

Aubeeluck-Charles v Shenaz Khan Clothing Ltd

2023 IND 52

CN476/15

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Nazima Aubeeluck-Charles

Plaintiff

v/s

Shenaz Khan Clothing Ltd

Defendant

JUDGMENT

By way of a Second Amended *Proeipe*, the Plaintiff is claiming from the Defendant Company the total sum Rs167 792. 62/- representing Wages as Indemnity in Lieu of Notice and Severance Allowance together with Interest at the rate of 12% per annum on the amount of Severance Allowance payable from the date of termination of employment to the date of final payment, with Costs, for the termination of her employment by the Defendant Company without notice and without justification.

The Defendant Company has denied the said Claim in its Plea, and has moved for the present matter to be set aside with Costs.

Each Party was assisted by Learned Counsel.

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

Case for the Plaintiff

It was the case for the Plaintiff that on 01-06-15, the Defendant Company, through its préposé Mr Naheem Khan (hereinafter referred to as the Defendant Company's préposé), had changed her place of work, inasmuch as she was asked to work on another machine close to an air conditioning unit, and upon her requesting to work on another machine because of the air conditioning unit, as she suffered from back pain, the Defendant Company's préposé stated to her the following words:

to ena caca dans to la tete, pas bizin toi ici, baise to chemin aller.

The Plaintiff was therefore of the view that the Defendant Company had thereby terminated her employment on 01-06-15 without notice and without justification.

Case for the Defendant Company

The Defendant Company's case was to the effect that at no time was the Plaintiff asked to work on another machine, but that the machine the Plaintiff was working on at all times was moved approximately 10 feet away, and was not close to any air conditioning unit.

It was further the case for the Defendant Company that the Plaintiff had not complained that she suffered from back ache, which it considered to be a "mere fabrication and baseless excuse" (paragraph 1. (e) of the Plea) on the part of the Plaintiff, and that no remarks or words had not been uttered to the Plaintiff's address.

The Defendant Company further averred that when it discovered that the Plaintiff had been overclaiming her travelling for the 06 years during which she had been in the employment of the Defendant Company and confronted the Plaintiff in relation thereto, the Plaintiff unilaterally decided to leave her employment, upon being paid her salary and equivalent of 06 days of Local Leave on 01-06-15, stating that she was terminating her employment.

The Defendant Company had therefore not terminated the Plaintiff's employment, and even contributed to the Plaintiff's "NPF and NSF" (paragraph 5. (d) of the Plea) for the month of July 2015.

Analysis

The present Judgment is being delivered in light of our Appellate Court's Judgment dated 09-03-23.

The Court has duly considered all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to the Submissions of each Learned Counsel.

The applicable Law

It was common ground between the Parties that the Plaintiff last worked at the Defendant Company on 01-06-15, and the applicable Law at the relevant time was the **Employment Rights Act** as amended (hereinafter referred to as **ERA**).

Not in dispute

It was common ground between the Parties that the Plaintiff:

- 1) had been in the continuous employment of the Defendant Company since April 2009;
- 2) was employed on a 06-day week basis; and
- 3) last worked for the Defendant Company on 01-06-15.

Was the Plaintiff's employment terminated by the Defendant Company without notice and without justification?

The Plaintiff's contention was that her employment was terminated by the Defendant Company without notice and without justification, when the Defendant Company's préposé changed her place of work and requested her to work on another machine which was close to an air conditioning unit, and upon her requesting to work on another machine because of the air conditioning unit, as she suffered from back pain, the said préposé stated to her the words as reproduced above.

It was the case for the Defendant Company that the location of the machine the Plaintiff was working on was changed by approximately 10 feet, but that the Plaintiff worked on the same machine at all times.

Whether the Plaintiff was asked to work on another machine which was close to an air conditioning unit or not is not central to the determination of the present matter, it being admitted that the location of the machine the Plaintiff was working on was changed.

The Plaintiff maintained in Court having been insulted by the Defendant Company's préposé in the following terms:

ena caca dans to la tête, to pas conne travail bez simin aller.

The only real difference lies in the words "pas bizin toi ici" ("you are not needed here") as averred in the Second Amended *Proecipe* and "to pas conne travail" ("you do not know the work") as deponed by the Plaintiff. The rest of the words were practically identical.

Whilst some variance is to be expected, in particular given the passage of time, the fact remains that "you are not needed here" cannot, and does not, mean the same as "you do not know the work".

This variance was not explained by the Plaintiff, and casts doubts on the Plaintiff's version.

Further, given the Plaintiff stated she went to report the matter to the Labour Office straight after having been insulted, it would have been natural for the Plaintiff to relate on the spot, in what circumstances and for what reason/s she considered her employment had been terminated without notice and justification by the Defendant Company.

The testimony of both Mr Vinesh Bissambur and Mrs Choomeshwari Ramnarain (hereinafter referred to as the Plaintiff's Witness No. 1 and the Plaintiff's Witness No. 2 respectively), who were two of the Labour Officers dealing with the Plaintiff's Complaint at the Labour Office, does not support the Plaintiff's case.

The Plaintiff's Witness No. 2, who was the Officer who recorded the initial complaint of the Plaintiff, stated clearly that no reason was given by the Plaintiff for the termination of her employment by the Defendant Company on the 01-06-15.

Whilst it may be that the Plaintiff's failure to mention why she considered the Defendant Company had terminated her employment without notice and justification was an oversight on her part at the time of her initial visit to the Labour Office, maybe induced by the fact she may have been upset about the whole incident, the Plaintiff ought to have mentioned such reason/s at her subsequent visits to the Labour Office.

No reason/s was however subsequently given by the Plaintiff as to why she considered that her employment had been terminated without reason and justification by the Defendant Company on 01-06-15, as confirmed by the Plaintiff's Witness No. 1.

It is to be noted that the Plaintiff's Witness No. 1 and the Plaintiff's Witness No. 2 deponed as to notes of the Labour Office, which notes had been made by several Labour Officers, as opposed to their respective statements.

Be that as it may, given they had personally dealt with the Plaintiff's complaint at the Labour Office, the Court finds that it can safely act on their respective testimony.

Also, the Plaintiff confirmed that she was paid her dues on the 01-06-15.

Had the Plaintiff been insulted, as she contends she was, it is surprising that she would have waited to be paid her dues, before going to report the matter to the Labour Office.

The fact that the Plaintiff admitted she was paid her dues on the said day in fact undermines the Plaintiff's version that she was insulted.

On the other hand, the Defendant Company's préposé denied having uttered the said words to the Plaintiff's address, and confirmed that the only issue was as regards the Plaintiff overclaiming her Transport.

Mrs Shenaz Khan, the Defendant Company's Director (hereinafter referred to as the Director of the Defendant Company) deponed along the same lines as the Defendant Company's préposé as regards the Plaintiff overclaiming her Transport.

The Road Transport Commissioner, represented by Mrs Guneshwaree Coylass (hereinafter referred to as the Defendant Company's Witness) confirmed that the bus fare from St John, Chebel to Rose-Hill Transport Bus Garage was Rs18/- one way.

Whilst the Plaintiff conceded she was claiming Rs24/- one way, she did explain that she was claiming same as she was travelling in a van, and that the Defendant Company's préposé had agreed to pay the said sum for her to get to work early. This aspect of the Plaintiff's testimony remained unchallenged, the Plaintiff only being asked if she had a document from the Defendant Company authorising her to claim such a sum for her Transport by van.

Be that as it may, in light of all the circumstances of the present matter, all the factors highlighted above, and for all the reasons given above, the Court finds that the Plaintiff has not established that she was insulted by the Defendant Company's préposé when she asked to work on a machine which was not close to an air conditioning unit and that the Defendant Company had thereby terminated her employment on 01-06-15 without notice and justification.

Resignation or Abandonment of Work?

The Plaintiff denied having said that she would leave her employment with the Defendant Company if it adjusted the amount of Transport she was claiming, but maintained at the Labour Office that she had no intention of resuming work at the Defendant Company.

The Plaintiff even refused to resume her work, when such opportunity was afforded to her at the Labour Office.

It was the contention of the Defendant Company, on the other hand, that the Plaintiff had unilaterally left her employment upon being paid her dues on 01-06-15.

Given the Plaintiff denied having resigned, it was incumbent on the Defendant Company to prove that the Plaintiff had resigned, in light of the principles set out in the Authority of **Dindoyal v Gourrege v [2015 SCJ 148]**:

The legal principles setting up the correct approach in determining such an issue are aptly summed up in the following extracts from **G.H. Camerlynck Droit du Travail – Le Contrat de Travail, Deuxième édition at Note 336**:

“... . . . L’employeur est, tout d’abord, tenu d’apporter la preuve de la démission contestée par l’intéressé. Ensuite, les juges – étant donné la gravité extrême des conséquences d’une démission – rechercheront si les propos ou les gestes parfois inconsidérés du salarié ne sont pas dus à une émotion ou une passion excusable interdisant de les considérer comme la manifestation sérieuse d’une volonté de rupture.”

“(38). Attendu que la démission ne se présume pas et que, seule, une manifestation sérieuse et sans équivoque de la volonté du salarié peut permettre d’établir que la rupture est imputable à son initiative” (Limoges 13 juin 1975, D.

1976.308, et la note)(Dans le même sens, Douai, 5 févr. 1976, J.C.P. 1976.IV.325)." (Emphasis added)

In the present matter, there is no evidence other than the words of the Defendant Company's préposé to the effect that the Plaintiff had said that she would leave her employment with the Defendant Company if her Transport amount was adjusted.

The Court is of the considered view that is not sufficient to prove that the Plaintiff had resigned, the more so as the Defendant Company's préposé started by saying that the Plaintiff only came, took her money and left, and then that the Plaintiff had said that if her Transport amount was readjusted, she would leave her employment.

Further, the Defendant Company's préposé stated that he had told the Plaintiff one month earlier that he would adjust her Transport amount and that the Plaintiff had said that if this were done, she would leave her employment. It is not clear from the testimony of the Defendant Company's préposé whether the Plaintiff had said the said words on 01-06-15, or one month before.

This being said, although the Defendant Company contended that the Plaintiff stated she was resigning, it clearly did not take the Plaintiff's said alleged words at face value, and more importantly, did not act on same.

Not only did the Defendant Company's Director state several times that the Defendant Company waited for the Plaintiff to come to work, in vain, but also that the Defendant Company paid the Plaintiff's NPF (Doc. D1) and NSF even after the Plaintiff had said she was leaving her work.

Had the Defendant Company been convinced that the Plaintiff had signified her resignation from her employment with the Defendant Company, there would have been no reason for the Defendant Company to wait for the Plaintiff to come to work and to continue paying the Plaintiff's NPF and NSF.

The Court is of the considered view that, in light of all the Pleadings (see paragraphs 5 (b), (c), and (d) of the Plea) and all the evidence on Record, in particular the testimony of the Defendant Company's Director, in essence, it was the contention of the Defendant Company that the Plaintiff had abandoned her work.

Given the issues raised by the Defendant Company in its Plea, the Court finds itself duty bound to address the issue of abandonment work, applying the principles set out in the Authority of **Berlinwasser International AG Mauritius v Benydin** [\[2017 SCJ 120\]](#):

It would not be correct to state that the Magistrate proceeded to decide the dispute outside the proceedings or by relying upon any extraneous consideration in view of the pleadings and the issues which were raised by the appellant itself.

It is however not open to the Defendant Company to raise the Defence of Abandonment of Work unless it has complied with the express provisions of **s. 36(5) of the ERA**, in light of the principles set out in the Authority of **Mauritius Agricultural & Industrial Co. Ltd v The Permanent Secretary, Ministry Of Labour & Social Security On Behalf Of Auckloo** [\[1974 MR 34\]](#) cited with approval in the Authority of **Dindoyal (supra)**:

To plead abandonment of work implies saying two things: first, the worker was absent from work, and second, he intended not to resume work. The effect of s. 7(3) is that the employer will not be allowed to prove that specific intent unless he has first taken steps to remove any possible controversy - viz. by calling on the worker to resume work. **(Emphasis added)**

The Court is alive to the fact that the Authority of **Auckloo (supra)** was decided under the previous Labour Laws, but the Court is nonetheless of the considered view that the rationale and principles set out in the said Authority apply to the present matter in light of the following passage from the Authority of **Dindoyal (supra)** citing with approval the Authority of **Belle Vue Mauricia (Harel Frères) Ltd v The Permanent Secretary, Ministry of Labour and Social Security** [\[1974 MR 31\]](#):

The Court had this to say whilst interpreting **Section 7(2) and (3) of the Ordinance**, which were couched in terms similar to **Section 32(3) and (4) of the Labour Act 1975**, and which have now been reproduced in **Section 46(7) of the Employment Rights Act** with effect from 2 February 2009:

"It results from the case of Kishtoo v. Building and Engineering Co. Ltd. [Review No. 1/72] that once a worker has duly referred the matter to the Labour

Inspectorate under s. 7(2) of the Termination of Contracts of Service Ordinance (No. 33 of 1963), then the employer is debarred from setting up a defence that the worker has abandoned his employment unless he proves that he has required the latter to resume work in the manner laid in s. 7(3). The terms of s. 7(3) are unrestricted: it prohibits every defence which sets up abandonment of work, and we should not be justified in limiting it to certain forms of abandonment of work to the exclusion of other forms."

S. 46(7) of the ERA in force at the time of the decision of **Dindoyal (supra)** reads as follows:

Where a matter is referred to the Permanent Secretary under subsection (2) or to Court under subsection (3)(a), the employer may not set up as defence that the worker has abandoned his employment unless he proves that the worker has, after having been given written notice –

- (a) by post with advice of delivery; or
- (b) by service at the residence of the worker,

requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from the receipt of the notice.

S. 46(7) of the ERA was repealed by **s. 25(i) of the Employment Rights (Amendment) Act 2013** [**\[Act No. 06 of 2013\]**](#) (hereinafter referred to as the **ER(A)A**), and no mention is made in the said **s. 25 of the ER(A)A** whether **s. 46(7) of the ERA** is being replaced by a specific section or subsection.

That being said, in the same **ER(A)A**, **s. 36(5) the ERA** was repealed and replaced by the following subsection:

- (5) An agreement shall not be broken by a worker where he absents himself from work for more than 2 consecutive working days without good and sufficient cause for a first time unless the employer proves that the worker has, after having been given written notice —
 - (a) by post with advice of delivery; or
 - (b) by delivery at the residence of the worker,

requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from receipt of the notice.

True it is that the wording of the said two subsections set out above are not identical, but the Court is of the considered view that the spirit and purport of the said subsections are the same, that is preventing an employer from treating an employee as having in effect abandoned his work, where he absents himself from work for more than two consecutive working days without good and sufficient cause for a first time, unless there is compliance with the written notice requirement.

The Court is of the considered view that the applicable Law at the relevant time, was **s. 36(5) of the ERA**, which came into effect on 11-06-13, that is well before 01-06-15 when the Plaintiff last worked for the Defendant Company.

At no stage of the Proceedings was it the case of the Defendant Company that the Plaintiff had absented herself in such a manner more than once. On the contrary, the Defendant Company's Representative clearly deponed to the effect that the Plaintiff would let the Defendant Company know when she would not able to come to work, and that the Defendant Company had never had problems with the Plaintiff.

Applying the principles set out in the Authority of **Auckloo (supra)** cited in the Authority of **Dindoyal (supra)**, whilst it appears that the Defendant Company had a "*genuine willingness not to sever [its] contractual relations with the worker.*" (**Ramjan and Co. v Mamode [1977 p. 38]**) as cited with approval in **Dindoyal (supra)**), given the Defendant Company's Director's testimony, as highlighted above, and the fact that the Defendant Company paid the Plaintiff's NPF and NSF (Doc. D1), the Defendant Company is nevertheless "*debarred from setting up a defence that the [Plaintiff] has abandoned h[er] employment [at it has not proven] that [it] ha[d] required the [Plaintiff] to resume work in the manner laid*" (**Belle Vue Mauricia** cited with approval in **Dindoyal (supra)**) in **s. 36(5) of the ERA**.

The Employer is placed under a statutory duty to comply with **s. 36(5) of the ERA**.

Further, the wording of **s. 36(5) of the ERA**, clearly sets out that a written notice is to be delivered to the Plaintiff. Therefore, the Defendant Company's verbal offer to the Plaintiff to resume her

work, albeit at the Labour Office, cannot, in the Court's view, constitute a written notice delivered to the Plaintiff, and hence cannot satisfy the requirements of **s. 36(5) of the ERA**.

The Court has noted the testimony of the Defendant Company's Director to the effect that it did not have the Plaintiff's address, as the latter had failed to give her precise address to the Defendant Company.

This does not mean that the Defendant Company was left with no recourse to comply with the said section of the **ERA**, the more so as the Plaintiff had referred the matter to the Rose-Hill Labour Office, which was to the knowledge of the Defendant Company, it having attended the Labour Office and having offered to the Plaintiff, thereat, to resume her work, which offer was turned down by the Plaintiff thereat. It was therefore open to the Defendant Company to contact the Labour Office in order to obtain the Plaintiff's address, in order to comply with the requirements of **s. 36(5) of the ERA**.

The mandatory nature of the requirement set out in **s. 36(5) of the ERA**, which is in similar terms to **s. 32(4) of the Labour Act 1975**, has been recognized in the Authority of **Dindoyal (supra)**:

The mandatory requirement to conform with the need to serve a written notice in conformity with Section 32(4) of the Labour Act has been consistently laid down in a number of subsequent decisions which dealt with the defence of abandonment of work raised by an employer. For instance, in **Ramjan and Co. v Mamode [1977 p. 38]** the Court pointed out the following at p. 42: 7

"Regarding the appellants' contention that the respondent had himself left his employment, it was observed in argument that that defence was not open to them as they had not complied with section 7(3) of Ordinance No. 33 of 1963 by which it was unlawful for an employer to set up as a defence that the worker had abandoned his employment unless he had first required the worker by notice in the prescribed manner to resume within a specified time and the worker had failed to do so. ..."

"....he (the employer) is debarred from raising it unless he has first complied with the requirements of section 7(3) of Ordinance No. 33 of 1963 as to notice, what the employer is called upon to show is his genuine willingness not to sever

his contractual relations with the worker. In fact what the employer would seek to prove is that he has kept the worker's job available to him until the latter has himself signified his intention not to accept the offer."

Applying the abovementioned principles to the present matter, in light of all the evidence on Record, all the circumstances of the present matter, and for all the reasons given above, although the evidence on Record establishes that the Plaintiff did not work for the Defendant Company after 01-06-15 and that the Plaintiff "intended not to resume work" (**Auckloo (supra)**), the Court is of the considered view that the Defendant Company is precluded from raising the Defence of Abandonment of Work, it having failed to comply with **s. 36(5) of the ERA**.

Basic Monthly Salary

The Plaintiff averred in the Second Amended *Proecipe*, that she was last remunerated at monthly intervals at the rate of Rs335. 25/- per day, but adduced no evidence to substantiate same.

The Defendant Company averred in its Plea that the Plaintiff's monthly basic salary as at July 2015 was Rs5200/-, and this is supported by the Monthly Return of Contributions (Doc. D1).

The Court therefore acts on the basis that the Plaintiff's monthly basic salary was Rs5200/- per month as at July 2015.

Miscellaneous

The Court takes Judicial Notice of the fact that "NPF and NSF" (paragraph 5. (d) of the Plea) stand for National Pension Fund and National Savings Fund respectively.

Conclusion

In light of all the evidence on Record, all the circumstances of the present matter, all the factors highlighted above, and for all the reasons given above, the Court finds that the Plaintiff has established her case on the Balance of Probabilities given the Defendant Company's failure to comply with **s. 36(5) of the ERA**, and the Court therefore orders **the Defendant Company to pay to the Plaintiff the total sum of Rs100 100/- representing Wages As Indemnity In Lieu Of Notice and Severance Allowance, made up as follows:**

1) One month's Wages as indemnity in lieu of notice	Rs5200/-
2) Severance Allowance for 73 months of continuous employment	
Rs5200/- x 3 months x 73/12	<u>Rs94 900/-</u>
	TOTAL Rs100 100/-

Pursuant to **s. 46(11) of the ERA**, the Court has a discretion as to any award for Interest on the amount of Severance Allowance payable (**Ramnarain v International Financial Services Ltd [2021 SCJ 35]**).

The Court is of the considered view that in the circumstances of the present matter, Interest at the rate of 05% *per annum* would be fair, and **the Defendant is therefore ordered to pay to the Plaintiff 05% Interest *per annum* on the amount of Severance Allowance only (Rs94 900/- only), payable from the date of the present Judgment to the date of final payment.**

No Order as to Costs.

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

[Intermediate Court (Financial Crimes Division)]

[Date: 29 June 2023]