[2011] UKPC 47
Privy Council Appeal No 0099 of 2010

JUDGMENT

Sugar Investment Trust (Appellant) *v* Jyoti Jeetun (Respondent)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Clarke
Lord Dyson
Sir John Laws
Sir Patrick Elias

JUDGMENT DELIVERED BY

LORD CLARKE

ON

20 December 2011

Heard on 17 November 2011

Appellant	*Respondent*
Sanjay Bhuckory SC Vimalen Reddi	Rishi Pursem
(Instructed by Raj Law Solicitors)	(Instructed by Carrington & Associates)

LORD CLARKE:

Introduction

1. On 21 November 1994 the respondent ("the employee") entered employment with the appellant ("the employer") as company secretary. She served the company in various capacities thereafter and became chief executive as from 27 July 2000. On 31 July 2002 she entered into a contract of employment in writing but on 19 August 2005 the employer terminated her employment and subsequently paid her three months salary in lieu of notice. On 27 September 2005 the employee brought proceedings in the Industrial Court in Mauritius claiming severance allowance under the Labour Act 1975 ("the 1975 Act"). On 30 May 2007 the Presiding Magistrate dismissed the claim, whereafter the employee appealed to the Supreme Court in its appellate capacity. Her appeal was allowed and the employer was ordered to pay her the sum of Rs 8,017,624.12 (about £160,350) together with interest and costs. The Chief Justice granted the employer leave to appeal to the Judicial Committee on 21 April 2010.

The contract

2. The contract contained a clause entitled "(h) Termination", which provided, so far as relevant, as follows:

> "(i) Your employment may be terminated by either party by giving to the other three months prior written notice of termination;
>
> …
>
> (iii) If the Company terminates your employment otherwise than for gross misconduct, you will be entitled to compensation representing three months salary for each year of service (starting on 21 November 1994) with the Company. Where employment is terminated by the company under clause (h)(i) without giving the three months notice, three months salary will, in addition to the compensation, be payable.
>
> …"

3. In its letter to the employee dated 19 August 2005 the employer abruptly stated that at a board meeting that morning it had decided to terminate her employment as chief executive with immediate effect. It added that she would be paid three months salary in lieu of notice and that she should by noon the next day hand over all company assets and documents as listed, including a Mercedes car, to the company secretary. No reasons were given.

4. As the Board sees it, the position under the contract is clear. This was a termination of the employment under clause h(i) but without giving three months notice. Clause h(iii) applies to a case in which the employer terminates the employment otherwise than for gross misconduct. This is such a case because there is no suggestion that the employment was being terminated for gross, or indeed any, misconduct. It follows that under clause h(iii) the employee was entitled, both to compensation representing three months salary for each year of service starting on 21 November 1994, and to three months salary in lieu of notice. However, the case for the employee has throughout been that her claim is not limited to her claim under the contract because she has a claim under the 1975 Act.

The 1975 Act

5. Section 2 of the 1975 Act is the definition section. It includes the following:

> "In this Act –
>
> "agreement" means a contract of employment, whether oral or written, implied or express;
>
> …
>
> "worker", …
>
> (a) means a person who has entered into or works under an agreement …
>
> …
>
> (c) does not include …

…

(ii) except, in relation to Part VI …, a person whose basic wage or salary is at a rate in excess of 240,000 rupees per annum."

Section 3 provides that, subject to any provision to the contrary in any other enactment, the 1975 Act shall apply to every agreement.

6. It follows from the above that the contract between the parties in this case is an "agreement" within the meaning of the 1975 Act, which therefore applies to it. The employee is also a "worker" within definition (a) above but, by reason of (c)(ii), only in relation to Part VI because her salary was in excess of 240,000 per annum. Part VI is entitled "TERMINATION OF AGREEMENTS" and applies to the employee. The critical provisions of Part VI for present purposes are these:

"34. Payment of severance allowance

(1) Subject to section 35, an employer shall pay severance allowance to a worker who has been in continuous employment with him for a period of 12 months or more where –

(a) the employer terminates the employment of the worker; …

36. Amount of severance allowance

(1) Subject to the other provisions of this section and to this Part, the amount of severance allowance payable to a worker shall be calculated in accordance with subsection (2), (3) or (4) as appropriate.

(2)-(3) [calculation of normal rate]

…

(7) The Court shall, where it finds that the termination of employment of a worker employed in any undertaking, establishment or service was unjustified, order that the worker be paid a sum equal to 6

times the amount of severance allowance specified in subsection (3).

…

(10) For the purposes of this section -

(a) the remuneration which shall be taken into account in calculating the severance allowance shall be the remuneration payable to a worker at the time of the termination of his employment."

The issues

7. The employee's claim throughout has been that her case falls within section 36(7) of the 1975 Act and that she is therefore entitled to six times the amount of severance allowance specified in section 36(3). Her case is that it is not permissible for the employer to contract out of the provisions of the 1975 Act, including section 36(7), and that, since the termination of her employment was unjustified, it follows that she is entitled to severance pay at what has been described in argument as the penalty rate. It was expressly accepted on behalf of the employer in the course of oral argument before the Board that, given that the employer gave no reasons for the termination of her employment, termination was unjustified within the meaning of section 36(7). However, it was submitted that the provisions of the 1975 Act do not apply to indeterminate contracts of this kind, that the statute must be read subject to the terms of article 1781 of the Civil Code and that the employer is not liable under that article. It was submitted that, in these circumstances, the employee is not entitled to rely upon section 36(7) of the 1975 Act. It was submitted in the alternative that the employer is not in any event liable by reason of clause h(iii) of the contract. In response, it is submitted on behalf of the employee that her rights under section 36(7) are not affected by article 1781 of the Civil Code or by the terms of the contract.

The decisions below

8. At first instance it was held by the President of the Industrial Court that the employment had been terminated under and in accordance with clause h(iii), which was a clause that had been added at the employee's request. In the absence of any impropriety or illegality on the part of the board or any ulterior motive on the part of members of the board, the employee's entitlement was limited by clause h(iii). In these circumstances this was not a case of summary termination under the 1975 Act. There was, so far as the Board can see, no reference in the judgment of the President

to the Civil Code or to the specific provisions of the 1975 Act. It was further held that, since the employment was terminated under a clause in the contract of employment, the Industrial Court had no jurisdiction to determine the claim. On appeal, the Supreme Court, comprising S Peeroo and AF Chui Yew Cheong JJA, took a different view. It held that the termination of the employee's employment was unjustified and that she was entitled to a severance allowance under section 36(7) of the 1975 Act.

Discussion

9. It is convenient to consider first the construction of the 1975 Act without reference to the Civil Code, which is not, so far as the Board can see, referred to in the 1975 Act. The provisions relied upon by the employee seem to the Board to be clear. Section 3 provides that, subject to any provision to the contrary in any other enactment, the 1975 Act shall apply to every agreement, which, by section 2, means a contract of employment. Section 34(1)(a) provides unequivocally that, subject to section 35, an employer shall pay severance allowance to a worker who has been in continuous employment with him for a period of 12 months or more where the employer terminates his or her employment. Section 35 is irrelevant because it simply excludes severance allowance in particular circumstances, none of which applies here. It is not in dispute that the employee is a worker within the meaning of the Act and that Part VI (and therefore section 34) applies to her notwithstanding the amount she was paid. It follows that, as a matter of construction of section 34, the employee was entitled to severance pay under that section.

10. The amount of that entitlement is expressly provided for in section 36, which by subsection (1) provides that the amount "shall be calculated" in accordance with subsections (2), (3) and (4). That provision is expressed to be subject to the other provisions of section 36 and to Part VI. For present purposes the only relevant subsections of section 36 are (7) and (10)(a) quoted above. Like subsection (1) (and indeed section 34(1)), subsection (7) uses the word shall and, in the opinion of the Board, is mandatory. Thus, where, as here, the court finds that the termination of employment was unjustified, it "shall" order the worker to be paid six times the ordinary rate. Moreover, the effect of subsection (10)(a) is that the remuneration "shall be taken as" the remuneration at the termination date. The expression "remuneration" is defined in section 2 as meaning "all emoluments earned by a worker under an agreement". The calculation required by section 36(7) and (10)(a) thus uses the total remuneration and not just salary. This provision is of significance in the employee's case because her total remuneration was considerably greater than her salary, which is one of the reasons why the severance allowance to which she is entitled under sections 34 and 36 is much more than the amount of compensation provided for in clause h(iii) of her contract. If this had been a case for the standard severance allowance, the employee's contractual entitlement would have been greater.

11. The use of the word "shall" is significant because, in the opinion of the Board, it shows, at any rate in cases where the severance allowance is greater than the compensation due under the contract, that the sections were to be applied notwithstanding the terms of the contract of employment. Where the 1975 Act intended that its provisions should be subject to the terms of the contract, it so provided expressly: see for example section 30(1) and 31(1) – (3), which are quoted below. Both section 30(1) and section 30(3) provide that a consequence "shall" follow "subject to any express provision of the agreement". It is thus clear that, if Parliament had intended to make section 34(1), 36(7) or 36(10)(a), subject to the terms of the contract, it would have done so expressly. It did not do so expressly but used the mandatory expression "shall".

12. The Board would add that, even if (contrary to its view) it was open to the parties to exclude the employee's right to the larger severance allowance payable under section 36(7) in cases of unjustified termination, it would be necessary to do so in clear terms. Clause h(iii) does not purport to exclude the employee's statutory rights under section 36(7) in a case of unlawful termination. Nor does it do so by necessary implication. It follows that, on the true construction of the terms of the contract, the employee remains entitled to a severance allowance under section 36(7) if, as is the case, she establishes the relevant conditions under it.

13. It is further submitted on behalf of the employer that Part VI of the 1975 Act only applies to determinate contracts and not to indeterminate contracts like the contract in this case. That is said to flow from the language of sections 30 and 31. Section 30, which is entitled "Termination of agreement", provides, so far as relevant:

> "(1) Subject to any express provision of the agreement and termination to subsections (2) and (3), every agreement shall terminate on the last of day of the period agreed upon or on the completion of the agreement's specified piece of work
>
> (2) A party to an agreement, other than an agreement entered into for a specified piece of work, shall, on the termination of the agreement, be deemed to have entered into a fresh agreement upon the same terms and conditions as the previous agreement unless notice has been given by either party to terminate the agreement in accordance with section 31."

14. Section 31, provides, so far as relevant:

> "(1) A party to an agreement for a period of time may, except where he is prohibited by any enactment from doing so, terminate the agreement

on the expiry of notice given by him to the other party of his intention to terminate the agreement.

(2) Notice may be verbal or written and may, subject to subsection (3), be given at time.

(3) Subject to any express provision of the agreement, the length of the notice to be given under subsection (1) shall –

(a) where the worker has, for not less than 3 years, been in continuous employment with the same employer, be not less than 3 months;

(b) in every other case –

(i) where the worker is remunerated at intervals of not less than fourteen days, be not less than fourteen days before the end of the month in which the notice is given;

(ii) where the worker is remunerated at intervals of less than 14 days, be at least equal to the interval."

15. It is said that neither of those sections includes a case like this, where clause h(i) of the contract provides that the employment may be terminated by either party on giving three months notice. The Board does not accept that that is so. The reference to an agreement for a period of time in section 31(1) surely includes the case where the contract is terminable on notice. There would otherwise be a potentially significant lacuna in the legislation. However, it is not necessary for the Board to reach a final conclusion on that question because sections 34 and 36 are not limited in any way. In particular, they are not limited to cases in which the employment is under a contract for a determinate term. They are entirely general and, for the reasons given above, apply to this case.

16. It is then submitted that indeterminate contracts are governed by article 1781 of the Civil Code. The problem with this submission is that there is nothing in the 1975 Act to suggest that its provisions are subject to the Civil Code. Further, there is nothing in article 1781 of the Civil Code to disapply any of the provisions of the 1975 Act which apply in a particular case. Articles 1779, 1780 and 1781 are set out below, first in the original French and then in translation. They have been amended from time

to time. So the dates in square brackets show when the particular provision was enacted and, in one case, repealed.

"CHAPITRE TROISIEME

Du louage d'ouvrage et d'industrie

1779 Il y a trois espèces principales de louage d'ouvrage et d'industrie:

1. le louage des gens de travail qui s'engagent au service de quelqu'un;

2. celui des voituriers, tant par terre que par eau, qui se chargent du transport des personnes ou des marchandises;

3. celui des architectes, entrepreneurs d'ouvrages et techniciens par suite d'études, devis ou marchés. [Act 37/78]

SECTION PREMIERE

Du louage des domestiques et ouvriers

1780 Les contrats de louage des gens de travail qui s'engagent au services de quelqu'un seront régis par le Labour Act. [Act 50/75]

1781 Le louage de service fait sans détermination de durée peut toujours cesser par la volonté d'une des parties contractantes. [Act 9/83]"

Néanmoins, la résiliation du contrat par la volonté d'un seul des contractants ne peut être admise que dans les conditions et formes requises par le Labour Act."

Le maître est cru sur son affirmation pour la quotité des gages, pour le paiement du salaire de l'année échue et pour les á comptes donnés pour l'année courante. [Repealed by Act 50/75]"

"CHAPTER THREE

Of the Hiring of Industry and Services

1779 There are three main kinds of hiring of industry and services:

1. The hiring of workers who enter the service of someone;

2. that of carriers, as well by land as by water, who undertake to carry persons or goods;

3. that of architects, contractors for work and technicians following research, estimates or contracts.

SECTION ONE

Of the Hiring of Servants and Workers

1780 The contract for the hiring of workers who enter the service of someone shall be governed by the Labour Act.

1781 The hiring of services made without determination of duration may always cease through the wish of one of the contracting parties.

Nevertheless, the termination of the contract through the wish of one only of the contracting parties can only be in accordance with the terms and conditions of the Labour Act."

17. The Board detects nothing in these provisions to contradict the conclusions which it has reached by construing the provisions of the 1975 Act. On the contrary they appear to the Board to underline the point that by the express terms of article 1781, although one of the parties may be able to bring the contract to an end, he can only do so "dans les conditions et formes requises par" the Act, which may perhaps be better translated than above by saying that a party can only bring the contract to an end in such a case in accordance with the requirements of the Act. Thus, if the 1975 Act entitles one of the parties to a severance allowance calculated in accordance with a formula laid down by the Act, the Board sees nothing in article 1781 to deprive him or her of that entitlement.

18. The Board has reached the conclusions set out above by a process of construction of the 1975 Act and, so far as relevant, of article 1781 of the Civil Code. It was referred to a number of cases but it is only necessary to refer to two, namely *Gaytree Textiles Ltd v Ghoolet* 1993 MR 231 and *D Shamboo v The Mahatma Ghandi Institute* 2006 MR 133. The decision in *Gaytree Textiles* is distinguishable because it was concerned with section 30(1) of the 1975 Act, whereas, as explained above, this appeal is concerned with sections 34 and 36. As to *Shamboo*, it is sufficient to say that it appears to the Board that its conclusions are consistent with the decision of the Supreme Court in that case.

Conclusion

19. The question for decision is essentially one of construction of sections 34 and 36 of the 1975 Act. For the reasons given above, the Board concludes that the employee was entitled to the severance allowance provided for in section 36(7) of the 1975 Act and that it follows that the Supreme Court were correct to allow the appeal from the Industrial Court and that this appeal must be dismissed with costs.