DILMOHAMED Noor Ahmad v/s ARICENT TECHNOLOGIES MAURITIUS LTD

2020 IND 20

THE INDUSTRIAL COURT OF MAURITIUS
(CIVIL JURISDICTION)

C N 708/14

In the matter of :

DILMOHAMED Noor Ahmad

Plaintiff

v/s

ARICENT TECHNOLOGIES MAURITIUS LTD

Defendant

JUDGMENT

The present case is a claim by the plaintiff against the defendant company for unjustified termination of employment in the total sum of Rs 2,241,212 representing severance allowance at punitive rate in the sum of Rs 2,109,376 and three months' salary in lieu of notice in the sum of Rs 131,836.

The pleadings

In a nutshell the averments of the plaintiff as per the proecipe dated 30 December 2014 and those of the defendant company as per its plea of 24 November 2015 are as follows:

Plaintiff was in continuous employment of the defendant company since July 2009 until the termination of his employment on 31 October 2014. He was occupying the post of Senior Manager Finance and was earning a terminal monthly salary of Rs 131,836, from which was deducted his contribution towards a pension scheme as mentioned in his contract of

employment. Since he joined employment a sum of Rs 25,000 was remitted to him to pay for all the current expenses of the month and at the end of each month the defendant will top up the balance.

On 10 October 2014 after a board meeting he was forwarded a document to resign of his own free will, to which he did not agree. On 15 October 2014 he sent a letter to defendant to ask for more information . On 30 October 2014 he received an email from defendant asking him to refund the sum of Rs 25,000 and on 31 October defendant sent a hand delivered letter of termination of his employment. Thereafter an amended letter of termination was sent to him and on or about 3 November 2014 he obtained a signed copy of the letter of termination of employment. Plaintiff averred that he considered his dismissal on 31 October to be unjustified. Hence his claim for severance allowance and three months' salary in lieu of notice.

In its plea defendant company averred that it forms part of the Aricent Group which consists of a number of companies throughout the world. It has 4 employees. The sum of Rs 25,000 was paid to plaintiff for incurring the day to day expenses. It further averred that on or about 18 September 2014 plaintiff was explained of the financial difficulties which the Group was facing and various options which had been considered to salvage the situation by Ms Lydia Brown, VP Finance, and Mr Jitendra Grover, AVP Finance of Aricent Group. He was also made aware of the worldwide repercussions of the financial strain of the Aricent Group on its companies. Hence it was contemplated that plaintiff's post would be made redundant as it would be absorbed partly by the Indian office and partly by the US office. The administrative duties would be performed by the local directors.

Defendant averred that plaintiff initially admitted to submit his resignation letter. And so a compensation package was offered to plaintiff representing 3 months' salary and a discharge agreement was thus drafted by defendant on or about 10 October. On or about 22 October plaintiff intimated to defendant that he was no longer willing to submit his resignation and threatened the company to file complaints with the Registrar of Companies. It further averred that the sum of Rs 25,000 was a float to cater for monthly expenses. But in view of the dire financial situation of the Aricent Group in the years 2013 and 2014 as part of the cost cutting exercises these expenses were discontinued. Its financial difficulties rendered it unfeasible to sustain the staff advances. A number of decisions were taken by the Aricent Group in an attempt to salvage the financial difficulties which it was facing as listed in paragraph 7 of the plea.

It is therefore averred that in view of the substantial financial difficulties faced by the defendant, the latter has no other alternative than to restructure its affairs and thus the

plaintiff's post was made redundant. Hence it denied being indebted to the plaintiff in the sum claimed or in any other sum whatsoever. On 4 November 2014 plaintiff was paid by bank transfer the sum of Rs 509,175 representing two months' remuneration in lieu of notice, gratuity and leave encashment. The present claim is therefore to be dismissed with costs.

Evidence adduced by plaintiff

Plaintiff's sworn testimony in Court was in substance to the following effect:

He was recruited by Aricent Technologies Mauritius Ltd (ATML) – the defendant company in 2009 and he acted as director for 4 companies including the defendant company. He was reporting to Mr Mick Lopez, the Chief Finance Officer (CFO) of the company and when the latter left the company he was replaced by Mrs Lydia Brown who sat on the board of Aricent Technologies as directors . He confirmed that on 10 October 2014 he attended to a board meeting after which a discharge letter was provided to him to resign from the company which he produced (Doc.B). He produced the email he sent in reply to the said letter asking for explanations (Doc.C) and he stated that he received no reply. He further produced an email of 30 October 2014 which he received from Mr Sanjay Marway (Doc.D) requesting him to settle the float of Rs 25,000. On 31 October 2014 at 16.55 hrs he got an email requesting him to surrender all the company's assets namely the laptop and the advance of Rs25,000. On the same date he received the letter of termination hand delivered to him by a messenger from Temple Corporate Services and signed by Mr Eric Buhrfeind, Chief People Officer. He made a copy of same which he produced (Doc.E).

Plaintiff stated that he was never given advance notice of the restructurings of the operation activities as mentioned in the said letter. As per said letter his duties and responsibilities will be absorbed partly by an Indian team and the administrative duties will be absorbed by the local directors. At that time there were only 2 local directors namely Ms Jamuna Gopaul and himself. Plaintiff further produced a handwritten copy of an email dated 30 October 2014 which he received on his blackberry (Doc.F). On 31 October he received an email from Ms J Gopaul asking him to ignore the previous letter (Doc.G) and on 05 November he handed over what was asked from him as per the document which was signed both by Ms Gopaul and himself (DocJ).

On 7 November 2014 he sent a letter to the Director of Aricent Technologies Mauritius as per Doc.K in which he made certain queries regarding the discharge agreement, the pension scheme, the restructuring of operations in Mauritius and that his duties will be reallocated partly to an Indian team and partly to a US team, following which he received a letter from Mr Eric Buhrfeind. In the said letter mention was made that he did not respond to the discharge agreement sent to him.

Plaintiff explained that as the financial controller of the company his main duty was to produce management accounts on a monthly basis thus he was the one who knew more about the financial aspects of the company. According to him at no point in time was the company facing any financial difficulties. He denied having ever threatened the company. Referring to documents E and H plaintiff stated that as per the said documents, in Mauritius the company has decided to restructure and reorganise its operations and therefore his current position as Senior Manager and Financial Controller in Mauritius will no longer exist as at 31 October 2014. Plaintiff explained that his responsibilities in the company were mainly as Financial Controller and as per the above documents his duties and responsibilities pertaining to the financial aspects of the company will be taken partly by an Indian team and partly by a US team.

Plaintiff acknowledged having received the letter dated 18 November 2014 (Doc.L) which put an end to his contract of employment. But he considered that his last date of employment was 31 October 2014. He contended that he has been unfairly dismissed and maintained his claim for compensation in respect of his years of service. He stated that he will no longer insist on the claim for three months' salary in lieu of notice. His claim is only in respect of the severance allowance at punitive rate in the sum of Rs 2,109,376 together with costs and interests since the date of his dismissal.

Under cross examination the following facts were elicited from the plaintiff:

He is a fellow chartered accountant from UK since 2005. Before joining the defendant company, he has been working as financial manager at Equity Aviation, then at Mauritours and before that he was working as Auditor in BDO. He admitted that he has a career mainly in the accounting field. His job description as per his contract of employment was Senior Manager/Finance (Doc.M).

The defendant company is a contracting entity engaged in software. It is a global business company holding a licence no.1 – GBL1. It is a company which does not operate within Mauritius. its activities are outside Mauritius.

Aricent is a group of companies operating worldwide and the defendant company forms part of this group. The activities performed from Mauritius are for the benefit of the other companies within the group worldwide. Plaintiff however considered that the primary beneficial would be as far as possible ATML.

Plaintiff admitted that the company in Mauritius was dealing primarily with a company in India and Mr Deepak Narain was one of the persons to whom he was reporting. He admitted that in the year 2014 there were a number of changes occurring within the Aricent group of

companies worldwide. He further conceded that among these changes were a number of restructurings done in other companies outside Mauritius.

Plaintiff stated that the first time he found out his job would no longer exist and his position would be made redundant was in September 2014 when he received a call from the HR in India namely from one Mr Jollysing informing him of a conference call discussion which would take place. Same was done around mid September and during which were present Ms Lydia Brown – Financial Controller based in the US, and Mr Grover who was based in India. Plaintiff conceded that the conference call discussion was about the restructurings envisaged in Mauritius in the defendant company and he confirmed that it was said that as part of the restructuring his position would no longer exist. Subsequent to that he sent an email to Ms Lydia dated 8 October 2014. Upon being referred to an email which he sent on the 15 October 2014 wherein he stated that he was aware that his job will be made redundant, plaintiff stated that he was referring to the conference call.

Plaintiff confirmed that he received the discharge agreement but after he sought legal advice he expressed his intention not to sign the said document. He identified Doc.H (letter dated 31 October 2014) as being the termination letter and stated that when he sent the letter dated 7 November 2014 (Vide Doc.K) he was no longer in employment; he had already surrendered his official items and was already paid the two months' notice and the untaken leaves. The payment was received by him on 4 November. He confirmed that in his letter of 7 November 2014 i.e Doc.k he raised four issues. He admitted that this document concerns all his views about the termination of his employment. He considered that the end of his employment relationship with the defendant company was on 31 October 2014. Following the letter dated 18 November 2014 (Vide Doc.L) he did not receive any further correspondence from the defendant company.

Under further cross examination plaintiff admitted the following facts put to him by Learned Senior Counsel appearing for the defendant company:

-Paragraphs 10 -14 of the Answer to particulars summarise the sequence of events for his termination;

- He was aware that there was a restructuring going on at Aricent worldwide and ATML in Mauritius as well;

-His position was made redundant as part of this restructuring

-The works he was doing in Mauritius was taken over mostly by the Indian colleagues he was working with and the administrative parts of the work was also supposed to be taken over by the local management company which handles the affairs of ATML;

-All the above were the reasons why his employment was terminated.

In re examination it came out that defendant company is a company based in Mauritius for Aricent Group of companies. Doc.E refers to the ongoing financial difficulties the Group has been facing. The Group never sent plaintiff any auditors' report. There were three other employees of the company – one looking after the accounts and the other two were assisting the Revenue department. They were recruited in 2013 and they are all Indians. He was the sole local employee of the company. Plaintiff maintained that he never received any formal communication that his duties and responsibilities will be taken over partly by the Indian team and partly by the US team, and that his administrative duties will be absorbed by the local directors as mentioned in the letter of 31 October. At the material time the local directors were Ms Jamuna Gopaul and himself.

Miss Bibi Tashoodeen Resal, a higher social security officer was called as a witness for the plaintiff. She confirmed that ATML is a company registered in Mauritius and had paid contribution to the employee Mr Dilmohamed Noor Ahmad i.e the plaintiff in the present case from July 2009 to December 2014.

Evidence adduced by the Defendant

Mr Sachin Luchmun deposed as representative of the defendant company in his capacity as Director of ATML – post which he is occupying since October 2014. Prior to 2014 he was the company secretary.

Mr Luchmun confirmed the defendant's plea namely at paragraph 3(1) that the company was in financial difficulties. He however conceded that he was not present at the meeting mentioned therein namely the meeting of the 18 September 2014 between Ms Lydia Brown, VP Finance, Mr Jitendra Grover, AVP Finance of Aricent Group and the plaintiff whereby the latter was informed of the financial difficulties the Group was facing and the various options considered so as to salvage the situation.

The defendant's representative testified to the effect that since 2013 the defendant company was in difficult financial situation and this led to some group structural. He explained that defendant company is part of the wider group of companies i.e Aricent Group. The latter is present in a number of jurisdictions and the defendant company is only one jurisdiction. He confirmed that there were several measures taken by the Aricent Group in order to salvage the financial difficulties which the Group was facing as enumerated in paragraph 7 of the plea namely:

-In the United States- the relocation of an office into a smaller office because of the laying off of workers

-In South Africa and Ukraine- closing down of offices. Hence Aricent South Africa Private Ltd was deregistered in April 2016 as shown by the certificate of deregistration dated 21.05.2014– Doc.R. And for Ukraine too there was a deregistration of Aricent Ukraine Limited Liability Company as per the certificate dated 1 April 2014 (Doc.S).

-In India there was laying off of workers, the headcount of 8704 was reduced to 8522 i.e a reduction of 2.9% as evidenced by letter dated 1 April 2014 (Doc.T).

-In China there was a substantial reduction in workforce of 85% from November 2014 to January 2015 (Doc.U).

Mr Luchmun stated that all the above shows the financial background of the company in 2013, 2014 to early 2015. He further added that at the material time the local company i.e the defendant company which forms part of the Aricent Group, was also affected. He explained that all above decisions taken by the Group had a direct impact in Mauritius. They brought about a change in operations and restructuring of local activities. The structure of the defendant company changes. At the beginning of October 2014 there were 4 persons- plaintiff as Senior Manager reporting to AVP Finance in India; Mr Bhupender Soni, ex Finance Treasury reporting to AVP Finance India; Mr Choubey and Pandey reporting to AVP Finance India. In 2016 the organigram of the company changes – plaintiff is no longer there and his position as Senior Manager does not exist anymore. Mr Chowbey is the only one there . There is instead a VP legal to whom Mr Deshpande reports - Doc.V.

The above witness stated that the job profile of Mr Deshpande is different from that of the plaintiff. Mr Deshpande is a legal person. His job was to vet contracts and approve them as well as carrying on negotiations for the company whilst plaintiff was more involved into the accounting/finance part of the entity. He pointed out that after plaintiff's departure no one took over his work and the task previously assigned to him was allocated to India and it is still the case today.

Mr Luchmun further stated that based on plaintiff's letter of 7 November 2014 (Doc.K) the only grievance of plaintiff concerning the restructuring of the company was that there would be only one local director left in the company, which is not in line with the Mauritian legislation. He however explained that the defendant company is a global business licence company of category 1. It holds a licence of category 1 and regulated by the FSC. In normal global business companies it is mandatory to have 2 resident/ local directors. In the case of the defendant company at that time there were 2 local directors namely Jamuna Gopaul and himself. Ms Gopaul was an employee of Temple Corporate Services (TCS) hence a professional director and himself as an employee of the defendant company. Then after the departure of plaintiff there are 2 local directors namely Ms Suvidhi Mohunparsad and he was

alternate to her. Miss Mohunparsad is an employee of TCS with a background of finance and accounting. She is not an employee of the defendant company but a professional director. Hence there are two professional directors and they are not employees of the defendant company like was the plaintiff.

Upon being shown Doc.L, the witness confirmed that it is a letter in reply to that sent by plaintiff whilst Doc.B – (the discharge agreement) was the same document which Mr Buhrfeind was referring in his letter i.e Doc.L, He confirmed a compensation was given to plaintiff namely a goodwill payment equivalent to 3 months remuneration. He finally added that following the termination letter issued to the plaintiff (Doc.H) and which was copied to the Ministry of Labour, the latter did not revert back to the company.

Under cross examination Mr Luchmun stated that he is aware of all the accounts of the company for the years 2013, 2014 up to date. He explained that when plaintiff's employment was terminated Ms Suvidhi Mohunparsad was appointed as director and he was appointed alternate director in October 2014. Before he became a director of the defendant company he was an employee of Temple Corporate Services Ltd (TCS) and at one point in time he was delegated by TCS to act as Secretary. At that time there were two Mauritian directors – Ms J Gopaul and the plaintiff, and one foreign director – Ms Lydia Brown. Mr Jeetendra Grover is not a director of the defendant company. He is in the management of Aricent Group. Both Mr Grover and Mr Buhrfiend are part of the Aricent Group.

The above witness confirmed that the documents which he produced in relation to Ukraine, China, South Africa etc are pure legal entities. They are foreign companies. As regards the defendant company, he believed that plaintiff was the best person to know whether the company was making profits or not. He has seen the audited accounts of the defendant company for the years 2012, 2013 and 2014. He confirmed that the defendant company is a registered company in Mauritius and registered with the FSC. The document submitted to the FSC are those relating to the financial statements of the defendant company.

Mr Luchmun admitted that he is deposing on behalf of the defendant company and mandated to give information concerning the company. However he has not brought the audited accounts of the defendant company because the Board decided to submit the Group audited accounts. Under further cross examination following an adjournment of the matter, the witness stated that following a Board meeting he has been authorized to produce before this Court the audited accounts of the defendant company. He thus produced the audited financial statements of the defendant company for the years 2009 – 2014 – Docs.W – W5. He explained that the financial year starts 1st April to 31st March and hence the audited accounts represent the income statements for year ending 31 March for each financial year.

It came out that for year 2009 (Vide Doc.W), there was a profit of 1,560,000 USD whilst for year 2014 (Doc.W5) there was a profit of Rs 35,805,104 USD. He confirmed that as per Doc.W – pg 7 under item 'cash at bank" for year 2009 there was 4,468,203 USD and for year 2014 – Doc.W5 as at 31 March 2014 the cash at bank was 18,494,307 USD.

According to Mr Luchmun the auditor's report for 2014 can be considered to be a clean report. He confirmed that in all the auditors' report his name do not appear as a director. For year ending 31 March 2014 according to the report the directors were the two foreign directors – Mr Buhrfiend who became director on 1st August 2013 and Ms Lydia Brown became director on 29 May 2013. He explained that there were two foreign directors and two local ones namely Mrs Natacha Bissessur- Jhugroo and Ms J Gopaul, Mrs Kushmawtee Doomun-Heerallal is the alternate director. He became director on 10 October 2014. As at now there are three directors, two Mauritians – Mr Ravi Nagpal and himself and one foreigner.

In re examination Mr Luchmum produced the organization chart of the different entities (Doc.X). He explained that Aricent Group encompasses the whole group and it is based in the United States. The parent company is Aricent Technologies based in Cayman and ATML falls under Aricent Technologies. He further explained that as per Doc.W4 the parent company engages itself to provide financial support to ATML in case it is unable to run its business effectively. Referring to the financial statement of 2012 (Doc.W3) at note 30 he stated that though the company made profits it depended heavily on the financial support from the parent company. The shareholders injected money – 'Injection Capital' whenever the company needed to have funds and this generated the profits. However the parent company had taken a lot of debts to actually give money to ATML. Thus whatever profits were derived from the company were sent back to the parent company for it to service its debts. As the parent company was making losses thus the decision was taken to restructure all its subsidiaries. And this led to the closure of offices and reduction of workers in South Africa, China, Ukraine and india.

Through Court following questions by Counsel for the plaintiff, it came out that for the year 2013 as per Doc.W4 (pg 40) the borrowings which the company had taken from Aricent Technologies was USD 30,790,000 whilst for year ending 2013 the borrowings were USD 18,990,00 and in 2014 it was USD 8,540,000 (Doc.W5 -pg 8)

He explained that ATML had actually repaid USD 22,360,000 till March 31, 2014 and in 2013 it paid USD 11,910,000 as loans (pg 43 of Doc.W5).He further added that the money which was accounting profits for the purposes of the financial state of the company were in fact capital injections which were made for the company to remain in financial good state.

Thus though the company was accounting profits this should not be construed as a show of the performance of the company.

Submissions

Both Counsel filed written submissions.

Plaintiff's main contention was that the acts and doings of the defendant amounted to unjustified dismissal warranting payment of severance allowance. It was pointed out that the economic state of Aricent Group of companies does not bind the plaintiff inasmuch as his employer is Aricent Technologies Mauritius Ltd. Furthermore the balance sheet of the defendant company shows that it had been making profits throughout the years and dividends too had been paid to its shareholders (page 44 of Doc.W5). It was further submitted that the employer cannot on the last day of the month dismiss without giving any advance reasons.

It was also submitted that the defendant must establish on a balance of probabilities that the restructuring was necessary and that it implemented cost saving measures as well as it offered alternatives to plaintiff. Counsel made reference to two judgments of this Court and the Privy Council case of De La Haye v Air Mauritius Ltd [2016] PRV 88

Counsel appearing for the defendant based his submission on three limbs – the strong defence of the defendant, the financial turmoil of the Aricent Group to which the defendant belonged and which led to a restructuring of the defendant company and the decisions for the running of the defendant company is the defendant's sole prerogative.

Analysis

I have carefully analysed all the evidence on record as well as the written submissions filed by both Counsel in respect of the present matter.

Undisputed Facts

It is not disputed that plaintiff was an employee of Aricent Technologies Mauritius Ltd - hereinafter referred to as 'ATML' and/or the defendant company, since 15 July 2009 (Vide Docs.A & M) until the termination of his employment on 31 October 2014 (Vide Doc.H). He was recruited as Senior Manager of Finance. It is also not in issue that ATML forms part of the Aricent Group - hereinafter referred to as "The Group" and that the Group has business operations in a number of countries including the United States, India, China, Ukraine, South

Africa, United Kingdom and Mauritius. The company's parent company is Aricent Technologies based in Cayman.

Disputed facts

It is the defendant's case that the Group has been experiencing financial difficulties over the last few years. This has led the Group to effect a global restructuring of its operations so as to salvage those financial difficulties. In that context the Group has taken a series of decisions in a number of jurisdictions where it has its subsidiaries. It is therefore the defendant's contention that those measures had a direct impact on its local subsidiary i.e ATML and they had brought about a change in operation and a restructuring of its local activities. Hence the post of Senior Manager of Finance held by plaintiff was made redundant and his duties were taken over partly by the Indian office and partly by the US office. The administrative duties would be performed by the local directors.

It is the plaintiff's case that the termination of his employment was unjustified. It was contended that plaintiff was not given any advance reasons for the termination of his employment. However the plaintiff's main contention as transpired from the written submissions filed on his behalf was that if the Aricent Group was allegedly facing economic difficulties this does not concern the plaintiff inasmuch as the latter was an employee of ATML. And it has been highlighted that ATML was not suffering any losses but was making profits. Furthermore no alternatives were given to the plaintiff. Hence plaintiff considered that he has been dismissed summarily and without any justification warranting payment of severance allowance to him.

The law applicable

The termination of the plaintiff's employment being on 31 October 2014, the law applicable is the **Employment Rights Act (ERA) 2008** as amended by Act No.6 of 2013 (hereinafter referred to as "The Act") which came into effect on the 11 June 2013.

As per the evidence on record plaintiff's employment was terminated as a result of his post being made redundant in the context of a restructuring of the defendant company. In the present state of our law, in such a particular situation the employee will be entitled to payment of severance allowance if the ground(s) put forward by the employer do not constitute valid reasons and hence causing the termination of his employment to be unjustified.

The section of the Act relevant to the issues in the instant case namely whether the termination of plaintiff's employment on the ground of redundancy was justified/unjustified

and whether plaintiff is entitled to payment of severance allowance is **section 46 (5) (d)** of the Act, which reads as follows:

46. Payment of severance allowance

(5) Where a worker has been in continuous employment for a period of not less than 12 months with an employer, the Court may, where it finds that –

(d) the grounds for the termination of agreement of a worker for economic, technological, structural or similar nature affecting the enterprise, do not constitute valid reasons;

order that the worker be paid severance allowance as follows –

(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months' remuneration; and

(ii) for any additional period of not less than 12 months, a sum equal to one twelfth of the sum calculated under subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer.

It is clear from the evidence on record that no 'faute' lies at the door of the employee and that the sole ground relied upon by the employer (defendant company) to terminate plaintiff's employment was for purely economic/structural reasons. Hence it can be said that it is a termination based on "motifs économiques" or a "licenciement économique" which is defined in the French Code du Travail in its article L. 321 -1 as the termination of employment of *"la personne du salarié résultant d'une suppression ou transformation d'emploi ou d'une modification substantielle du contrat de travail consécutive notamment à des difficultés économiques ou à des mutations technologiques".*

Discussion

As per the wordings of Section 46(5) of the Act, the burden lies on the defendant company-employer to prove that there were valid economic, technological, structural or reasons of similar nature to terminate plaintiff's employment.

In the Supreme Court case of ***La Bonne Chute Ltd v Termination of Contracts of Service Board [1979] MR 172*** it was held as follows " ……*In determining whether an employer is justified in reducing his work force, the Board should not limit its exercise to a mathematical computation, but consider also whether the employer has shown good cause to lay off the particular worker or workers concerned. To hold otherwise would mean that, in giving notice, the employer could even fail to disclose the names of the workers destined for*

the axe, so that the proceedings before the Board would take place without the worker whose livelihood may be at stake being given a hearing."

On the other hand in the case of ***Nestlé Products (Mtius) Ltd v Dabysingh*** [1988 MR 179] it was held that ……..*"Economic, technological, or structural grounds are usually referred to in French law as motif économique resulting from economic or financial difficulties (d'ordre conjoncturel) or as a result of technological changes (d'ordre structurel). However it has been reported that even in the absence of any financial difficulties or technological changes, there could still be licenciements pour motif économique where the termination or modification is being made to preserve the competitiveness of the business."*

Turning to case in hand, defendant has adduced evidence that the Aricent Group of which the defendant company forms part, was facing financial difficulties. It is also on record that in order to salvage the difficult economic situation it was facing, the Group envisaged a global restructuring strategy and it was in that context that several measures were taken in respect of the Group's subsidiaries. On that score the Court takes note of the unchallenged evidence on record that in several of its subsidiaries cost saving measures have been taken in the form of closing down of offices and laying off of workers. Indeed it came out in evidence that in the United States, India and China there have been a reduction of workforce namely a reduction of 2.09% in India (Vide Doc.T) and 85% in China (Vide Doc.U). In the United States there have been a relocation of an office into a smaller one due to the laying off of workers whilst in South Africa and Ukraine offices have been closed down leading to the deregistration of the Aricent South Africa Private Ltd and Aricent Ukraine Limited Liability Company as evidenced by Docs.R and S respectively.

Whilst the above evidence has not been challenged, it transpires from the tenor of the evidence adduced by the plaintiff that his main contention was that though Aricent Group was facing financial difficulties, his employer – ATML was not in the same situation in view of the profits generated by the company as evidenced by the audited accounts of the company for the years 2009 – 2014 produced by Mr Luchmun, the representative of the defendant company (Docs.W – W5). Whilst it is true to say that the profitability or not of the defendant company was not specifically averred in the plaint, however it is significant to point out that the burden is on the defendant to prove that the actions taken by the employer constitutes a valid reason to terminate the plaintiff's employment. Hence it was in that context that plaintiff has shown to the Court that according to him the financial situation of his employer did not warrant the abolition of his post so that he considered the termination of his employment unjustified.

Whilst it is correct to say that the audited accounts of the defendant company show that the company has generated profits - for example for year ending 31 March 2014 there was a net profit of 35,000,000 USD (Vide Doc.W5) the Court cannot lose sight on the other hand of the explanations of Mr Luchmun to the effect that the defendant company depended on its parent company – Aricent Technologies which injected capital and gave loans to the defendant company to run its operations. This explains the borrowings taken by the defendant company (See pg 40 Doc.W4, pg 8 Doc.W5) and the repayment of loans by ATML to Aricent Technologies (pg 43 Doc.W5). Hence as the parent company was making losses the decision was taken to restructure all its subsidiaries.

In light of all the above, the crucial question which this Court is led to determine is the following: Does the financial situation of the Group in no way affect its subsidiaries, and hence the defendant company?

The following extracts from ***Encyclopedie Dalloz, Tome III Répertoire de Droit du Travail, Licenciement pour motif économique, at note 98*** are of pertinence to the above question:

98. Dans L'ârret dit "Thomson Vidéocolor", la chambre sociale énonce clairement que "les difficultés économiques doivent être appréciées au regard du secteur d'activité du groupe auquel appartient l'entreprise concernée" (Soc. 5 avr. 1995, no. 93 -42.690, D. 1995. 503, note M. Keller et Somm.367, obs. I. de Launay-Gallot)……..Bien entendu, lorsque l'entreprise n'appartient à aucun groupe, le cadre d'appréciation demeure l'entreprise (Doc. 7 oct. 1998, no. 96-43.107, RJS 11/1998, no. 1350).

The above decision of the Cour de Cassation finds its great relevance in today's economic context as nowadays economic activities are more and more often globalized so that one cannot make abstraction of the economic situation of the foreign companies forming part of a group of companies. As pointed out at ***note 100 of Encyclopedie Dalloz*** (supra) "*En faisant abstraction de la situation des entreprises étrangères du groupe qui appartiennent au même secteur d'activité, on s'expose à voir se développer des pratiques dans lesquelles l'entreprise francaise du groupe est considérée comme pouvant concentrer les coûts et les pertes de ce secteur, sans possibilité de corriger l'appréciation à l'échelle de l'ensemble du secteur d'activité , en intégrant dans l'analyse les entreprises étrangères florissantes du même secteur. On crée en quelque sorte un angle mort dans l'évaluation de la situation économique. Ce biais est regrettable. Dans la mesure où les activités économiques sont de plus en plus souvent, de nos jours, "globalisées" ou "mondialisées", il n'est guère possible d'avoir une représentation pertinente de la situation économique de l'entreprise dans son*

domaine d'activité si l'on occulte, a l'intérieur du groupe en cause, les résultats internationaux du secteur d'activité correspondant……..."

Based on all the evidence on record and from the analysis above, the Court is of the considered view that the subsidiaries forming part of the Group cannot be left unconcerned by the financial turmoil which the Group was facing. In fact as already elaborated above it was the financial crisis of the Group which led to this global restructuring exercise in several of the Group's subsidiaries like India, China, South Africa where there were closing down of offices and laying off of workers. This begs the question as to whether Mauritius could have been spared of this restructuring exercise. Unfortunately not. As explained by the defendant's representative , Mr Luchmun, the measures taken by the Group to salvage the situation have a direct impact in Mauritius and have brought about a change in its operational activities and a restructuring of the local activities. Indeed it is on record that ATML was dealing primarily with India and in the context of this restructuring, the post of Senior Manager of Finance occupied by plaintiff was absorbed partly by the Indian team and partly by the US team so that plaintiff's post was made redundant and no longer existed as at 31 October 2014.

Furthermore it transpires that those cost saving measures were taken by the Group "with a view to continuing to operate in the most effective and efficient manner in the short and medium term" (vide Doc.H). Indeed the prerogative to manage and organize his business lies with the employer who knows best how to run his business so as to make it more effective and productive. In fact this is a well established principle in the french jurisprudence as pointed out by ***Camerlynck in Dalloz, Droit du travail, Contrat du travail, tome 1 at note 464 :***

"Selon une jurisprudence traditionelle confirmée, le chef de l'entreprise propriétaire étant seul responsable du risque ainsi assumé, bénéficie corrélativement du pouvoir de direction; il décide donc seul de la politique économique de l'entreprise, de son organisation interne et des modalités techniques de son fonctionnement qu'il peut à tout moment aménager à son gré. Le juge ne saurait en aucun cas se substituer à lui dans l'appréciation de l'opportunité des mesures prises, quelles que soient les conséquences au regard de l'emploi".

The same approach is adopted in the Supreme Court case of ***Plaine Verte Co-operative Society Ltd v/s G. Rajabally [1991] SCJ 227*** where it was held that *"….the Court should not substitute itself to the employer who keeps the last word as to how his business is to be run and managed….."*

Hence the defendant company – plaintiff's employer, as part of the Group cannot but implement those measures taken by the Group in several of its subsidiaries so as to make

the operation activities of the Group and hence its subsidiaries more productive and effective. In fact plaintiff admitted during cross examination that there were a number of changes occuring within the Aricent Group, among which a restructuring exercise in many companies forming part of the Group including ATML and that his position was made redundant as a result of this restructuring.

Plaintiff's contention that he was not made aware of this restructuring at the level of ATML is not borne out in evidence. On the contrary there is evidence on record that since mid September 2014 plaintiff was made aware of the restructuring exercise contemplated by the Group for Mauritius during the conference call which he had with Mr Jollysing, Ms Lydia Brown and Mr Grover (see proceedings 06 March 2017 pg 12 & pg14). Furthermore as per Doc.L plaintiff was also explained by the HR of the options available to him as well as the compensation to be payable to him.

Conclusion

In the case in hand it is on record that the global restructuring envisaged by the Group of which the defendant company forms part, is to help the Group get out of the financial turbulence it was facing and to make it more effective. A number of cost effective measures were implemented by the Group in several of its subsidiaries. It was in that context that the position held by the plaintiff in ATML - the defendant company, one of the Group's subsidiaries, was made redundant and it is on record that as at to date the position of Senior Manager of Finance no longer exists in the organigram chart of ATML (Vide Doc.V).

In light of all the above, the Court is satisfied that the defendant company- employer has proved on a balance of probabilities that the post occupied by the plaintiff- employee was no more required by the employer in the context of the global re organization of the Group, thus causing the post of Senior Manager of Finance to be redundant. In the circumstances the Court considers that the termination of the plaintiff's employment on the ground of redundancy was justified.

I accordingly dismiss the present plaint.

I make no order as to costs.

This 25 August 2020

K. Bissoonauth (Mrs)

President, Industrial Court