Easter Term
[2016] UKPC 11
Privy Council Appeals No 0037 of 2014 and 0038 of 2014

JUDGMENT

Grewals (Mauritius) Ltd (Appellant) *v* Koo Seen Lin (Respondent) (Mauritius)

Koo Seen Lin (Appellant) *v* Grewals (Mauritius) Ltd (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Kerr
Lord Hughes

JUDGMENT GIVEN ON

5 May 2016

Heard on 13 April 2016

Appellant
Patrice Doger de Spéville SC
Ravi Bhookhun
(Instructed by Blake Morgan LLP)

Respondent
Antoine Domingue SC
Yasser Caunhye
(Instructed by M A Law (Solicitors) LLP)

LORD HUGHES:

1. The claimant Koo Seen Lin ("KSL") brought an action against his former employers, Grewals Mauritius Ltd ("Grewals") in relation to his dismissal from his post as General Manager of their timber business. The issues which arose before the Industrial Court and subsequently on appeal before the Supreme Court were:

> (i) had he been constructively dismissed during March 2002 (as he contended) or dismissed by letter of dismissal dated 22 April 2002 (as Grewals contended)?
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> (ii) had he been guilty of misconduct justifying dismissal? and
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> (iii) was he entitled to severance pay, and if so at the standard or the punitive rate, and based upon what contractual remuneration?

2. Both the Industrial Court magistrate and the Supreme Court answered the first question by holding that he had been constructively dismissed during March 2002, thus before the letter of dismissal dated 22 April 2002.

3. The Industrial Court magistrate held that of the some 20 charges of misconduct levelled by Grewals, none of them were made out. But on appeal the Supreme Court, whilst upholding many of his findings, held that some six complaints afforded Grewals justification for dismissal. It concluded that even if the full extent of Grewals' accusations were not proved, KSL had been guilty of conduct amounting to abusive use of his position as General Manager by way of favouring a separate company called Jadis Ltd which was owned by his son. In some instances that was the conclusion even on his own case.

4. On the findings of the Industrial Court, severance pay at the punitive rate followed. On the different conclusions of the Supreme Court, that court held that severance pay only at the standard rate was justified.

5. There have now been cross-appeals by the parties to the Board as follows:

> (a) Grewals appeal against the finding of constructive dismissal;

(b) KSL appeals against the conclusion that his conduct justified dismissal;

(c) separately KSL challenges the conclusion that severance pay at the standard rate was all that he was entitled to;

(d) Grewals concede that if, contrary to their principal argument, there was constructive dismissal, then severance pay at the standard rate follows, but they contend that the Supreme Court miscalculated the remuneration package on which it should be based because it did not apportion the value of a company car as between private and work use.

Summary of facts

6. KSL had been employed by Grewals since 1978. He had begun as an accountant but had progressed to General Manager by 1996. In 2001/2002 the newly in post Chairman of the company became concerned about a number of allegations which reached him anonymously and about what he himself saw of KSL's methods of work. He commissioned an investigation by forensic investigators. On 22 February 2002, he suspended KSL from his position. On the same day KSL was interviewed about complaints then known. The chairman set up a Disciplinary Committee chaired by Queen's Counsel, to consider the evidence. The investigators reported to him on 8 March 2002, concluding that KSL had misconducted himself in a number of ways. On 19 March some 18 complaints were formulated for KSL to answer, and two more were added on 26 March. The Disciplinary Committee began its sittings on 27 March, and on both that date and on 9 April KSL was present, legally represented, before it.

7. Whilst this was going on, the chairman of Grewals wrote on 14 March 2002 to a number of its suppliers with whom KSL was in the habit of dealing. The letters were some in French and some in English. The relevant part of the English language letters was in these terms:

> "We hereby inform your company that Mr Georges Koo Seen Lin no longer holds a managerial position within our organisation. Any dealings he may conduct with your company will be in his own personal capacity."

The French text was to similar effect but a little more explicit:

> "Nous tenons à vous informer que Monsieur G Koo Seen Lin n'occupe plus le poste de Directeur General de Grewals

(Mauritius) Ltd. Toutes transactions qu'il pourrait avoir avec votre compagnie serait en son nom personnel."

8. Also in the meantime, Grewals had written to KSL on 6 March stopping his right to be supplied by a local garage with petrol on the firm's account. The letter told him that the firm took the view that he had been abusing the petrol account, and had used Rs.13,080 for February, when, in its contention, only Rs.4,000 per month was reasonable. A separate letter told the garage to stop supplies to the firm's vehicles, but gave no more information about the reason.

9. At a similar time, Grewals cancelled the credit account for the mobile telephone issued to KSL.

10. By 16 April 2002 KSL and his lawyers had become aware of the letters to the firm's suppliers. On that day, when a further hearing of the Disciplinary Committee was planned, his lawyers wrote to Grewals saying that it was plain that a decision had been made to dismiss him, that the Disciplinary Committee was in consequence a sham and that KSL declined to take any further part in it. Grewals responded by letter saying that there had been no dismissal, but simply a suspension.

11. The committee continued to sit, but without any participation by or on behalf of KSL. In due course it reported that he had been guilty of serious misconduct. On 22 April Grewals wrote to KSL a letter dismissing him for gross misconduct.

12. Although that letter was written on 22 April, no salary payment for April was made to KSL at the end of that month. When, sometime later at about the beginning of September, Grewals came to make a return to their pension providers they entered against KSL's name "cancelled 31/3/2002".

Constructive Dismissal?

13. KSL relies upon the letters to the suppliers, the stopping of the petrol account, the mobile telephone cancellation, the failure to pay his salary for April and the pension return as demonstrating that Grewals repudiated the contract of employment.

14. KSL contended before the Board that the conclusions of the courts below that there had been constructive dismissal amounted to concurrent findings of fact, with which the Board ought not, in accordance with its usual practice, to interfere. That is not, however, the right approach. The primary facts were not significantly in dispute.

Whether they amounted to constructive dismissal or not was a matter not of fact but of the legal consequences of the facts.

15. However, in the view of the Board, the conclusion of both courts below that Grewals had committed a repudiatory breach of the contract of employment was entirely justified, if not indeed inevitable. When constructive dismissal is in question, the acid test is not whether the employer *intended* to dismiss; it is whether he has by his conduct, objectively judged, repudiated the contract. If he has, the employee is entitled, by accepting the repudiation, to treat the conduct as constructive dismissal.

16. The stopping of the petrol and mobile telephone accounts were not necessarily indicative of repudiatory behaviour by Grewals. Both actions might well have been concomitants of mere suspension of KSL. Moreover, the stopping of the petrol account was in terms for over-use, rather than on the basis that his employment was thenceforth at an end.

17. The non-payment of salary at the end of April came after KSL had in any event been dismissed by the letter of 22 April. Likewise, the return to the pension providers in September came far too late to constitute an act of repudiation. Both, however, are of some relevance to the extent that they are capable of demonstrating that Grewals thought that KSL's employment had been ended not on 22 April but on 31 March, and thus that they had intended to dismiss him by that earlier date. Although an intention to dismiss is not a necessary part of an employer's repudiatory conduct before it can amount to constructive dismissal, if such intention exists it is plainly material to the question whether such repudiatory conduct has taken place.

18. But the crucial fact here lay in the letters to Grewals' trading partners. The Board entirely understands that it was necessary to tell such people, who were accustomed to treating KSL as the voice of Grewals, that he no longer had the authority he had hitherto enjoyed. That is particularly so given the manner in which, as will be seen, he had been using his position to favour Jadis Ltd. But that does not answer the question whether what was done amounted to a repudiatory breach by Grewals of the contract under which they employed KSL. It is true that the letters were not sent to KSL, but that does not matter if they demonstrate repudiatory conduct. It may be true, as Grewals submit, that the chairman was not a lawyer and that in writing he might not have expressed himself as clearly as he ought to have done. But the question is whether the ordinary non-lawyer businessman, reading these letters, would understand that KSL had been dismissed. It is not necessary to be a lawyer to understand the difference between suspension and dismissal. The letters really bear only one interpretation. That is that KSL, hitherto employed as General Manager, no longer is. The French text made it particularly clear by speaking of his no longer occupying the post to which he had previously been appointed. In other words, his contract as General Manager was at an end.

Misconduct justifying dismissal

19. It is unnecessary to say more about most of the 20 complaints of misconduct which were levelled against KSL. The magistrate dismissed them on the facts, if in somewhat summary fashion, and the Supreme Court, which analysed them carefully and succinctly, endorsed his findings in relation to most of them. But the Supreme Court found that on some six different occasions KSL had abused his position with Grewals to favour Jadis Ltd. Jadis was a company controlled by KSL's son. Its registered office was at KSL's home. He was its auditor and an authorised signatory for its cheques. The Supreme Court found that, in most cases even on his own evidence, he had ignored a plain conflict of interest and had conducted Grewals' affairs to benefit Jadis. The judge at first instance had not dealt with the conflict of interest issue at all. The Supreme Court found the following instances.

> (1) He had caused Grewals to make a purchase from Jadis of a substantial quantity of hinges, hooks and adjusters when (a) Grewals had plenty in stock already and (b) no credit terms were negotiated such as would be normal, and despite the fact that Grewals had a severe cash flow problem. The items concerned were not normally bought or sold by Jadis. Grewals did not need them and in the end could only get rid of them at a loss.
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> (2) He had advanced some Rs.50,000 of Grewals' money to a transport contractor used by both that firm and by Jadis. An allegation that this was payment for the transport of Jadis merchandise (juice) was not proved, but KSL's own account that this was a loan to the contractor demonstrated a misuse of Grewals' funds since there was no occasion for such a loan; moreover the relevant paperwork suggested that the money was paid for the transport of timber, and said nothing about a loan.
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> (3) Although he denied doing so, he had frequently used Grewals' vehicles and their employed drivers to transport juice for Jadis.
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> (4) He had caused Jadis to intervene in a sale of poles by Grewals to Wong Chap Lan, who needed them to fulfil a hotel contract. Although the evidence was insufficient to prove that Jadis had thus been enabled to make a profit which Grewals might have made, there was no reason for Jadis to have anything to do with the contract, and the explanation offered by KSL was rejected.
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> (5) He had used Jadis to pay for a container load of pine which Grewals had imported. The allegation that this had been fraudulent failed for want of evidence, but it demonstrated a potential conflict of interest.

(6) He had bought, for Grewals, a consignment of barbed wire from South African suppliers, Cape Gate (Pty) Ltd, but had then sold the merchandise on to Jadis and arranged for it to be delivered to that company. It may be that Grewals had taken a profit on the deal, but the merchandise had been used by Jadis to develop a business foothold in a new area, Rodrigue, where Grewals itself had an established commercial presence. Whether or not there was any loss of profit for Grewals, this was using Grewals to help a competitor.

The Supreme Court also found a further transaction which demonstrates a similar conflict of interest:

(7) Grewals owed some catering contractors Rs.4,640. KSL arranged for payment of this sum to be made not to the contractors but to Jadis. The allegation that as a result Grewals had to pay twice was not proved, but the accounting was at the least irregular and, as the Supreme Court held, not acceptable.

20. The judge at first instance had not discussed these various transactions separately. He had contented himself by saying that the explanations offered by KSL seemed plausible, but that did not address the conflict of interest which was disclosed even on his own evidence. The Supreme Court, which set out the detail of these matters, was undoubtedly entitled to find that, even if they were not proved to have had the more sinister implications which Grewals alleged, they demonstrated a plain conflict of interest and amounted to conduct which gave cause for dismissal. The Board can see no basis on which an appeal against these findings can succeed. Subject to the new point mentioned next, the consequence of this is agreed to be that KSL is entitled to severance pay at the ordinary, but not at the punitive, rate.

A new point

21. Before the Board, KSL sought to argue an entirely new point based upon section 32(2)(a) of the Labour Act 1975, which he contends demonstrates that whatever his misconduct may have been he is entitled to severance pay at the punitive rate.

22. Section 32, so far as material, reads as follows:

"32. Unjustified termination of agreements

(1) No employer shall dismiss a worker -

(a) by reason only of the worker's filing in good faith of a complaint, or participating in a proceeding, against an employer involving alleged violation of a law;

(b) for alleged misconduct unless -

(i) he cannot in good faith take any other course; and

(ii) the dismissal is effected within seven days of -

(A) where the misconduct is the subject of a hearing under subsection (2), the completion of the hearing;

(B) where the misconduct is the subject of criminal proceedings, the day on which the employer becomes aware of the final judgment of conviction; or

(C) in every other case, the day on which the employer becomes aware of the misconduct

(2)(a) No employer shall dismiss a worker unless he has afforded the worker an opportunity to answer any charges made against him and any dismissal made in contravention of this paragraph shall be deemed to be an unjustified dismissal.

…"

Sections 34-36 then deal with the payment of severance allowance. Amongst those provisions is section 36(7) which reads:

"(7) The court shall, where it finds that the termination of the employment of a worker employed in any undertaking, establishment or service was unjustified, order that the worker be

paid a sum equal to six times the amount of severance allowance specified in subsection (3)."

23. The argument which KSL now seeks to advance runs as follows:

(a) on the finding of constructive dismissal here made, he was dismissed by 31 March 2002;

(b) as at that date the Disciplinary Committee had begun its hearings but they were not concluded;

(c) therefore KSL had not been afforded, before dismissal, the opportunity required by section 32(2)(a) to answer the charges against him and accordingly the dismissal is deemed by the statute to be unjustified;

(d) by section 36(7), it follows from this that severance pay at the punitive rate of six times the normal rate is payable.

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. This argument was not advanced either before the Industrial Court or before the Supreme Court. Not only that, but the latter court expressly inquired of counsel then appearing for KSL what consequences followed if the finding of constructive dismissal, for which he was contending, were to be made. It was agreed before the Board that far from advancing the argument now constructed, counsel then appearing for KSL told the Supreme Court that the correct approach to severance pay was to apply the principle enunciated in *Cayeux Ltd v De Maroussem* [1974] MR 166 and *Saint Aubin Limitée v Alain Jean François Doger de Spéville* [2011] UKPC 42; [2011] PRV 3. Neither was a misconduct case and no point arose on section 32(2)(a). These cases were concerned with when the termination of the contract of employment was made with a valid reason. If the presently advanced argument is correct, that submission to the Supreme Court was not simply a failure to take the point but was positively misleading. The Notice of Appeal to the Board does not raise the point but concentrates on issues of conduct. There were references to section 32(2)(a) in KSL's skeleton argument before the Board, but they were not linked to a contention that it followed that punitive rate severance pay was due, nor were the steps of argument itemised above set out. The principal authority relied on before the Board, *Bissonauth v The Sugar Fund Insurance Board (Mauritius)* [2007] UKPC 17 (which was a conviction case raising section 32(1)(b)(ii)(B)) was, although available since 2007, neither referred to nor included in the authorities

submitted to the Board until a very late supplementary list arrived only a day or two before the hearing.

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.

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. It is possible that the new argument is well founded. But that is not the only possible conclusion. There is agreed to be no reported case in which section 32(2)(a) has been applied to a case of constructive dismissal. One possible view is that it simply does not apply to such cases, where the employer may be found to have dismissed constructively without ever intending to do so, but rather is geared entirely to cases where the employer exercises a voluntary decision to dismiss. The structure of the subsection, which requires the employer in effect to stay his hand until the employee has been able to answer the allegations against him, might be thought to lend some support to that construction. A second possibility is that if the subsection does apply to a case of constructive dismissal, it does so in modified fashion when an opportunity to answer was already afoot, as it was here. On such a view, the employer might be held indeed to have offered his employee the necessary opportunity to answer the charges where a tribunal (moreover here legally chaired) is already in existence and the employee has the option to decline to accept any repudiatory conduct of the employer and instead to make good his case, if he can, before that tribunal. Those may well not be the only possible interpretations of section 32(2)(a) in the context of constructive dismissal, but they show that this is not an example of a demonstrably unassailable argument to which there can be no possible answer. Nor does the argument answer the question what follows in law if, after a dismissal which does not comply strictly with section 32, it becomes plain beyond dispute that the employee was guilty of misconduct justifying dismissal, indeed possibly very grave misconduct. Nor does the Board overlook other difficulties which might attend the literal reading of the allied section 32(1) for which KSL contended, since if he is right it might mean that unless there is a hearing the whole process of learning of misconduct or conviction, giving the employee the opportunity to make his case and completion of his answer, has to be concluded within seven days

if the dismissal is to be justified. All of these matters call for sustained and prepared argument on both sides, and the considered view of the Mauritian courts.

27. The Board has considered whether the correct approach to the proposed new argument might be to remit the case to the courts of Mauritius for it to be developed there. In the circumstances of this case it is satisfied that that would work plain injustice. The events with which this case is concerned took place 14 years ago. The litigation before the Industrial Court occupied no less than 36 days, over a period of over three years between March 2004 and June 2007. Before the Supreme Court a similarly protracted course followed, spread over a further 17 months from June 2010 to November 2011. Any further prolongation of this already excessively extended litigation could not possibly be justified, and would no doubt simply risk yet further congestion of the overloaded Mauritian courts, to the peril of other litigants as well as of the other party to this case.

28. In these circumstances the Board has no doubt that it would be quite wrong to permit KSL to develop the wholly new argument which he wishes to advance. He has had ample opportunity to do so in the proper place, but did not take it.

Apportionment of car benefit

29. Grewals contend that the Supreme Court ought to have apportioned the car benefit when calculating the remuneration package on which severance pay (at the standard rate) fell to be calculated. It founds that submission on the evidence of KSL that he used the company car with which he was provided about 80-85% of the time for company business and the remainder 15-20% for private use. Say Grewals, therefore only 15-20% of the cost of the car and its petrol ought to be considered as part of KSL's remuneration.

30. This contention was advanced to the Supreme Court by Grewals but the court rejected it in the following terms:

> "The term 'remuneration' in the Labour Act, as has been authoritatively laid down in *Stella Insurance Co Ltd v Ramphul* [1987 MR 151], covers 'everything which is quantifiable and paid to the worker.' We consider that there is no sound basis for any apportionment of the car or petrol allowance which had been regularly, consistently and unconditionally paid to the respondent as monthly allowances in a manner which was commensurate with his office and status as General Manager."

31. The Supreme Court thus took the view on the facts that the value of the car to the employee was not limited to a percentage of its cost, but rather lay in the fact that it was always available to him for private use whenever he wished to use it. That appears to the Board to be a legitimate and practical view of the value to an employee of the provision of a company car. If he did not have a company car he would not achieve equivalent benefit for 15-20% of the cost of providing his own car. The case for apportioning the petrol allowance might well have been regarded as stronger, but the Board is not persuaded that the court fell into any error of law or principle. The true value of the benefit in kind fell to be assessed as a practical matter on all the evidence by the court below.

Disposal

32. For these reasons the Board concludes that both Grewals' appeal and KSL's cross appeal must be dismissed. The Board invites the parties to make written submissions as to costs with 14 days from the promulgation of the judgment.