[2011] UKPC 32
Privy Council Appeal No 0022 of 2010

JUDGMENT

Adamas Limited (Appellant) *v* Mrs. Yong Ting Ping How Fok Cheung (Respondent)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Mance
Lord Clarke

JUDGMENT DELIVERED BY
Lord Mance
ON

9 August 2011

Heard on 28 June 2011

Appellant	*Respondent*
Mr Michel Ahnee	Adam Solomon Alexander Robson
(Instructed by M A Law (Solicitors) LLP)	(Instructed by Blake Lapthorn Solicitors)

LORD MANCE:

1. The appellant makes jewellery and operates duty free shops, one at Floreal towards the west of the island and another at Belle Mare on the east coast. The respondent, Mrs Cheung, was employed by the appellant from 2 September 1986 until 30 June 2002, when she was dismissed. She brought proceedings in the Industrial Court for unjustified dismissal, and was awarded a total of Rs 1,013,443.16 on 26 September 2007. In addition to 3 months wages in lieu of notice, the bulk of the award consisted of Rs 950,543.33, representing a sum, payable for unjustified dismissal under section 36(7) of Labour Act 1975, equal to six times the normal severance allowance (which is half a month's remuneration for every 12 months served). The award was upheld, by different reasoning, in the Supreme Court (Balancey and Domah JJ) on 12 May 2009. The appellant now appeals as of right to the Board, formal leave being given by the Supreme Court on 8 June 2009.

2. Mrs Cheung was initially employed as a sales person based at the appellants' Floreal shop, paid by commission. She was promoted to senior sales representative in August 1996. With effect from 1 July 2000, the appellants introduced a new commission scheme, with two elements, individual commission (0.3% on individual actual sales) and team effort commission, but by letter dated 15 July 2000 they agreed that Mrs Cheung would receive a fixed monthly commission of Rs 5000 and form part of the new commission scheme. By letter dated 24 November 2000, Mrs Cheung was further promoted to assistant shop manager, on fresh terms providing her with a basic monthly salary of Rs 15,000. After an initial three months' probationary period, she was to have for her personal use a company car, which the company would maintain. The letter further provided that:

> "Any bonus & commission received is given strictly on a discretionary, and gratuitous basis, and do not bind the company in any way whatsoever. You will form part of the existing commission scheme approved by the company."

3. Her new duties and responsibilities were described in an annexure as follows:

> "As Assistant shop Manager of Adamas Ltd, your duties and responsibilities will consist of (but not limited to) the following:

(a) To manage the Duty Free shop at Floreal and all its branches, in a manner consistent with the policies of the company and as directed by the directors.

(b) To ensure the smooth running of the shops in its day to day operations.

(c) To ensure that the inventory is well displayed and proper ordering is made on a timely basis in consultation with the directors and assist the directors in merchandise selection and ordering.

(d) To ensure that procedures are being followed by everyone in the shops as per their respective duties and responsibilities and to ensure that everyone adheres to these.

(e) To ensure that there is adequate human resources at any time to provide customer service to visitors and clients.

(f) To provide constant training to sales representatives

(g) To undertake any other duty and responsibility suitable to your post as may be assigned to you by the Company."

4. On 21 September 2001 the appellants wrote that, due to what they ascribed to an accounting error, they had continued to pay Mrs Cheung a monthly fixed commission of Rs 5000 after her promotion to assistant shop manager. Mrs Cheung replied on 25 September 2001 that she was

> "not agreeable to your decision to unilaterally cancel the monthly fixed commission. As you are aware, the latter was granted to me so as to compensate my "manque à gagner financier" following the implementation of the new commission scheme in July 2000. This has been reiterated in your letter of 24 November 2000."

Nevertheless, on 10 October, Mrs Cheung was paid only her basic salary and commission of Rs 3190.60, which she received under protest by letter dated 22 October 2001.

5. By letter dated 24 October the appellants informed Mrs Cheung that she was being transferred to work at their Belle Mare shop with effect from 5 November 2001,

with an increased travel allowance and normal overtime paid for any increase in working hours required. By reply dated 6 November Mrs Cheung expressed her surprise at this previously unannounced move, which seemed to her "very much to be a punitive transfer in view of my recent dispute with management concerned fixed commission", and pointed out that the monthly turnover at Belle Mare was only about Rs 234,000 compared to Rs 8.5m at Floreal. She also asked for clarification of her working hours and the position regarding overtime. The dispute continued with Mrs Cheung maintaining her position in further correspondence on 15 November (again asking for clarification of her working hours) and 26 November (and the appellants' group operations manager, Mr Benjamin Samba, reiterating the appellants' stance on commission on 13 December).

6. Against this background arose the disputes relating to the scope of Mrs Cheung's duties as assistant shop manager which eventually led to her dismissal. Duty free sales sold at either shop could only be delivered to their buyers at the airport on departure. The appellants had therefore to arrange for their delivery to the airport, and, before any sale, the procedure was for the sales representative to check with the appellants' headquarters that this could be done. The person responsible for collecting deliveries from the Belle Mare shop was a Mr Lutchana, a senior sales representative, who had a company car for this purpose. From 3 to 8 December 2001, he was on leave in the Seychelles. The appellants arranged for him to be substituted by Mr Lafleur, another salesman. However, Mr Lafleur also had his own marketing to undertake.

7. So it came about that on 3 and 5 December 2001 the manager of the Belle Mare shop, Mr Steve Rayapoullé, asked Mrs Cheung to convey items of jewellery sold from Belle Mare to the Floreal shop, from which they could be conveyed to the airport. Mrs Cheung lived in the westerly part of the island so that the journey was not as such off her route at the end of the day, and she undertook the task. But when she was asked for a third time by Mr Rayapoullé on 6 December, and then also spoken to by Mr Samba, she refused. In a letter dated 13 December maintaining that she had been obliged to undertake the delivery under clause (g) of her duties and responsibilities and giving her a formal warning, Mr Samba said that his request had been made because she had been "the only available person with a company car". (In his oral evidence, he accepted that there had in fact been at least one other car available on 6 December.)

8. Mrs Cheung replied in detail by letter dated 20 December. She said that she had always discharged her duties, which did not include deliveries; Mr Lutchana had, before going on leave, told her that he had made arrangements with Mr Lafleur for deliveries, which either he or Mr Chiniven would make. She had only undertaken the deliveries on 2 and 5 December at Mr Rayapoullé's insistence, and he had referred to his request on 5 December as a "favour" and promised in future to send Mr Chiniven or Mr Perumal. There had been other available vehicles and drivers at Floreal on 6 December. The drive from Belle Mare to Floreal after the shop closed was a long one;

she did not feel safe and could barely drive at night; and she had no means of communication in case of danger. Alternative means of delivery had been found on 7 December, when she had felt ill. She went on to remind Mr Samba that her requests for clarification of the position regarding commission as well as overtime remained unanswered.

9. Mr Samba responded on 27 December to Mrs Cheung's letter of 20 December. In paragraph A, he complained that her "attitude towards management has now become very alarming and rude" and said that she was free to take whatever steps she saw fit if she felt her transfer had been punitive; in paragraph C, he said that the management's position on commission had already been communicated; and in paragraph D he said that shop managers were obliged to work outside normal hours if needed without extra remuneration, that the company had been "exceptionally willing to offer her a gratuitous payment for extra hours generally required by the Belle Mare Shop base", but that "in view of your attitude and what can only be interpreted as a non-acceptance of the offer the company has decided to withdraw the offer". In between these paragraphs appeared paragraph B, in these terms:

> " You are reminded that as Assistant Shop Manager it is your duty to manage the shop in Belle Mare as well as perform any other duty suitable to your post as may be assigned to you by the company and that any lack of or mismanagement [sic] is ultimately your responsibility. Should you feel unable to carry out these duties or you would like to return to the post of sales representative please inform me immediately"

10. Relations continued at a low point. A further letter of warning was given to Mrs Cheung on 4 February 2002, for allegedly leaving a necklace in the shop window over a weekend. On 20 and 26 February, Mrs Cheung made complaints to the Ministry of Labour and Industrial Relations in respect of failure to pay for overtime at Belle Mare, non-payment of the fixed commission as well as her "punitive transfer" to Belle Mare, complaints which the Ministry on 10 May referred for conciliation and arbitration under section 82 of the Industrial Relations Act 1973. On 15 April a third letter of warning was given to Mrs Cheung for changing two tyres on her company car and having the bill passed to the appellants as an expense. In response, Mrs Cheung said that the garage had advised her that the tyres were worn out and in poor condition, that she had obtained prior authorisation from her superior, Mr Rayapoullé, who had personally given the garage oral instructions, and that this was in accordance with a circular issued by the appellants' managing director. Mr Samba took issue with these points, maintaining that any such authorisation could only come from him, although he might reconsider the issue of payment if the tyres were returned to him for inspection. (Ultimately, it appears that payment was made.)

11. On 25 May Mrs Cheung was again asked by Mr Rayapoullé and refused to convey jewellery to Floreal. On 28 May the appellants "after due consideration of the above incident and also your past conduct" suspended her and initiated disciplinary proceedings. On 4 June, they gave notice of disciplinary charges that she did on 25 May

> "1. Disobey the instructions of Mr Steve Rayapoullé to bring a sold parcel of jewelry from the Belle Mare shop to Floreal for shipment.
>
> 2. Threaten to cancel that sale of jewelry if nobody was sent to pick up the parcel from the Belle Mare shop."

They also gave notice that they might "inter alia also produce" the contract of employment and the letters of warning dated 13 December 2001, 4 February and 15 April 2002. Disciplinary hearings were held on 14 and 18 June, and Mrs Cheung was notified on 20 June that the charges had been found proved, and that management had concluded that she had committed a gross misconduct warranting dismissal.

12. After hearing evidence and submissions on 22 February 2007, the Industrial Court (Mr A R Hajee Abdoula) on 26 September 2077 reached a different conclusion. Unfortunately, the Industrial Court did so under the misapprehension that the disciplinary charges related to, and the dismissal in June 2002 had followed from, the refusal to deliver jewellery on 6 December 2001. To compound the confusion, it appears also to have thought that the episodes of the tyre change, the cessation of payment of the fixed commission, the industrial relations complaint and the transfer to Belle Mare took place in that order and prior to the 6 December 2001. Nevertheless, the Court's findings are not without all significance. It found Mrs Cheung's explanations to be plausible, and it held that no "instructions" had been given by Mr Rayapoullé, that he had on 2 and 5 December requested what he himself had qualified as "favours" from Mrs Cheung, and that "For reasons best known to himself he attempted to obtain yet another favour from [her] when there were already at Floreal half a dozen of vehicles lying in waiting". The Industrial Court concluded by saying that "At best, if there was any [instruction], it could only have been by way of a request for a favour which [Mrs Cheung] was perfectly entitled to refuse".

13. On appeal, the Supreme Court addressed the question whether the Industrial Court's "misapprehension regarding the two incidents was of such a nature as to vitiate his conclusion". It concluded that it was not for these reasons:

> "(a) the nature of the dispute arising from the facts which were themselves identical;

(b) the issue between the parties in both incidents was the same; and

(c) it is not unreasonable to assume that the insertion of 6 December 2001 for 25 May 2002 may be an unfortunate *lapsus calami*, not going to the root of the determination. Indeed, the only difference between the two incidents was that there was a lapse of 8 months between and that the second incident occurred after a formal warning issued to the respondent by letter dated 13 December which respondent replied by 20 December. Be that as it may, account should be taken of the fact that the crucial controversy between them whether the conveyance of parcels did or did not form part of the scheme of service of the respondent had remained unresolved."

The Supreme Court also dealt with further submissions, that the real issue was not whether Mr Rayapoullé had given instructions, but whether Mrs Cheung's duties covered conveying jewellery, that, even if they did not in December 2001, they came to do so, as a result of her continuing in the appellants' employment after December 2001, and that the magistrate had not addressed the charge relating to a threat to cancel the relevant sale of jewellery. The Supreme Court saw the absence on the evidence of any instructions in either December 2001 or May 2002 as indicating that the request made in May "continued to be one for a favour rather than one for legal compliance". It saw the case throughout as turning on the question whether the delivery of jewellery "formed part of the contract of employment", rather than as one of unilateral change of terms of employment; and it noted in this connection that there had been no other incident between 6 December and 25 May where such a condition had been imposed, and said that "the ball had fallen in the camp of the company to resolve that issue" after Mrs Cheung's letter of 20 December 2001. Finally, it noted that Mr Rayapoullé's evidence had not supported the charge of threatening to cancel the sale.

14. Before the Board, Mr Ahnee in his attractive and well thought-through submissions on behalf of the appellants contends that neither court below has correctly appreciated the full factual position or the applicable law. However, the main focus of his case was that, whatever the position may have been in December 2001, Mrs Cheung was by May 2002 well-aware that the appellants required her as assistant manager to assist with deliveries when requested, and must, so far as necessary, be taken to have accepted that the appellants were entitled to require this.

15. So far as concerns the position in early December 2001, the Board sees no reason to go behind the concurrent findings of the courts below. These were that the requests made by Mr Rayapoullé and accepted by Mrs Cheung were by way of favours, rather than instructions as they would have been if based on any legal duty. Further, according to the official court translation of the evidence put before the Board, all that even Mr Samba said in chief was that, when he spoke to Mrs Cheung

on 6 December, "I asked her to do a favour because we had a problem" ("Mone dire li rende ene service parski nou ti dans ene probleme").

16. Mr Ahnee submits however that the Supreme Court failed to appreciate the significance of events subsequent to 6 December 2001; the Supreme Court referred to the correspondence dated 13 and 20 December, but erred in suggesting that the ball lay thereafter in the appellants' court; this was to overlook paragraph B of Mr Samba's reply of 27 December; further, the Supreme Court failed to attach any significance to the fact that Mrs Cheung remained in the appellants' employment from December 2001 onwards and the absence from her industrial relations complaint in February 2002 of any reference to any issue regarding jewellery deliveries.

17. The correct legal analysis is, Mr Ahnee submits, that, even if Mrs Cheung was not originally obliged to delivery jewellery, she was by the appellants' letters dated 13 and 27 December, made aware that this was required of her as a matter of duty rather than favour, and accepted this by continuing in employment without further objection. In support of this analysis, Mr Ahnee relies before the Board (as he did before the Supreme Court) upon the reasoning in the decisions of the Supreme Court in *Periag v International Beverages Ltd.* 1983 MR 108, *The Constance & La Gaiété S E Co Ltd. v Bhungshee* 2000 SCJ 67 and *Joseph v Rey & Lenferna Ltd.* 2008 SCJ 342.

18. The issue in all these three cases was whether there had been a constructive dismissal. In *Periag* the employee was claiming severance allowance on the basis that he had been constructively dismissed by being demoted to salesman driver from his previous post of chief salesman driver. In its reasoning in *Periag*, the Supreme Court considered English law caselaw "useful as a guide to illustrate the general direction taken by judicial thinking in England in order to reach just solutions in industrial disputes and [as showing] a similarity in the direction taken by French and Mauritian judicial thought". It cited in this connection Lord Denning's well-known dictum in *Western Excavating (ECC) Ltd. v Sharp* [1978] 1 QB 761, 769C that the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". It should however be noted that Lord Denning prefaced this dictum by recording that - the conduct must "be sufficiently serious to entitle him to leave at once" and followed it with a sentence saying "He will be regarded as having elected to affirm the contract".

19. Although the Supreme Court in *Periag* found some value in English caselaw, it went on understandably to say that, since the matter was "governed by our own specific Labour law, it is best to look to our own law and the cases decided in the context of that law in order to find precise solutions". On the point in issue before it, it was able to rely directly upon *Mahasing v The Tea Development Authority* 1980 SCJ

169. However, it added that the conclusion in *Mahasing* that an employee could not remain in employment and claim severance pay for constructive dismissal seemed "unimpeachable" for a further reason, namely that:

> "… since under the general principles of our law of contract a worker is entitled to treat his employment agreement as at an end in circumstances where his employer commits a breach of such a kind as to entitle the worker to do so, the worker must elect whether to treat his employment agreement as at an end and terminate it or to overlook the breach and stay in his employment under changed terms. He may protest or take some little time or do both before making his election and taking a final decision. He must, however, make his election. Otherwise his employment links will not be severed and he will be regarded as being in "continuous employment. In this respect, both English and Mauritian case law have reached the same solutions."

Mr Ahnee relies in particular on the words "stay in his employment under changed terms".

20. In the case of *The Constance & La Gaiété* a watchman was in August 1993 transferred to his employers' Belle Mare section, where he would be expected to do night shifts as well as the day shifts which he had until then had. He undertook night shifts under protest for some six months, but then claimed to have been constructively dismissed. The Supreme Court held, first, that he had had - no "acquired right …. to work only on day shift" and had failed to establish that his transfer to the new section "constituted a substantial modification of his term of service" but, secondly, that, even if one were to assume that the change was improper, he must be deemed to have accepted the modification, and his decision to quit in February 1994 was a resignation, not a constructive dismissal. The Supreme Court cited in this connection all but the last sentence of the passage from *Periag* quoted above.

21. In the third case of *Joseph*, the employee had been manager of a department with responsibility for sales, marketing and administration as well as technical aspects, but, after a takeover of another company, a co-manager was appointed in respect of the former aspects, while his activity was limited to the technical. It was found on the facts that he had accepted the change without protest and had worked for a month, before deciding to leave and found his own company. His claim for constructive dismissal was dismissed. The Supreme Court said that:

> "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."

The Court went on to refer to the passage in *Periag* and Lord Denning's dictum in *Western Excavating*, and to say that "In the present case, the appellant's lack of response to the new terms clearly showed that he had initially accepted the new conditions and remained in employment before changing his mind must later."

22. In each of these three cases, there was no accepted constructive dismissal, because the employee had, at least by conduct, accepted the new post or terms which the employers had assigned and did not treat the change made as repudiatory or (therefore) as a constructive dismissal.

23. In none of these cases was the situation considered of a change of the nature or terms of employment, which although improper was not sufficiently serious to be repudiatory or therefore capable of constituting a constructive dismissal. In none of them was the situation considered of an announced change of terms which, although repudiatory, did not call for any immediate response or action by the employee, who could and did continue to perform his or her original job as if no change had been requested.

24. In the present case, the Board considers that two questions arise which are not, therefore, covered by these previous decisions. First, were the appellants in Mr Samba's letters of 13 and 27 December 2001 insisting on a change which was repudiatory, in the sense that Mrs Cheung could, if she had wished, have brought her employment to an end on the ground that she had been constructively dismissed? Secondly, assuming that the change was repudiatory, was Mrs Cheung obliged to treat it as such, bearing in mind that she could perform her contractual duties (as she correctly saw them) perfectly adequately? Could she not simply await and then refuse any instructions to deliver jewellery that might be given, leaving it to the appellants, if they wanted, actually to dismiss her and thereby expose themselves to her present claim for unjustified dismissal?

25. On one view, the words "stay in his employment under changed terms" used in *Periag* and later cases might be read as suggesting that any employee, who continues in employment after any breach by his or her employer consisting of a requirement to do work outside the scope of the original employment contract, thereby accepts the new conditions. But this would not represent a rational legal position. If the change demanded was, although outside the scope of the original contract, so minor as not to be repudiatory, the employee would have no right to treat him or herself as constructively dismissed. It could not be right in such circumstances to treat an employee as having waived any claim for damages for the breach. The Board understood Mr Ahnee to accept that whether conduct is sufficiently serious to justify

termination of a contract always depends on an analysis of the particular circumstances. It may be open to question whether the change proposed in this case was repudiatory, when Mrs Cheung could simply refuse to undertake deliveries if and when asked. But, even if one assumes that most if not all unilateral changes of job or terms by an employer including the present would be repudiatory if outside the scope of the original contract, the Board sees no reason why an employee, faced with an employer's demand for what the employee regards as unjustified changes, should then be obliged to treat the contract of employment as terminated on pain of being held, otherwise, to have accepted such changes. Where, as here, the original contractual job continues to exist and to be capable of performance by the employee, the employee can continue to perform; it is the employer who in such circumstances has to decide what stance to take.

26. The views expressed by the Board in the previous paragraph are reinforced by a consideration of the treatment of the subject in *Introduction au Droit du Travail mauricien* (1995) by M D Fokkan (a lecturer at the University of Mauritius). Mr Ahnee helpfully and properly directed the Board's attention to this work. In it M. Fokkan discusses in some detail at pp 145-148 the legal position arising where an employer introduces a change falling outside the original contract ("une modification substantielle" as opposed to the mere "modification accessoire" occurring when an employer introduces revised arrangements falling within the scope of the original contract). Starting with the proposition that a modification substantielle "requiert impérativement le consentement de l'employé", Mr Fokkan then cites the passage quoted above from *Periag*, which he discusses as follows:

> " L'employé peut soit refuser ou accepter la modification. En cas d'acceptation il y a novation de l'obligation ayant fait l'objet de la modification. Aucune des deux parties ne peut y revenir. Une novation requiert en principe une manifestation de volonté valable et libre. …….
>
> En cas de refus explicite, l'employeur peut soit faire marche arrière et maintenir les conditions convenues à l'origine dans le contrat ou alors insister sur celle-ci qui mènera probablement vers un licenciement de l'employé, l'employeur ne pouvant pas imposer la modification à celui-ci. Le refus peut être un refus exprès ou alors s'exprimer par le comportement de l'employé. Plusieurs hypothèses sont ici possibles. La première consiste pour l'employé à prendre acte de la rupture et à s'adresser à la cour pour faire reconnaître le licenciement, qu'on qualifie alors de "constructive dismissal". La seconde consiste pour l'employé à cesser de travailler sans toutefois saisir le tribunal. Il convient ici à ce que l'employé fasse bien connaître son intention afin d'éviter qu'elle ne soit interprétée come un démission. Il faut toutefois faire ressortir qu'une "démission ne se présume pas et ne peut résulter que de la volonté claire et non équivoque du salarié de mettre fin au contrat de

travail." Le simple fait de cesser de travailler ne saurait donc en lui-même être interprété comme une démission. La jurisprudence Automobile Grandin, examinée plus haut, est probablement valable ici également. Afin d'éviter que cette situation reste en suspens, l'employeur voudra probablement prendre acte d'une rupture. Dans la mesure où le refus de l'employé est légitime, ce refus ne peut être clairement la cause de la rupture. La responsibilité de la rupture demeure avec l'employeur, l'acte de celui-ci étant alors qualifié de licenciement.

Il existe toutefois une dernière situation, celle où l'employé ne procède pas à un "election" mais continue malgré tout à travailler. Cette situation ne peut se présenter en vérité que dans les cas où la modification ne requiert pas la collaboration de l'employé, tel par exemple les modifications dans la rénumération. Y a-t-il un consentement tacite à la modification empêchant éventuellement l'employé d'invoquer la rupture? "He may protest or take some little time before making his election...He must, however, make his election." L'arrêt Periag peut être interprété de deux façons. Premièrement, puisque l'initiative de la rupture revient à l'employé, si celui-ci continue à travailler, et cela même après avoir protesté, il pourra éventuellement (après le "little time") être considéré comme ayant accepté la modification: "First since under the general principles of our law of contract a worker is entitled to treat his employment agreement as at an end and terminate it or to overlook the breach and stay in his employment under changed term." Cette approche est confirme à l'ancienne jurisprudence française pour laquelle "il appartient au salarié de prendre acte de la rupture, sans pouvoir exiger le maintien des conditions antérieures" (Soc., 21 janvier 1987, Bull, V, no.33) et que, s'il continue à travailler, il "n'a pas usé de son-droit de faire constater la rupture aux torts de l'employeur" et doit donc être présumé avoir accepté les nouvelles conditions de travail (Soc. 9, 10 et 23 avril 1986, Dr.Soc., 1986.869). Rivero & Savatier désapprouvent cette jurisprudence car "cela obligeait le salarié refusant la modification de son contrat à prendre l'initiative de la rupture" alors que ça aurait dû être à l'employeur de tirer les consequences de son acte. Une autre lecture de l'arrêt Periag est toutefois possible. La question qui était posé à la Cour était si un employé pouvait avoir droit à l'indemnité de licenciement s'il n'y avait aucune rupture du contrat, celui-ci continuant à travailler dans l'entrprise. A quoi la Cour répond par le négative. L'éligibilité à 'indemnité de licenciement n'intervient qu'en cas de rupture du contrat: "the payment of severance allowance presupposes the ending of the employment relationship and cannot arise unless the worker is no longer employed by his employer." Toute inteprétation de l'arrêt Periag devrait ainsi être limitée à la réponse que l'arrêt donne à cette question. Le simple fait de continuer à travailler dans l'entreprise n'implique pas

> ainsi nécessairement une acceptation de la modification. C'est en effet la solution maintenant retenue en France par la Cour de cassation, 8 octobre 1987 (Raquin et Trappiez c. Société Jacques Marchand). Il revient en effet à l'employeur de prendre acte du refus de l'employé et de licencier celui-ci. La simple poursuite du travail en elle-même, alors que l'employé aurait initialement refusé la modification, ne saurait être interprétée comme une acceptation tacite. De par son état de subordination, l'employé ne fait ici que subir la modification sans pour autant l'accepter. Dans l'espèce Raquin, l'employé a pu ainsi demander un rappel de son salaire sur environ une dizaine d'années."

27. M Fokkan thus starts with a clear statement that an employee can refuse or accept a modification of the contract of employment. M. Fokkan goes on to say that "En cas d'acceptation il y a novation de l'obligation ayant fait l'objet de la modification. That indicates (since the parties have not changed) a variation of the particular obligation the subject of the change. In that event "Aucune des deux parties ne peut y revenir". But, as M. Fokkan rightly goes on, "Une novation require en principe une manifestation de volonté valable et libre" – a variation requires in principle a manifestation of valid and freely expressed will. In the Board's view this is the underlying principle. As to the decision in *Periag*, M Fokkan takes the view which the Board has indicated in paragraph 25 above that it prefers; he notes, as the Board has in paragraphs 17-19 above, that *Periag* was only concerned with the question whether an employee who decides to remain in employment after a constructive dismissal can claim severance pay, and he states that "the simple fact of continuing in employment in the enterprise does not necessarily imply an acceptance of the modification". As this recognises, a manifestation of will may in some circumstances be implied from conduct, but the mere fact of continuing to perform according to the original contract does not manifest any acceptance of a proposed modification.

28. In support of this view, M Fokkan is able to cite both French academic opinion (Profs Rivero and Savatier) and the modern French authority of *Raquin et Trappiez c Société Jacques Marchand* (8 October 1987, No de pourvoi: 84-41902 84-41903). In this latter case, an employer sought unilaterally to vary employees' remuneration and the Cour de cassation said:

> "Attendu que, pour débouter MM. Raquin et Trappiez de leur demande en paiement de rappels de salaires et de sommes représentant l'incidence qui devait en résulter sur le montant des indemnités de rupture et de la prime annuelle, la cour d'appel énonce que s'il n'appartient pas au salarié, qui refuse de donner son accord à la réduction de salaire, d'imposer à l'employeur le maintien des conditions antérieures, en revanche il lui incombe de tirer les conséquences de ce désaccord en prenant, s'il l'estime utile, l'initiative de la rupture du lien contractuel ;

> Attendu qu'en statuant par ces motifs, alors que l'acceptation par MM. Raquin et Trappiez de la modification substantielle qu'ils avaient refusée, du contrat de travail ne pouvait résulter de la poursuite par eux du travail, et alors que c'était à l'employeur de prendre la responsabilité d'une rupture, la cour d'appel a violé le text susvisé"

29. Earlier Cour de cassation authority might be read as taking a more rigid line. M. Fokkan cites a decision of 21 January 1987 (No de pourvoi 84-40956) for its general statement that, in a case where an employer makes a modification of a substantial element of the contract, it is up to the employee to treat the contract as at an end, without being able to insist on the maintenance of the previous terms. Both the decision on 8 October 1987 in *Raquin et Trappiez* and the earlier decision of 21 January 1987 concerned very briefly stated facts, very far removed from the present : in *Raquin et Trappiez*, it appears, a change of remuneration, resulting in a loss of income which the employees protested, although continuing to work for some ten years; and, in the earlier decision, it appears, a restructuring of remuneration, which the employee was again said to have protested, although continuing to work for some six years.

30. It is unnecessary to consider the facts or outcome in either Cour de cassation decision, or how any comparable case might be resolved in Mauritius. The facts of the present case lie within a much smaller compass and time-scale. What matters for present purposes is the general principle under French law, and in this respect the Board prefers the principle stated in the later case, *Raquin et Trappiez*. More recent authority, again in the area of reduction of salary, also speaks in terms consistent with *Raquin et Trappiez*: see *Société Roneo* (31 October 2000, No de pourvoi 98-44988 98-45118), where the Cour de Cassation stated that modification of a contract of employment by an employer, for whatever reason that might be, requires the consent of the employee.

31. Mr Ahnee acknowledged in his submissions that a similar approach applies under English law, where silence without more does not imply consent. But Mr Ahnee submitted that Mauritian social and labour conditions could justify a different approach. The suggestion is however unspecific and unsupported. The civil law of Mauritius can be expected to take close account of the development of French civil law, and in *Periag* itself the Supreme Court saw a similarity in the direction of English, French and Mauritian judicial thinking, and indeed believed that English and Mauritian caselaw had reached the same solutions in this area.

32. In the light of the Board's conclusions regarding the law, the critical question is not simply whether Mrs Cheung remained in the appellants' employment after the appellants had made clear that they expected her to undertake deliveries as part of the contractual duties. It is whether, on the basis that this was not originally within the

scope of her contractual duties and not capable of being made so under clause (g) of her duties and responsibilities, she ever, expressly or impliedly, agreed to a variation of her contract so as to bring deliveries within the scope of her duties or of clause (g).

33. As the Board has said, Mr Ahnee placed heavy reliance in this connection on the absence of any reply by Mrs Cheung to Mr Samba's letter dated 27 December, of which, he points out, the Supreme Court also made no mention in its judgment.. The Board notes, however, that, in the appellants' letter dated 4 June 2002 notifying Mrs Cheung of the disciplinary charges, the only document relating to the December incident mentioned was the letter of warning dated 13 December. To that Mrs Cheung responded in no uncertain terms on 20 December, making very clear both her rejection and the reasons for her rejection of any change of the scope of her employment.

34. In the Board's view, the fact that Mrs Cheung did not reply to the letter dated 27 December is unsurprising. It is true that one paragraph (B) of the letter dated 27 December addressed the question of performance of duties but it did so only in the most general fashion. It did no more than call Mrs Cheung's attention to her admitted contractual duty to manage the shop and perform any other duty suitable to her post, and ask her to inform Mr Samba immediately should she feel unable to carry out these duties or like to return to the post of sales representative. No specific reference was made to jewellery deliveries and no answers were attempted to any of the detailed contents of Mrs Cheung's letter dated 20 December, by which she had made very clear that she did not regard such deliveries as within the scope of her contract and why she objected to their being treated as such.

35. Nothing can in these circumstances be inferred, by way of consent on her side to undertake such deliveries, from the fact that Mrs Cheung did not reply, repeating what she had already made clear on 20 December. If there is any inference, it seems to be that Mr Samba could not on 27 December think of a convincing response to her detailed objections, rather than vice versa. The Supreme Court was therefore right to regard the issue as remaining open or unresolved after December 2001.

36. The other matter relied upon is the absence from Mrs Cheung's industrial relations complaint dated 20 February 2002 of any reference to any issue regarding jewellery deliveries. But that complaint came two and a half months after the last occasion when Mrs Cheung had been asked to deliver jewellery, that itself only occurring during a period of holiday leave of the employee who normally undertook deliveries; the complaint was also two months after Mrs Cheung had made her position crystal clear in her letter dated 20 December to which, as the Board has just noted, there was no substantial or convincing response. There was no reason in these circumstances for Mrs Cheung to raise the matter with the industrial relations authorities. Nothing can in any event be inferred by way of consent from the fact that she did not.

37. In these circumstances, the Board is unable to see any basis on which it could properly be concluded that Mrs Cheung agreed, either expressly or impliedly, to vary the scope of her contract of employment to bring within her duties an obligation to make jewellery deliveries from Belle Mare to Floreal when and if requested. The request made of her on 25 May 2002 was thus one which she was entitled to refuse, as she did, and her dismissal on account of such refusal was unjustified.

38. Accordingly, this appeal must be dismissed. The Board would like to record its thanks to solicitors and counsel for the respondent who kindly agreed to act pro bono when it appeared that the respondent would not otherwise be represented before the Board. The Board has benefitted greatly from the submissions of counsel for both parties.