LEENA RENGHEN VS WOODMAP LTD

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Cause Number: 100/23

THE INDUSTRIAL COURT OF MAURITIUS

(CIVIL DIVISION)

In the matter of:-

LEENA RENGHEN

Plaintiff

VS

WOODMAP LTD

Defendant

JUDGMENT

Introduction

This case concerns a claim of Rs 458,300.48/- by the Plaintiff who considered that the Defendant has put an end to her contract of employment without notice and justification by unilaterally changing her conditions of employment.

The facts

By virtue of a plaint dated the 9th January 2023, the Plaintiff averred that she was in the continuous employment of the Defendant as a shop assistant since the 3rd November 2009, for and in consideration of last monthly salary at the basic rate of Rs 12,875, on a 6-day week basis.

It is the version of the Plaintiff that on the 29th January 2021, the Defendant's preposé, Mrs Marie Paul Nogues, verbally informed her that the work site at Caudan, Port Louis, would be closing down in two weeks' time due to a decrease in sales and travel restrictions and that she would therefore be deployed at a shop located in Bagatelle. The Plaintiff contended that she informed Mrs Nogues that she would not be able to travel to Bagatelle due to her health conditions.

She added that on the 15th February 2021, the Defendant's director, Mr Walter Nogues closed down the shop at Caudan and told her: "Je vous oblige de venir travailler a Bagatelle". On the next day, she received a letter of 'Changement D'Affectation' dated the 15th February 2021 detailing her new working hours and new workplace.

The Plaintiff considered that the Defendant, by its acts and doings, has unilaterally changed her conditions of employment and has therefore put an end to her contract of employment without notice and justification. The Defendant has also failed to pay to her 22 days' annual leave which were still outstanding at the time of her termination of employment.

The Plaintiff is therefore claiming from the Defendant the sum of Rs 458,300.48 made up as follows:

(i)	One month's wage as indemnity in lieu of notice	Rs 12,875
(ii)	Outstanding local leave	Rs 10,894.23
(iii)	Severance allowance for 135 months continuous service	Rs 434,531.25

		RS 458,300.48

The Defendant has denied being indebted to the Plaintiff in the sum claimed or in any sum whatsoever. In its plea, the Defendant has averred that the Plaintiff has been in continuous employment with the Defendant since the 3rd November 2009 until the 09th March 2021 and the Plaintiff was last occupying the post of Sales representative.

The Defendant averred that the Plaintiff"s claim is devoid of merit and is misconceived in as much as it is the Plaintiff herself who abandoned her work and willingly and knowingly, broke her contract of employment with the Defendant. It contended that the Plaintiff did not even once try to attend her designated place of work at Bagatelle such that her stand was purely speculative. The Defendant maintained that the relocation to Bagatelle did not and could not, in the circumstances, make the Plaintiff worse off and moved that the Plaintiff's claim be set aside with Costs.

Observations

I have assessed the evidence on record. The gist of the case is that the Plaintiff is claiming one-month's wages as indemnity in lieu of notice, outstanding local leave and severance allowance on the basis that the Defendant terminated her employment without notice and without justification by unilaterally changing her conditions of employment. On

the other hand, the Defendant has raised the defence of abandonment of work. I shall therefore consider the legal principles in relation to the notion of constructive dismissal and abandonment of work as well as the versions of each party in the case.

CONSTRUCTIVE DISMISSAL

The Law

There is a general principle that the employer cannot unilaterally modify a contract of employment to impose same on the employee without the latter's consent. It has been laid down in the case of **SOMAGS LTEE V GUCKOOL R [2017 SCJ 36]** that:

> *"It is clear that it would be procedurally wrong for the employer to decide, unilaterally, to modify a contract of employment and to impose same on an employee without having consulted with the latter and sought his consent first."*

In the same breath, the Supreme Court referred to Dalloz, Encyclopédie de Droit Social, vo. Contrat de travail n.195 in the case of **VACOAS TRANSPORT CO. LTD V POINTU [1970 MR 35]** for the following proposition:

> *«En cas de modification unilatérale des conditions auxquelles le contrat de travail a été originairement souscrit le refus par le salarié d'accepter les conditions nouvelles n'empêche pas en principe la responsabilité de la rupture d'incomber à l'employeur…»*

Having said that, it is important to consider the nature of the modification of the contract of employment to determine whether same would amount to a termination of the contract. In the case of **NEW MAURITIUS HOTELS LIMITED v PRÉVAUTJ J (2023) SCJ 461,** the Court referred to Encyclopédie Dalloz, Droit du Travail,Vo Contrat de Travail: Modification par Sandrine Maillard –Pinon, février 2021 note 79 and 80 to qualify the nature and function of the modification of the contract of employment. We can read this:

> *«A. Nature du changement:*
>
> *79.Un poste se définit tant par son contenu que par son positionnement dans l'organigramme de l'entreprise. Indépendant de la qualification du salarié, un changement de poste est alors suffisamment important pour pouvoir être refusé, soit lorsque les nouvelles fonctions sont radicalement différentes (V. infra, n os 82 s.), soit lorsqu'elles affectent la place du salarié dans l'entreprise (V. infra, nos 84 s.).*

Fonctions radicalement différentes

80. «En l'espèce, un salarié embauché comme ingénieur était occupé à des fonctions d'«ingénieur qualification» consistant à vérifier les fonctionnalités et la conformité d'un produit en cours et en fin de développement. Il a pu refuser d'effectuer les tâches d'un « ingénieur développement », dès lors que celles-ci consistaient à développer de Nouvelles applications et étaient très différentes des siennes. La Cour de cassation a ici énoncé qu'un «changement d'affectation caractérise une modification du contrat de travail dès lors qu'il concerne des fonctions de nature et de qualification différentes». De toute évidence, c'est surtout la différence de nature des fonctions, dont les juges semblent déduire le changement de qualification, qui a permis d'établir l'existence d'une modification du contrat de travail (Soc. 5 mars 2014, no12.29.242).».

The Court concluded that *"it follows that whenever there is a change or transfer in posting of an employee, any marked difference in the nature of the work of the new job is important in determining whether there has been a modification of the contract of employment".*

In other words, the modification must be substantial and reflective of an important difference in the nature of the work originally performed by the employee. When there is such a substantial modification of the original contract of employment, it can give rise to a case of constructive dismissal, the acid test being whether the employer, 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. **(RE: C.BASTIEN-SYLVA V SANLAM GENERAL INSURANCE LTD (2020) SCJ 259).**

The principle of a constructive dismissal has been laid down in the cases of **SAINT AUBIN LIMITEE V ALAIN JEAN FRANCOIS DOGER DE SPEVILLE (2011 UKPC 42)** and **SUNGUTH R V KELLER GEOTECHNICS (MAURITIUS) LTD (2022) SCJ 24**, as follows:

*"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."*

It is further laid down in the case of **A. J. MAUREL CONSTRUCTION LTEE V FORGET H. R. N (2008) SCJ 164** and reproduced in the case of **MAURIVET LIMITED v HURON J M 2023 SCJ 226** that:

> *"la modification essentielle est celle qui transforme un élément du contrat qui présentait de l'importance pour un salarié lors de la conclusion du contrat de travail ou qui aggrave de façon notable ses conditions de travail (modification de l'horaire, du lieu de travail…".*

It is important therefore to consider whether the nature of the modification, in the present case, would give rise to a claim of constructive dismissal.

CONSTRUCTIVE DISMISSAL - *Applying the law to the facts*

It is not disputed that on or about the end of January 2021, the Defendant informed the Plaintiff that it had decided to relocate its shop from Caudan, Port Louis to its own manufacturing workshop situated at AT.io, Bagatelle precinct, Moka Smart City and that the Plaintiff would be reassigned to Bagatelle.

In cross-examination, the Plaintiff explained that the problem caused by the modification of her contract of employment was the relocation and new place of work, rather than the new hours of work for which she didn't contest. In fact, the working days changed from Monday till Saturday to Monday till Friday, with a total number of 40 working hours rather than 45 hours. I have therefore considered whether the relocation of the place of work by the Defendant would amount to a substantial modification of the contract of employment which could establish a case of constructive dismissal by the Plaintiff.

At this juncture, I deem it fit to refer to the case of **RAMSURRUN P. v FLOREAL KNITWEAR LTD (2006) SCJ 287** where it has been laid down as follows:

> *"It is well established that a worker is entitled to treat his contract of employment as having been terminated by his employer when there has been a unilateral modification by the employer of an essential condition of his contract.* ***Vide Vacoas Transport v Pointu*** *[1970 MR 35]****, Periag v International Beverages Ltd*** *[1983 MR 108]. Whereas a worker's remuneration and his hours of work are generally considered to be essential conditions of a worker's contract of employment, his workplace on the other hand will, in certain circumstances, be considered as such. A unilateral change of the place of work of a worker will not always entitle him to treat his contract of employment as having come at an end. This is illustrated by the conclusions reached by this court in* ***S. Tirbanee v Floreal Knitwear Ltd [2002***

SCJ 146]and Mrs B. Bridoux v Noblesse CieLtee [2004 SCJ 49]. *The circumstances which brought about the change and the prejudice incurred by the employee as a result of the change are factors to be taken into consideration, but more importantly is the intention of the parties at the time of the contract that the place of work constituted an essential condition of the contract of employment".*

I have considered the contract of employment between the Plaintiff and the Defendant which reflects the initial intention of the parties as they laid down the essential conditions of work at the time of entering the contract. It is laid down in **Camerlynck, second edition, Tome 1 at paragraph 390** that *:"C'est donc, suivant la formule de la cour de cassation, à la date de la conclusion du contrat (....) que doit être recherché par les juges du fond si la modification revêtait ce caractère essentiel dans l'esprit des parties et non à une date ulterieure en considérant les particularités actuelles de la situation personnelle de la salariée concernée.... En realité, la jurisprudence interpretera bien souvent la prétendue volonté initiale des parties en fonction des circonstances, de la nature objective de l'emploi ainsi que de l'activité de l'entreprise ».*

In the present case, I have perused the contract of employment entered between the Plaintiff and the Defendant dated the 4th November 2011 and produced by the Plaintiff in Court. I read therein that the Defendant has a head office in Riche en Eau, St Hubert and showrooms in Caudan Port Louis and Ruisseau Creole, Riviere Noire. Amongst the conditions of work adhered to by the Plaintiff, the place of work has never been mentioned. The Defendant explained that the Plaintiff was a sales representative for the company in general and hence, the exact location of the place of work was not mentioned in her contract. The Plaintiff conceded to this in cross-examination and hence, I have no difficulty to find that the place of work was not a condition of the contract of employment. Instead, there is a clause in the contract stipulating : *If the distance between your residence and your place of work exceeds 3 km, you shall be refunded of the equivalent of the return bus fare.* This means that the place of work has not only not been mentioned but is also a flexible destination for which the Plaintiff would be refunded.

In view of the contract of employment, it can safely be deduced that the initial intention of the parties when entering the contract was not limited to one specific place of work for a company which had different showrooms and which would pay transport costs to the Plaintiff. Although the Plaintiff was posted at the showroom of Caudan and was the sole person responsible for the shop as explained by the Defendant in cross-examination, the fact remains

that the Plaintiff was not employed to work in the Caudan shop only, the place of work not being an essential element of her contract of employment.

I have further considered the circumstances of the case, the functions of the Defendant company and the reasons which brought about the change in relocation of the place of work. The representative of the Defendant explained, in Court, that the Defendant is a private limited company incorporated in Mauritius on the 08th April 2009 and was at the material time involved in the manufacture and sale of handicraft products. Until 2021, the Defendant's main place of business was at a shop in Caudan, Dias Pier, Port Louis.

It averred that given the prevailing economic condition following the Covid-19 breakdown of 2020/2021 and subsequent closure of the Mauritian borders, the Defendant's business operations were severely affected as its customers consisted mainly of foreigners. In January 2021, owing to the drastic decrease in sales, resulting in about 80% of the turnover, the Defendant had no other viable alternative but to relocate by closing its shop at Caudan, Port Louis, and opening a shop in its own manufacturing workshop situated at AT.io, Bagatelle precinct, Moka Smart City.

According to the Defendant, the relocation of the Defendant's shop from Caudan to Bagatelle was necessary and justified at the material time due to the difficulties occasioned by the Covid-19 pandemic. The Defendant contended that had it continued operations at its shop in Caudan, its business would have collapsed completely, thereby jeopardising the continued employment of its employees. The Defendant sustained his argument that the relocation from Caudan to Bagatelle was necessary in cross-examination by averring that the rental of the Caudan shop was too heavy. Therefore the Defendant has in good faith adopted measures to mitigate the situation, thus preventing redundancies.

It is the version of the Defendant that the changes made by the Defendant employer with respect to the workplace and working hours were decisions which it was entitled to take for the better running and exigencies of its business in its own discretion and were not significant ones. It went on to say that the place of work was not an essential term of the contract of employment and at no point in time did the Plaintiff make any protests as to the changes in the working hours at the material time. The Defendant added that the Plaintiff did not even once try to attend her designated place of work at Bagatelle such that her stand is purely speculative. The Defendant maintained that the relocation to Bagatelle did not and could not, in the circumstances, make the Plaintiff worse off.

In cross-examination, the Plaintiff agreed that the relocation of the place of work occurred at the time of the Covid-19 pandemic, after the shop had been closed for about 2 to 3

months. In such a situation, I find that the Defendant acted in good faith by relocating the Plaintiff and saving her employment at a time when tourism and sales had decreased.

I have further noted that the relocation was from Caudan to Bagatelle, which according to the Plaintiff would have warranted a change of bus to attend the new place of work. The Plaintiff contended that the relocation paused problems to her health conditions and she produced in Court, a medical certificate establishing that she has a history of migraine and sciatica which could be affected by a long travel.

In the case of **BRIDOUX MRS. B. & 32 ORS v NOBLESSE CIE LTEE 2004 SCJ 49,** the Court found a relocation from Coromandel to Tyack/Souillac to constitute hardship to the employee leading to a termination of employment. It referred to the principle laid down in **Camerlynck, Droit du Travail 2ème Edition Vol. 1 para. 391**, to the effect that :

> *«La jurisprudence a reconnu un caractère essentiel aux modifications suivantes:*
>
> *….Modification du lieu de travail, qui constitue en règle générale une condition essentielle du contrat par interpretation de la volonté des parties, notamment «si elle rend le déplacement plus difficile, plus pénible, plus long et plus fatiguant pour l'intéressé»"*

In the present case, the distance between Port Louis to Bagatelle cannot be construed to be so long as to be substantively difficult, hard, long and too tiring for the Plaintiff. Although she would have had to change buses along the way, there is nothing which suggests that the road would be too long or difficult to travel. The Plaintiff would not be in a position to tell whether the distance between Port Lous to Bagatelle was substantially long and difficult as she never even once tried to attend her new place of work. In fact, the medical certificate does in no way mention that the Plaintiff cannot travel a reasonable distance and at any rate, the Plaintiff is someone who was in a position to travel to Court and face Trial.

I therefore find that the relocation of the place of work from Port Louis to Bagatelle did not amount to a substantive modification of the contract of employment between the Plaintiff and the Defendant. In fact, the Defendant did everything possible to preserve employment in a difficult situation.

ABANDONMENT OF WORK

The Law

It is the version of the Defendant that the Plaintiff abandoned her work and willingly and knowingly, broke her contract of employment with the Defendant. The provision

governing abandonment of work can be found in section 61(3) and (4) of the Workers Rights Act. They are as follows:

> *(3)An agreement shall not be broken by a worker where he absents himself from work for not more than 3 consecutive working days without good and sufficient cause for a first time.*
>
> *(4)Subject to subsection (3), where a matter, in relation to the absence of a worker is referred to an officer or to the Court, the employer may not set up as a defence that the worker has abandoned his employment unless he proves that the worker has, after having been given written notice –(a) by post with advice of delivery; or (b)by delivery at the residence of the worker, requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours on receipt of the notice.*

In the case of **DINDOYAL P. v GOURREGE A.2015 SCJ148** referring to the case of **BELLE VUE MAURICIA (HAREL FRÈRES) LTD V THE PERMANENT SECRETARY, MINISTRY OF LABOUR AND SOCIAL SECURITY [1974 MR 31]**, the Court explained what is meant by abandonment of work –

> *"In a case of dismissal, the employer is in effect saying: whether the employee is willing to work or not, I have decided to terminate his employment. Abandonment of work, on the contrary implies that the employer was still willing to provide work, but that the employee refused to give his services any longer".*

The Court found that it was considered that the worker had abandoned his work when he openly declared his intention not to perform work which he had been lawfully requested to perform.

ABANDONMENT OF WORK - *Applying the Law to the facts*

The Defendant averred that by letter dated the 15th February 2021, the Plaintiff was informed of her reassignment to Bagatelle and she was formally requested to report at work at Bagatelle on Monday the 22nd February 2021. However, the Plaintiff failed to report to work since the 22nd February 2021 without any good and sufficient cause.

On the 26th February 2021, given that the Plaintiff has been absent from work for more than 3 consecutive days without any good and sufficient cause, the Defendant caused a latter to be sent to the Plaintiff, requesting her to resume work within 24 hours from receipt thereof,

and failing which the Defendant would have no other alternative than to consider that the Plaintiff has abandoned her work and that she has willingly and unilaterally broken her employment relationship with the Defendant without valid cause and/or justification.

It is the Defendant's contention that the Plaintiff failed to comply with the requirements of the said letter to resume work, thereby showing her intention to abandon her work. The Defendant averred that the Plaintiff did not even respond to the letter dated the 26th February 2021, nor did she forward any medical certificate covering her period of absence. The Defendant therefore considered that the Plaintiff had abandoned her work and that she had broken her contract of employment, and sent a letter dated the 9th March 2021 to that effect to the Plaintiff. The Defendant added that the Plaintiff willingly, and in full knowledge of the implications, chose to break her contract of employment with the Defendant and despite being requested to resume work, failed to do so. In Court, the Defendant produced the letter dated the 26th February 2021 evidencing that the Defendant requested the Plaintiff to resume work within 24 hours from receipt of the said letter. The Plaintiff conceded that she received such letter but never replied to same.

It is clear that we are in a situation where the Defendant was willing to provide work to the Plaintiff but the latter was no longer willing to provide her services. The Plaintiff did not attend work from the 22nd February 2021 until the 26th February 2021, date on which the Defendant caused a letter to be sent as the Plaintiff was absent for more than 3 consecutive days without any good and sufficient cause. In these circumstances, the Defendant duly paid to the Plaintiff all sums due in relation to her leave period and bonus.

The difference between mere absence and abandonment of work can be gleaned from the case of **MAURITIUS AGRICULTURAL AND INDUSTRIAL CO. LTD V THE PERMANENT SECRETARY, MINISTRY OF LABOUR & SOCIAL SECURITY ON BEHALF OF AUCKLOO [1974] MR 34.** It was laid down as follows:

> *"Absence is a mere fact independent of any mental element. Abandonment, on the contrary, implies a specific intent –viz the intent of the worker not to resume work and to treat the agreement as dead. On such a view, there is no conflict between the two enactments. To plead abandonment of work implies saying two things: first, the worker was absent from work, and second, he intended not to resume work. The effect of section 7(3) is that the employer will not be allowed to prove that specific intent unless he has first taken steps to remove any possible controversy –viz by calling on the worker to resume work".*

In the present case, there is no doubt that the Plaintiff had no intention to resume work. She conceded that she did not even try to attend the new place of work at Bagatelle and did not even tell the Defendant that she considered the relocation as a termination of her employment.

The Defendant, for its part, duly did the needful to comply with the requirement for a statutory safeguard of a written ultimatum to the employee. **(RE: SEETOHUL V OMNI PROJECT LTD (MAURITIUS) (2015) UKPC 5).** The Defendant duly caused a letter to be sent to the Plaintiff requesting the latter to resume work but the Plaintiff failed to do so.

I have borne in mind the dicta in the case of **DINDOYAL P. v GOURREGE A. (2015) SCJ148** to the effect that: *"The Court must be satisfied that the employee's decision to leave his job was unequivocal and brought about as the result of a pondered and lucid decision"*. In the present case, I find that the Plaintiff's decision to leave the job was not upon an impulsive moment or under the spell of emotions. She clearly abandoned her work despite being requested to resume work in a situation where a relocation of work did not amount to a termination of employment by the Defendant.

Conclusion

In light of the above, I find that the Defendant case has remained credible. I find that the Plaintiff has failed to prove its case on a balance of probabilities. I dismiss the case.

Judgment delivered by: M.GAYAN-JAULIMSING, Ag President, Industrial Court
Judgment delivered on: 01st October 2024