Aubeeluck-Charles v Shenaz Khan Clothing Ltd

2022 IND 12

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

The Plaintiff is claiming from the Defendant Company **Wages As Indemnity In Lieu Of Notice and Severance Allowance**, by way of Second Amended Proecipe dated 24-02-22.

The Defendant Company has denied the said Claim in its Plea dated 29-11-17.

The Parties were respectively assisted by Learned Counsel.

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

The Plaintiff's Case

The gist of the Plaintiff's testimony was that on 01-06-15, when she went to work, the Defendant Company changed the position of the machine she was working on, and placed same opposite

an air conditioning unit. Upon the Plaintiff telling the Defendant Company that she had lower back issues, Mr Khan (hereinafter referred to as the Defendant's Representative), who was the one who had recruited her and who paid her, harassed her, and said the following words to her address:

> Ena caca dans to la tête, to pas konn travail bez simin aller.

Following this, the Plaintiff left and went directly to the Labour Office to register her Complaint.

The Plaintiff was hence claiming Rs167 792. 70/- from the Defendant Company for having terminated her employment without Notice and without justification.

In cross-examination, the Plaintiff conceded that the Defendant Company had reproached her for overclaiming her Travelling Expenses, but denied that same had happened on 01-06-15, and deponed that same instead had happened at the Labour Office.

The Plaintiff conceded having received her salary on 01-06-15, and maintained having reported to the Labour Office that her machine had been moved near an air conditioning unit.

The Plaintiff also conceded that the Defendant Company's Representative had asked her to resume her work at the Labour Office, but that she had refused, as he always harassed her at work, and as she knew that if she went back to work, she would have many problems with the Defendant Company's Representative.

The Plaintiff stated that the Defendant Company had terminated her employment on 01-06-15, and that she was not aware whether the Defendant Company had paid her National Pension Scheme (hereinafter referred to as NPS).

The Plaintiff denied having herself resigned after being confronted by the Defendant Company about her overclaiming her Travelling Expenses over 06 years, conceded that the Defendant Company had from the outset said at the Labour Office that it had not terminated her employment, and had asked her to resume her work.

Mr Vinesh Bissambur (hereinafter referred to as the Plaintiff's Witness No. 1) deponed inter alia that the Plaintiff had reported to the Rose-Hill Labour Office on 01-06-15 that her employment had been terminated with immediate effect without mentioning any reason, and confirmed that no document was produced to the Labour Office by the Defendant Company.

The Plaintiff's Witness No. 1 further stated that the Defendant Company had said that the employment was terminated as the Plaintiff had left employment on her own.

In cross-examination, the Plaintiff's Witness No. 1 confirmed that the Plaintiff made no mention on 01-06-15 that she was moved from one machine to another, that the said other machine was near an air conditioning unit, that she was harassed by her Employer or another person there, that the Defendant Company's Representative uttered the words reproduced above to her address, and also confirmed that there was no Claim for Wages.

The Plaintiff's Witness No. 1 also confirmed that the Defendant Company's Representative requested the Plaintiff, in presence of the Labour Officer, to resume work, and that the Plaintiff, in presence of the Labour Officer, said she was not agreeable to same.

Mrs. Choomeshwari Ramnarain (hereinafter referred to as the Plaintiff's Witness No. 2) deponed that she was the Labour Officer to whom the Plaintiff had made her Complaint at the Rose-Hill Labour Office on 01-06-15, to the effect that the Defendant Company had terminated her employment with immediate effect on 01-06-15, without any reason or justification.

The Plaintiff's Witness No. 2 was not cross-examined by Learned Counsel for the Defendant Company.

The Defendant Company's Case

The Defendant Company's Representative deponed inter alia to the effect that he was an Employee of the Defendant Company, and so was the Plaintiff.

The Defendant Company's Representative denied having, on the relevant day, placed the Plaintiff's machine near an air conditioning unit, denied having uttered the words as reproduced above to the Plaintiff, and denied having terminated the Plaintiff's employment, and explained that

upon being confronted about her overclaiming her Travelling Expenses, the Plaintiff said that if her Travelling Expenses were reduced, she would leave.

The Defendant Company's Representative maintained there was no argument on the relevant day, and confirmed that the Plaintiff had been to the Rose-Hill Labour Office and despite being asked to resume her work, refused to do so at the said Labour Office.

In cross-examination, the Defendant Company's Representative reiterated that there was no issue other than the Plaintiff's overclaiming her Travelling Expenses, and confirmed having had no problems with the Plaintiff during her time of employment with the Defendant Company between 2009 and 2015.

The Defendant Company's Representative maintained that the Plaintiff was paid her dues on 01-06-15 in cash, signed the file, and left, conceded that the Plaintiff was given a payslip when she would ask for one, and denied having illtreated the Plaintiff, which was the reason why the Plaintiff had left her employment.

Mrs Shenaz Khan (hereinafter referred to as the Defendant Company's Director) stated inter alia that the Plaintiff was employed by the Defendant Company, denied having terminated the Plaintiff's employment on 01-06-15, and explained having paid the Plaintiff's NPS (Doc. D1) for the month of July, although the Plaintiff had stopped working.

The Defendant Company's Director explained that the Plaintiff had overclaimed her Travelling Expenses, and produced a document (Doc. D2) emanating from the National Transport Authority (hereinafter referred to as NTA), and added that it was the Plaintiff who had stopped working.

In cross-examination, the Defendant Company's Director explained that the Defendant Company had no contact with the Plaintiff once she had left, and hence had not asked the Plaintiff for a letter of resignation.

The Defendant Company's Director went on to state that the Defendant Company waited for the Plaintiff to come to work, in vain, did not know where the Plaintiff resided, explaining that the Plaintiff had not given her address, and agreed that the National Pension Fund (hereinafter referred to as NPF) was paid one month after the salary.

In re-examination, the Defendant Company's Director denied having terminated the Plaintiff's employment, agreed that the Plaintiff had said at the Labour Office that her employment had been terminated, and that she had paid the NPS for the Plaintiff for the month of June although the Plaintiff had stopped working on 01-06-15.

The NTA, as represented by Mrs Guneshwaree Coylass, stated that the amount payable for a bus journey from St John, Chebel to Rose-Hill Transport Bus Garage in Rose-Hill, as per its Records, was Rs18/- one way.

Analysis

The Court has duly analysed all the evidence on Record and all the circumstances of the present matter, and the Court has given due consideration to all the documents produced in the course of the Proceedings, and has duly considered the Submissions of both Learned Counsel.

The Court has also watched the demeanour of the Plaintiff and her Witnesses, and that of the Defendant Company's Representative and the Defendant Company's Witnesses with the utmost care.

The Court places it on Record that although the Second Amended Proecipe is dated 24-02-22 and was filed in Court on 24-02-22, it reflects the position of the Plaintiff as at 12-01-21, date on which the Motion for Amendment to the Proecipe was made and granted, there being no objection taken thereto by Learned Counsel for the Defendant Company.

At the outset, the Court notes that the present matter is before the Industrial Court, and that in many instances, such as the present one, the documentary evidence is inexistent on the part of the Plaintiff, and limited on the part of the Defendant Company. The Court is however of the considered view that this does not necessarily adversely affect the case of the Parties.

From all the Pleadings and all the evidence on Record, it is the contention of the Plaintiff that her employment was terminated on 01-06-15 when she was insulted by the Defendant Company's Representative.

The Defendant Company maintained not having terminated the Plaintiff's employment, and claimed that the Plaintiff had resigned. However, the tenor of the testimony of the Defendant Company's Director reveals that the Defendant Company waited for the Plaintiff to resume her employment, in vain.

It flow therefrom, that there is a contradiction in the Defendant Company's case, as either it considered that the Plaintiff had resigned, or that the Plaintiff had abandoned her work.

Now, from all the Pleadings and all the evidence on Record, the Court is of the considered view that in essence, it was the contention of the Defendant Company that the Plaintiff herself decided to leave her employment on the said date when she was confronted with her overclaiming her Travelling Expenses, and thus abandoned her work (see in particular paragraph 5 (b), (c), and (d) of the Plea to the Amended Proecipe dated 29-11-17, and the testimony of the Defendant Company's Representative and Director respectively).

The Court finds 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 v Gourrege** [2015 SCJ 148], to the point:

> 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)**

Now, given it is common ground that the Plaintiff stopped working on 01-06-15, the applicable Law at the relevant time was the **Employment Rights Act** (hereinafter referred to as ERA).

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 in the said Authority is relevant to, and applies 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.

Now, 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).

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.

Be that as it may, 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 02 subsections set out above are not identical, but the Court is of the considered view that the spirit and objective 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 2 consecutive working days without good and sufficient cause for a first time, unless there is compliance with the written notice requirement.

In light of all the above, the Court is of the considered view 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.

As to the Plaintiff's absence, it was common ground that the Plaintiff last worked for the Defendant Company on 01-06-15, and the Defendant Company's Director clearly deponed that she waited for the Plaintiff to come to work, in vain.

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 comet to work, and that the Defendant Company had never had problems with the Plaintiff.

As to the Plaintiff's intention not to resume work, the Plaintiff herself conceded having refused to resume her work at the Defendant Company on 01-06-15, when asked to do so at the Labour Office.

It is therefore clear from all the above 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 Plaintiff's verbal statement that she did not intend to resume her work at the Defendant Company is, however, not sufficient for the Defendant Company to invoke that the Plaintiff had herself put an end to their employment relationship, as per the principles set out in the Authority of **Dindoyal (supra)**:

> The fact that the appellant had, on 11 November 2008, orally signified an intention to terminate her employment would not in law be sufficient to enable the respondent to successfully invoke a defence of termination of employment by the appellant resigning in such circumstances. (Emphasis added)

Now, it has been clearly established in the Authority of **Auckloo (supra)** that "The effect of section 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)**" (**Dindoyal (supra)**).

In the present matter, the Defendant Company's Director conceded not having asked the Plaintiff for a written letter of resignation, and no concrete evidence was forthcoming from the Defendant Company as to its compliance with s. 36(5) of the ERA and as to its "*genuine willingness not to sever his contractual relations with the worker."* (**Ramjan and Co. v Mamode [1977 p. 38]** as cited with approval in **Dindoyal (supra)**).

The Court is alive to the fact that the Defendant Company's offer to the Plaintiff to resume her work, and the Plaintiff's refusal to do so, took place at the Labour Office.

And 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.

That may be so, but the fact that 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, leads the Court to conclude that it was 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.

By Law, the duty is placed on the Employer, in the present matter, the Defendant Company, 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.

In light of all the above, there is no evidence on Record to establish that the Defendant Company had in fact complied with s. 36(5) of the ERA.

Now, 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, 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, in the absence of any evidence on Record to establish that it had complied with s. 36(5) of the ERA.

Miscellaneous

The Plaintiff's Witness No. 1 clearly stated in Court that he was only present on 15-06-15 and was not the Labour Officer who registered the Plaintiff's Complaint.

The Court therefore finds that it can safely act on the testimony of the said Witness only in relation to the meeting of 15-06-15, given he clearly stated he was not the Labour Officer who registered the said Complaint, and therefore has no personal knowledge of same, and further, given he was deponing from a document, the maker/s of which has/have remained unknown.

In relation to the line of cross-examination adopted by the Defendant Company in relation to the Plaintiff's Witness No. 1, the Court notes that it was not the case for the Plaintiff that she had been made to change machines, and was made to work on a machine which was near an air

conditioning unit. The Plaintiff's contention was that her machine itself was moved near an air conditioning unit.

Be that as it may, these abovementioned factors have no direct bearing on the determination of the present matter.

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 Claim on the Balance of Probabilities, and the Court therefore orders **the Defendant Company to pay to the Plaintiff Rs167 792. 62/- representing Wages As Indemnity In Lieu Of Notice and Severance Allowance for having terminated her employment without Notice and without justification.**

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 the circumstances of the present matter, in particular the Plaintiff's refusal to resume her work although invited to do so by the Defendant Company itself, do not justify the award of Interest at 12% per annum on the amount of Severance Allowance, and that 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, payable from the date of termination of her employment to the date of payment.**

[Delivered by: D. Gayan, Ag. President]
[Industrial Court]
[Date: 28 February 2022]