Samouilhan v Casela Ltd

2023 IND 55

CN254/18

THE INDUSTRIAL COURT OF MAURITIUS
(Civil Side)

In the matter of:-

Angelique Marie Irene Samouilhan

Plaintiff

v/s

CASELA LTD

Defendant

JUDGMENT

By way of her Amended *Proecipe*, the Plaintiff is claiming from the Defendant Company the **total sum of Rs1 232 000/- representing One Month's Wages As Indemnity In Lieu Of Notice and Severance Allowance, together with 12% Interests *per annum* on the amount of Severance Allowance payable from the date of termination of employment to the date of payment, and such amount by way of compensation for wages lost and expenses incurred in attending Court, for her constructive dismissal**.

In its Plea, the Defendant Company denied the said Claim, and moved for same to be dismissed with Costs.

The Plaintiff was initially assisted by the Labour Inspector, and then by Learned Counsel.

The Defendant Company was at all times assisted by Learned Counsel.

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

Case for the Plaintiff

In essence, the Plaintiff's case was that by its acts and doings, the Defendant Company had constructively terminated her employment, for which she was claiming from the Defendant Company the total sum of Rs1 232 000/- representing one month's wages as indemnity in lieu of notice and Severance Allowance.

Case for the Defendant Company

The Defendant Company's case was to the effect that it had not constructively terminated the Plaintiff's employment, but that it considered that the Plaintiff had failed to perform her duties and had failed to sign a letter containing duties which could legitimately be expected of her, and failed to offer her explanations in relation thereto, when called upon to do so before a Disciplinary Committee.

The Defendant Company therefore denied being indebted to the Plaintiff in the sum claimed or in any sum whatsoever, and moved for the present matter to be dismissed with Costs.

Analysis

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, and to the Authorities put in by Learned Counsel for the Plaintiff, and referred to by Learned Counsel for the Defendant Company.

Applicable Law

As per the Amended *Proecipe*, the Plaintiff averred that the Defendant Company had constructively terminated her employment without notice and without any justification on 21-10-16 (paragraph 1(q) of the Amended *Proecipe*).

It follows therefrom that the Plaintiff's case was that she last worked for the Defendant Company on 21-10-16, and the applicable Law at the relevant time was the **Employment Rights Act as amended (hereinafter referred to as ERA)**.

Applicable principles

In cases of constructive dismissal, the question to be addressed by the Court has been 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).

In cases of Constructive Dismissal, the burden rests on the Plaintiff to prove his/her case against the Defendant Company on the Balance of Probabilities.

Were the Plaintiff's terms and conditions of employment unilaterally varied by the Defendant Company such that the Plaintiff's employment was constructively terminated by the Defendant Company?

Several reasons were invoked by the Plaintiff in support of her Claim to the effect that her terms and conditions of employment were unilaterally varied by the Defendant Company leading her to consider she was constructively dismissed, and the Court will consider each one in turn.

Change in reporting line

It was common ground between the Parties that there was a change in the Plaintiff's reporting line (Paragraph 1(h) of the Amended *Proecipe* and paragraph 4 of the Plea).

The Court has noted the tenor of the e-mail (Doc. P10) in which the Defendant Company denies that any unilateral change was being brought to the Plaintiff's employment.

This contention is however untenable.

First, this is contrary to the Defendant Company's own averment as per its Plea at paragraph 4.

Second, the Defendant Company itself wrote to the Plaintiff *inter alia* communicating to her the revised Job Description (Doc. P6). The use of the work "revised" establishes conclusively that the Plaintiff's Job Profile was modified by the Defendant Company.

Third, had there been no change in the Plaintiff's employment, there would have been no need for the Plaintiff to sign (Doc. P6).

Fourth, the very fact that the Plaintiff was to report to the Commercial Manager (Doc. P6) as opposed to the Senior Operations Manager (Doc. P5), was clearly a unilateral change in the Plaintiff's line of reporting and therefore Job Profile, which as per paragraph 2 of the contract (Doc. P5), was part and parcel of her contract of employment with the Defendant Company.

And fifth, it is beyond dispute that the said change was initiated by the Defendant Company due to the restructuring process taking place at the Defendant Company as a whole (paragraph 4 pf the Plea), such that the said change was unilaterally brought to the Plaintiff's contract of employment by the Defendant Company.

In light of all the above, the Court having found that there was a unilateral modification of the Plaintiff's contract of employment, the Court is now to determine whether the said modification was a substantial one, as propounded by Dr Fok Kan in **Introduction Au Droit Du Travail Mauricien at page 308 (supra)**:

> "[l]'étendue du caractère substantiel de la modification s'apprécie objectivement".

The Court is of the considered view that the reporting line of the Plaintiff was an essential element of the contract of employment, it being mentioned in the Contract itself (at paragraph 3 of Doc. P5) and in the Job Profile attached to (Doc. P5) (it being the third element mentioned in the said Job Profile), and any modification to same was a substantial modification of the contract of employment of the Plaintiff.

The said conclusion is supported by the Defendant Company's own averments in its Plea to the effect that this was the "only major change that had taken] place" in relation to the Plaintiff's contract of employment (paragraph 4 of the Plea). The use of the word "major" confirms that the said change was a substantial one, and this is further established by the very fact that the Defendant Company needed the Plaintiff to agree to such change, as evidenced by (Doc. P6),

That being said, the Plaintiff explained in Court that by having her reporting line changed, she was being demoted from third rank, where she was reporting to the Senior Operations Manager, to the fourth rank, where she was being requested to report to the Commercial Manager.

In support of her case, the Plaintiff produced the letter (Doc. P7) she sent to the Defendant Company wherein she mentioned that the Defendant Company had unilaterally "recently imposed several radical changes to [her] conditions of employment" (Doc. P7), and in the said letter, the Plaintiff specifically mentioned that:

1) "most of [her] responsibilities as a manager ha[d] been either curtailed or withdrawn";
2) "The newly appointed Commercial Manager ha[d] in effect taken over most of [her] tasks"; and
3) "new tasks ha[d] been assigned to [her] including the demand that [she] should henceforth work on weekend" on roster, i.e. "either a full day on Saturday or a Sunday every week or two full weekends per month".

No mention is made of the change in reporting line or of demotion. Had the Plaintiff in fact objected to the said change in her reporting line and been of the view that she was being demoted due to the new line of reporting, the Plaintiff ought to have specified same in the said letter (Doc. P7), which, it is worth noting, was written during the relevant period of disagreement between the Parties.

Also, in the letter (Doc. P9), although it is mentioned that the Defendant Company "had brought unilateral changes to [the Plaintiff's] contract of employment", the only element which is reiterated is that specifically mentioned at paragraph 4 of the letter (Doc. P7), that is the request that the Plaintiff "work on weekends".

In Court, the Plaintiff expressed herself with ease, and did not sugar coat her words, and this is also apparent from the letters (Docs. P7 and P11) written by the Plaintiff herself.

Being an outspoken person, one would have expected the Plaintiff to spell out her disagreement to the said change in her line of reporting and her resulting feeling of demotion in her said letters addressed to the Defendant Company.

This the Plaintiff failed to do.

Additionally, it was averred from the outset by the Defendant Company that the said change in the Plaintiff's reporting line was "due to the restructuring process of the company as a whole" (paragraph 4 of the Plea).

The fact that there was a restructuring process is evidenced by the letter (Doc. P6).

It is to be noted, however, that a "new structure" is mentioned in the said letter (Doc. P6) in relation to the "Retail Department" as opposed to the Defendant Company as a whole, but no evidence has been adduced in the course of the Proceedings by the Plaintiff to show that there was no restructuring process of the Defendant Company as a whole, and it was not the case for the Plaintiff that her Department only had been restructured. On the contrary, from the answers given by the Plaintiff in cross-examination, it is clear that the Plaintiff did not dispute that there was a restructuring process of the Defendant Company at the relevant time.

In light of all the above, the Court is of the considered view that there was indeed a substantial unilateral change in the Plaintiff's contract of employment by the Defendant Company, given the change in her reporting line (Doc. P6), but the Court is further of the considered view that the Plaintiff has not established that she objected to the said change in her reporting line at the relevant time. As indicated above, whilst the Plaintiff specifically mentioned three factors which according to her had been unilaterally modified by the Defendant Company (Doc. P7), there is no specific mention of the change in her reporting line.

The Court therefore finds that the Plaintiff has by her conduct, in effect, not objected to the said change in her reporting line, has acquiesced in the said change, and hence cannot rely on same at this stage in support of her case that she has been constructively dismissed.

Change in Job Profile/New Duties

As per the Job Profile (Doc. P6), the following elements were added to the Plaintiff's Job Profile (Doc. P5):

1) Monitor stock levels of all outlets and direct stock movement (Implementation and coordination paragraph of Doc. P6);
2) Ensure the inter-outlet transfers are done effectively (Implementation and coordination paragraph of Doc. P6);
3) Conduct operational field duties as required (Implementation and coordination paragraph of Doc. P6);
4) Monitor attendance of employees and report any unusual trend (Staff Management paragraph of Doc. P6);

5) Responsible for attendance management of the Vipertex System (Staff Management paragraph of Doc. P6);
6) Health & Safety Responsibilities (Health & Safety Responsibilities Doc. P6);
7) Perform any other cognate duties as may be assigned by the Management (Doc. P6).

On the other hand, the Plaintiff was no longer to ensure staff welfare in her department (Staff management Doc. P6), which appears to have been incorporated in the new paragraph Health & Safety Responsibilities (Doc. P6).

In light of all the above, it would appear, on the face of it, that there were unilateral changes brought to the Plaintiff's employment by the Defendant Company.

As regards items 1) and 2) above however, the Plaintiff herself deponed to the effect that she was "analysing and deciding which quantities should go to which shop within Casela and authorising the move of stock between the shops, if something was slow moving and one shop moving to another shop, it was a bit faster". These were therefore duties performed by the Plaintiff before (Doc. P6) and hence do not amount to new duties being imposed on the Plaintiff.

In relation to items 4) and 5), the Plaintiff herself explained that she would authorise the timetable which was prepared by the staff and approved by the supervisor, she would ensure that the timetable was well balanced, and authorised the leaves and days off.

Further, the Plaintiff explained that she was authorising and confirming the Vipertex system information input, and was signing the HR's paper.

These duties cannot therefore be said to be new duties imposed on the Plaintiff.

In relation to item 6), the focus appears to be on Health & Safety as opposed to welfare (Doc. P6).

That being said, the **Cambridge Online Dictionary** defines welfare as a person's health and happiness [1], and defines health and safety as "a set of rules intended to protect people from illness or injury caused by their work" [2].

[1] https://dictionary.cambridge.org/dictionary/learner-english/welfare
[2] https://dictionary.cambridge.org/dictionary/english/health-and-safety

It is clear from the abovementioned definitions that welfare goes beyond health and safety, as welfare is also concerned with a person's happiness, and not solely a person's health and safety.

The Court is therefore of the considered view that it cannot be said that the Health & Safety Responsibilities listed in (Doc. P6) go beyond the duties the Plaintiff was performing as per her Job Profile (Doc. P5) in relation to ensuring the Staff welfare in her department, and that hence new duties were being imposed on the Plaintiff.

As regards items 3) and 7), the Court sees nothing untoward therein. At any rate, at no stage did the Plaintiff adduce any evidence as to any operational and/or cognate duties she had been requested to perform by the Defendant Company.

More significantly, the Plaintiff unequivocally admitted in cross-examination that the said two documents (Docs. P5 and P6) showed that her responsibilities had not changed.

In light of all the above, the Court finds no merit in the Plaintiff's contention that her Job Profile had been changed and that new tasks were being assigned to her.

Was the Plaintiff given an ultimatum to sign the new Job Profile and accept the change in reporting line?

The Plaintiff explained that she was called to meetings several times by the HR, by the Senior Operations Manager and by the Communications Manager, and then by the Senior Managing Director, and eventually with the Group HR, to press her to sign (Doc. P6).

The Plaintiff stated that she was being harassed to sign the said (Doc. P6), and that she was given an ultimatum (Doc. P7) to sign (Doc. P6) with a deadline.

It is beyond dispute that the Plaintiff was requested by the Defendant Company to sign the letter (Doc. P6) and the attached Job Profile twice:

1) on 02-09-16 (Doc. P6), when the Plaintiff was asked to sign same within one week of its receipt; and
2) on 13-10-16 (Doc. P8), when the Plaintiff was required to sign same by latest Monday 17-10-16 before 13h00.

These two requests were made more than one month apart, and the Plaintiff was given one week's delay from the receipt of the said letter (Doc. P6), and then 05 days' delay, respectively, to sign and return (Doc. P6).

It is clear, therefore, that the Defendant Company did afford time to the Plaintiff to sign the said document, there being more than one month between the said two letters, as highlighted above, but given the fact that the Parties were at an impasse since 02-09-16 (Doc. P6), it was legitimate for the Defendant Company to wish to find a solution to the said situation.

In light of all the above, the Court is of the considered view that there was no ultimatum imposed on the Plaintiff to sign the said letter.

Was/were the Plaintiff's authority/duties/responsibilities curtailed as Retail Manager since the recruitment of the Commercial Manager?

The Plaintiff deponed to the effect that since July 2016, when the Commercial Manager was recruited, she was no longer allowed to perform the following duties which she had up to then been performing, at first for 04 years, and then for 05 years, and which were being performed by the Commercial Manager:

1) Coordinating the work flow;
2) Implementing new products, choosing or developing new products;
3) Manage pricing, stock control, and stock transfers;
4) Analysing and interpreting trends to facilitate planning;
5) Deciding what products to eliminate, what products to have in the shop;
6) Organising special displays and events;
7) Deciding and preparing promotional materials and displays;
8) Direct stock movement.

The underlined duties do not appear in the Plaintiff's Job Profile (Doc. P5).

Be that as it may, the Plaintiff stated that these duties were mentioned only on paper in her Job Profile (Doc. P5), but that in fact, it was the Commercial Manager who was performing her duties.

The Plaintiff went on to state that she was advised that she was not allowed to perform her duties, and was also copied in e-mails, as opposed to e-mails being addressed to her for decisions as regards the duties she was carrying out for her department.

There is no evidence on Record, other than the Plaintiff's words, to support her contention.

In the letter (Doc. P6) addressed to the Plaintiff, the Defendant Company mentioned the meeting of 19-08-16 "regarding the new structure of the Retail Department".

The Plaintiff therefore did have a meeting with the Defendant Company on 19-08-16 "regarding the new structure of the Retail Department", and the Court takes Judicial Notice of the fact that a restructuring exercise generally entails a redistribution of duties.

True it is that Mrs Sushila Khedun (hereinafter referred to as the Plaintiff's Witness) deponed *inter alia* to the effect that many changes occurred with the arrival of Mr Thévenet as Commercial Manager and that the Plaintiff was no longer allowed to perform duties such as preparing the timetable, the transfers, the days off, the sick leaves, and negotiating prices.

The Plaintiff's Witness also importantly admitted in cross-examination not being aware of the Job Profile of the Commercial Manager.

This is significant in view of the fact that it was not disputed that there was a restructuring exercise being carried out at the Defendant Company.

The testimony of the Plaintiff's Witness in no way establishes that the Plaintiff's duties were curtailed since the recruitment of the Commercial Manager.

It is also worth noting that the Plaintiff averred that the Commercial Manager was recruited in July 2016 (paragraph 1.h) of the Amended *Proecipe*), and stated in Court that since July, when a Commercial Manager was employed, she was forbidden from carrying out her duties, and that all her duties and responsibilities were completely changed.

First, there is a difference between one's duties/responsibilities being curtailed and one's duties/responsibilities being completely changed.

Second, the Plaintiff contended that her duties and responsibilities were changed completely since July 2016 when the Commercial Manager was recruited, but only wrote to express her disagreement to her changed terms and conditions of work on 10-10-16 (Doc. P7), that is about 02-03 months later.

And third, the said letter (Doc. P7) was written more than one month after (Doc. P6).

This delay in expressing her said disagreement to the changed terms and conditions was not explained by the Plaintiff.

In addition, although it is mentioned that Mr Laurent Gordon-Gentil was present at the meeting of 06-10-16 (Doc. P7), in Court, the Plaintiff expressly stated that the said Mr Gordon-Gentil "was not in the meeting". Taken on its own, this inconsistency in the Plaintiff's case could not weaken the Plaintiff's case, but the cumulative effect of the said inconsistency with the other factors highlighted above undermines the Plaintiff's case.

In light of all the above, the Court finds no merit in the Plaintiff's abovementioned contention.

Was the Plaintiff requested to perform low level tasks devolving on her subordinates?

The Plaintiff explained that she was made to perform her subordinate's duties, whereby she was put on the timetable to work on the floor as salesgirl and was told which shop to work in to sell and the times at which she was to work, she was put on the timetable to work on Saturdays and Sundays, and was told to do Vipertex system information input, which had been performed by her assistant, the Administrative Assistant.

The Plaintiff was also of the view that it was unlawful for her to be asked to work on Weekends, explaining that in 05 years, she had been requested to work on Weekends maybe twice. It was the contention of the Plaintiff that as per her Contract (Doc. P5), she may be requested to work on Weekends, but that this was overlooked by the Defendant Company, which inserted her in the timetable to work on Weekends and Public Holidays.

In effect, it was the Plaintiff's contention that from a position where she was approving the timetable of the staff, she was put into it, and from a situation where she had been authorising and confirming the Vipertex system, she was made to input information in the said system, such that she was being asked to perform all the duties that her subordinates were performing.

The Court has duly considered the e-mail (Doc. P13), and whilst a "roster" and "Vipertex duties" are mentioned therein, it cannot reasonably be concluded therefrom that the Plaintiff was made to perform her subordinates' duties.

First, in light of the express terms of the Plaintiff's contract (paragraph 4. 2. of each of Docs. P1, P2, and P5), it cannot be disputed that the Plaintiff may be requested to work on Weekends and Public Holidays.

It was therefore perfectly in order for the Defendant Company to ask the Plaintiff to work on Weekends and Public Holidays, bearing in mind the nature of the activities carried out by the Defendant Company.

That being said, the Plaintiff has produced no documentary evidence to show that she was inserted on the said Weekend timetable systematically.

In light of all the above, the Court is of the considered view that by asking the Plaintiff to work on Weekends and Public Holidays, the Defendant Company was merely enforcing one of the express terms of the Plaintiff's contract of employment, and was in no way bringing any unilateral substantial change going to the root of the Plaintiff's contract of employment. The request by the Defendant Company that the Plaintiff work on Weekends and Public Holidays cannot therefore the said to be illegal.

And second, the Plaintiff explained that she was authorising and confirming the Vipertex system information input, so that she was already performing some tasks in relation to the said system. And given only Vipertex duties are mentioned in the said e-mail (Doc. P13), it would be against common-sense to conclude that this necessarily meant the Plaintiff was made to perform her subordinate's duties. Vipertex duties may well include the duties the Plaintiff confirmed she was performing in relation to the said system.

In light of all the above, the Court is of the considered view that it has not been established that the Plaintiff was being requested to perform low level tasks devolving on her subordinates.

<u>The Plaintiff considered her employment to have been constructively terminated by the Defendant Company without notice and without justification on 21-10-16</u>

The Plaintiff did not produce the letter referred to at paragraph 1(q) of the *Proecipe*, explaining that she had no copy of same.

The Plaintiff however produced documents dating back to 2011 and 2012 ((Doc. P1) dated 29-09-11 and (Doc. P2) dated 15-10-12), documents dated 2016 which she had not signed ((Docs. P4 and P6) and the exchange of correspondence between herself and the Defendant Company

between 10-10-16 and 17-10-16 (Docs. P7, P8, P9, P10, and P11)), which shows that the Plaintiff is an organised person, who keeps her personal records in order.

It is therefore surprising, to say the least, that the Plaintiff should not have a copy of the said letter referred to at paragraph 1(q) of the *Proecipe*, which was more recent than all the other documents referred to above, but also more crucially as the said letter was central to the Plaintiff's case, as this was the letter by which the Plaintiff informed the Defendant Company that she considered herself as having been constructively dismissed.

In effect, the said letter was the means by which the Plaintiff was informing the Defendant Company that she *prenait l'initiative de rompre son contrat de travail avec la compagnie défenderesse mais que la compagnie défenderesse était malgré tout responsable de cette rupture* (***Introduction Au Droit Du Travail Mauricien – 1/ Les Relations individuelles de travail****, (supra)*).

It is also interesting to note that although the Commercial Manager was recruited in July 2016, although the Plaintiff contended that her duties and responsibilities were curtailed and/or changed completely since July 2016, although the Plaintiff was asked to sign the new Job Profile (Doc. P6) since 02-09-16, and although the Plaintiff was suspended from duty and requested to appear before a Disciplinary Committee since 18-10-16, the Plaintiff only considered herself as having been constructively dismissed on 21-10-16 and informed the Defendant Company thereof by way of letter dated 22-10-16.

Not only was this letter written more than three months after the Plaintiff contended her duties had been substantially and unilaterally modified by the Defendant Company and more than one month after the Plaintiff was requested to sign the new Job Profile, but more importantly five days after the Plaintiff was suspended and convened to appear before a Disciplinary Committee.

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 v International Beverages Ltd [1983 SCJ 220]**).

And the following passage from the Authority of **Joseph v Rey & Lenferna Ltd** [2008 SCJ 342] is found of particular relevance:

> 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, who demonstrated in Court she was not one to endure something without putting up a fight, nevertheless remained in the employment of the Defendant Company despite the said deadlock, and only considered she had been constructively dismissed as from 21-10-16 (paragraph 1(q) of the *Proecipe*), as highlighted above.

This letter would have assisted the Court in determining what acts and doings of the Defendant Company led the Plaintiff to consider she was constructively dismissed, and whether the Plaintiff was justified in considering she was constructively dismissed on 21-10-16.

Be that as it may, in light of the Court's Findings in the section Were the Plaintiff's terms and conditions of employment unilaterally varied by the Defendant Company such that the Plaintiff's employment was constructively terminated by the Defendant Company?, the Court is of the considered view that the Plaintiff has not established that she was constructively dismissed by the Defendant Company on 21-10-16.

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 on Probabilities, and the present matter is therefore dismissed.

No Order as to Costs.

[Delivered by: D. Gayan, Ag. President]
[Intermediate Court (Financial Crimes Division)]

[Date: 30 June 2023]