BHOYROO RAVINDRANATH v/s DENIM DE L'ILE LIMITED

2020 IND 17

THE INDUSTRIAL COURT OF MAURITIUS
(CIVIL JURISDICTION)

C N 126/12

In the matter of :

BHOYROO Ravindranath

Plaintiff

v/s

DENIM DE L'ILE LIMITED

Defendant

JUDGMENT

Plaintiff is claiming from the defendant the total sum of Rs 525,480 as he considered that the defendant has terminated his employment without reasonable cause and/or justification. He further considered that the said dismissal was oppressive, unjust and unfair. Defendant has denied same and has averred that plaintiff was dismissed for gross misconduct and hence it could not in good faith take any other course of action. It therefore denied being indebted to the plaintiff in the sum claimed or in any other sum whatsoever.

The pleadings

In an amended proecipe plaintiff averred that he was in the continuous employment of Union Textiles Ltd as Labourer since March 1990. In 1995 Union Textiles Ltd changed its name to Novel Textiles Ltd and plaintiff was by then a Mechanic. In June 2004 Novel Textiles Ltd ceased its business and defendant took over the business. Plaintiff was then offered employment as Mechanic with effect on 24/6/2004. As at August 2005 he was earning a terminal remuneration of Rs 11,139. Plaintiff further averred that on 31st August 2005

defendant summarily dismissed him from employment without any reasonable cause and/or justification. He considered such dismissal as oppressive, unjust and unfair. Hence his claim for severance allowance and 3 months' wages in lieu of notice in the total sum of Rs 525,480.

In its plea the defendant whilst admitting that it offered employment to plaintiff as mechanic as from 24th June 2004, denied that the plaintiff was earning a terminal salary of Rs 11,139 in August 2005. It averred that plaintiff was paid compensation in 2004 by Novel Textiles Ltd when the latter ceased its business. Defendant further denied that it dismissed plaintiff from employment without cause and/or justification. It averred that following a disciplinary committee plaintiff was dismissed for gross misconduct and in the circumstances it could not in good faith take any course of action. It therefore denied being indebted to the plaintiff in the sum claimed or in any other sum whatsoever.

Plaintiff's case

The following witnesses deposed on behalf of the plaintiff:

-Miss A Jhingree, Compliance Officer at the Registrar of Companies produced two certificates of incorporation of Union Textiles Ltd and Denim de L'ile Limited respectively (Docs.A & B) as well as a certificate of a change of name of Union Textiles Ltd to Novel Textiles Ltd (Doc.C). She also produced a true and certified copy of the director's report and financial statements of Denim de L'ile Limited for the year ending 30 June 2005 (Doc.D). She stated that at pg 17 of the report in respect of taxation it is mentioned that *"In the context of the take-over of the business assets of Novel Textiles Limited and Novel Garments (Mauritius) Limited (The 'Novel Group') by the Company, the Minister of Finance and Economic Development has, under section 57A of the Income Tax Act, approved the transfer of up to 45% of the unrelieved tax losses of the Novel Group as at 30 June 2004 to the Company……..."*

Under cross examination the above witness confirmed that Union Textiles Ltd , Novel Textiles Ltd on one hand and Denim de L'ile Limited on the other hand are two different legal entities. She further confirmed that the paragraph which she just read out starting with "In the context of the take-over ……..." at pg 17 it is also mentioned at the end of the said paragraph the following *"At 30 June 2004, the unrelieved tax losses transferred amounted to approximately Rs 600 million."*

-Mr J Suhootoorah, Lead Analyst at the Ministry of Finance deposed to the effect that according to records, on 22 June 2004 the Minister of Finance & Economic Development in the context of the take-over of Novel Group by Denim de L'ile approved the transfer of up to

45% of the unrelieved tax losses of Novel Textiles Ltd & Novel Garments Ltd as at 30 June 2004 to Denim de L'ile Limited. He explained that this transfer of unrelieved tax losses is a fiscal incentive given to manufacturing companies in compliance with section 59(A) of the Income Tax Act. That incentive is given in cases of take-over. In the present case it was given subject to two conditions: That Denim de L'ile will re employ 1,400 out of the 3,100 mauritian employees and the fresh employment term should guarantee these employees at least the same basic salary that they were earning previously at Novel. He confirmed that the terms and conditions of the re employed employees will not be less beneficial in terms of the basic salary. He produced a document to the above effect (Doc.E).

Under cross examination the above witness stated that apart from the above document it was not possible to retrace any other document from the ministry as it dates back as far as 2004. He confirmed that Doc.E is in fact a letter sent from the Ministry to PriceWaterhouseCoopers (PWC). At the material time the latter was the company's consultant. He further added that despite the fact the Ministry has officially written to PWC to find out any other document in relation to the present matter, it has not replied but unofficially through phone they have been told that no other document has been found. He produced the letter he sent to PWC (Doc.F).

Mr R Bhoyroo, the plaintiff in the present matter adduced evidence which was in substance as follows:

He confirmed that since March 1990 he was working as Labourer at Union Textiles Ltd which in 1995 changed its name to Novel Textiles and then to Denim de L'ile (DDI)in 2004. He produced a letter dated 30 June 2004 emanating from Novel Textiles to the effect that he has been working in the weaving department as mechanic (Doc.G). In 2004 he was offered employment in Denim de L'ile. He produced two letters dated 24 June 2004 to that effect and signed by Mr Sohawon who was working as HR in Novel Textile and then in Denim de L'ile. The latter explained to him that Novel Textile was closing down and that he will continue his employment with Denim de L'ile on the same terms and conditions of work namely concerning his hours of work, wages, local and sick leaves. In 2004 he was working as mechanic in Novel Textiles as well as foreman shift in the weaving department. He kept the same employment with Denim de L'ile. He produced a document dated the 01 July 2004 signed by him regarding the terms and conditions of his employment with Denim de L'ile (Doc.J) where he worked until August 2005 when his employment was terminated. At the material time he was drawing a monthly salary of Rs 11,139 and he produced his pay slip for the month of August 2005 (Doc.K).

Plaintiff explained that he received a letter of convocation from Denim de L'ile dated 25 August 2005 to attend to a disciplinary committee (Vide Doc.L). In the said letter there were two charges levelled against him namely that on 24 August at 1.30 a.m he was not on his site of work and that about 2.00 a.m he was found in a room with another person. He attended the disciplinary committee and gave his explanations. Thereafter he received a letter dated 31st August informing him that the second charge was found proved and that the company had no other alternative than to terminate his employment (Doc.M).

In relation to the charges levelled against him, plaintiff explained that on the 24th August at about 1h30 a.m he was at work. As foreman he had to drive a forklift to bring materials from one building to another. He knows the Chinese woman whose name is mentioned in the letter of charges as an employee working in the weaving department. He stated that he was also working on a shift system and on the material date he was doing night shift. There was a team of workers comprising of operators and cleaners who were under his responsibility but the person mentioned in the letter of charges did not form part of the said team of workers. On the material date whilst he was coming out of a building called Long chain beam section to go to another building, he saw two Chinese ladies who were coming into the said building. As they were not supposed to be at work at that time, he queried them and one of them told him "portable, portable". He stated that the Chinese ladies only spoke a little creole and he talked to them in creole and also with signals. He conceded that at the material time Mr Seeram and Mr Ajodha were working as security guards in the defendant company but before that Mr Seeram was working in his team shift as cleaner. But following the take-over of the previous company by Denim de L'ile Limited, Mr Seeram's employment was terminated and thereafter he saw him working as security guard. He stated that Mr Seeram thought that it was him who gave his name as among one of the employees to be fired when the factory was closing down. Both Mr Seeram and Mr Ajodha deposed before the disciplinary committee. According to the plaintiff Mr Seeram has levelled a false charge against him and has lied before the committee inasmuch as before the committee he stated that on the material date he allegedly saw him fastening his belt whilst Mr Ajodha stated that he allegedly saw him pulling up his trousers. Plaintiff further added that at the material time he was in the forklift and he was going to the mess room found in the Long chain beam section. In the said building there are no doors but only one opening.

Plaintiff confirmed that he gave his explanations before the disciplinary committee in relation to the two charges against him and thereafter he was informed that one charge has been found proved. He maintained that his employment was terminated without justification. When he was working for Novel Textiles he was a good employee (as per the document which he has produced) and he was granted the best attendance award. He further maintained his

claim against the defendant in the total sum of Rs 525,480 representing severance allowance at punitive rate and 3 months' wages in lieu of notice.

Under cross examination plaintiff confirmed that in the year 1990 he was working for Union Textiles which in 1995 became Novel Textiles. Then the latter closed down so that he started working for DDI. He admitted that he stopped working for Novel Textiles in June 2004. He is not aware that DDI bought only the assets of Novel Textiles. He stated that Mr Ameen Sohawon told him that his conditions of work with DDI will remain the same. Upon being shown Doc.J he admitted that it is a contract of employment with DDI with a probation period of 3 months and that he signed same. He knows that there is a pension scheme for employees and that from 1989 until 2003 Novel Textiles was contributing for his pension scheme. In 2004 -2005 the contribution was from Denim de L'ile and in 2007 it was from a company called RS Denim Ltée. That company has no connection with Denim de L'ile. After that he was employed by Pleasure Train Co Ltd, then by RS Denim Ltée again, after which he went to work for FM Denim. He admitted that as per Doc.G Novel Textiles closed down on 30/6/2004. He further admitted that his employment with Novel Textiles was terminated on 30 June 2004 and that as from 01 July 2004 he had a new contract of employment with Denim de L'ile. He denied that Denim de L'ile i.e the defendant company in the present case is not indebted to him in any sum claimed. He did not agree that his period of employment with Novel Textiles cannot be taken into account in his employment with Denim de L'ile. He conceded that he received a sum of Rs 71,827.21 corresponding to the normal rate of compensation when the company ceased business.

Plaintiff denied that he committed a gross misconduct. He stated that in August 2005 he was working on night shift which started at 11h p.m and ends at 7h a.m. The alleged incident occurred during the night of 23 -24 August at nearly at 1h30 a.m. He was not aware that on the material date Mr Ajodha and Seeram saw an ex patriate Chinese worker whilst they were doing their night patrol and that upon seeing them she ran away nor was he aware that they followed the said Chinese worker up to the store. He did not agree that when Mr Ajodha and Seeram entered the store they saw him together with another female Chinese worker. He denied that at the material time Mr Ajodha saw both the Chinese worker and himself pulling up their trousers. He further denied that he asked for excuse to Mr Seeram in the following words: "lot coup mo pas pu faire sa excuse mwa, excuse mwa". He stated that he never requested them not to put in any entry to that effect in the Entry book.

He recalled that he attended to a disciplinary committee where Mr Ajodha and Seeram gave their version. He admitted that thereafter he received a letter to the effect that charge 2 has been proved against him and that the company had no other alternative than to terminate his

employment. He did not agree that the company is not indebted to him because he had committed a serious misconduct and that the termination of his employment was justified. He further did not agree that as from the 01 July 2004 he entered into a new contract of employment with the defendant company.

Defendant's case

The following witnesses deposed in support of defendant's case:

-Mr Sohawon deposed to the effect that in the year 2004 the company Novel belonged to Chinese Investors, then the latter closed it down and it was purchased by Italian Investors who changed its name to Denim de L'ile Limited.

The above witness stated that as regards Mr Ravindranath Bhoyroo (i.e the plaintiff in the present case) the latter was employed as mechanic in the weaving department but when the company was taken over by Denim de L'ile Limited (DDI), the employees were retained but there was a shift in employment with a new contract of employment. He explained that the new employer was Denim de L'ile Limited and the employment of Mr Bhoyroo with DDI started as from 01.07.2004. Novel and DDI are two complete entities. When 'Novel' was closed the company agreed with the help of the Ministry of Labour to pay to each employee, including the plaintiff, a compensation at normal rate as per the law. A new employment was offered to all employees who were retained. Some of the staff who were foreigners namely Chinese had to go back but those who were retained were offered a new contract of employment with new conditions. He confirmed that a sum of Rs 70,000 was paid as indemnity to the plaintiff and that there was no continuity of employment for the plaintiff with DDI. He further confirmed that in 2005 the plaintiff's employment was terminated for gross misconduct.

Under cross examination the above witness confirmed that in 2004 he was the personal Manager of Novel Textiles. He agreed that the letter dated 21st June 2004 was under his signature (i.e Doc.H). He further agreed that there are in fact two letters dated 21st June and 24th June respectively under the heading of Denim de L'ile Limited to the effect that Mr Bhoyroo was being offered employment with effect as from 24th June. He explained that Denim de L'ile Limited took over from Novel Textiles on 1st July 2004 but it was agreed between management that employment will take effect from 24th June 2004. He further explained that he wrote the two letters under the instructions of the management and at the material time being the HR Manager he was doing the liaison between the two companies i.e Novel Textiles and Denim de L'ile.

He conceded that at all times during the period of transition the plaintiff was working in the factory as mechanic. He however stated that when the new employer took over the company the employees were still in employment but not with the same years of service. He admitted that previously Novel Textiles was known as Union Textiles but it was the same company. Novel Textiles was paying contribution for the plaintiff and following termination of his employment with 'Novel' he was given a compensation of Rs 71,827. The said sum was reached by taking into consideration the period of notice which is three months' salary and the length of service namely two weeks per year of service but he is not in a position to explain exactly how the sum was calculated as he did not have all the facts and figures in his possession being given that the company has closed down.

The above witness maintained that when Denim de L'ile took over from Novel Textiles the employees continued to work with a new contract of employment. He did not know what is meant by fiscal incentive and he cannot say whether there were conditions that Denim de L'ile had to employ 1,600 employees on the same terms and conditions. Same was decided between the directors. He stated that Mr Seeram was a security guard but he could not recall whether the latter was working together with the plaintiff in the weaving department. He did not know whether Mr Seeram was working under the supervision of the plaintiff.

In re examination Mr Sohawon stated that he cannot confirm whether with Novel Textiles Mr Bhoyroo was a staff member but he knows that he was in the weaving department.

-Mr Appanah, the defendant's representative deposed and his evidence was in substance as follows:

He is the Human Resource Manager of Denim de L'ile Limited. He explained that in 2004 there was a change in ownership, namely before 2004 it was Novel Textiles and then it was taken over by Denim de L'ile Limited which is a private limited company incorporated on 14.05.2004 as a new company. The latter took over the business assets of Novel Textiles and the company employed the workers on fresh terms and conditions of employment with no provisions of past service of the workers from Novel Textiles. He confirmed that Mr Bhoyroo – (the plaintiff) was part of the staff of Novel Textiles and he was employed by Denim de L'ile Limited on 01.07.2004 as mechanic in the weaving department. He is a staff according to his letter of employment and he worked for about a year when his employment was then terminated.

Mr Appanah stated that the plaintiff appeared before a disciplinary committee following an incident whereby the security guard Mr Ajodha found him in a small room near the Long beam section. He was caught at about 2h00 a.m with a Chinese operator and at the material time he was seen pulling up his trousers. His enquiry revealed that on the material date the

plaintiff left his post in the weaving section and went in the mess room in the long beam section. He was together with an expatriate Chinese operator and when he was caught by the security guard he was pulling up his pants. He asked for forgiveness and even requested the security guard not to report the said incident in the diary/enquiry book of the security. Hence plaintiff was convened before a disciplinary committee and thereafter his employment was terminated for gross misconduct.

The above representative of the defendant company stated that he considered the plaintiff had committed an indecent behavior at the workplace and hence the company is not liable to the plaintiff in the sum claimed or in any sum whatsoever. He maintained that plaintiff entered into a new contract with Denim de L'ile Limited as from the 01 July 2004 with a probation period of three months as a fresh employee in the company. He confirmed that the plaintiff was compensated when his contract of employment with Novel Textiles was terminated after the latter had closed down. He was also an employee of Novel Textiles. When the latter closed down in 2004 all the employees were paid a compensation of two weeks per year of service as per the agreement which was reached between the Ministry of Labour and the company Novel Textiles. And the employees were offered fresh employment with fresh terms of employment together with a probation period.

Under cross examination Mr Appanah stated that he was working as Assistant H R with Novel Textiles and hence he was assisting Mr Sohawon. He too was offered some compensation when the company closed down and his contract of employment with Denim de L'ile Limited took effect as from 01.07.2004. When Doc.J was shown to him, he agreed that same is dated 01.07.2004 under the signature of the General Manager. He confirmed that Mr Bhoyroo- the plaintiff signed the said letter on the 5th July 2004. When referred to Docs. H and H1, he explained that at that time the company sent job offers to many workers including the plaintiff but the employment started on the 1st July as the company started its operations on the 1st July 2004. He cannot confirm whether at some point in time the plaintiff has stopped working in the weaving department of Novel Textiles but he maintained that when the Italians bought over the assets of Novel Textiles they started operations on the 1st July 2004 and the recruitment of employees started as from that date. Novel Textiles stopped operating and the plaintiff's employment with Novel Textiles was stopped and he entered into a new contract of employment with Denim de L'ile Limited with effect from 1st July 2004. There are no provisions for past services in the new contract of employment. All workers were offered a fresh employment with a probation period.

Mr Appanah stated that he became HR of the defendant's company in 2005. He is aware that in the context of the take-over of the Novel Group by Denim de L'ile Limited the Minister

of Finance has approved the transfer of losses of Novel Textiles as at June 2004 subject to two conditions namely that the company would re employ 1,400 out of 3,100 Mauritian employees and that the fresh employment terms would guarantee the same level of basic salary that the workers were previously earning.

Regarding the incident of August 2005, Mr Appanah stated that it was the security guard Mr Ajodha who whilst doing his patrol found a Chinese worker running in a corner in the mess room. Then he found the foreman in the room together with the Chinese worker, following which he called his colleague Mr Seeram who at that time was posted at the gate, to come on site i.e in the weaving section near the mess room. Then there were exchanges between Mr Bhoyroo with Mr Ajodha and Mr Seeram. He did not agree that the plaintiff never asked Mr Ajodha or Seeram not to put in any entry. The investigation revealed that Mr Bhoyroo asked for forgiveness and also requested them not to put in any entry in the diary book of the security. He stated it was not true that on the material date the plaintiff was at all times in the forklift, going from one building to another and maintained that at the material time he was found in a room together with a Chinese worker.

Mr Appanah further stated that the compensation that was offered to the plaintiff took into account the number of years he was in employment with Novel Textiles from 1995 to 2004.

-Mr Ajodah, deposed as to the incident which occurred during the night of 24 August 2005. At the material time he was working as security guard in the defendant company, on a shift basis together with other colleagues namely Mr Seeram and Mr Foolchand among others. There were about 5-6 security guards on duty. He explained that on the material date after midnight whilst he was doing his patrol he heard a noise. As it was dark he lit up his torch and then he saw two persons, a Chinese lady and Mr Bhoyroo. They were both pulling up their trousers. He called his colleagues and when Mr Seeram and Foolchand came on the spot he continued his patrol and thus he did not know what exchange took place between Mr Bhoyroo and his colleagues.

Under cross examination Mr Ajodha confirmed that at the material time he was an employee of Denim de L'ile Limited but now he is no longer working in the defendant company. He knows Mr Bhoyroo as an employee of the said company but he was not befriending him. He further confirmed that on the material date and at the material time he was on foot patrol and he was alone. He explained that whilst he was patrolling and reaching near a corridor he heard a noise and someone talking. He therefore lit up his torch and saw the plaintiff together with a Chinese female worker. He then called his colleague through radio and when the latter came he went away. He further explained that the corridor is inside a building near a window which at the material time was wide open and therefore any noise inside or when

someone is talking inside, could be heard outside. There is a mess room on the other side of the building. He maintained that whatever he is stating in Court was what he actually saw at the material time i.e the plaintiff together with a Chinese female worker and at the material time they were both pulling up their trousers.

Mr Ajodha further stated that it was Mr Seeram who came on the spot together with another person, following which he left the site. It was his duty to inform Mr Seeram as he was working under his instructions. It was for Mr Seeram and his colleague to take their decision and to put the relevant entry. He could not recall whether he put up an entry. He did not recall either what he said before the disciplinary committee because it was so many years ago. He however added that what he said before the disciplinary committee was what he saw on the material date whilst he was patrolling. He did not know whether on the material date Mr Bhoyroo was working as forklift driver. He further stated that he will not say something which he has not seen and he maintained that whatever he said in Court was what he actually saw on the material date and time.

In re examination the above witness stated that before he entered into the corridor he lit his torch. He explained that he would not have entered the corridor if he would not have heard a noise and it was then that he saw a Chinese female worker together with Mr Bhoyroo. He then immediately called his colleague through radio. On the material date there were many Chinese workers doing night shift. He could not recall whether there was another Chinese female worker who ran away.

-Mr Seeram was also called to depose in support of the defendant's case. His testimony was in substance as follows:

In the year 2005 he was working as security guard at Denim de L'ile Limited but now he is no longer working. He confirmed that during the night of 23-24 August 2005 he was doing night shift. On the material date at about 2h00 a.m Mr Ajodha and himself were doing a surprise check. Reaching near the warehouse he saw Mr Bhoyroo together with Mr Ajodha and a Chinese female worker. Mr Bhoyroo then came towards him and told him the following words "lot coup mo pas pou faire sa, excuse moi, excuse moi". Then Mr Ajodha reported the matter to Mr Foolchand.

Under cross examination the above witness admitted that he was working in Novel Textiles before he joined employment as security guard with Denim de L'ile Limited. He was working in the dyeing section but he was not under the supervision of Mr Bhoyroo who was posted in the weaving department. He did not agree with plaintiff's version to the effect that he caused him to be responsible for the termination of his employment with Novel Textiles. He stated that the decision was taken by the management and superior officers.

He explained that his duty as security guard consisted in keeping watch on the factory and the workers. He is aware that at the material time Mr Bhoyroo was employed as foreman and that he used to drive the forklift from one building to another. He further agreed that on the material date whilst Mr Bhoyroo was working on night shift he was driving the forklift from one building to another. He maintained that at the material time when he went on the spot he saw Mr Bhoyroo together with Mr Seeram and a Chinese female worker in the courtyard of the factory but he did not know what had happened. He did not put up any entry because he did not see anything. It was Mr Foolchand who put up the entry because he was the person in charge. He informed the latter of the incident following which he put up an entry. Mr Seeram confirmed that he deposed before the disciplinary committee but he denied that he stated therein that on the material date he saw Mr Bhoyroo pulling up his trousers. He stated that when he reached the spot Mr Bhoyroo came towards him and told him the following words twice “lot coup mo pas pou faire ca, excuse moi, excuse moi”.

In re examination upon being shown a document emanating from Denim de L’ile Limited he confirmed that same is a report from the security section and in which was reported the incident he referred to above. He further confirmed that therein was mentioned that on the material date Mr Ajodha and himself were doing patrol. He read the following from the said report : “Later foreman Bhoyroo approached SG Seeram and said “lote coup mo pas pou faire sa, excuse moi, excuse moi”. He also refused to give any statement and asked not to insert any entry in the diary book at night shift.”

Submissions

Counsel appearing for the plaintiff submitted that there are two issues to be thrashed out by the Court namely the issue of continuity of service and the issue of unjustified termination of employment which are to be determined under the Labour Act of 1975 which is the applicable law in the present matter.

As regards the unjustified dismissal it was submitted that the plaintiff had strongly denied all the allegations levelled against him. Furthermore Counsel contended that the witness Ajodha who deposed on behalf of the defendant contradicted the version of the representative of the defendant, Mr Appanah inasmuch as Mr Ajodha stated that he did not know whether plaintiff was not at his place of work at 1h30 a.m whilst Mr Appanah stated that it was Mr Ajodha who reported that the plaintiff was not at his place of work at the material time. Further witness Ajodha stated that he did not follow any Chinese girl who was running in the yard. He only recalled that he saw the plaintiff in an unbecoming behavior with a Chinese female worker. Counsel thus submitted that the selective memory of the witness renders its testimony not credible. It was also highlighted that witness Seeram stated that on

the material date he did not see the plaintiff in the store but in the factory yard and that he did not know what had happened nor had he seen any Chinese girl running away. It is therefore the submissions of Counsel appearing for the plaintiff that in the light of the discrepancies in the testimonies of Mr Ajodha and Seeram coupled with the version of Mr Appanah the defendant has failed to establish that there was gross misconduct.

As regards the years of service which the plaintiff reckoned in the defendant's employment, Counsel cited Section 34 (2) (c) and Section 35 (iii) of the Labour Act. It was pointed out that since plaintiff was working with Union Textiles from 1990 up to 1995 when there a change of name to Novel Textiles and since Denim de L'ile Limited took over the assets of Novel Textiles in 2004, then plaintiff is deemed to have been employed with Denim de L'ile Limited and hence there was continuity of employment. It was therefore submitted that the number of years of service which plaintiff reckoned should take effect as from 1990 and hence severance allowance which defendant is liable to pay to the plaintiff should take into account the numbers of years of service from 1990 up to 2005 when plaintiff's employment was terminated.

Counsel appearing for the defendant based his submissions on two limbs – the first limb is in respect of the termination of the plaintiff's contract of employment for gross misconduct and the second limb is as regards the duration of the plaintiff's contract of employment.

As regards the first limb of his submission, Counsel referred to the testimony of the various witnesses. He stated that the incident took place in 2005 but the plaint was lodged in 2012 – i.e seven years later. Thus the witnesses cannot be blamed to have forgotten some collateral issues. The important issue remains the charge against the plaintiff and which was the subject matter of the disciplinary hearing. Same was qualified as a gross misconduct which brought about the termination of the plaintiff's contract of employment.

Counsel referred to the testimony of Mr Ajodha namely of what he actually saw on the material date. He highlighted that there cannot be a better answer from Mr Ajodha than the following : Non, seki mo fin truver sa meme. Mo fine dire li ti la dans meme" in reply to a question put to him by Counsel for the plaintiff which was to the effect that the plaintiff did not do anything in the room where he was allegedly seen. The evidence of Mr Seeram was also referred to namely that the latter confirmed that the plaintiff begged for excuse at least on two occasions. Counsel pointed out that plaintiff would not have done so if he had nothing to reproach himself. He stated that this was further confirmed by the entry put up by Mr Foolchand in the diary book of the defendant company and wherein mention was made that plaintiff requested for no entry to be made.

It was therefore the submissions of Counsel for the defendant that based on the testimonies of the above witnesses, the defendant has proved on a balance of probabilities that the plaintiff had committed an indecent behavior. Hence following the findings of the disciplinary committee the defendant company decided to terminate the plaintiff's contract of employment.

Counsel for the defendant contended that there is no need for the Court to address the issue of the duration of the plaintiff's contract in view of the latter's gross misconduct. He however offered the following submissions as regards this particular issue which forms the second limb of his submissions – he referred to the answer to particulars namely the following answers from the plaintiff regarding his employment with defendant "There was no contract of employment between plaintiff and defendant. Plaintiff joined Novel Textiles on 1/5/95 and worked till 30/06/2004. The company was taken over by Denim and he took employment from 24/06 till he was dismissed". Counsel stated that there is no mention of Union Textiles though it was submitted on behalf of the plaintiff that he started with Union Textiles in 1990.

Counsel further contended that there is absolutely no confusion or contradiction that the plaintiff started afresh in July 2004. He referred to the letter from the Ministry of Finance where words like " re employment" and "fresh employment" are mentioned as well as plaintiff's contract of employment where the word "probation" is used. He stated that a person cannot be put on probation if according to plaintiff he has been working for the defendant for over 10 years. He cannot also be asked to sign a new contract of employment if he has been in employment continuously for the past 10 years. It was submitted that the documents produced also confirm that it was a new contract of employment because Denim took over the assets of Novel and the law does not provide for any taking over of assets. The testimonies of Mr Appanah and Sohawon were referred to and which according to Counsel confirm that plaintiff's employment with Novel was finished, the factory was closed and Denim took over the assets and activities as from the 1st July. There is a fresh contract of employment with new conditions. He contended that the word "deemed" is used in section 34 or 35 of the Labour Act on no less than 4 occasions. It is a deeming provision which has been contradicted by every single document that has been produced in relation to the present matter. Counsel for the defendant thus submitted that the length of employment of Mr Bhoyroo could only have started in 2004 and it was terminated in 2005 just after the period of 12 months.

Analysis

I have carefully analysed all the evidence on record as well as the submissions of both Counsel.

Undisputed facts

It is not disputed that the plaintiff was employed as labourer in Union Textiles Ltd since March 1990. Then in 1995 Union Textiles Ltd changed its name to Novel Textiles Ltd where plaintiff has been working as mechanic in the weaving department until 2004. In June 2004 Novel Textiles Ltd ceased its business and the company was taken over by Denim de L'ile Limited – the defendant company in the present case and which both parties sometimes referred to as DDI.

It is also clear from the evidence of the representative of the defendant company, Mr Appanah that in the context of this take-over the Minister of Finance & Economic Development has approved the transfer of up to 45% of the unrelieved tax losses of Novel Textiles Ltd & Novel Garments Ltd as at 30 June 2004 to Denim de L'ile Limited. It is on record that same is a fiscal incentive given to manufacturing companies in cases of take-over in compliance with section 59(A) of the Income Tax Act. It also transpires from the testimony of the above witness and confirmed by Doc.E that this fiscal incentive was given to Denim de L'ile Limited subject to two conditions: Firstly that the company will re employ 1,400 out of the 3,100 Mauritian employees and secondly the fresh employment term should guarantee these employees at least the same level of basic salary that they were earning previously at Novel Textiles Ltd.

There is nothing on record to suggest that the above two conditions were not complied with by the defendant company. It is also not in issue that the plaintiff's employment was terminated by the defendant company on the 31 August 2005 after one of the charges which were levelled against him was found proved by the disciplinary committee which he attended on the 27 August 2005. Hence plaintiff's employment was terminated on ground of gross misconduct.

Facts in issue

As rightly pointed out by both Counsel there are two issues to be thrashed out – the first one being the continuity of service of the plaintiff's employment with the defendant company and the second issue being the alleged gross misconduct leading to the termination of the plaintiff's employment.

As regards the first issue it is the plaintiff's contention that there was continuity of employment with the defendant company since 1990. Plaintiff considered that as he was employed by Union Textiles Ltd in 1990 and then there was a change of name to Novel Textiles Ltd in 1995 where he worked until 2004 when the latter's assets were taken over by Denim de L'ile Limited -the defendant company, then his years of service with the defendant

company should start as from 1990 until 2005 when his employment was terminated by the defendant company. Counsel for the plaintiff has submitted that the plaintiff has worked without any break, the terms and conditions relating to hours of work, salary, sick leave and local leave has remained unchanged until his employment was terminated in 2005. However the defendant contended otherwise. According to defendant plaintiff's employment with the company Denim de L'ile Limited started in 2004 because he entered into a new contract of employment with the said company. It was submitted that in 2004 he was paid a severance allowance by Novel Textiles which shows that his employment was put to an end. Then in 2004 he was placed on probation for 3 months in the defendant company after which he was offered employment in the said company.

In respect of the second issue raised, plaintiff considered that he never committed any act of gross misconduct inasmuch as on the material date and at the material time he was never on the spot with a female Chinese worker and was never caught up in an unbecoming behavior as contended by the defendant. It is however the defendant's contention that on the material date at about 2h00 a.m plaintiff was caught by a security guard – Mr Ajodha, in an indecent behavior and he begged for excuse twice, hence the termination of his employment on the ground of gross misconduct after he was given the opportunity to give his explanations before a disciplinary committee.

Discussion

The plaintiff's employment having been terminated on the 31 August 2005 the law applicable is the Labour Act 1975 (hereinafter referred to as "The Act") which was repealed in 2008 by the Employment Rights Act 2008 which comes in operation on 19 September 2008.

The Court bears in mind that the present plaint entered by the plaintiff is a claim for severance allowance against the defendant company for alleged unjustified termination of his contract of employment. It is however the defendant's contention that the termination of the plaintiff's contract of employment is justified inasmuch as it has been terminated on ground of gross misconduct and hence it could not in good faith take any course of action Therefore defendant's contention that plaintiff is not entitled to payment of any severance allowance or any other sums whatsoever.

The sections of the law relevant to the issue of unjustified dismissal more specifically on ground of misconduct and payment of severance allowance are sections 32, 34 and 35 of the Act which are reproduced below for ease of reference:

32. *Unjustified termination of agreements*

(1) No employer shall dismiss a worker -

(a) by reason only of the worker's filing in good faith of a complaint, or participating in a proceeding, against an employer involving alleged violation of a law;

(b) for alleged misconduct unless

(i) he cannot in good faith take any other course; and

……...

***34.** Payment of severance allowance*

(1) Subject to section 35, an employer shall pay severance allowance to a worker who has been in continuous employment with him for a period of 12 months or more where

(a) the employer terminates the employment of the worker;

(b) the worker, on or after attaining the age of 60, retired voluntarily;

(c) the worker, before attaining the age of 60, retires voluntarily in accordance with the provisions of any Remuneration Order Regulations made by the Minister under section 96 of the Industrial Relations Act.

(2) For the purposes of this section

(a) a worker who works for his employer on 4 or more days in any week shall be deemed, in respect of that week, to have been in continuous employment;

(b) no worker shall cease to be in the continuous employment of an employer by reason of his participation in a strike which is not unlawful under the Industrial Relations Act.

(c) where a worker ceases to be in the employment of one employer and enters the employment of another under section 35(3), the employment of the worker by the first and second employer shall be deemed to be continuous employment.

***35.** Exclusion of severance allowance*

(1) No worker shall be paid severance allowance where he is dismissed pursuant to section 32(1)(b). (The underlining is mine)

(2) Where -

(a) an employer dies and his worker is employed or offered employment by the personal representative or heir of the deceased employer forthwith after the death;

(b) a worker's employment by a partnership ceases on the dissolution of the partnership, and he is employed or offered employment by a member of the dissolved partnership or a new partnership forthwith after the dissolution;

(c) a worker's employment by a body corporate ceases on the dissolution of that body and he is employed or offered employment by some other corporate body in accordance with an enactment or a scheme of reconstruction forthwith after the dissolution; or

(d) a worker's employment ceases on the disposal by his employer of the goodwill, or of the whole or a substantial part of the business, or of that part of the business in which he is employed and he is employed or offered employment by the person who acquires the goodwill or business or part of the business forthwith after the disposal,

on terms and conditions which are not less favourable than those of the former agreement, the worker shall not be entitled to severance allowance.

(3) Where a worker to whom an offer is made in any of the circumstances specified in subsection (2) accepts the offer, he shall be deemed to enter the employment of the person by whom the offer is made forthwith upon the cessation of his employment with the first employer.

(4) Where a worker is deemed to be in continuous employment in accordance with section 34(2)(c) and that continuous employment is terminated in circumstances in which severance allowance is payable, the employer in whose service the worker was employed immediately before the termination shall be deemed to be the employer during the whole of the period and shall be liable to pay severance allowance accordingly.

Turning to the instant case, it clearly transpires from the evidence on record that the plaintiff reckoned more than 12 months continuous service with the defendant company inasmuch as he joined service with the defendant company in June 2004 and his employment was terminated on 31 August 2005. Thus as per Section 34 (1) of the Act plaintiff is entitled to claim payment of severance allowance from his employer upon termination of his employment if he considered that his employment has been terminated without justification. On the other hand the defendant company – employer is entitled not to pay any severance allowance to the plaintiff if it considered that the plaintiff – employee has committed an act of misconduct and that it had no other alternative than to terminate his employment as provided by section 32 (1) (b) of the Act. As clearly stipulated by section 35(1) of the Act in such circumstances an employer is not liable to pay any severance allowance to an employee.

In light of the above, the Court will therefore first and foremost deal with the issue of misconduct to determine whether the defendant company – employer is liable to pay

severance allowance to the plaintiff – employee and, if the termination is found to be unjustified by the Court, then the issue of length of service of the plaintiff's employment in the defendant company will be a relevant issue to be addressed by the Court.

Alleged misconduct – Unjustified/ justified termination of plaintiff's employment

In the case in hand the Court bears in mind that the only ground on which the defendant company as employer has terminated the plaintiff's employment is that of gross misconduct in relation to charge 2 in the letter dated 25th August 2005 (Vide Doc.L) and which was found proved by the disciplinary committee. The said charge reads as follows:

2. At about 2.00 a.m you were found to be in presence of one Chinese worker, Miss LIN YUE HUA, who was off duty, in a small room near the entrance of Long Chain Beam section. You were seen by Security guards, Seeram and Ajodha, pulling up your trousers when latters came to the room."

It is trite law that the burden lies on the employer to establish that the termination of the employee's employment, on the ground of misconduct is justified and that he cannot in good faith, take any other course of action. Hence in the present case, the Court will have to determine whether the defendant company as employer has discharged its burden of proving on a balance of probabilities that it had no other alternative than to dismiss the employee from its employment and therefore not liable to pay any severance allowance as claimed for by the plaintiff.

However as stated in the case of **Chan Man Sing v Wing Tai Chong Company Limited [2012] SCJ 82** *"each misconduct must be viewed in the specific context in which it occurred and in the light of the nature of the relationship existing between the employer and the employee. Also, whether in any given situation an employer cannot in good faith do otherwise than dismiss a worker for misconduct is a question of fact."* ……..

Turning to the instant case, it clearly transpires that the misconduct which brought about the termination of the plaintiff's employment was the incident which allegedly occurred during the night of 24 August 2005. It is not in issue that on the material date and at the material time the plaintiff was on the premises of the defendant company inasmuch as he himself confirmed that he was on duty doing night shift. It is also on record that the two witnesses for the defendant company namely Mr Seeram and Mr Ajodha were also on duty as security guards during that particular night. Furthermore the Court also takes note that the Chinese female worker whose name is mentioned in charge 2 was an employee of the defendant company and was known to the plaintiff as per the latter's own testimony in Court.

Now as regards the alleged incident, the Court bears in mind that on that score the case for the defendant company rested essentially on the two witnesses Ajodha and Seeram. Both deposed before the disciplinary committee. It is true to say that in Court witness Ajodha stated that he did not recall whether he deposed before the disciplinary committee but the Court does not lose sight that the disciplinary committee was in 2005 and the plaint was lodged in 2012, amended in 2015 and witness Ajodha and Seeram deposed in 2018 i.e nearly 13 years after the disciplinary committee was held. So it is all legitimate that the witnesses cannot recall each and every detail of the sequence of events which took place in 2005. However Mr Ajodha did state that whatever he said during the committee and in Court was what he actually saw on the material date and time. He maintained all throughout examination in chief and cross examination that whilst he was on foot patrol and reaching near a building – the Long chain beam section, he heard a noise and when he lit up his torch he saw the plaintiff together with a Chinese female worker. He saw both of them actually pulling up their trousers.

After a careful analysis of the testimony of the above witness and taking into account all the facts and circumstances of the case, the Court does not find any reasons not to believe the version of Mr Ajodha. The latter makes it clear to the Court that he would not say anything which he had not seen and whatever he testified in Court was what he actually saw at the material time, to quote his own words: *"Non, seki mo fin truver sa meme. Mo fine dire li* (referring to the plaintiff) *ti la dans meme"* (i.e referring to the spot where he saw the plaintiff). The Court also takes note that though plaintiff has denied being together with a Chinese female worker, however Mr Seeram too had confirmed the presence of the said female worker who was together with the plaintiff when he reached the spot. This begs the question of what was this lady doing on the company's premises on the material date at about 2h00 a.m together with the plaintiff. It cannot be said that both Mr Ajodha and Mr Seeram are lying about the presence of this Chinese female worker on the spot on the material date and at the material time.

Further the Court does not lose sight of the evidence of Mr Seeram that when he came on the spot the plaintiff begged for excuse twice in the following words: "lot coup mo pas pou faire sa, excuse moi, excuse moi". There is also evidence on record that the plaintiff refused to put up any entry -this was confirmed by Mr Seeram who read a report from the security section of the defendant company which was shown to him by Counsel appearing for the defendant and wherein was mentioned the following *: "Later foreman Bhoyroo approached SG Seeram and said lote coup mo pas pou faire sa, excuse moi, excuse moi. He also refused to give any statement and asked not to insert any entry in the diary book at night shift.".* True it is that the person who inserted the said entry i.e one Mr Foolchand was not

called by the defendant but it is equally to be noted that at no point in time was this entry challenged by the plaintiff either. Therefore this begs the question of why would the plaintiff beg for excuse and refuse that any entry be inserted in the diary book if he had not done anything wrong?

The plaintiff's version that at the material time he was allegedly in the forklift and that Mr Seeram is levelling a false charge against him because Mr Seeram allegedly thought that it was him (i.e plaintiff) who gave his name as among one of the employees to be fired when Novel Textiles was taken over by Denim de L'ile Limited does not seem plausible to the Court. Both witnesses Ajodha and Seeram are no longer working in the defendant company and therefore the Court does not find any reasons why they would level a false allegation against the plaintiff. Furthermore it clearly transpires from their evidence that at the material time when they saw the plaintiff the latter was not in the forklift. Furthermore the plaintiff's version that during the said night he allegedly saw two Chinese female workers who were looking for their mobile phone seems most farfetched to the Court especially when taking into account the time at which same occurred i.e at about 2h00 a.m.

The Court is well alive of some contradictions between the testimony of the defendant's representative, Mr Appanah and the testimonies of the above two witnesses which were in fact highlighted by Counsel appearing for the plaintiff namely that Mr Appanah stated that the two witnesses saw another Chinese girl running in the yard whereas the said witnesses stated that they had not actually seen any girl running; and also the evidence of Mr Appanah that both witnesses Ajodha and Seeram saw the plaintiff and the female worker pulling up their pants whilst Mr Seeram stated he did not witness same but he confirmed that when he reached the spot he saw the plaintiff together with a Chinese female worker. The Court does not consider those contradictions so material as to undermine the credibility of the above two witnesses, the more so taking into account the lapse of time between the occurrence of the incident and their depositions in Court. Suffice it to say that the presence of the Chinese female worker which had been confirmed by both witnesses, at such time of the night, together with the plaintiff, is by far in plaintiff's favour. This coupled with the version of Mr Ajodha that at the material time when he saw them they were both pulling up their trousers is very telling of a most unbecoming behavior on the part of an employee on the working premises of his employer.

Now the question to be determined by the Court is whether such a behavior on the part of the plaintiff amounts to a gross misconduct as contended by the defendant and that it had no other alternative than to summarily terminate plaintiff's employment. On that issue it is significant to point out that the termination of employment on the ground of misconduct will

depend essentially on the degree and seriousness of such misconduct. The Supreme Court case of **Abdurrahman N v Total Mauritius Limited [2013] SCJ 480** where reference was made to the following passage from **Fok Kan – Introduction au Droit du Travail Mauricien 1ère Edition at p. 196** is of relevance:

'L'élément clef dans l'appréciation de la faute semble être sa gravité. Il existe en effet divers degrès de faute (Harel Frères Ltd. v Jeebodhun [1981 MR 189]. Au bas de l'échelle il y a les fautes legères qu'elles ne justifient pas un licenciement et entraineraient en cas de licenciement le paiement de l'indemnité de licenciement au taux punitif de même que l'indemnité de préavis. La faute n'étant que légère l'employeur aurait du sanctionner l'employé autrement que par le licenciement. Le deuxième degré de faute est la faute sérieuse. Bien que la faute justifie ici la sanction ultime du licenciement, elle n'est pas considerée comme suffisamment grave pour écarter l'application de la S. 34, c'est-a-dire le paiement de l'indemnité minimum légale et de l'indemnité de préavis. Au sommet de la hiérarchie des fautes nous retrouvons les fautes graves qui elles justifient un 'summary dismissal', c'est-à-dire sans préavis et donc éventuellement sans l'índemnité de licenciement dans la mesure ou l'employeur ne pouvait 'in good faith take any other course.' Seul donc une telle faute grave constitue un misconduct au sens de la S 32 (1) (b).'

In **Camerlynck – Droit du Travail – Le Contrat de Travail, 2ème Edition at para 452**, the following extract on "faute grave" is of pertinence:

"454. La faute grave, aux termes d'une jurisprudence constante, et conformément aux dispositions des conventions collectives, entraine la privation du bénéfice de préavis et de l'indemnité compensatrice, et justifie le licenciement immédiat……La faute grave n'est-elle pas, suivant la decision même de la Cour de Cassation, celle qui rend impossible le maintien des relations contractuelles……..."

In its second edition, at pgs 364-366 the author **Dr D Fok Kan** elaborated on this notion of misconduct and made the same classification as above. He further added that *"L'appréciation de la gravité de la faute se détermine non seulement en fonction de la faute en elle-même mais également en fonction de toutes les circonstances de l'espèce. Ainsi dans l'arrêt Ootim v Societé de Gérance de Mon Loisir la Cour précise que "if that (citant un extrait de l'arrêt Soc. De Gérance de Mon Loisir v Munogee SCJ no.306 de 1990) is tentamount to saying that, wherever an act of serious misconduct such as larceny is proved, that is the end of the matter and outright dismissal must follow automatically since all else is irrelevant, we would respectfully suggest that this is too sweeping. Whatever be the law in France, our S. 32 says that, even if there is an act of misconduct, the courts will look upon outright dismissal as unjustified if ------the employer does not satisfy them that he could not*

in good faith have taken any other course. Obviously the degree of misconduct is itself one of the factors to be taken into account to determine whether the employer can be expected to lighten the punishment or forego it altogether ……"

It is also pertinent to refer to the following from **Jurisclasseur, Droit du Travail, - Licenciement pour motif personnel, under the heading Comportement du salarié, note 91:**

***91**.- Principe.- Certains comportements peuvent justifier le licenciement du salarié, que l'agissement reproché soit ou non constitutive d'une faute, qu'il soit répété ou isolé, et dans quelques hypothèses bien qu'il soit produit en dehors du temps et même du lieu de travail , à condition toutefois qu'il ne résulte pas d'une provocation de l'employeur (Cass.soc., 16 janv. 1991: Juris- Data no. 1991-004250).*

Applying all the above to the case in hand, the Court is of the view that the conduct of the plaintiff on the material date and at the material time as per the evidence adduced by the witnesses for the defendant, did amount to a "faute grave" inasmuch as such an unbecoming behaviour on the part of the plaintiff with one of the employees of the defendant company, took place on the working premises and during working hours. Indeed such a behavior cannot be condoned by any employer on its working premises. Hence taking into account all the facts and circumstances of the present case, the Court is satisfied that the defendant company-employer had no other alternative than to terminate the plaintiff's – employee's employment summarily.

Having determined that the termination of the plaintiff's employment was justified, hence the issue of continuity and length of service of the plaintiff's employment is of no relevance.

Conclusion

Based on all the above considerations, the Court is not satisfied that the plaintiff has proved his case on a balance of probabilities. On the other hand the Court is satisfied that the defendant has proved on the required standard of proof, that the termination of the plaintiff's contract of employment was justified and hence it is not indebted to the plaintiff in the sum claimed by the latter or in any other sums whatsoever.

The present plaint is accordingly dismissed.

I make no order as to costs.

This 30 June 2020

K. Bissoonauth (Mrs)

President, Industrial Court.