Easter Term
[2018] UKPC 14
Privy Council Appeal No 0088 of 2016

JUDGMENT

De La Haye (Appellant) *v* Air Mauritius Ltd (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Wilson
Lord Reed
Lord Hughes
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

21 May 2018

Heard on 26 April 2018

Appellant	*Respondent*
Jean Claude Bibi Juliya Arbisman Abdullah Yusuf Ali Bauluck Sheren Govinden (Instructed by Jean-Marie Leclézio)	Gilbert Ithier SC (Instructed by Axiom Stone)

LORD HUGHES:

1. In these proceedings Mr De La Haye ("the plaintiff") claims severance pay under the Employment Rights Act 2008 (as amended) following the ending of his employment as a pilot by Air Mauritius Ltd ("the defendant").

2. The plaintiff was employed under a series of separate four-year contracts. The first ran from 8 December 1997 to 7 December 2001. The second commenced the day after the expiry of the first and ran from 8 December 2001 to 7 December 2005. Likewise, the third commenced immediately on the expiry of the second and was due to run from 8 December 2005 to 7 December 2009. However, this third contract was, in Summer 2006, displaced by mutual consent by a fourth contract dated 16 June 2006; this fourth and last contract of employment was to run from 13 July 2006 to 12 July 2010. Nothing turns on the reasons for this substitution of the fourth contract for the third, which seem to have been connected with a change of model of aeroplane which he was employed to fly.

3. One of the reasons why the plaintiff was employed under successive fixed term contracts appears to have been that as an expatriate his work permit ran only for four years at a time. The defendant's evidence was that another reason was that demand for air services fluctuated a good deal with global and local conditions.

4. Each of these fixed term contracts contained similar terms. One of them was for termination by either side on notice to the other. The critical clause for present purposes is clause 10(A) of the last (fourth) contract. So far as material it read:

> "Subject to … [provisions not relevant to the present litigation], this Agreement shall be subject to termination:
>
> either (i) on the day which is four years from the beginning of the period as defined in clause 2; [that would have been 12 July 2010]
>
> or (ii) by six months' notice in writing given by either party at any time during the duration of the Agreement;
>
> or (iii) … [provision for four weeks' notice by either side in the event of unremedied breach by the other.]"

5. On 27 February 2009, when the fourth contract had about 17 months to run, the defendant served written notice of termination on the plaintiff. The relevant parts of its letter to him read:

> "Dear Mr De La Haye,
>
> In the face of the economic crisis that is growing in intensity, losses incurred and expected with the fuel hedging and the financial situation of the Company which is exacerbated by a substantial drop in traffic, the Company's operations for year 2009-2010 has been significantly reduced.
>
> As a consequence, the Company has no other choice than to review its manpower requirements.
>
> In this respect, we regret to inform you of Management's decision to terminate your contract effective 31 August 2009. Pursuant to clause 10A(ii) of your contract dated 16 June 2006 and bearing reference C16F06YP03, this letter serves as a six months' notice for the termination of your contract.
>
> …"

6. The plaintiff's claim was principally for severance pay under section 46 of the Employment Rights Act 2008 ("the Act"). If he was entitled to such severance pay, it fell to be calculated by reference to his remuneration according to the formula contained in that section. In addition to his salary he enjoyed several potentially valuable allowances, benefits and privileges. There was some dispute between the parties as to which of these would count towards his remuneration for the purpose of the formula, and what if any credit needed to be given for gratuities paid under the successive contracts, but the Board is concerned only with the question whether he qualified for severance pay at all.

7. Entitlement to severance pay is dealt with in section 46 of the Act. The terms here set out by the Board are those which prevailed at the time that the plaintiff's contract came to an end (ie on 31 August 2009). So far as material section 46 then provided as follows:

> "46. Payment of severance allowance

(1) Where a worker has been in continuous employment for a period of not less than 12 months with an employer and the employer terminates his agreement, the employer shall pay severance allowance to the worker as specified in subsection (5).

…

(5) Where a worker has been in continuous employment for a period of not less than 12 months with an employer, the court may, where it finds that -

(a) the termination of agreement of the worker was due to the reasons specified under section 36(3) and (4);

(b) the termination of agreement of the worker was in contravention of section 38(1), (2), (3) and (4);

(c) the reasons related to the worker's alleged misconduct or poor performance under section (38)(2) and (3) do not constitute valid reasons for the termination of employment of the worker;

(d) the grounds for the termination of agreement of a worker for economic, technological, structural or similar nature affecting the enterprise, do not constitute valid reasons;

(e) notwithstanding paragraphs (a), (b), (c) and (d), the termination of agreement of the worker was unjustified,

order that the worker be paid severance allowance as follows -

(i) for every period of 12 months continuous employment a sum equivalent to three months remuneration; and

(ii) for every period of less than 12 months, a sum equal to one twelfth of the sum calculated under

> subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer."

Subparagraph (e) had been added to section 46(5) by amendment made by the Finance (Miscellaneous Provisions) Act No 14 of 2009, with effect from 1 July 2009, thus before the end of the plaintiff's employment. It should be recorded that since then there have been further amendments, not to subsection 46(5) but to the initial qualifications under subsection 46(1), and to provide for exceptions to the entitlement to severance allowance.

8. The references in subsection 46(5)(a) to section 36(3) and (4) are to circumstances in which a worker may treat the employer's actions as amounting to termination. The references in section 46(5)(b) to section 38(1) to (4) are to prohibitions on termination for various reasons such as race or other protected characteristics, or protected activity, and to the circumstances in which termination for misconduct or poor performance is permitted.

9. It will be noted that the concept of continuous employment is relevant both under section 46(1), which requires a minimum of 12 months such service before severance allowance arises at all, and also under section 46(5), where the length of such service determines the amount of the allowance. "Continuous employment" is given a specific definition for the purposes of the Act in section 2, which provided then, as it still does:

> "'continuous employment' means the employment of a worker under an agreement or under more than one agreement where the interval between an agreement and the next does not exceed 28 days."

10. It follows that in the present case, on the law as it stood in August 2009, there were three conditions, all of which had to be satisfied, for entitlement to severance allowance:

(i) there had to be a termination by the employer;

(ii) there had to be the necessary period of continuous employment; and

(iii) the termination had to fall within one or more of subparagraphs 46(5)(a) to (e).

The decisions of the courts below

11. In the Industrial Court the magistrate heard evidence on each side as to the economic reasons which the defendant contended justified it in giving notice to the plaintiff, and which had been foreshadowed in the letter of notice. There was a good deal of evidence concerning the impact on the defendant airline of the global financial crash in 2008-09, not only via reduced demand for its services but also because of the effect on hedging fuel contracts which it had made, which had run into considerable losses. The evidence was that overall the losses were of the order of €84.3m or almost 4 billion rupees by 31 March 2009. There was evidence that a series of cost-saving measures had been adopted before there was any question of terminating the contracts of any pilot. They had included asking employees to take unpaid leave of up to two years, or to switch to part-time work, and the granting of unpaid leave to pilots. Recruitment had been put on hold. The evidence also showed that the cost to the defendant of an expatriate pilot, such as the plaintiff, was a good deal greater than that of a local pilot, because several valuable allowances and privileges were enjoyed by the former which the latter did not have. For his part, the plaintiff disputed the truth of the assertion that the defendant was under economic pressure, and pointed to the fact that later in 2009 some recruitment had been resumed. He also contended that the defendant had failed to show that the selection of himself for termination was justified. The magistrate had all this evidence on both sides. She determined that there was clearly sufficient economic justification for the termination of the plaintiff's contract. Given the extra cost which expatriate pilots involved, there could be no basis for saying that the selection of the plaintiff, at a time of the financial stringency which had been established, was unjustified. She expressed herself in these terms:

> "The court holds that the termination of the last contract of employment of the plaintiff after due notice was given, was perfectly justified in the present circumstances. The court will conclude that there is no evidence to show that this termination was either unfair or unreasonable."

12. The magistrate did not in those circumstances need to address the length of continuous service. She did hold that successive fixed term contracts did not, by reason of succession, become an indeterminate employment. Nor did she need to address the nature of the termination of the plaintiff's contract, though she did observe that it had been as provided for in the notice clause of the contract (10(A)(ii)).

13. On appeal to the Supreme Court, the court decided the case on a different, and preliminary, point. It agreed that the contract was for a fixed term rather than for an indeterminate duration. It held that the plaintiff did not pass the threshold for severance allowance, because the contract had been determined by the giving of notice, as

provided for in the terms freely agreed by both parties. The court referred to section 36(1) of the Act. That provided:

> "(1) Subject to any express provision of an agreement and to subsections (2), (3), (4) and (5), every agreement shall terminate on the last day of the period agreed upon or on the completion of the specified piece of work."

The court drew attention to the first eight words of the subsection. It affirmed the fundamental propositions that the parties are normally at liberty to conclude such contract as they wish and that a contract is the particular law of those parties in their relationship. It held that because the plaintiff's contract had been determined in accordance with its terms it had been terminated not by the unilateral act of the employer but "in conformity with the common will of the parties as expressed in their agreement." In those circumstances, the court did not reach the question of what continuous employment the plaintiff had had, nor whether the economic grounds relied on by the defendant were made out or not.

Submissions before the Board

14. For the plaintiff, Mr Bibi contended principally that the four contracts fell to be considered together as continuous employment within the definition given by section 2 of the Act. For the defendant, Mr Ithier SC contended that such an interpretation of the Act would be absurd.

15. For the plaintiff, Mr Bibi submitted that whilst the contract provided for termination by either side by the giving of notice, that did not mean that when such notice was given there was no termination by the giver. The Board understood Mr Ithier to accept that the notice which the defendant gave amounted to a termination of the contract by it, but he contended that because the parties had freely agreed to such a method of termination, it could not give rise to entitlement to severance allowance. That was, he submitted, either because such termination was altogether outside section 46, or because, as a consensual method of ending the contract, it was automatically justified.

16. Mr Bibi's careful written case had begun by withdrawing the ground of appeal which raised the issue of the economic circumstances justification. It became clear that he may not have intended altogether to abandon his case that there was no such justification. The Board was very conscious that his withdrawal would have led the defendant to believe that the point was not pursued, but it nevertheless permitted him to outline the submissions which he wished to make. They repeated the arguments advanced before the magistrate.

17. Mr Bibi also sought the leave of the Board to raise three entirely new grounds of appeal. These had not figured at any stage in either of the courts below. The Board needs to repeat what it said on this topic quite recently in *Grewals (Mauritius) Ltd v Koo Seen Lin* [2016] UKPC 11; [2016] IRLR 638, when a similar attempt was made.

> "24. The Board's role is to hear appeals from decisions in the courts of the country where the dispute arose. Whilst it sometimes happens that the argument develops as the case progresses through the courts, the Board will not normally entertain an argument which was not advanced below unless it can be done without injustice …
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> 25. The consequence of this very late development of a new argument is twofold. Firstly, it is quite apparent that Grewals had not had a proper opportunity to consider it, and the Board was in consequence deprived of any considered argument by way of response to it. Secondly, and more importantly, the Board is deprived of the considered conclusions of the Industrial Court and Supreme Court on the point. The argument which it is sought to develop may have considerable implications for the practice of employment law in Mauritius. An analysis of how it can or cannot be accommodated within the law and practice of employment in that jurisdiction is an essential element in arriving at a correct conclusion about it. It would be unfair to the other party to this case, and potentially dangerous to the development of Mauritian employment law, for the Board to rule on this point without the necessary groundwork having even been attempted.
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> 26. It may be that in some instances an entirely new argument is so indisputably correct that it can and should be entertained without injustice even though it had been overlooked through all the earlier stages of the litigation. That is not, however, this case."

18. It should be added that there may be occasions when no injustice would be done by entertaining a new argument, at least if it is a pure point of law. Mr Bibi identified the old case of *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 as accepting that proposition, albeit in a case in which the fresh argument was not permitted because it was far from clear that the evidence would not have had to be different if the new argument had been raised at trial. That is, however, only one circumstance relevant to whether there would be injustice in investigating entirely new arguments. Another is undoubtedly the great desirability of the Board having the considered opinion on the topic of the courts in the country from which the question comes to it, especially a court of specialist jurisdiction such as the Industrial Court.

19. In the event, the Board permitted Mr Bibi to outline his three new arguments, in order to decide whether they should properly proceed to adjudicate upon them or not. They were:

> (i) the notice of termination was invalidated because subsequently the defendant, by a note to the plaintiff dated 17 April 2009, said that it could confirm that the effective date of termination was 3 September 2009, whereas the notice had expired on 31 August;
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> (ii) the notice of termination was invalidated because, contrary to section 37(6)(a), notice to the Minister of Labour was not given in advance of the notice of termination, but only on 2 March 2009; and
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> (iii) the notice of termination was unlawful because contrary to section 37(1).

20. In the event, the Board refused to entertain any of these fresh arguments. The first, and perhaps the second, might, if raised at the right time at trial, have entailed further evidence, for example as to what lay behind the note of 17 April (although the plaintiff accepted that it appeared to have been written because he had received the notice on 3 March), and when exactly the minister was informed. Moreover the Board would have been deprived of the considered opinion of the local courts. Those considerations apart, the Board was not only far from persuaded that these fresh arguments fell within the category of ones which had such merit as to require them to be admitted despite their lateness and the absence of any excuse for their not having been advanced when they should have been, but, to the contrary, was entirely satisfied that there is no arguable point in any of them. In the briefest terms:

> (i) if the notice sent to the plaintiff determined his contract on 31 August, then without his consent no other date (even one only three days later) could be substituted, but even if the defendant's willingness to treat him as employed for three extra days was unnecessary, that concession could not undo, still less invalidate, the notice originally given; the alternative view would entail the proposition that the plaintiff's contract had never been terminated, which no-one, rightly, suggests;
>
> (ii) even if the requirement is to notify the minister *before* giving notice of termination, which is far from clear, and even if the effective date of termination was 31 August rather than 3 September, such notification is not a condition precedent to the validity of the notice of termination such that the termination ceases to have any effect if it is not given;

(iii) section 37 provides for any party to an employment contract (other than one for a fixed period) to be able to terminate it by giving notice (of 30 days unless a different period is agreed); the exception of fixed term contracts does not mean that there can be no provision for notice in such contracts; it merely means that section 37 is necessary for indeterminate contracts and that if a contract is *only* for a fixed term no question of notice will arise; a contract such as the present is, however, perfectly legitimately a contract which can be brought to an end in two ways, at the end of the fixed term or earlier by notice as agreed.

Analysis

21. The Board is satisfied that the notice sent by the defendant to the plaintiff was a termination by it of his contract. The fact that it was a termination permitted by the freely agreed terms of the contract does not alter the fact that it brought the contract to an end, nor that it was undertaken by one party only. The Supreme Court fell into error in holding that what happened was not a unilateral act of the defendant. It was indeed a unilateral act, and the fact that it was anticipated and permitted by the contract does not make it any the less so. Subject to meeting the other requirements of section 46, therefore, this termination was perfectly capable of triggering entitlement to severance allowance.

22. The Board cannot accept Mr Ithier's argument that because the giving of notice was envisaged by the freely agreed contract, that by itself either excluded the provisions of section 46 or meant that the termination was automatically justified for the purposes of that section. If that were so, most of the provisions of section 46 for the payment of severance allowance in the event of a termination on prohibited grounds would be wholly ineffective in the case of fixed term or indeterminate contracts containing provisions for termination on notice. An employer could, for example, give notice of termination on the grounds of an employee's race, colour or pregnancy, even though termination on such grounds is prohibited by section 38(1), and avoid the obligation to pay severance allowance. Similarly, the protection for workers against dismissal for misconduct unless the safeguards required by section 38(2) are satisfied would simply be circumvented.

23. Much of Mr Bibi's argument was devoted to the question of continuous employment. The Board agrees with him that the employment of the plaintiff under the four successive fixed term contracts described above did indeed fall within the concept of continuous employment as defined in section 2. There is nothing in the least absurd about so reading section 2. Section 2 is expressly designed to treat as continuous employment successive fixed term contracts. That they are none of them indeterminate is true but nothing to the point. There could perhaps be examples of successive indeterminate contracts separated by breaks of not more than 28 days, which might also fall within the definition, but much the most common case will be successive fixed term

contracts. The plain reason for the provision is to accord to a worker who has in reality been in employment for a substantial time, albeit under successive contracts closely following one another, the same severance allowance as a co-worker employed for the same length of time under a single, usually but not necessarily indeterminate, contract. There is nothing absurd about such a statutory rule.

24. That said, there could be no question in any event in the present case but that the plaintiff met the base qualification for severance allowance set by section 46(1), namely 12 months' continuous employment. Even his last contract had run for more than two and a half years by the time he was given notice. The question of the length of his continuous employment would have been relevant to the calculation of his severance allowance if the termination had not been justified.

25. Justified, however, it clearly was on the basis of the findings of the magistrate in the Industrial Court. The Board does not embark on a re-appraisal of the evidence on a question of evaluation such as this, especially when made by a specialist tribunal with local experience of the considerations which are relevant to justification for termination; it would only reverse the finding of a first instance judge who had heard the evidence on each side if satisfied that it betrayed some error of principle or lacked any proper basis. Nothing which Mr Bibi could have said, despite heroic efforts, could have begun to show such error.

26. It follows that the plaintiff's appeal must be dismissed. His contract was indeed terminated by the defendant but the termination was justified.