Constantin v Sorrento Co Ltd

2023 IND 9

CN291/14

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Annabelle Constantin

Plaintiff

v/s

Sorrento Co. Ltd

Defendant

JUDGMENT

By way of Amended Plaint dated 20-09-18, **the Plaintiff is claiming from the Defendant Company the total sum of Rs287 428. 20/- representing One Month's Wages In Lieu Of Notice and Severance Allowance, together with Interest at the rate of 12% running as from the date of termination of the agreement to the date of final payment on the sum of Severance Allowance, and Interest at the legal rate running as from the date of Judgment to the date of final payment on the Wages In Lieu of Notice, with Costs, for the unjustified termination of her employment by the Defendant Company.**

The Defendant Company denied the said Claim in its Amended Plea dated 17-01-19.

The Parties were respectively assisted by Learned Counsel.

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

Case For The Plaintiff

It was the case for the Plaintiff that her employment was terminated by the Defendant Company for having been ill-treated on 13-01-14, such that she was entitled to Severance Allowance.

Case For The Defendant Company

The Defendant Company denied the Plaintiff's Claim and the gist of its case was to the effect that it had not terminated the Plaintiff's employment, and that it was the Plaintiff who had stopped working.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter.

The Court has also given due consideration to the Submissions, Authorities, Extracts of Reference Books, and cases referred to respectively by each Learned Counsel.

The Court has duly considered all the documents produced in the course of the Proceedings.

It appears that (Docs. D2 and D3) are copies of the same document, and the Court therefore acts on the basis of (Doc. D2).

Applicable Law

Given the Plaintiff's employment was terminated on 13-01-14, the applicable Law at the relevant time was the **Employment Rights Act as amended (hereinafter referred to as ERA)**.

Not In Dispute

It was not in dispute that the Plaintiff was employed as Accounts Clerk by the Defendant Company and was therefore in the continuous employment of the Defendant Company at the relevant time.

It was also common ground between the Parties that Mrs Jennifer Chung Tung (hereinafter referred to as the Defendant's Representative) was the Director of the Defendant Company at the relevant time. This is also borne out by the documentary evidence (Docs. P and D2).

Date of Entry

The Court has noted that the Plaintiff contended to have been in the continuous employment of the Defendant Company as from 01-04-06, but conceded in cross-examination having resigned in February 2007 and started working at the Defendant Company again as from 01-04-07.

It is averred in the Amended Plea that the Plaintiff was in the continuous employment of the Defendant Company as from 02-04-06, whereas it was put to the Plaintiff in cross-examination that she had started working for the Defendant Company as from 01-04-06.

And as per the Termination Agreement (Doc. P), which was prepared by the Defendant Company itself, it is mentioned that there was a Contract of Employment between the Plaintiff and the Defendant, which Contract was dated 01-04-06.

Be that as it may, the Court is of the considered view that the Plaintiff having admitted in Court that she started working at the Defendant Company on 01-04-07 amounts to an *aveu judiciaire*, which establishes that the Plaintiff had started working for the Defendant Company as from 01-04-07.

Constructive Dismissal

It was originally averred in the Plaint that the Plaintiff had been "constructively dismissed on account of having been ill-treated by the Director of the Defendant)" (paragraph 3. g of the Plaint dated 15-05-14), but the said Plaint was amended to *inter alia* specifically delete the word "constructively", and it was averred in the Amended Plaint dated 20-09-18, that the Plaintiff had been "dismissed on account of having been ill-treated by the Director of the Defendant".

It was then averred:

1) at paragraph 3. g of the Amended Plaint dated 20-09-18, that the Plaintiff's employment had been "verbally terminated […] illegally";
2) at paragraph 3. i of the Amended Plaint dated 20-09-18 that the Plaintiff had been "summarily dismissed by the Defendant"; and then
3) at paragraph 4 that the Plaintiff's "contract of employment has been terminated by her employer, in circumstances where she is entitled to severance allowance".

In Court, the Plaintiff deponed to the effect that she had been ill-treated, and that hence she considered her employment had been terminated, the more so as the Defendant's Director had acted in a similar manner with her in the part.

The Plaintiff added that another reason for which she considered her employment to have been terminated by the Defendant Company is that the Defendant Company's Director told her that she could leave if she was not happy.

Then, the Plaintiff added in Court that her employment had been terminated by the Defendant Company for its failure to pay her dues within the statutory delay, and as she had been given no Notice

It is trite Law that the principles governing unjustified, illegal, or summary dismissal are very different from the ones governing constructive dismissal.

That being said, although the state of the Pleadings is not clear, as highlighted above, bearing in mind the basic principle that the Parties are bound by their Pleadings, Learned Counsel for the Plaintiff and for the Defendant Company agreed in Submissions that the present matter was one of constructive dismissal.

The Court therefore proceeds on the basis that the present matter is one of constructive dismissal, and the question to be addressed by the Court 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.

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.

It is settled Law that the burden of proof lies on the Plaintiff in cases of constructive dismissal.

Ill-Treatment

The initial reason invoked by the Plaintiff for her Claim for constructive dismissal is that she was ill-treated by the Defendant Company.

It is clear from the original Plaint dated 15-04-14 and the Plaintiff's Complaint to the Labour Office (Doc. D2) that the basis for the Plaintiff's Claim was the alleged incident 13-01-14.

In her Complaint at the Labour Office, the Plaintiff explained that when she resumed work, she was given 03 months' work to be completed in 02 weeks, and when she told the Defendant Company's Representative that she would not be able to complete such amount of work in such a short period and that she was not sure she would able to be at work on the following day as her Mother was ill, the Defendant Company's Representative told her that she would have to submit a letter should she decide to resign.

The Plaintiff then explained that the Defendant Company's Representative stated that if she could not do the work, she could leave.

Following same, the Plaintiff considered that her employment had been verbally terminated on 13-01-14.

In Court, the Plaintiff explained that when she asked the Defendant Company's Director to extend the deadline for the VAT Returns, the Defendant Company's Director got angry, and was so angry that she told the Plaintiff that if she could not work, she could leave because she was used to doing nothing and it would not be difficult to get a replacement.

In cross-examination, the Plaintiff added that when she Defendant Company's Representative got angry, she insulted her, i.e. the Plaintiff.

Ill-treatment is not defined in the **ERA**, and the Court therefore applies the "golden rule of interpretation […] [which is] that when a text is clear, a word must be given its ordinary dictionary meaning […]" [1].

Ill-treatment is defined as harsh or cruel treatment in the **Collins Dictionary** [2].

And in the Authority of **Bibi v Law Foon [1980 MR 63]** [3], the Appellate Court was "of opinion that not any kind of verbal abuse will enable a worker to relinquish his appointment. The language of the superior, and the circumstances in which it is used, must be shown to be such that no man can reasonably be called upon to submit to it."

The Plaintiff initially complained that the Defendant Company's Representative at first told her she would have to submit a letter, should she decide to resign, then that the Defendant Company's Representative told her she could leave if she could not work, and it then was that the Defendant Company's Representative got so angry that she told the Plaintiff that if she could not work, she could leave because she was used to doing nothing and it would not be difficult to get a replacement, and eventually that the Defendant Company's Representative insulted her.

Applying all the above-mentioned principles to the present matter, "the acid test [..] [being] whether […] [the Defendant Company] has by […] [its] conduct, objectively judged, repudiated the contract" (**Grewals (supra)**), the Court is of the considered view that the words allegedly uttered by the Defendant Company's Representative were not "of such a serious and intolerable nature that […] [the Plaintiff] […] [could not] reasonably continue working for" [4] the Defendant.", and was therefore not entitled to treat herself as having been constructively dismissed for the reasons given below.

First, there is nothing "unbearably harsh" (Australian Arbitration Board) [5] in the words allegedly uttered by the Defendant Company's Representative, for the Plaintiff to feel compelled to leave or to feel she had no other choice but leave.

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[1] **De Boucherville v Commissioner Of Prisons & Ors [2006 SCJ 25]**
[2] https://www.collinsdictionary.com/dictionary/english/ill-treatment
[3] Cited with approval in the Authority of **Jooharoo v Poonoomasee [2014 SCJ 160]**
[4] **Jugoo v Microwise Computer Mart Ltd [2004 SCJ 69]**
[5] **Bibi (supra)**

The Plaintiff was resuming work after her Maternity Leave and her Sick Leave.

The Plaintiff was meant to resume work after her said Sick Leave on 11-01-14, but had been allowed to resume work on 13-01-14, as the 11-01-14 was a Saturday, which was half-day and as the Plaintiff was unwell.

This aspect of the Defendant Company's Representative's testimony remained unchallenged, and is also borne out in (Doc. D2).

The Defendant Company showed compassion when it allowed the Plaintiff to resume on 13-01-14 instead of 11-01-14.

But when the Plaintiff resumed on 13-01-14, she said she would not be able to complete the assigned task within the required delay, and asked for the deadline to be reviewed, and also said that she did not know whether she would be able to report for duty on the following day as her Mother was ill (Doc. D2).

It therefore appears that the Plaintiff failed to appreciate her obligations to her employer.

The Court has noted the line of cross-examination adopted by the Defendant Company to the effect that all employees were under pressure when there were VAT Returns to be submitted to the Authorities, which the Plaintiff confirmed, but that it did not mean that the Defendant Company's Representative had insulted the Plaintiff.

By saying so, the Defendant Company meant that the Defendant Company's Representative herself was under pressure, and hence may have said words due to the said pressure.

The Court has noted that the Defendant Company's Representative reacted very quickly when it was put to her that there was "*un soucis*" (an issue) when the Plaintiff was meant to resume, and did not even let Learned Counsel for the Plaintiff complete his question.

Further, there was a stage when the Defendant Company's Representative was deliberately trying to evade the questions, feigning not understanding questions which were put to her in simple French language.

This showed clearly that the Defendant Company's Representative was not necessarily patient and would be ready to pretend not understanding to avoid having to answer questions which displeased her.

Further, the Defendant Company's Representative deponed in Court to the effect that the Termination Agreement (Doc. P) was prepared to defend the Defendant Company, and that she did not expect the Plaintiff to invent such things.

It stands to reason that had there been no incident, there would have been no reason for the Defendant Company to protect itself.

Further, at no stage was it put to the Plaintiff that she had invented the whole incident.

In light of all the above, the Court is of the considered view that an incident did occur between the Plaintiff and the Defendant Company's Representative on the relevant day, and that the Defendant Company's Representative used the words mentioned by the Plaintiff, due to the Plaintiff's attitude as highlighted above, coupled with the pressure of the VAT Returns, but the Court is further of the considered view that "[t]he language of the superior [i.e. the Defendant Company's Representative], and the circumstances in which it […] [was] used, [i.e. the Plaintiff saying, upon her resumption, that she would not be able to complete the work assigned to her within the required delay, her asking for the delay to be extended, when there was a deadline for the filing of the VAT Returns and all employees were under pressure, and the Plaintiff saying she might not be able to attend work on the following day (i.e. on the day following her resumption) due to her Mother being ill,] […] [have not been] shown to be such that no […] [person could] reasonably be called upon to submit to it" [6].

Second, the Plaintiff's case went from the Defendant Company's Representative having told her she would have to submit a letter should she decide to resign, to the Defendant Company's Representative having insulted her.

[6] **Bibi (supra)**

Had the Defendant Company's Representative insulted the Plaintiff on 13-01-14, the Plaintiff would surely have mentioned same at the Labour Office.

All these variances in the Plaintiff's version can only undermine her case.

For all the reasons given above, the Court is of the considered view that the words attributed to the Defendant Company's Representative by the Plaintiff are not of such a nature as to objectively amount to ill-treatment justifying the Plaintiff in considering herself as having been constructively dismissed, and the Court finds, in light of the all the above, that there is no evidence on Record to establish that the Defendant Company had by its "conduct, objectively judged, repudiated the contract" (**Grewals (supra)**), entitling the Plaintiff to consider herself as having been constructively dismissed.

Having found as above, there is no need for the Court to consider the issue of Notice.

Payment Not Made In Time

One of the other reasons invoked by the Plaintiff for considering herself as having been constructively dismissed in Court was that her dues were paid after the statutory delay.

The Plaintiff never invoked same at the time of her Complaint at the Labour Office as one of the reasons she considered herself as having been constructively dismissed.

This was also not made a live issue in the Pleadings.

It is therefore not open to the Plaintiff to invoke same as a further justification for her considering herself as having been constructively dismissed.

Be that as it may, as set out in the Authority of **Joseph v Rey & Lenferna Ltd [2008 SCJ 342]**, the employee's response to the employer's conduct is crucial in cases of constructive dismissal:

> 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."

In the present matter, the Plaintiff remained in the Defendant Company's employment despite not being paid her Untaken Leaves within the statutory delay for the years 2011, 2012, and 2013.

By doing so, the Plaintiff had acquiesced in the said conditions, and cannot invoke same as a reason for considering herself as having been constructively dismissed.

The same reasoning applies to her salary between 21-12-13 and 31-12-13.

The situation is different as regards the Plaintiff's salary for January 2014, as the Plaintiff's employment was terminated on 13-01-14, and hence was not yet due at the said time.

For all the reasons given above, the Court finds that it is not open to the Plaintiff to claim she had been constructively dismissed because the had not been paid all her dues within the statutory delay.

Certificate Of Employment

S. 51 of the ERA places a statutory obligation on every employer to provide to a worker, whose employment it terminated, or who has resigned from her/his employment, with a Certificate of Employment, within 07 days of the termination of her/his employment.

Given the very wording of **s. 51 of the ERA**, a Certificate of Employment can only be provided by the employer to the employee after the termination of the employment relationship, and hence cannot be a basis for an employee claiming to have been constructively dismissed.

The Court therefore finds that it is not in order for the Plaintiff to claim to have been constructively dismissed on the ground that she was not provided with a Certificate of Employment.

Termination Agreement (Doc. P)

The Court is of the considered view that there is no need to examine the wording of the said Termination Agreement (Doc. P) to determine whether it amounts to a *transaction*, bearing in mind the requirement for *des concessions réciproques*, given the Plaintiff refused to sign same.

It therefore has no bearing on the determination of the present matter.

Abandonment Of Work

The Defendant Company contended that the Labour Office had said that the Plaintiff had left her employment voluntarily, i.e. that the Plaintiff had left of her own volition, and that at no stage had the Defendant Company terminated the Plaintiff's employment.

Be that as it may, both Learned Counsel were in agreement as to the fact that the present matter was not about Abandonment of Work.

At any rate, it was not open to the Defendant Company to raise the Defence of Abandonment of Work in the absence of any evidence to the effect it had complied with **s. 36(5) of the ERA**.

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: 30 January 2023]