[2011] UKPC 42
Privy Council Appeal No 0003 of 2011

JUDGMENT

Saint Aubin Limitée (Appellant) *v* Alain Jean François Doger de Spéville (Respondent)

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Wilson

JUDGMENT DELIVERED BY LORD MANCE ON

23 NOVEMBER 2011

Heard on 31 October 2011

Appellant	*Respondent*
Herve Duval	Maxime Sauzier SC
(Instructed by M A Law Solicitors LLP)	(Instructed by Blake Lapthorn Solicitors)

LORD MANCE:

Introduction

1. The production of sugar has for long been a staple industry in Mauritius, and it constituted the traditional focus of the business of the appellant, Saint Aubin Limitée. The respondent, Mr de Spéville, is an engineer with expertise in the fields of automobile and agricultural technology, and was by letter dated 23 December 1998 appointed as the appellant's transport and workshop (or garage) manager at an initial salary of Rs 38,000 with a thirteenth month in December. It was agreed that his previous years of employment in the sugar industry with other employers, commencing in 1975, would be recognised by the appellant (i.e. for purposes such as the calculation of any severance allowance).

2. Concern about the prospects for the sugar industry led the appellant to diversify into the production of rum. From 2002 Mr de Spéville helped to set up a small distillery, which opened on 3 December 2003 and thereafter he spent part of his time as the distillery's effective manager, signing himself as such in correspondence. He attended to the transport and workshop division from 0530 to 0900, and, unless there was any further duty to be performed there, he went to the distillery for the rest of the day, until about 1530.

3. In May 2005, in circumstances to which the Board will return in greater detail, the appellant told Mr de Spéville that he was to devote himself full time to the distillery, that its business was to be substantially expanded, and that Mr Pierre Seneque has been informed that he would be taking over as transport and workshop manager in Mr de Spéville's place. Mr de Spéville treated this as a constructive dismissal of him as transport and workshop manager with effect from 16 May 2005, and claimed accordingly. He further claimed that there was no justification for any termination of his employment. These claims were accepted by the Vice-President of the Industrial Court, Mr Magistrate B. Marie Joseph, in a judgment dated 14 October 2008 and by the Supreme Court which dismissed an appeal on 19 May 2010.

4. The Vice-President awarded an indemnity of three months salary in lieu of notice and, on the basis that termination was unjustified, a severance allowance at the punitive rate prescribed by s.36(7) of the Labour Act RL 3/315 of 30 December 1975 as amended. The indemnity amounted to Rs 285,020.13. The punitive rate of severance allowance fell under s.36(7) to be calculated as a sum equal to six times of the ordinary severance allowance, which was itself specified by s.36(3) as half a month's remuneration for every period of 12 months served. Taking his previous

employment in the sugar industry into account, Mr de Spéville had served 30 years by May 2005, and so the punitive rate would give 90 (i.e. 6 x ½ x 30) times one month's remuneration. On this basis severance allowance at the punitive rate was in fact assessed in the very substantial amount of Rs 8,550,603.90. The Board need not engage with the detail of the calculations, which were unchallenged before it, though it notes in passing that the calculation of average monthly salary in the Industrial Court's judgment contains an obvious mathematical error, to Mr de Spéville's advantage, and the relationship between that calculation and the monthly figures used to calculate the indemnity and severance allowance is also unclear.

5. The present appeal is brought as of right pursuant to formal leave given by the Supreme Court on 7 June 2010. The grounds of appeal raise, firstly, jurisdictional and constitutional points relating to the circumstances in which Mr Magistrate Joseph delivered judgment as Vice-President of the Industrial Court and, secondly, challenges to the conclusions of both courts below that the appellant constructively dismissed Mr de Spéville and that termination of his employment was unjustified within the meaning of s.36(7).

The first set of grounds: jurisdictional and constitutional points

6. The jurisdictional and constitutional points can be taken briefly. Mr Duval for the appellant conceded at the outset of the oral hearing before the Board that the Board was in a position to re-determine all the issues arising between the parties on the basis of the transcripts before the Board and the facts found, and that no advantage would be gained in that respect by a successful submission that the judgments below should be set aside and the case remitted for rehearing. He did not press any argument that different facts might be found, and on that basis he proceeded directly to the second set of grounds identified in the preceding paragraph. Nevertheless, the Board will take a little time to indicate why in its view the concession made in relation to the first set of grounds was appropriate.

7. The argument on these grounds before the Supreme Court relied upon two provisions: s.10(8) of the Constitution, whereby any case instituted before a court determining any civil right or obligation "shall be given a fair hearing within a reasonable time", and s.11(1) of the Industrial Court Act 1973, requiring the Vice-President to "explain to a person against whom judgment has been given that he has a right to appeal, and the conditions under which the right may be exercised". Under s.10(8) it was claimed that the Vice-President was away from the jurisdiction and had delayed unduly in delivering judgment: the hearing of the evidence in fact started on 21 February 2007, and the last sitting was on 25 February 2008, when the Vice-President reserved judgment; on 6 June 2008 he announced that judgment would be given on 21 August 2008, but this was then postponed four times, in one case with the court clerk noting internally that the judgment was further reserved because the Vice-

President "will not be able to travel to Mauritius" on the date previously fixed. The parties were eventually informed by circular of the filing in the registry for their inspection of a judgment stated to have been "delivered on 14 October 2008" in their absence. The last matter is the basis of the complaint that s.11(1) of the Industrial Court Act was not complied with.

8. The Supreme Court disposed of these points by saying as to the first that there was "nothing on record to suggest that the Vice-President was away from the jurisdiction" and that in any event the delay in delivering judgment was "not uncommonly long". As to this, the Board observes that the court clerk's note itself showed some degree of absence from the jurisdiction, but, more importantly, that judicial notice might have been taken of the fact that the Vice-President had been seconded for a period to lead Rwanda's newly established Commercial Court, returning to Mauritius only in April 2009 to take up the Presidency of the Industrial Court. As to the second point, the Supreme Court noted that, although the judgment was delivered in the absence of the parties, they were notified promptly of it by circulars and in any event no prejudice was caused, since both parties lodged appeals well within the prescribed time. (Mr de Spéville's appeal was on account of the Vice-President's failure to award interest, and was resolved by agreement before the Supreme Court.)

9. Before the Board, the appellant sought in its case to expand the scope of the first set of grounds. It pointed to the Courts Act, ss.120 and 124. S.120 provides:

> "Except with the permission of the Chief Justice, no Magistrate shall, with or without remuneration, hold any office other than that of the Magistrate and perform any duties other than those relating to his office."

S.124 provides that the Chief Justice may direct another Magistrate to replace any Magistrate incapable of acting for any reason. In the light of these sections and Mr Joseph's Rwandan appointment, the appellant's case suggests that "these conditions went to the root of [the Vice-President's] jurisdiction", and that the Supreme Court's failure to enquire into them resulted in the appellant "entertaining doubts" as to whether the Vice-President was empowered by law to deliver judgment as he did on 14 October 2008.

10. Since no points on ss.120 and 124 were taken before the Supreme Court, it is not surprising that that court did not enquire into them. But, in any event, the points are self-evidently bad. The assumption, in the absence of any other evidence, must be that every step necessary was taken for the proper secondment of the Vice-President to sit in Rwanda: *omnia rita acta esse praesumuntur*. The respondent's case in fact states that the Vice-President was on leave without pay and that he had had, as one

would expect, the Chief Justice's express authorisation to sit in Rwanda, as well as to return and deliver judgments in cases he had heard before leaving for Rwanda. If the Supreme Court had taken judicial notice of the Vice-President's secondment abroad, it could have been expected to take judicial notice of such facts.

11. The appellant's case under the Constitution has also expanded. Reference is now made to s.10(9) of the Constitution, providing that:

> "Except with the agreement of all the parties, all proceedings of every court …., including the announcement of the decision of the court …. shall be held in public."

The appellant acknowledges that it is established law, both in Mauritius and in the European Court of Human Rights in *Pretto v Italy* (App. No. 7984/77) [1983] ECHR 7984/77, that a practice of informing the parties by circular that judgment had been filed for inspection in the registry does not offend such a provision. But it argues that this practice is excluded by the special features of the s.11 of the Industrial Court Act, which requires the magistrate to explain to the losing party its right of appeal. The appellant states that the practice actually followed is to hold an oral hearing, at which the magistrate draws attention not only to only s.11, but also to ss.12 and 13 of the same Act (which permit an alternative method of challenge, by way of review by the Chief Justice or a judge deputed by him – a process said to offer a losing party the advantage of an unfettered review of both fact and law).

12. It may well be that the requirement in s.11 could be satisfied consistently with the practice of filing judgments for inspection in the registry, by including with the judgment a suitably worded explanation of the existence of and conditions attaching to a right of appeal. Be that as it may, the Supreme Court was clearly correct to regard any breach of s.11 as well as any (if any) breach of s.10(8) of the Constitution as quite irrelevant, when each party knew of and utilised its right of appeal in due time. To set aside an otherwise unimpeachable judgment, merely because of such a breach, would be wholly inappropriate.

13. As to its second point, the appellant submitted, with justification, before the Supreme Court that, if delay was undue, the fact that it regularly occurred was and is no answer to a complaint of breach of s.10(8) of the Constitution. The appellant sought to buttress this by suggesting that the Vice-President's judgment contained errors and was so drawn as to give cause to consider that "the many other impressions to which Mr Magistrate Joseph must have been exposed in his new functions in a foreign country have deprived him of the quietude he required properly to analyse the facts".

14. It is, however, no basis for setting aside a judgment that too long has been taken to deliver it. Before any question of disturbing it arises, the judgment needs, at the least, to be examined on its merits to see whether there is a real prospect that the delay has impaired the judge's ability to arrive at a fair conclusion. That is no doubt what the appellant appreciated by its imaginative references to "other impressions" to which the Vice-President may have been exposed in Rwanda. But these references too find no support in the Vice-President's judgment, which is impressively thorough and well-reasoned on both fact and law. The only specific criticism which is made of it relates to a single sentence in which the Vice-President stated that Mr de Spéville was "employed continuously as Transport/Workshop Manager until 2/5/05 when he was formally put in the position of Manager of the distillery". This, it is suggested, overlooks the fact that Mr de Spéville had helped set up the distillery and acted as its manager. But it is clear that the Vice-President had not overlooked these matters. He referred to them fully in his earlier account of the agreed facts and evidence and said later that it was undisputed that Mr de Spéville was "originally employed as Transport/Workshop Manager and was called upon to help in the setting up of a distillery, which he agreed to do", and that the fact that he had "readily helped to set up the distillery" did not entitle the appellant to remove him "from his substantive [job as] Transport/Workshop Manager".

15. It follows that there was nothing in the first set of grounds relating to jurisdictional and constitutional points.

The second set of grounds: was there a constructive and unjustified dismissal?

16. In order to examine these grounds, the Board starts with some further facts. First, no criticism was or has ever been made of Mr de Spéville's stewardship of the appellant's transport and workshop division. On the contrary, an independent report dated 18 February 2003 concluded that the "Workshop and Transport division is clearly under control, and the technical and Administrative aspect is well run" under his supervision. As from 1 April 2004, he was given first a special monthly allowance and then a monthly salary increase of Rs 7,225.

17. On 2 May 2005 Mr de Spéville returned from two weeks leave abroad, to be handed a letter dated 27 April 2005 by the appellant's director, Mr J M Patrick Guimbeau. In the letter Mr Guimbeau announced that the appellant intended substantially to expand its rum business, in volume and product type, and that it had decided (*nous avons décidé*) to make Mr de Spéville responsible full time for the distillery and to free him from responsibility (*de te libérer de ta responsibilité*) for the garage. The letter concluded by saying that the distillery was set to become an important department in the group, and that "*il y a beaucoup de travail en perspective et nous sommes confiants que tu peux mener à bien ces défis*". In the same meeting Mr

Guimbeau also said that Mr Seneque had been told that he would be replacing Mr de Spéville as transport and workshop manager.

18. Mr de Spéville did not agree to the proposed change in his employment. A suggestion that he agreed to it in the meeting was not accepted by the Vice-President, who pointed out that the suggestion was only made at trial. Mr de Spéville was, on the contrary, very upset by the proposed change, so much so that he saw a doctor on the next day, complaining of extreme anxiety and sleeplessness due to the issue. He remained off work, but wrote to the appellant on 6 May 2005, pointing out that he had always been employed as transport and workshop manager, in an area in which his expertise lay. He said that it was inconceivable "d'être d'un jour au lendemain demis de mes fonctions premières", asked what would become of his current benefits and requested the appellant to review its decision. There was no answer to this letter, but on 16 May 2005, after Mr de Spéville's return to work, Mr Chelin, the appellant's operations manager to whom all the prior correspondence had been copied, confirmed to him the contents of Mr Guimbeau's letter of 27 April 2005. Mr de Spéville wrote on the same day recording the course of events and accepting the appellant's stance as constructively dismissing him. He duly returned the keys of his car, his cellphone and laptop.

19. The principles governing constructive dismissal and unjustified termination are not in dispute. A constructive dismissal occurs if an employer imposes on an employee unilaterally, that is without the employee's consent, a substantial modification of the original contract conditions: *Adamas Limited v Cheung* [2011] UKPC 32. The employee is entitled, though not bound, to treat such a change so imposed as a constructive dismissal. If he does, as Mr de Spéville did, he will be entitled to damages in lieu of notice and severance pay.

20. It is a separate and different question whether severance pay should be calculated at the ordinary or the punitive rate. Under s.36(7) this depends upon whether termination of the employment was unjustified. That must be judged independently of whether the employer went about it in the wrong way, for example by constructively or summarily dismissing the employee without due contractual cause. Termination may be "unjustified" in terms of the statute even if due contractual notice is given. Conversely, it may be "justified" even if due contractual notice is not given. The protection against unjustified dismissal given by the statute is a type of protection against unfair dismissal. As the Supreme Court said in *Cayeux Ltd v de Maroussem* 1974 MR 166, 170 under the predecessor legislation: "the former common law right of the employer to terminate unilaterally and without cause the employment of his worker has ceased to exist".

21. In *Harel Frères Ltd v Veerasamy* 1968 MR 218, in a passage quoted by the Board in *Mauvilac Industries Ltd v Mohit Ragoobeer* [2007] UKPC 43, the Supreme

Court held under the predecessor legislation that termination would only be unjustified "where the employer has no valid reason at all to discontinue employing a worker"; and that, in circumstances where an employer had failed to prove misconduct in the form of sabotage, the magistrate ought to have gone on to consider whether the employees' actions had been suspicious and had, therefore, given the employer a valid reason for terminating their employment (albeit subject to payment of ordinary severance allowance, and presumably also due contractual notice). In *Cayeux Ltd v de Maroussem* 1974 MR 166, the Supreme Court applied the approach indicated in *Harel Frères Ltd v Veerasamy* in a context where the employer company had lost two of its three contracts with major petrol companies for servicing, maintenance and repair work. As a result of this loss, the company had no longer any work or need for one of the two assistants who had previously worked on such contracts. The claimant, one of such assistants, was retained on full pay, but was expected to sit in an empty office without work and was, for good measure, rebuked for absenting himself from work when he went to consult his legal adviser. With evident justification, he treated this change in his conditions as a constructive dismissal. However, the Supreme Court concluded that termination as such was justified. The employer's operational requirements had changed, and it had no more work for the employee. It had a valid reason to put an end to the contract of employment on notice and payment of severance allowance at the ordinary rate (p.170). The employee was entitled (in effect) to no more than he would have received had the employer taken that course.

22. In the present case, the Vice-President held that what occurred involved "a blatant modification of the essential conditions of [Mr de Spéville's] employment". The positions of transport and workshop manager and distillery manager were "not similar inasmuch as the nature of the work is different and they involve different duties and responsibilities". The change had never been discussed beforehand with Mr de Spéville and was a unilateral decision imposed on him overnight, which he was entitled to treat as a constructive dismissal, as he did (in fact after the decision had been reiterated) by his letter dated 16 May 2005.

23. As to whether termination was unjustified, the appellant argued, in reliance on the case of *Cayeux Ltd v de Maroussem*, that, in view of its need to diversify and to develop the rum side of its business, it would be better and more efficient if Mr de Spéville worked full time in the distillery. But, the Vice-President held:

> "the fact remains that all these reasons do not pertain to the reorganisation of the particular garage of which [Mr de Spéville] was in charge or the whole enterprise of which it formed part. In fact, the distillery was a new enterprise which the defendant believed, as it was entitled to, it could engage in view of the difficulties of the sugar industries that were looming ahead."

24. In the Supreme Court, it was conceded that there had been "a major modification of [Mr de Spéville's] contract of employment", but reliance was again placed on *Cayeux v de Maroussem*, to argue that the modification was "in the context of a reorganisation of the activities of the sugar industry and of Saint Aubin Ltée and is therefore justified". The Supreme Court accepted the principles stated in *Cayeux v de Maroussem*, but it too rejected the argument on the facts. It noted that

> "the post of transport and workshop manager and for that matter the garage did not cease to be part of the activities of Saint Aubin Ltée."

However, it added:

> "Further, apart from the assertions of Mr Guimbeau, all the evidence pointed to the fact that the distillery was still at a very preliminary stage. It can therefore be hardly said that the better interests of Saint Aubin Ltée required that the contract of employment of Mr de Spéville be substantially modified."

25. Before the Board, Mr Duval sought to revive the appellant's case that the proposed change did not involve any or any substantial modification or justify Mr de Spéville in treating himself as constructively dismissed. In the light of the findings of fact made by the Vice-President, and for the reasons he gave and which the Supreme Court endorsed, the Board cannot accept this submission. The change clearly constituted a substantial modification, and it was announced without prior warning or discussion on 2 May 2005 and reiterated on 16 May 2005 in a manner which made it clear that it was a *fait accompli* as far as the appellant was concerned. Mr de Spéville was under no obligation to give the appellant any further opportunity to rethink its position, and was entitled to treat himself as having been constructively dismissed, as he did by his letter dated 16 May 2005.

26. As to the issue of justification for termination, the Board considers that the Supreme Court went too far in the second limb to its reasoning, set out in the second passage quoted in paragraph 24 above. If the appellant had determined to do away with its transport and workshop division (e.g. by contracting out the relevant activities) or if the position of manager of that division had for some other reason been made or become redundant, the court should not second guess the wisdom of the relevant commercial decisions or course of events leading to that result. Equally, here, it was not for the court to judge whether the appellant was right to consider that its economic interests would be better served overall if it could arrange for Mr de Spéville to become distillery manager full time. The appellant may well have been right in its judgment that it (and indeed Mr de Spéville) would have flourished, if only Mr de Spéville had taken over full time as distillery manager. But that is not the point.

27. The appellant had engaged Mr de Spéville contractually as its transport and workshop manager. The relevant question is whether it had any valid reason to terminate that employment. The post remained unchanged, with as far as appears precisely the same needs, and Mr de Spéville was to be replaced in it. There is also no suggestion that Mr de Spéville's ability or suitability to occupy the post had in any way changed.

28. The appellant's broader economic interests and wishes are irrelevant to the question whether there was any valid reason to terminate Mr de Spéville's employment and to replace him as transport and workshop manager. Even if the benefits and conditions attaching to the full-time post of distillery manager would have been as good as, or the long-term prospects even better than, those as transport and workshop manager, no-one is obliged to have glory thrust upon them, and Mr de Spéville was entitled to prefer to retain his familiar contractual post. The appellant had no right to assume that he would give up, still less to insist upon him giving up, that post, and, once he declined that option, no reason has been shown for replacing him in it - except that Mr Guimbeau may already have foreclosed that possibility by nominating Mr Seneque to replace Mr de Spéville even before speaking to Mr de Spéville on 2 May 2005.

29. For these reasons, the Board considers that the Vice-President and the Supreme Court reached the correct conclusions on the facts of this case as found by the former. This appeal will therefore be dismissed. The appellant will pay the respondent's costs, unless good cause to the contrary is shown to the Board in writing by submissions lodged within 14 days of the issue of this judgment.