Chung v Dry Cleaning Services Ltd

2022 IND 54

CN714/16

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Mrs. Nathalie Chung Chai Man

Plaintiff

v/s

Dry Cleaning Services Ltd

Defendant

JUDGMENT

The Plaintiff is claiming from the Defendant Company the total sum of **Rs7 469 000/- with Costs and Interests at 12% from the date of dismissal until the date of payment, for Constructive Dismissal as from 14-12-16**, by way of her 01st Amended Proecipe dated 05-04-19.

The Defendant Company denied the said Claim in its Plea dated 10-10-17.

The Parties were respectively assisted by Learned Senior Counsel.

The Proceedings were held partly in English and partly in Creole.

The Case For The Plaintiff

It was the case for the Plaintiff that she was constructively dismissed as from December 2016 due to the following reasons:

1) Her job was changed from Customer Care to Quality Control;
2) She was requested to look after the technical side of the factory and to read technical manuals;
3) She was requested to wear a uniform like factory clothes, which was harassment and a demotion;
4) Her parking slot was taken away; and
5) Her name was removed from the Viber Forum.

The Case For The Defendant

The case for the Defendant Company was to the effect that the Plaintiff was not constructively dismissed, but had "abandoned her post" (paragraph 18(i) of the Plea).

Analysis

At the outset, in view of the fact that the present matter was started anew, the Court places it on Record that the Court has only taken into consideration the evidence and documents placed before it.

The Court has duly considered all the evidence on Record, and has given due consideration to the Submissions of Learned Counsel for the Plaintiff and to the Written Submissions of Learned Senior Counsel for the Plaintiff, and to the Submissions of Learned Senior Counsel for the Defendant Company.

The Court has also duly considered the Authorities referred to, and put in, by Learned Counsel for the Plaintiff and by Learned Senior Counsel for the Defendant Company.

The Court has given due consideration to the documents produced in the course of the Proceedings:

1) Occurrence Book (hereinafter referred to as OB) No. 2363/16 (Doc. P1);
2) Higher School Certificate (hereinafter referred to as HSC) (Doc. P2);
3) Letter dated 10-03-92 (Doc. P3);

4) Statement of Emoluments and Tax Deductions for Income Year Ended:
    a) 30-06-07 (Doc. P4);
    b) 30-06-08 (Doc. P5);
    c) 30-06-09 (Doc. P6);
    d) 31-12-11 (Doc. P10);
    e) 31-12-13 (Doc. P13);
    f) 31-12-14 (Doc. P14);
    g) 30-06-15 (Doc. P15);
    h) 30-06-16 (Doc. P16);
5) Job Description for the Plaintiff (Doc. P7);
6) Job Vacancy for Customer Care Coordinator (Doc. P8);
7) Visiting Cards for the Plaintiff as:
    a) Customer Relations (Doc. P9);
    b) Customer Care Manager (Doc. P11)
8) Payslips for the Plaintiff for the months of:
    a) January 2012 (Doc. P12);
    b) January 2014 (Doc. P17);
    c) February 2015 (Doc. P18);
    d) January 2016 (Doc. P19);
9) Letter dated 07-12-16 addressed to the Plaintiff (Doc. P20);
10) Screenshot (Doc. P21);
11) Unsigned letter dated 14-12-16 from the Plaintiff (Doc. P22);
12) 02 Cash Memos (Doc. P23);
13) Letter dated 15-12-16 to the Plaintiff (Doc. P24);
14) Letter dated 16-12-16 from the Plaintiff (Doc. P25);
15) Letter dated 14-12-16 to the Plaintiff (Doc. P26);
16) Letter dated 14-06-10 to the Plaintiff (Doc. P27);
17) Letter dated 28-06-10 to the Plaintiff (Doc. P28);
18) Letter dated 22-06-10 from the Plaintiff (Doc. P29);
19) Original letter dated 14-12-16 from the Plaintiff (Doc. D1); and
20) Customer Care Coordinator Job Advertisement (Doc. D2).

The Court notes that the Plaintiff's name as per the 01st Amended Proecipe is Nathalie Chung Chai Man, and that the HSC (Doc. P2) is on the name of one Nathalie Anne Choo Ah Toung.

There is a National Identity Card (hereinafter referred to as NIC) number mentioned for instance on the Statements of Emoluments (Docs. P4, P5, P6, P10, P13, P14, P15, and P16), which is the same NIC mentioned on the OB No. 2363/16 (Doc. P1), which relates to the Plaintiff, but there is no mention of any NIC for example on the documents (Docs. P2, P7, P9, P11, P12, P17, P18, P19, P20, P21, P22, P25, and D1).

Be that as it may, at no stage of the Proceedings was it disputed that the said documents were in relation to the Plaintiff, nor was the differences in the said names made a live issue, and the Court therefore acts on the basis that the said documents relate to the Plaintiff.

Not In Dispute

The following elements were not in dispute:

1) Since March 1992, the Plaintiff had been in the continuous employment of the Defendant Company;
2) The Plaintiff started as Secretary with an initial salary of Rs11 000/-;
3) In January 2011, the Plaintiff was promoted to Customer Care Coordinator with a salary of Rs35 426/- plus company car; and
4) In January 2016, the Plaintiff's salary was increased to Rs60 000/-.

Learned Senior Counsel for the Defendant Company confirmed that the financial issues were not in dispute.

The Employer/Employee relationship between the Parties since March 1992 was not disputed.

Was The Plaintiff Constructively Dismissed By The Defendant Company?

The Applicable Principles

The question to be addressed by the Court in Claims of Constructive Dismissal was set out in the Authority of **Grewals (Mauritius) Ltd v Koo Seen Lin [2014 PRV 38]** at paragraph 15:

> 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.

Joseph v Rey & Lenferna Ltd [2008 SCJ 342] is Authority for the following principles:

> In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment."

This means that Constructive Dismissal is "[…] *une rupture [de Contrat] prise sur l'initiative de l'employé mais dont l'employeur est malgré tout responsable*" (*Introduction Au Droit Du Travail Mauricien – 1/ Les Relations individuelles de travail, 2ème édition, page 349,* Dr Fok Kan).

Periag v International Beverages Ltd [1983 SCJ 220] is Authority for the principle that there must imperatively be a *rupture de Contrat* for the Employee to claim Severance Allowance.

The issues to be considered for Constructive Dismissal Claims include the following:

1) Has the Employer has committed a serious/fundamental breach of Contract that goes to the root of the Contract or a repudiatory breach;
2) Was that breach the reason why the Employee felt forced to leave or which left the Employee with no alternative but to resign, and was the reason why the Employee resigned;
3) Has the Employee done anything to suggest that s/he has accepted the said breach or a change in employment conditions; and
4) If the Employee remains in Employment, does the Employee consent or acquiesce the said change.

Was The Plaintiff's Job Changed From Customer Care To Quality Control?

As per paragraph 12 of the 01st Amended Proecipe, the Plaintiff averred that her job had been changed from Customer Care to Quality Control.

It was further the case for the Plaintiff that she had been requested to do quality control work but also to have a basic knowledge of the machinery used in the factory and to understand technical issues (Answer A14 of the Answer To Particulars).

In Court, the Plaintiff explained that she was Customer Care Relations, and her job was to look after clients, and her job remained the same when she became Customer Care Coordinator and was given a job description (Doc. P7).

The Plaintiff deponed to the effect that in mid-September 2016, the Defendant Company's General Manager, Mr Sylvio Sundanum (hereinafter referred to as the General Manager), told the meeting of Managers and Supervisors that she would "no more make any visits that [her] job [was] now a Quality Control, that [she] need[ed] to roam the Factory to check on the finished linen".

The Plaintiff explained that this came as a shock to her, as this had never been discussed with her, and that she was made aware then that her job had to include Quality Control, when her job as Customer Care Manager did not involve Quality Control.

The Plaintiff stated that as Customer Care Manager, she had to look after customers, build interactions, give the satisfaction to promote long-term relationship and loyalty, and that she was in touch with the customers, and would cascade down the issues of the customers, and then follow back.

The Plaintiff explained that although she was still in touch with the customers at that point in time, she could not effect her normal scheduled visits, as the General Manager had said no more visits, and she had to roam the factory, "be in front of the noisy machines in the heat of the factory and check the finished […] linen".

The Plaintiff who was trained as Customer Care, and did not know Quality Control, wondered how to manage, and felt this "was demeaning also because it was less than the Manager position", and suffered from acute anxiety when going to work every day, as her job had changed from one day to the other.

The Plaintiff averred that she complained to the General Manager and to the HR Manager of the Defendant Company Mrs Nuseeb (hereinafter referred to as the HR Manager), and had no option but to consider this change as a demotion which was tantamount to Constructive Dismissal (see also Answer A15 of the Answer To Particulars), hence the present action.

Further, the Plaintiff explained that she had "the sword of Damocles" hanging over her head since mid-September, and yet made no complaint of whatever nature until 14-12-16.

The Plaintiff conceded not having complained in writing to the Defendant Company that she was requested to do technical studies and was no longer performing her job as Customer Care, and explained this by stating that the General Manager of the Defendant Company "is not a man. You have no option than to obey. Otherwise, he will tax you as being insubordinate, arrogant, arguing negatively".

The Plaintiff also explained not having complained as what the General Manager said was "paroles de Messie", that he controlled everything, and she tried to do what he had asked her to, but found it so difficult, she was having "mental stress […] physical stress […] was feeling dizzy […] [had] migraines]".

The Plaintiff went on to explain that she had had a problem with the General Manager in 2010, and nonetheless wanted to cruise through the 06 years she had left, but that the General Manager did a lot of things, making her days harder and harder.

The Plaintiff even conceded having never complained between 2010 and 2016 to the Defendant Company, as the General Manager was the "porte-parole" of the Directors, and as it was mentioned in the letter of 15-12-16 that there had been consultation with the higher management.

In effect, the Plaintiff attempted to show that she did not complain because of the attitude of the General Manager, the Plaintiff seeking to place reliance on the letter of 2010 (Doc. P27) in support thereof.

It is however clear from the Plaintiff's said reply (Doc. P29) to the General Manager's letter (Doc. P27), that the Plaintiff was not one to take things lying down, and expressed herself in no uncertain terms in the said letter.

Nothing has been placed on Record to suggest why, suddenly, in 2016, the Plaintiff felt she no longer could face the General Manager.

The fact that there had been consultations with Higher Management mentioned in the letter of 15-12-16, cannot justify the Plaintiff having chosen not to complain to the Directors about the General Manager's conduct between 2010 and 2016, the more so as the Plaintiff accepted that she knew the Directors, and saw them every day, except as from the moment when she was shifted to the factory from the administrative block.

At no stage did the Plaintiff say that after being moved from the Administrative Block, she no longer could have access to the said Directors.

In order to explain why she had not complained that her job had been changed to Quality Control, the Plaintiff stated that the most shocking part was being requested to proceed on Leave, not knowing why.

The Plaintiff admitted having made no complaint, and confirmed not having mentioned this before the previous Bench, although it was important.

In Court, the HR Manager stated that the Plaintiff was Customer Care Manager at the Defendant Company, that the Plaintiff's job was never changed in the organisational chart of the Defendant Company, and that she had no document or Communiqué to the effect that the Plaintiff's job was changed from Customer Care Manager to Quality Control to put in the Plaintiff's file.

The HR Manager deponed to the effect that Customer Care goes hand in hand with Quality Control, inasmuch as complaints received from Customers were mainly in relation to quality issues, such as torn clothes, clothes which are not properly ironed or packed.

The HR Manager explained that all the said complaints were registered in the Customer Care Department, which then investigated, in order to respond to the Customers' complaints.

In case of need, for example as regards torn clothes, the Customer Care Department would call in the Technicians, who would then give a feedback to the Customer Care Department, which would then decide whether there was a need to compensate the Customer or not.

As regards “root causes of quality problems” (Doc. P24), the HR Manager explained that root cause meant that if clothes are not properly ironed, there was a need to know whether the issue was with the iron itself, its steam, or the person ironing the clothes who may have not acquired the skills.

The HR Manager also explained that the Plaintiff had never complained to the HR Department that her job had been changed, and that the Plaintiff was not told, in her presence, to stay in the Factory and look at books all day, and was no longer to make visits as Customer Care.

The HR Manager confirmed that the Plaintiff was still seeing her Clients up to the moment she left the Employment of the Defendant Company.

The HR Manager explained that her calling the Plaintiff was on a personal level, that she had received no instructions to do so, and had no authority to do so, and denied having told the Plaintiff that the Defendant Company no longer had a grudge against her, and that no charge would be levelled against her.

As per paragraph 2.b. of the Job Description (Doc. P7), it is clearly mentioned that in relation to Appollo Bramwell Hospital, Small Hotel, and Restaurant Management, the Plaintiff was to do a follow up of “quality issues with factory managers”. And as per paragraph 2.d. of the said document (Doc. P7), the Plaintiff was to “[w]ork closely with factory managers to ensure delivery on time/quality/quantity”.

The Plaintiff was therefore clearly, as Customer Care Coordinator, to address issues of quality (Doc. P7), and it was very telling that the Plaintiff stated in Court that she was never made aware that her job had to include Quality Control.

It is to be noted that the Plaintiff spoke about temperature, solvent, mechanical action, and agreed that this was the basis of her job.

Further, the Plaintiff deponed, when confronted with her testimony before the previous Bench, that "[a]mongst the quality, there are several other issues that the Customer Care Manager has to attend to. […] Quality issues, a loss (sic) garment, a claim, amongst others. It's not just about quality".

This would tend to support the Defendant Company's contention that "it was an essential component of customer care to have a basic knowledge of quality control".

Although the Plaintiff stated in Court she could no longer effect her normal scheduled visits, it is significant to note that the Plaintiff confirmed having kept a log of the Customer Care she had done for all the hotels, between September and December, and it flows therefrom that the Plaintiff was still performing her duties as Customer Care Manager between September and December 2016, otherwise there would have been no reason for the Plaintiff to keep a log of her Customer Care for all the hotels during the said period.

Now, as per Answer A5 of the Answer to Particulars, it was the case for the Plaintiff that visiting cards were issued by the Defendant Company to its Officers with their designation for work purposes.

The Plaintiff produced 02 visiting cards as Customer Relations and Customer Care Manager (Docs. P9 and P11 respectively), but produced no visiting card with her post being in relation to Quality Control.

The Plaintiff produced the letter of 07-12-16 (Doc. P20) in support of her case, and it is worth to note that in the said letter (Doc. P20), it is mentioned that the Plaintiff is "Customer Care Manager".

The Plaintiff also produced a letter (Doc. P24) dated 15-12-16, i.e. one day after the date on which the Plaintiff considered herself as having been constructively dismissed, from the Defendant Company in which it is mentioned that the Plaintiff was eventually promoted to the post of Customer Care Manager, which the Plaintiff confirmed in Court.

The Plaintiff also relied on an advertisement of 2018 (Doc. P8) to buttress her contention that the job description of Customer Care Coordinator had remained the same.

Now, the Court notes that the Plaintiff is relying on an advertisement of 2018 to justify her answer, when the question specifically asked of her was in relation to facts which occurred in 2016, that is prior to the said advertisement.

Further, there is no job description per se, although the job title of “Customer Care Coordinator” is mentioned, in the said advertisement (Doc. P8).

The Court therefore finds that it cannot reasonably act on the basis of the said advertisement to reach the conclusion that the job description had remained the same, given the said advertisement is subsequent to the relevant facts of the present matter.

At any rate, there is no detailed job description mentioned in the said advertisement (Doc. P8) which the Court could compare with the Job Description (Doc. P7), to determine in a concrete manner, whether the said two job descriptions were the same, and whether the responsibilities of Customer Care Coordinator remained the same.

Although the Plaintiff herself admitted suffering from “acute anxiety”, Learned Senior Counsel for the Plaintiff objected to the issue of anxiety being canvassed in cross-examination of the Plaintiff, because the Plaintiff could not have anxiety, as she was promoted.

However, when cross-examining the HR Manager, Learned Counsel for the Plaintiff precisely asked the HR Manager that a person being asked to study technical manuals for instance, would create more anxiety in someone already having such a condition.

Now, either the Plaintiff was suffering from anxiety, and was still suffering therefrom, in 2016, or not, but the fact that the Plaintiff may have suffered from anxiety prior to 2016 does not necessarily mean she was still suffering from anxiety in 2016.

Also, anxiety and depression cannot be amalgamated, and at no stage did the Plaintiff say she suffered from depression, and no evidence was adduced in relation thereto.

At any rate, it was not disputed that the Plaintiff functioned perfectly well until 2016.

As regards the reason why the Plaintiff was asked to proceed on Leave, the Plaintiff appears to have stated before the previous Bench that she had not seen either of the Employees, Gaytree and Priya, on 05-12-16 and/or on 07-12-16, and had had no problem with Gaytree on 07-12-16.

In relation to Priya, the HR Manager explained that when Priya went to the office of the Customer Care, where the Plaintiff and her Assistants had their offices, they said to her ("*bane la line dire li*") to leave, to go by the procedure, and that she had to call.

Now, the next question put to the HR Manager was that the said Priya was not happy when the Plaintiff said those words to her, but it is to be noted that the HR Manager used the word "they" ("bane la"), and had referred to the Plaintiff and her Assistants, without giving any precision as to who was present in the said Customer Care Office at the relevant time.

Now, this was Examination-in-Chief, and therefore, no leading questions ought to have been put to the HR Manager, but no objection was taken thereto by the Plaintiff, and the Court therefore finds that it can safely act on the said answer of the HR Manager to the effect that it was the Plaintiff who said the said words to Priya.

This clearly goes against the Plaintiff's testimony that she had not seen or met the said Priya on the relevant day.

As regards Gaytree, whilst maintaining not having seen Gaytree on 07-12-16, the Plaintiff stated that she had had a problem with Gaytree on 07-12-16, who was being discourteous to her over the phone.

It appears that the Plaintiff was playing on words, and appears to have contradicted herself, by stating before the previous Bench not having had any problem with Gaytree, and then stating in Court that she did have a problem with Gaytree, as the latter was being discourteous to her over the phone.

The HR Manager deponed to the effect that she heard the Plaintiff saying in a loud tone to another person that s/he was cheap, did not fly at the same level, and to lower the tone ("*to cheap, to cheap, my fly meme level qui toi, to baisse to ton, to baisse to ton*"), and heard the Plaintiff slamming the phone ("*ine claque telephone*").

And a moment later, she received a telephone call from the said Gaytree telling her that the Plaintiff had spoken badly to her, and was not allowed to do so.

As she was finishing her conversation with Gaytree, the Plaintiff entered her office and told her that it was Gaytree, and to speak to her.

Upon the HR Manager replying that she would speak to the Plaintiff in presence of Gaytree, the Plaintiff refused, and left her office.

Some moments later, she went out of her office and saw Gaytree coming, at around 15h55-16h00, when the Plaintiff said to Gaytree that she was cheap, and maintained that she was cheap ("*to cheap, to cheap, mo maintain qui to cheap*"), to which Gaytree replied she was going to commit suicide.

At that stage, the HR Manager asked two Assistants to take Gaytree under the porch.

The HR Manager confirmed that it was these two incidents which prompted the Defendant Company to send the said letter of 07-12-16 (Doc. P20), which was explicit as to why the Plaintiff was asked to proceed on Leave, and the Plaintiff cannot reasonably contend that she was at a loss as to why she had been asked to proceed on Leave.

In light of all the above, the Court is of the considered view that the Plaintiff was Customer Care Manager until the time she no longer was in the Employment of the Defendant Company, and that there was no change to the Plaintiff's job from Customer Care to Quality Control.

Now, even if the Court were to accept (which the Court does not) the Plaintiff's contention that her job was indeed unilaterally changed from Customer Care to Quality Control, and did constitute a repudiatory breach of her Contract of Employment "sufficiently serious to entitle [her] to leave at once" *(Western Excavating (ECC) Ltd. v Sharp* [1978] 1 QB 761, 769C cited with approval in the Authority **Adamas Limited v Cheung [2011] UKPC 32**, the Court finds the principles set out in the Authority of **Periag (supra)**, cited with approval in the Authority of **Joseph (supra)** pertinent:

> since under the general principles of our law of contract a worker is entitled to treat his employment agreement as at an end in circumstances where his employer commits a breach of such a kind as to entitle the worker to do so, the worker must elect whether to treat his employment agreement as at an end and terminate it or to overlook the breach and stay in his employment under changed terms. He may protest or take some little time or do both before making his election and taking a final decision. He must, however, make his election. Otherwise his employment links will not be severed and he will be regarded as being in "continuous employment".

It is crucial to note that the Plaintiff, whilst considering this alleged demotion to be tantamount to Constructive Dismissal, nonetheless continued to work for the Defendant Company between September-October 2016 and 14-12-16 December.

Now, the Plaintiff was entitled to take some time to consider her position, “[she] may protest or take some little time or do both before making [her] election and taking a final decision. [She] must, however, make [her] election. Otherwise [her] employment links will not be severed and [s]he will be regarded as being in "continuous employment” (**Periag (supra)**).

This was even more so understandable since the Plaintiff had worked for the Defendant Company for about 24 years, it not being disputed that she joined the Defendant Company in 1992.

In effect, the Plaintiff by averring that she was allegedly demoted in September-October 2016, which she considered amounted to Constructive Dismissal, but having worked until 14-12-16, that is for about 03 months, in fact took no steps to clearly sever the employment relationship with the Defendant Company until 14-12-16.

The Court is of the considered view that some 03 months is more than “some little time […] [taken] before making [her] election and taking a final decision” (**Periag (supra)** and (**Joseph (supra)**), and that the Plaintiff has, by her conduct, accepted the said alleged change in her job.

As highlighted above, the Court finds, in light of the all the above, that there is no evidence on Record to establish that the Plaintiff’s job was unilaterally changed from Customer Care to that of

Quality Control, which constituted a repudiatory breach of Contract by the Defendant Company, entitling the Plaintiff to consider herself as having been constructively dismissed.

Was The Plaintiff Requested To Look After The Production And Technical Work At The Factory For Which She Had No Qualifications?

The Plaintiff averred she was requested by the General Manager to look after the production and the technical side of the factory (paragraph 13 of the 01st Amended Proecipe), and that she was requested by the General Manager to study the manual of the machines at Dry Cleaning Services, despite the General Manager knowing that she was not a technical person and had never done any technical studies (paragraph 14 of the 01st Amended Proecipe).

The Plaintiff deponed to the effect that the General Manager of the Defendant Company told her to read technical books, and that she had to understand technical issues on site, her having "to stand in front of the machine and guess what is going wrong", despite her having no qualification in relation thereto, and it being "out of the scope of [her] work".

As a result, the Plaintiff felt belittled, and was being forced to understand "technical issues just to find the root cause of any problem that could happen on washing or on finishing", which was out of her knowledgeability, her capabilities, and the purview of her job responsibilities.

The Plaintiff explained that the word "root" meant "delving into the production issues that can make – there's a defect in the washing, that the washing is still soil (sic)".

The Plaintiff went on to explain that there were several manuals she was referred to, and that each manual could have from 50 to 100 pages, "depending on the intricacies of the machines", with specific vocabulary, which she did not understand.

As per the letter (Doc. P24), it was the case for the Defendant Company that the Plaintiff was not given the responsibility of overseeing the factory or the production, but was to have a basic technical knowledge and was referred to manuals as guidelines, as the Plaintiff was advised to find root causes of quality problems in order to advise Management, bearing in mind that most complaints received by the Customer Care Office were in relation to quality issues.

Now, "[l]*'étendue du caractère substantiel de la modification s'apprécie objectivement*". (*Introduction Au Droit Du Travail Mauricien – 1/ Les Relations individuelles de travail, 2ème édition, page 308,* Dr Fok Kan), and whilst there may appear, on the face of it, to have been a unilateral substantial modification in the Plaintiff's job, it is to be borne in mind that the Plaintiff's job included issues of quality as per the Plaintiff's job description (Doc. P7), as highlighted above.

The Court also bears in mind the Plaintiff's own testimony as well as that of the HR Manager, to the effect that the Plaintiff was still carrying out her visits as Customer Care until the time she left the Defendant Company.

It is further significant to note that the Plaintiff chose to rely on a letter dated 15-12-16 (Doc. P24), i.e. on the day following her Constructive Dismissal according to her, to prove her said averments.

Even if the Court were to take the view (which the Court does not) that there was a substantial modification to the Plaintiff's Employment Contract, as indicated above by remaining in the Defendant Company's Employment and explaining having tried to do what the HR Manager had asked her to do, the Plaintiff is deemed to have acquiesced the said change and is no longer entitled to rely on same to substantiate her Claim, in light of the following extract from the Authority of **Adamas (supra)**:

> 32. In the light of the Board's conclusions regarding the law, the critical question is not simply whether Mrs Cheung remained in the appellants' employment after the appellants had made clear that they expected her to undertake deliveries as part of the contractual duties. <u>It is whether, on the basis that this was not originally within the scope of her contractual duties and not capable of being made so under clause (g) of her duties and responsibilities, she ever, expressly or impliedly, agreed to a variation of her contract so as to bring deliveries within the scope of her duties or of clause (g).</u>

As highlighted above, in light of all the above, the Court is of the considered view that there was no change, whether substantial or otherwise, to the Plaintiff's Contract of Employment.

Was The Plaintiff Requested To Wear A Uniform Worn As The Other Workers In The Factory?

As per paragraph 15 of the 01st Amended Proecipe, the Plaintiff averred that "the General Manager had requested Plaintiff to wear uniform as the other workers in the factory."

In support of her said averment, the Plaintiff relied on the letter of 15-12-16 (Answer A18 of Answer To Particulars).

As per the letter (Doc. P3), it was an express term of the Plaintiff's employment as from March 1992 that the Defendant Company would provide her with a uniform.

The Plaintiff explained that she was issued with a uniform, but never wore same, and that an allowance was negotiated and obtained for her to dress properly, as from 2011.

The Plaintiff deponed to the effect that the General Manager had said in November 2016 that she and the HR Manager, would have to wear a uniform as from 2017, for the ISO Certification for the branding, which was harassment.

The Plaintiff then expatiated on the issue, explaining that she and the HR Manager were not opposing wearing a uniform, but wanted a suit, and requested for another fabric, to differentiate them, but that the General Manager insisted that she and the HR Manager wear the same uniform as factory clerks, which was when the HR Manager said it was harassment (see also paragraph 16 of the 01st Amended Proecipe.

The Plaintiff also deponed to the effect that only the HR Manager and she were requested to wear a uniform, and that the 02 other Managers, who were gentlemen, were not requested to wear a uniform, and were in civilian clothes.

The HR Manager deponed to the effect that in 2016, the Defendant Company had started the procedure for the ISO 9000 Certification, and one of the recommendations was for Employees to wear a uniform.

The HR Manager stated that when she was promoted as Manager, she was given a choice as to whether to wear a uniform or not, and she opted not to, and negotiated and obtained an Allowance as from 2011 to buy/stitch her own clothes.

The HR Manager went on to explain that in 2016, an HR Assistant informed her that the General Manager had said that she and the Plaintiff also would have to wear a uniform, to which she and the Plaintiff did not agree.

She went to see the General Manager on her own, i.e. without the Plaintiff, and told him that she and the Plaintiff were not willing to wear a uniform, but the General Manager was adamant that she and the Plaintiff would have to wear a uniform.

As this displeased her, she went to see the Plaintiff, and they then both went to see the General Manager on the following day, and said they would not wear a uniform, to which the General Manager replied that exceptionally, for them, they could wear a different top, but would have to wear the skirt and jacket of the uniform.

The HR Manager also admitted having said to the General Manager that it was harassment, and admitted it was tantamount to insubordination.

At no stage was it suggested that the Plaintiff's terms of employment were different to those of the HR Manager, and the Court is of the considered view that it is reasonable to infer that the uniform was also an express term of the Plaintiff's Employment as Manager.

It was the case for the Defendant Company that there were 02 meetings, and that at the first meeting, the General Manager insisted that the Plaintiff wear a uniform, and that at the second meeting, the General Manager agreed that the Plaintiff may get her uniform stitched, in the style that she wished, but that the top had to be in the same tone.

So, at first the Plaintiff contended that the request to wear a uniform in itself was harassment, then that it was because she was requested the wear a uniform in the same fabric as Factory Clerks that constituted harassment, and was demeaning.

As regards the ISO Certification, the Plaintiff at first stated that the General Manager of the Defendant Company had told her that she would have to wear a uniform for the ISO Certification, then that she did not know the reason why she was requested to wear a uniform, and then that the General Manager told her that she would have to wear a uniform as from 2017 because of the ISO 9000.

The Plaintiff stated not being aware of any recommendation as from 2015 that all employees wear a uniform for the ISO Certification, and when confronted with her testimony before the previous Bench, stated that there was a recommendation to wear a uniform, but that she never thought that the uniform would be the same as Factory Clerks.

Despite the said contradiction in the Plaintiff's testimony, the Court is of the considered view that the Plaintiff was well aware that the request to wear a uniform was due to the ISO Certification.

From a reading of paragraphs 15, 16 and 17 of the 01st Amended Proecipe and the Answer A19 of the Answer To Particulars), the Plaintiff seems to aver that the fact that she was asked to wear a uniform as the other workers in the factors, when the Defendant Company knew well that the Plaintiff was a Manager, drew managerial salary and managerial fringe benefits, and was sitting in the Administrative Block prior to being transferred to the factory, was tantamount to harassment, and that it was this harassment which was most humiliating and insulting, and constituted clearly a demotion from the Plaintiff's managerial status to ordinary staff status (paragraph 17 of the 01st Amended Proecipe).

However, as per the Answer A21 of the Answer To Particulars, what the Plaintiff considered most humiliating, insulting and clearly constituted a demotion of the Plaintiff from the Plaintiff's managerial status to ordinary staff status was transferring the Plaintiff from the Administrative Block to the factory floor with a request to wear the same uniform as factory workers.

It is also worth noting that in the Proecipe, the Plaintiff averred she was requested to wear a uniform as workers in the Factory (paragraph 15 of the 01st Amended Proecipe), in Answer 19 of the Answer To Particulars it was a uniform as Depot Personnel, and in Court, as Factory Clerks.

There is no indication whether the Factory Worker, the Factory Clerk, and the Depot Personnel wore the same or different uniforms at the relevant time.

The Plaintiff averred having made numerous complaints to the Defendant Company's HR Manager (Answer A22 of Answer To Particulars).

Now, it was not disputed that the Plaintiff occupied the post of Customer Care Manager as from 2012, but other than the Plaintiff's testimony, there is nothing on Record to support the contention of the Plaintiff that her salary was aligned with that of the other 04 Managers, and/or that all Managers' salaries were aligned.

Be that as it may, it is to be noted that as per the Plaintiff's initial Contract (Doc. P3), the uniform was an express term of her Employment.

In light of all the above, the Court is of the considered view it can hardly be said that there was a unilateral change to the Plaintiff's Contract of Employment, let alone a substantial one, and/or a demotion of the Plaintiff by such request to wear a uniform.

Was A Parking Slot Which Had Since Long Been Attributed To The Plaintiff Taken Away?

As per paragraph 18 of the 01st Amended Proecipe, the Plaintiff averred that without her having been informed, the parking which she had used for a very long time was taken away from her and given away to one Mrs Mary Adaken, who is a Cousin of the General Manager of the Defendant Company.

In Court, the Plaintiff deponed that from 2006 to 2010, her car was parked in front of the factory, whereas between 2010 and 2016, she parked her car in front "of the administrative block, next to the port (sic) where the directors were parking".

The Plaintiff explained that when she saw a white car parked in her designated parking slot (though her name was not fixed on the said parking), she asked the General Manager, who told her that the said parking slot was henceforth that of his Cousin Mrs Adaken, as a result of which the Plaintiff had to park her car at the back of the factory where the motorcycles and pick-ups were parked.

This made the Plaintiff feel she was not supported, was being victimised, and was not being valued.

The Plaintiff relied on the letter of 15-12-16 (Doc. P24) to support her averment that the parking slot she was using had been taken away by the General Manager

The Plaintiff explained that there were covered parking slots for the Directors, although there were no names or registration numbers thereon, and 04 parking slots next to the Directors' covered parking slots, one for each of the 04 Managers, and there was tacit knowledge that one of same was for her.

When confronted with her testimony before the previous Bench that she had the same parking ("*j'avais le meme parking")* between 2000 and 2016, the Plaintiff explained that what she meant by that was that she had a parking slot.

It is unlikely that the Plaintiff, who was composed and articulate, would have said that she had the same parking, when she meant she had parking slot.

The said words are plain simple French, and cannot reasonably have had another meaning.

The Defendant Company at all times contended that the Employees of the Defendant Company had "the privilege to park their respective cars in the designated parking area of the Defendant and there is no reserved parking", adding that there were "parking slots/bays reserved for the top management of the Defendant" at paragraph 15.(ii)(v) of the Plea.

It further denied having taken away the Plaintiff's parking slot as alleged by the Plaintiff at paragraph 15. (iii) of the Plea.

The HR Manager confirmed in Court there was no document to the effect that a specific parking slot had been allocated to the Plaintiff, that there was no Record of procedure of who was to park her/his vehicle in which parking slot, and that there was no reserved parking, save for the Directors under the porch.

In light of all the above, coupled with the Plaintiff's own admission there was "tacit knowledge" that one of the parking slots was for her, the Court is of the considered view that there was no allocation of a specific parking slot to the Plaintiff, or that there was no specific designated parking slot for the Plaintiff, and that there was no such designated parking slot which was taken away, from the Plaintiff.

In the circumstances, it cannot be said that there was a unilateral modification of the Plaintiff's conditions of work by the Defendant Company, which modification was repudiatory.

Was The Plaintiff's Name Removed From The Management Forum Of The Company After She Had Been Asked To Proceed On Leave As If The Defendant Company Had Already Taken The Decision To Get Rid Of The Plaintiff's Services?

As per Answer A24 of the Answer To Particulars, the letter (Doc. P22) is meant to be dated 13-12-16.

The Plaintiff conceded in cross-examination having written the said letter on 13-12-16, and having corrected the date to 14-12-16 when she saw her name had been removed from the Viber Forum.

The Plaintiff also explained having changed the date to 14-12-16 because she posted the letter on 14-12-16, then that it was a typing error, in that she wrote "13" instead of "14", and maintained that the letter was written on 14-12-16, because the date was changed to 14-12-16.

The Plaintiff went on to explain that she typed the said letter in the morning, before 08h00, on 14-12-16, and hence did not insert the issue of Viber in the body of the letter.

It is significant to note that the Plaintiff admitted that she considered herself as having been constructively dismissed, independently of the Viber issue.

The Plaintiff's own admission that she wrote the said letter (Doc.P22) on 13-12-16, does not sit well with the Plaintiff's other own admission that a deciding factor was when she was removed from the Viber Forum, following which she received phone calls from her Colleagues on 14-12-16 asking her whether she had been dismissed which was a deciding factor.

In relation to the letter (Doc. P22), the Court notes the following:

1) it is typed;
2) it is unsigned;
3) it was initially dated 13-12-16;
4) the “13” was crossed out, replaced by “14” written by hand, with an initial next to the “14”; and
5) there is a handwritten note at the bottom of the last page of the said letter, with a signature next to the said handwritten note.

In relation to the letter (Doc. D1), the Court notes the following:

1) it is meant to be the original of the letter (Doc. P22);
2) it is signed in black ink;
3) it was initially dated 13-12-16;
4) the “13” was crossed out with blue ink, replaced by “14” written by hand in blue ink, with an initial next to the “14” in blue ink;
5) there is a handwritten note at the bottom of the last page of the said letter, with a signature next to the said handwritten note, all in blue ink; and
6) the said handwritten note is not identical to the one contained in the letter (Doc. P22).

Either the Plaintiff considered herself as having been constructively dismissed on 13-12-16, or on 14-12-16 after being removed from the Viber Forum and after receiving phone calls in the circumstances mentioned above.

In addition, the Plaintiff conceded not having mentioned, when the case was heard before the previous Bench, that she had received phone calls from her Colleagues asking her whether she had been dismissed, although she viewed this as something of utmost importance, a deciding factor, as she had a blank.

It is surprising that the Plaintiff would have had had a blank about this crucial aspect of her case when deponing before the previous Bench.

The various reasons given by the Plaintiff for changing the dates in effect affect the Plaintiff's credibility, and leave an uncertainty as to whether the Plaintiff considered she had been constructively dismissed on 13-12-16 or on 14-12-16.

The Court has noted the letter (Doc. P22), on which the Plaintiff's handwritten note mentions that her name was removed from the "Managers' Forum on Viber" on 14-12-16.

The Court has further noted that in the letter (Doc. D1), the handwritten note mentions the "Viber forum", with the date of 14-12-16 only appearing underneath the Plaintiff's signature.

From what is visible on (Doc. P21), there is no way for the Court to ascertain whether the said screenshot (Doc. P21) relates to the "Managers' Forum on Viber" or to the "Viber forum" mentioned by the Plaintiff.

Be that as it may, the screenshot (Doc. P21) does mention that the Plaintiff's name was removed and it was not disputed that the Plaintiff's name was removed.

Further, although no date appears on the said screenshot (Doc. P21), it was not disputed that the Plaintiff's name was removed on 14-12-16 at about 08h48.

The Plaintiff produced a copy of 02 Cash Memos (Doc. P23), evidencing that the Plaintiff posted the said letter (Doc. P22) at about 11h45-11-h46, i.e. after her name was removed from the Viber Forum.

The Plaintiff also deponed to the effect that her name had been removed from the Viber Forum on 14-12-16, when she was not suspended.

True it is that the Plaintiff was not suspended as at 07-12-16, but the tenor of the letter (Doc. P20) is to be borne in mind. The Plaintiff could have been left in no doubt as to the fact that the Defendant Company was not satisfied with her attitude, which was the very reason she was asked to proceed on leave.

The Plaintiff deponed to the effect that when her name was removed from the said Chat Forum on 14-12-16, she "knew he finally got what he wanted. He is getting rid of me. He wants me out. […] He finally got rid of me".

One can only guess who the said "he" was, the Plaintiff not having specified who "he" was. But it is clear that the Plaintiff was referring to a specific person, as opposed to the Defendant Company itself.

The HR Manager deponed to the effect that she could not say whether the Administrator of the Viber Group had received instructions to remove the Plaintiff from the said Group, and that she could not say whether the Plaintiff was removed from the said Group before the Plaintiff received the letter for the Disciplinary Committee.

The Court is of the considered view that the removal of the Plaintiff's name from the Viber Forum cannot reasonably amount to a unilateral fundamental breach of the Plaintiff's Contract of Employment going to the root of the Contract, as this was a modern tool used for ease of communication.

Further, the Plaintiff deponed that she felt dismissed, irrespective of the Viber Forum, given the succession of events, which was a very exhausting and harrowing period of her Life.

The Plaintiff in effect explained that the removal of her name from the Viber Forum was the last straw.

The Court seeks guidance from the UK Employment Appeal Tribunal (hereinafter referred to as EAT)'s decision of *JV Strong and Co Ltd v Hamill EAT 1179/99*, cited in **Unfair Dismissal, Employment Law Handbook, August 2010**, where the EAT offered guidance inter alia to the effect that "in cases where there has been a course of conduct the tribunal must consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, it must take account of the nature of the incidents, the overall time span, the length of time between the incidents, and any factor that may have amounted to a waiver of any earlier breaches. The EAT added that the tribunal must also consider the nature of the alleged waiver […] whether it was a 'once and for all' waiver or one that was conditional on there being no repetition of the same conduct".

In the present matter, the Court bears in mind the Plaintiff's admission that she considered herself as having been constructively dismissed, irrespective of the Viber issue.

It therefore follows that in fact, the Viber issue cannot constitute the "last straw" in a succession of events.

In light of all the above, the Court is of the considered view that the Plaintiff has not been able to establish that her "name was removed from the Manager's (sic) forum on viber as if the Defendant Company had already taken the decision to get rid of her services" (paragraph 19 of the 01st Amended Proecipe).

Further, the Court is of the considered view that for all the reasons given above and for all the reasons given in relation to each of all other reasons invoked by the Plaintiff for considering she had been constructively dismissed, there has been no breach, whether fundamental or otherwise, of the Plaintiff's Contract of Employment or conditions of Employment, such that the removal of the Plaintiff's name from the Viber Forum cannot be a "sufficient trigger to revive the earlier" (**Unfair Dismissal (supra)**) incidents.

Was The Plaintiff Pressurised Into Retiring?

This issue was not mentioned in the 01st Amended Proecipe, and is hence, strictly speaking, *ultra petita*.

The Court is however of the considered view that it ought to address the said issue of retirement, given the Plaintiff adduced evidence in relation thereto, and given this may shed some light on the intention of the Defendant Company, applying the principles set out in the Authority of **Grewals (supra)** at paragraph 17:

> Although an intention to dismiss is not a necessary part of an employer's repudiatory conduct before it can amount to constructive dismissal, if such intention exists it is plainly material to the question whether such repudiatory conduct has taken place.

It was the contention of the Plaintiff that the issue of her retiring was raised by the General Manager of the Defendant Company on 07-12-16, when she went to see the latter upon receipt of the letter (Doc. P20).

As per the letter (Doc. P22), the Plaintiff wrote therein that the General Manager "proposed" to her to retire. There is no mention in the said letter of any undue influence or pressure being exercised by the General Manager on the Plaintiff for her to retire.

Further, as per the penultimate paragraph of page 01 of the letter (Doc. P24), which was produced by the Plaintiff herself, a discussion with regards to the proposal of the Defendant Company is mentioned.

At no stage did the Plaintiff put in doubt the contents of the said letter.

Further, it is significant to note that it is mentioned therein that the General Manager discussed the amount for settlement, only following the Plaintiff's said request.

This was not put in doubt at any stage.

The Plaintiff deponed to the effect that she was being pressurised by the Defendant Company to retire, with the General Manager going to her place at 21h20 on 12-12-16, and the Plaintiff going into the details of the said meeting, following which the Plaintiff put up a Pre-Measure (Doc. P1).

The Plaintiff maintained that it was the first time the General Manager had to come to her place, and that he did so, to tell her to pre-retire.

In Court, the HR Manager deponed to the effect that the General Manager had told her that the Plaintiff had raised the issue of pre-retirement, and that the letter for the Disciplinary Committee was issued on 14-12-16 (Doc. P26) as the Parties were negotiating.

It is therefore apparent that the question of retirement was raised by the Plaintiff herself, in particular given the tenor of the second paragraph on page 01 of the said letter (Doc. P24).

The Court therefore finds that there is no evidence on Record to establish in a cogent manner that the Plaintiff was being pressurised into retiring by the General Manager.

The Court is comforted in reaching the said conclusion as although the Plaintiff deponed about how strongly she felt about the said actions of the General Manager on 12-12-16, the Plaintiff only made the said Pre-Measure (Doc. P1) on 15-12-16, that is about 03 days after the said visit, and more importantly, 01 day after the date she considered herself as having been constructively dismissed.

It is also interesting to note that the Plaintiff produced the Pre-Measure (Doc. P1) dated 15-12-16, in which she mentions "my general manager" (emphasis added), despite claiming having been constructively dismissed since 14-12-16.

The Court has duly assessed the demeanour of the HR Manager, and is of the considered view that it can hardly be said that the HR Manager was a *témoin de complaisance*.

She deponed in a straightforward manner, struck the Court as an honest Witness, even going to the extent of admitting having called the Plaintiff of her own volition, to ask the Plaintiff to come back to work, that she told the HR Manager that to insist that she wear a uniform was harassment, which was tantamount to insubordination.

It is also to be borne in mind that the HR Manager was longer working for the Defendant Company at the time she deponed in Court.

Other Issues

-Pleadings

The Plaintiff referred the Defendant Company to paragraphs 11 to 27 of the Amended Plaint as to him the Plaintiff's alleged dismissal amounts to an alleged Constructive Dismissal (Answer A27 of the Answer To Particulars).

True it is that the Answer To Particulars dated 07-08-17 related to the Amended Proecipe dated 18-05-17, but it is to be noted that the said Answer refers to paragraphs "11 to 27", when the

Proecipe, the Amended Proecipe, and the 01st Amended Proecipe contain 23, 24, and 24 paragraphs respectively.

This could have been a typographical error, but the Plaintiff referred to paragraphs 29(a) to (i) of the Amended Plaint in Answer A29 of the Answer To Particulars.

In the circumstances, the Court is of the considered view that the references to paragraphs 25, 26, 27, and 29(a)(i) cannot be considered to be mere typographical errors.

The Court has noted that as per paragraph 17(iv) of the Plea dated 10-10-17, the year mentioned in 2017, but places it on Record, that since it was the Plaintiff's own case that she was sent a letter on 14-12-16 requesting her to appear before a Disciplinary Committee on 23-12-16, the dates are to be read as 14-12-16 and 23-12-16, and that no prejudice will be caused to the Plaintiff thereby, in particular considering that the Plea itself is dated 10-10-17, i.e. before the 14-12-17 and 23-12-17.

-Change Of Office

The Plaintiff attempted to canvass the issue of change of office in the course of the cross-examination of the HR Manager, as this was canvassed in Answer A21 of the Answer To Particulars, but the Defendant Company objected to same, as the Plaintiff had not deponed as to same.

The Court is of the considered view that there is no need for the Court to address the issue of change of offices, as Learned Senior Counsel for the Plaintiff did not pursue his questioning on the said issue.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, the Court finds that the Plaintiff has not established her case on the Balance of Probabilities, and the Plaintiff's Claim is therefore dismissed.

With Costs.

[Delivered by: D. Gayan, Ag. President]

[Intermediate Court (Financial Crimes Division)]

[Date: 04 October 2022]