

## CONSTANCE v LEGUIRE

(2012) SLR 129

A Derjacques for the plaintiff  
C Lucas for the defendants

**Judgment delivered on 18 May 2012 by**

**RENAUD J:**

This plaint was entered on 14 June 2007 whereby the plaintiff is seeking for a judgment ordering the defendants to jointly or in solido pay her the sum of R 95,000 with interest and costs.

The plaintiff was a kitchen cleaner and inhabitant of Belle Vue, La Digue, at all material times. She is married to one Mr Pierre Constance and has three children, namely, Nathaniel Constance aged 22 years; Prisca Constance aged 18 years and Kris Constance aged 12 years. The plaintiff was aged 38 years at the time of entering the plaint.

In their joint statement of defence the defendants averred that the duties of the plaintiff were also to work as room cleaner, yard cleaner and to do any other duties assigned to her. Her duties were that of cleaner but not restricted to kitchen cleaning of the premises known as Tarosa.

The first defendant is a Mauritian national and was the football coach of the “La Passe” football club. He resided at Tarosa Restaurant at the material time.

The second defendant is the owner and director of the restaurant known as Restaurant Tarosa and was the employer of the plaintiff who was a kitchen cleaner at that restaurant.

The third defendant was the manager, employee and agent of the first defendant at Tarosa Restaurant and she supervised and operated the said restaurant. The third defendant averred that she is also assisted by the second defendant when he is on site and in attendance.

The plaintiff averred that during the first week of May 2007 and continuing up to 30 May 2007, the defendants committed a *faute* in law against her rendering the defendants liable in law to her. The particulars of the *faute* alleged by the plaintiff are:

1. First defendant sexually harassed plaintiff by touching her on her body and buttocks repeatedly at the said restaurant and in its rooms;
2. First defendant made sexually explicit statements and remarks to plaintiff during the course of her duties at the said restaurant;

3. First defendant followed plaintiff in the said restaurant and whilst plaintiff was cleaning rooms of the restaurant on several occasions;
4. Second defendant, despite complaints by plaintiff ordered plaintiff to clean first defendant's rooms;
5. Second defendant issued warnings and a termination letter on plaintiff attempting to force her to clean first defendant's rooms thereby exposing plaintiff to additional sexual harassment by first defendant despite plaintiff's complaints;
6. Second defendant failed and omitted to provide plaintiff with a safe working environment free from sexual harassment by first defendant;
7. Third defendant omitted and failed to act to protect plaintiff from sexual harassment by first defendant;
8. Third defendant failed to provide plaintiff with a safe working environment free from sexual harassment by first defendant and ordered plaintiff to enter and clean first defendant's rooms.

This averment and the particulars set out above are vehemently denied by the defendants in the joint statement of defence and put the plaintiff to strict proof.

The plaintiff also averred that she made several complaints of sexual harassment by the first defendant to Lance Corporal Leggaie of the Seychelles Police Force at La Passe, La Digue, and these complaints have been entered into the police occurrence book at the said police station.

The plaintiff also averred that she made several complaints of sexual harassment by the first defendant at the Ministry of Employment Office, at La Passe La Digue.

The defendants pleaded that the averments contained in the two paragraphs immediately above were not within the knowledge of the defendants until after the plaintiff had resigned from her post on 24 May 2007 and that the allegations of sexual harassment were made after May 2007 which in any event are denied.

The employment of the plaintiff by the second defendant was terminated on 30 May 2007 for her refusal to enter and clean the room of the first defendant at the said restaurant. This is denied by the defendants who averred that the plaintiff resigned by letter addressed to the second defendant dated 24 May 2007 for reasons other than that pleaded in the plaint.

For reasons set out in her plaint the plaintiff averred that she has been put to loss and damages which she particularized as follows:

(a) Moral damages for humiliation, depression, anguish, psychological trauma	R70,000
(b) Special damages for future loss as a result of loss of employment	<u>R25,000</u>
<b>TOTAL</b>	<b>R95,000</b>

The defendants denied the above stated claims of the plaintiff and averred that the plaintiff suffered no loss or damage and was paid all benefits in terms of the Employment Act 1995, and the plaintiff is put to strict proof for all heads of claim including quantum.

At the hearing of this suit the plaintiff and her husband testified and adduced in evidence nine documents as exhibits.

The second and third defendants also testified and adduced in evidence seven documents as exhibits.

The first defendant who is a Mauritian national had since left the country and appeared by counsel and did not adduce evidence.

### **The Issues**

The case of the plaintiff is that she was employed by the second defendant working under the direct supervision of the third defendant in the restaurant of the second defendant, at which restaurant there are rooms one of which was occupied by the first defendant who was a football coach of La Passe Football Club, of which the second defendant was the manager and during the course of her employment she was sexually harassed by the first defendant that led to the termination of her employment to her financial detriment. The plaintiff claims that she was not protected by her employer and immediate supervisor from the sexual harassments of the first defendant and that amounted to a *fault* on their part that made them liable in law to pay her damages.

1. Was there sexual harassment of the plaintiff by the first defendant?
2. If so, were these harassments known to and made with the connivance of the second and/or third defendants?
3. Are the second and/or third defendants liable for the sexual harassment of the plaintiff by the first defendant?
4. Does an employer have a duty of care to provide its employee with the working environment of a restaurant free from sexual harassment from its customers?

### **Findings**

The evidence of the plaintiff that the first defendant sexually harassed her stands uncontradicted. The first defendant did not adduce any evidence to the contrary. There are two rooms to let upstairs at the Tarosa Restaurant which the plaintiff has to clean as part of her duties. The first defendant was the occupier of the room. On the second occasion that the plaintiff went to clean that room the first defendant started saying such words to her, as – “*you have a big buttock*”; “*I love you and I would like to have a deal with you*”. She did not appreciate these at all because she has self-respect as a married woman with children. The first defendant touched her waist and buttock and held her and asked her if she was coming to work at night to make herself available to him at night. She was not satisfied with this. She went and explained to the third

defendant very well what had happened and informed her that she will not go again to that room because of the harassment of the first defendant. The third defendant expressed her understanding of the situation and she was not asked to clean that room for about three days. The first defendant kept walking behind her to get her to clean his room again. On the fourth day the third defendant told the plaintiff that the second defendant had asked that she (the plaintiff) should clean the room of the first defendant. The plaintiff then talked to the second defendant on the phone and the latter informed the plaintiff that he is not interested in her complaint and the room must be cleaned. The plaintiff wrote to the second defendant a letter on 24 May 2007 (**Exhibit P4**). The second defendant answered the same day and suspended her employment (**Exhibit P5**). She however continued to work up to 28 May 2007 when her employment was terminated. The plaintiff felt depressed at the material time. As her husband was not in the country she complained to the police and L/Cpl Leggaie on 30 May 2007 took a statement (**Exhibit P6**) from her. She also complained to the Ministry of Employment on 24, 29 and 30 May 2007. She also sought medical help through a psychologist. She went back to work and the second defendant terminated her employment for refusing to clean the room.

The plaintiff joined the second defendant in the suit for the reason that the latter, being an employer who had a staff member in his employment who was working well, had never refused to do any work, was never absent from work, should when a situation as such arose have taken the plaintiff and the first defendant and talked to both of them in order to resolve the matter instead of sacking the plaintiff and failing to protect her.

The plaintiff joined the third defendant in the suit because she had informed the third defendant who was very close to her as her manageress and who showed understanding of her situation; thereafter she had turned against the plaintiff and insisted that she continue to clean the room of the first defendant. In the opinion of the plaintiff both the second and third defendants were not doing the right thing knowing full well the behaviour of the first defendant, and that disturbed her mentally.

The plaintiff pursued her complaint for wrongful termination of employment against the second defendant and that culminated in her complaint being upheld and judgment given in her favour in the sum of R 54,615.

## **Conclusion**

I conclude that the first defendant sexually harassed the plaintiff by making verbal sexual advances towards her and touching her waist and buttock when she was performing her duties in cleaning the room occupied by the first defendant situated on the premises of the second defendant which is managed by the third defendant.

On the first occasion that such harassment started the plaintiff cautioned the first defendant not to do so. On a second occasion the first defendant repeated the sexual harassment.

In the circumstances and for the reasons stated I find on a balance of probabilities that the plaintiff has proven her case against the first defendant in that the first defendant sexually harassed the plaintiff and this amounts to a *fault* in law which the first defendant is liable to the plaintiff. I hereby give judgment in favour of the plaintiff as against the first defendant.

In the normal circumstances an employer has a duty of care to provide its employee with a working environment which is free from sexual harassment. This duty must be viewed in relation to the type of work and the prevailing physical environment.

There may be an environment which is such that the body of a male worker may have to touch a female worker when they are performing their duties. In such case if the female worker finds this to be a normal situation the issue of sexual harassment does not arise.

There may also be situations where male and female workers are working and words of a sexual nature are said among the workers and none of them take any offence in that. There again the issue of sexual harassment will not arise.

There is also the situation where by virtue and the nature of work, a female worker finds herself subjected to verbal sexual harassment by customers such as while serving in a restaurant or cleaning the room of a male customer in a hotel room, including physical harassment by touching of the buttock or any part of the female worker.

In my view there is no sexual harassment if that worker takes no offence in that and condoned the client's act. However, I believe that there is harassment if the worker takes offence and cautioned the customer not to repeat the harassment but yet again on a second occasion the same client repeats such act of sexual harassment. In that case the customer commits both a criminal offence and a *fault* in law.

On the basis of the evidence I do not find reason to believe that the sexual harassments of the plaintiff by the first defendant were known to and made with the connivance and condonation of by the second defendants and/or third defendants. In that circumstance I do not find the second and/or third defendants liable for the sexual harassment of the plaintiff by the first defendant. The first defendant was not an employee, agent or préposé of the second defendant and/or third defendant and the latter cannot be held vicariously liable for the action of the first defendant. I therefore dismiss the plaintiff's case against the second and third defendants but made no award as to costs.

The plaintiff is claiming a total sum of R 95,000 as particularized above. In assessing the quantum of damages I gave very careful thought as to what happened to the plaintiff as well as the non-public circumstances in which the fault occurred and the number of times it took place. It is my judgment that a fair and reasonable sum to be awarded as moral damages for humiliation, depression, anguish and psychological trauma suffered by the plaintiff in the circumstances is **R 25,000**.

I do not believe that any special damage for future loss as a result of loss of employment is called for as the plaintiff had taken up her employment complaint with the appropriate authority and had redress.

In the final analysis judgment is accordingly entered in favour of the plaintiff as against the first defendant in the sum of R 25,000 with interest and costs.