of **Periag v International Beverages Ltd [1983 MR 108]** will not find its application here as Plaintiff had made up her mind soon after the conduct of Defendants having been brought to her attention.

Had her resignation letter been subject to payment by Defendants of 2 months of severance allowance per year of service to her like Defendants did for Mr. Joumont and Mr. Jeebodh, then Plaintiff would have been expected to sign it following the agreement reached by Defendants and which was accepted by her in September 2015 as per the unrebutted evidence. Furthermore, it is significant to note that there is no evidence to show that Mr. Leclezio signed his letter of resignation without being entitled to one and a half months of severance allowance per his year of service as agreed by Defendants. Prior to Defendants having agreed as regards the quantum of severance allowance in relation to all the 4 employees namely Mr. Leclezio, Plaintiff, Mr. Joumont and Mr.Jeebodh to be paid to them respectively for them to resign as a form of compensation, Defendants ought to have enquired first as to their

individual track record (which in the case of Plaintiff would be going back to June and July 2015) before taking any decision in that respect. Thus, it is untenable that Plaintiff not having accepted the new terms of her resignation letter when brought to her knowledge and which was unilaterally modified by Defendants so that she did not turn up to work from then onwards was still in their employment so that they were at liberty to convene her thereafter to attend to a disciplinary committee to answer 2 charges made against her in relation to 2 alleged acts of misconduct having been carried out by her in June and July 2015 which is a procedure according to law when that ought to have been done well before the agreement was reached and accepted by Plaintiff in September 2015.

The very fact that Plaintiff had accepted to resign upon compensation agreed by Defendants to be given to her, the Defendants cannot unilaterally change the terms of the agreement of Plaintiff's resignation meaning without any payment at all being made to her and without her consent. The letter of resignation viz. Doc. A was not at all what she had consented to namely to resign with immediate effect without being paid anything and on top of that having accepted to forfeit her rights of claims of whatsoever nature to make against Defendants and any of its directors, *"préposés"* and agents in their personal names in respect of her employment within the group after having reckoned 14 years continuous service. What she had consented to was to resign subject to her being paid 2 months of severance allowance per year of service so that the terms of her resignation as per the agreement reached by Defendants and accepted by her were substantially modified by Defendants without her consent. Following her refusal to sign that resignation letter, she was convened to answer 2 charges in relation to alleged acts committed in June and July 2015 before their disciplinary committee as per Doc. B which she refused to attend as according to her it was a sham committee as Defendants meaning her employers had already decided to dismiss her without paying her anything as per Doc. A as per her letter dated 30.12.2015 viz. Doc. C in which she considered herself to have been constructively dismissed from her employment by Defendants. They having substantially modified their agreement without Plaintiff's consent as regards payment of severance allowance in the form of a compensation to her, claimed that because she did not accept being paid nothing at all and having failed to appear when subsequently convened before their disciplinary committee in relation to 2 charges made against her which concerned the period well before the agreement was reached, the payment of compensation as per the original contract could not stand and that they were therefore not indebted to her in any sum whatsoever. That was

because they had not constructively dismissed the Plaintiff as claimed by her on the day she received the letter dated 22.12.2015 which was on 23.12.2015 as per Doc. A. I take the view that the conduct of Defendants would be objectively construed by a reasonable man that Defendants as Plaintiff's employers had already decided to dismiss her according to their terms meaning without any payment at all by having substantially modified the agreement reached and accepted by Plaintiff without her consent when it was agreed that her resignation was subject to her being paid severance allowance for 2 months per year of service as a means of compensation in line with the aim of Defendants to cut down costs in Fertco Ltd so that the disciplinary committee was just a sham committee(see- **Sunguth**(supra), **Saint Aubin Limitée v Alain Jean Francois Doger de Speville [2011 UKPC 42]** and **Adamas Limited v Cheung [2011 UKPC 32]**). Moreover, in the mind of a reasonable man, Plaintiff's employers' conduct would be construed as being of such a serious and intolerable nature that she could not reasonably continue working for those employers and that they had by their conduct repudiated her contract (see- **Bastien – Sylva** (supra) and **Grewals (Mauritius) Ltd v Koo Seen Lin [2016 UKPC 11]**).

It is apposite to note that the Defendants are not bound by the findings of their disciplinary committee as was held in the case of **Planteau de Maroussem v Dupou [2009 SCJ 287]**:

"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."

For all the reasons given above, I find that the case for the Plaintiff has been proved on a balance of probabilities in the sense that both Defendants have by their conduct by applying the objective test highlighted in **Bastien – Sylva** (supra) and in the Privy Council case of **Grewals (Mauritius) Ltd v Koo Seen Lin [2016 UKPC 11]**, constructively dismissed the Plaintiff from her employment.

I, accordingly, order both Defendants to jointly and severally pay to the Plaintiff the sum of Rs. 3,464,387.14 as severance allowance for 140 months of Plaintiff's continuous employment with both Defendants. I also order both Defendants to jointly

and severally pay to Plaintiff interest at the rate of 12% per annum on the amount of severance allowance payable as from 30.12.2015 to the date of final payment. With Costs.

S.D. Bonomally (Mrs.) *(Vice President)*
28.4.22