Trinity Term
[2019] UKPC 28
Privy Council Appeal No 0048 of 2018

JUDGMENT

United Docks Ltd (Appellant) *v* De Spéville (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Wilson
Lady Black
Lord Briggs
Lady Arden

JUDGMENT GIVEN ON

10 June 2019

Heard on 11 April 2019

Appellant
Rishi Pursem SC
Bilshan Nursimulu

(Instructed by Blake Morgan LLP (Oxford))

Respondent
Herve Duval SC
Luxmi Churitter Kistnareddy
Karvi Arian
(Instructed by Axiom Stone Solicitors)

LORD WILSON: (with whom Lady Hale, Lady Black and Lord Briggs agree)

1. From 1986 United Docks Ltd ("the company") employed Mr Marc de Spéville ("the respondent") as an accountant. At some stage he became its senior accountant. On 21 February 2007 it summarily dismissed him for what it described as gross misconduct on his part. On 6 April 2007 he issued a claim in the Industrial Court against it. He alleged that its dismissal of him had been unjustified within the meaning of section 32(1) of the Labour Act 1975 ("the Act"), which has now been repealed, and that therefore, pursuant to section 36(7) of the Act, it should be ordered to pay him a severance allowance at the punitive rate of six times the amount of the allowance normally payable pursuant to section 36(3), together with his salary for three months in lieu of notice.

2. Her Honour Mrs SBA Hamuth-Laulloo, who became the Presiding Magistrate of the Industrial Court, considered the respondent's claim at no less than 11 hearings spread between June 2008 and May 2011. By a judgment not delivered until 20 June 2014, she held that the company's dismissal of the respondent had been justified and she therefore dismissed his claim. But on 5 June 2017 the Supreme Court (Chui Yew Cheong and Maghooa JJ) upheld his appeal and ordered the company to pay him, subject to a deduction to be explained in para 15 below, a sum (in round figures, which the Board proposes to use throughout this judgment) of Rs 9.5m in respect mainly of severance allowance at the punitive rate but also of salary in lieu of notice, together with interest at 12% pa from 21 February 2007.

3. The company appeals as of right to the Board against the Supreme Court's order.

4. The misconduct of which the company alleged the respondent to have been guilty related centrally to a payment made by the company in October 2006 to Mr Rivalland in accordance with calculations made by the respondent.

5. The company is a public company, listed on the Stock Exchange in Mauritius. In 2006 the arrival of a new shareholder caused an upheaval in the company. In October 2006 the shareholders elected a new board of directors. Mr Rivalland had been the company's general manager for 16 years. At a meeting of the previous board of directors on 23 August 2006 Mr Rivalland, apparently in anticipation of the upheaval, requested to be allowed to retire. The board accepted his request and resolved that the company should provide him with a retirement package of payments and other benefits which, so the company now contends, may have been in excess of its legal obligations towards him. The minutes of that meeting record the agreed package as follows:

> "une somme équivalente á une année de salaires comme ses prédécesseurs, une pension complète, un 'Ex gracia paiement' d'un mois par année de service et sa voiture de fonction qui lui sera transférée."

6. When in October 2006 he calculated the sums payable to Mr Rivalland, the respondent did not have before him the minutes of the meeting on 23 August 2006. He knew that they referred to the sum payable but they had not been sent to him and he had not asked for them. Nevertheless he had clear instructions as to how to effect the calculation. Both Mr Piat, the outgoing chairman of the board of directors who had chaired that meeting, and Mr Allain de Spéville, the outgoing chairman of the corporate governance remuneration committee, had instructed him that, in calculating both the "année de salaires" and the "Ex gracia paiement", he should take not Mr Rivalland's basic salary but his total remuneration in money or money's worth during the final year of his employment.

7. In October 2006, in accordance with calculations made by the respondent, the company paid Rs 22m to Mr Rivalland; and no doubt it also transferred the car to him.

8. At about the same time the new board of directors of the company appointed Mr Baissac to be its temporary manager. An external auditor, Mr Heeralall, was instructed to audit payments made by the company, including the payment recently made to Mr Rivalland.

9. Mr Heeralall reported that the payment to Mr Rivalland should have been only Rs 14m, in other words that the respondent's calculation had led to an overpayment to him of Rs 8m.

10. The proper disposal of this appeal does not require the Board to descend deeply into Mr Heeralall's calculations. It is enough to say by way of summary that the sum of Rs 8m, alleged to have been overpaid, comprised the following:

(a) Rs 3m referable to mistakes in the calculation of the "Ex gracia paiement" (such as equating salary for 13 months with that for a year) which the respondent was later to admit had been careless;

(b) Rs 2m referable to the respondent's inclusion in his calculation of the "Ex gracia paiement" of Mr Rivalland's total remuneration instead of his basic salary; and

(c) Rs 3m referable to the respondent's inclusion in his calculation of the "année de salaires" of (again) Mr Rivalland's total remuneration instead of his basic salary.

11. The central charge of misconduct which the company was shortly to level against the respondent and which was later to represent the centre-piece of its plea in defence of his claim in the Industrial Court, was that, by gross miscalculation, he had caused it to make to Mr Rivalland an overpayment of Rs 8m. It will already be apparent that, of that sum, Rs 5m had been approved by him for payment to Mr Rivalland in accordance with instructions given to him by the then chairmen of the company and of the remuneration committee. The company never suggested, and the President of the Industrial court did not hold, that the careless - and reprehensible - mistakes which had led to the overpayment to Mr Rivalland of Rs 3m would alone have justified his summary dismissal for misconduct; and so his explanation for the mistakes, which he alleged to have been uncharacteristic, becomes irrelevant.

12. Late in November 2006 there was a culmination of the increasing conflict between the respondent and the company's new management. On 24 November 2006 Mr Baissac went to his office and accused him of having spoken to Mr Rivalland following his departure from the company about its affairs in breach of confidence. The respondent replied that Mr Rivalland already knew what he had told him, namely that the directors were proposing to retrieve the voting papers cast at the recent general meeting of shareholders in order to discern how each of them had voted. The respondent added that, in proposing to do so, the directors were in his view "fouilleurs de poubelles" (rummagers in dustbins). In an email sent that day to the new chairman of the company Mr Baissac reported his altercation with the respondent and suggested that he had become a liability to the company, which should take action against him. The respondent was quick to complain that Mr Baissac had posted this email on the company's open email server so that its contents had become known to a number of other employees. The company's answer was that the respondent had wrongly failed to explain to Mr Baissac how the company's email system enabled an email to be sent confidentially.

13. On 29 November 2006 the company suspended the respondent's employment. In January 2007 it formulated charges against him for consideration by its disciplinary committee. The central charge related to the alleged overpayment of Rs 8m to Mr Rivalland. But there were subsidiary charges that at the meeting with Mr Baissac the respondent had slandered the directors and had admitted disclosing confidential information to Mr Rivalland; that, following his suspension, he had accessed and read three emails in Mr Baissac's mailbox; and that he had caused his own email password to be reset, which had thus enabled him to continue to use the company's email system.

14. In February 2007 the company's disciplinary committee considered the charges against the respondent. He gave evidence and had the considerable advantage of representation by Mr Duval, who, now Senior Counsel, appears on his behalf before the Board. By letter to the respondent dated 21 February 2007 Mr Baissac informed him

> "that in the light of the findings of the Disciplinary Committee the Company has reached the conclusion that you have been guilty of gross misconduct and that, in the circumstances, the Company has no alternative but to dismiss you from its employment."

Mr Baissac did not there particularise the gross misconduct of which the committee had found the respondent to have been guilty.

15. But on 1 March 2007 Mr Baissac sent another letter to the respondent, entitled "Re: Payment of Severance Allowance". He wrote:

> "The Management has further considered your case and has, in the light of your long years of service with the above company and also in a gesture of goodwill, decided to pay you severance allowance at normal rate in the sum of Rs 1.1m, and this notwithstanding the fact that in view of the management you have been guilty of gross misconduct. We enclose a cheque to that effect."

The deduction which the Supreme Court directed to be made from its award, to which the Board has referred in para 2 above, is a deduction of Rs 1.1m which the company then paid.

16. Mr Pursem SC, whose fair and economical presentation of the company's appeal to the Board is in the finest traditions of counsel in Mauritius, concedes, as he conceded in both local courts, that, unless the respondent's approval of the alleged overpayment to Mr Rivalland amounted to misconduct which justified it, the company's summary dismissal of him was unjustified.

17. The conclusion of the learned magistrate was that

> "there is no doubt that gross misconduct has been fully established and that UDL was fully justified to dismiss the plaintiff summarily."

18. In a previous passage of her judgment she had found that the overpayment to Mr Rivalland had been in the full sum which the company had alleged, namely Rs 8m; and she had concluded that the respondent had been guilty of gross misconduct in having approved payment of it. How did she justify that conclusion in the light of the fact that, of the Rs 8m, Rs 5m had been calculated as payable in accordance with instructions given to the respondent by the two chairmen? The answer is that she based it upon a criticism of the respondent which, as in an interlocutory ruling she had recognised, had not been levelled against him before the disciplinary committee: it was that he had been wrong to act on the instructions of the chairmen without verifying their accuracy by calling for the minutes of the board meeting on 23 August 2006, set out, so far as relevant, in para 5 above. The magistrate found that "he ought to have … known that he needed to see the said relevant documents before implementing any decision" and that "he should have checked the Resolution [and] failed in his duties by failing to look at it".

19. There was considerable criticism before the Supreme Court, as there is before the Board, of the above basis of the magistrate's pivotal conclusion that the respondent was guilty of gross misconduct in relation to the full alleged overpayment of Rs 8m. The Supreme Court's objection to it was that his perceived failure to consult the minutes had not figured in the charges made against him before the committee, with the result that, by virtue of section 32(2)(a) of the Act, it could not justify his dismissal. But there are two further powerful features of the criticism. What, first, was the source of the respondent's perceived duty to decline to act on the chairmen's instructions without verifying them against the terms of the resolution recorded in the minutes? And, second, would the respondent's study of the minutes have reasonably led him to consider that their instructions to make his calculations by reference to Mr Rivalland's total remuneration rather than to his basic salary ran counter to the resolution? In this regard Mr Duval points out with force that

(a) the word "salaires" refers only to the one-year payment;

(b) it does not refer to the "Ex gracia paiement", in relation to which the minutes require a month to be taken for each year of service but fail to address the question "a month of what?";

(c) the word is "salaires" and not, as the magistrate said, "salaire";

(d) the word is "salaires" and not, for example, "salaire de base"; and

(e) the payment of "salaires" was to be "comme ses prédécesseurs" but there was no evidence of the way in which payments to Mr Rivalland's predecessors had been calculated.

20. The Supreme Court's decision to uphold the respondent's appeal may well have been justified by reference only to the company's failure to have put to him, prior to dismissal, the basis of the magistrate's pivotal conclusion, with the result apparently mandated by section 32(2)(a) of the Act. But there is a bigger point upon which the Board prefers to rest its conclusion that the Supreme Court was entitled to reverse the magistrate's decision.

21. Section 32 of the Act, entitled "Unjustified termination of agreements", provided:

> "(1) No employer shall dismiss a worker -
>
> (a) …
>
> (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 …"

In these proceedings nothing turns on the requirement in subsection (1)(b)(ii) for dismissal within seven days. But everything turns on subsection (1)(b)(i) for, unless the company could not in good faith have taken any other course than to dismiss the respondent, his dismissal for misconduct was unjustified and the court was therefore required under section 36(7) of the Act to order payment of severance allowance at the punitive rate.

22. In her judgment the magistrate correctly referred to the words of section 32(1)(b)(i) of the Act. Thereupon, however, she quoted from para 21 of the Board's judgment in *Saint Aubin Limitée v de Spéville* [2011] UKPC 42 that

> "termination would only be unjustified 'where the employer has no valid reason at all to discontinue employing a worker'."

Then she added:

> "In the light of the above extract, it is for this court to determine whether the UDL had a valid reason to dismiss the plaintiff in the present circumstances."

23. The Supreme Court correctly upheld Mr Duval's submission that in that regard the magistrate had unfortunately given herself a gross misdirection in law. The *Saint Aubin* case was not one of summary dismissal for misconduct so section 32(1)(b)(i) of the Act was irrelevant to it. The justification or otherwise for the employee's constructive dismissal in that case arose only under section 36(7). That subsection, which provided for payment of severance allowance at the punitive rate in the case of all unjustified terminations of employment, extended much more widely than to unjustified summary dismissals for misconduct. It was, as the Board had explained in para 20 of the same judgment, "a type of protection against unfair dismissal"; and, in circumstances in which the justification for a termination of employment was not governed by section 32 of the Act, it was appropriate to assess it by reference to whether the employer had a valid reason to terminate it.

24. A question whether the company had a valid reason to dismiss the respondent is obviously different from a question whether it could not in good faith take any other course than to dismiss him. The former asks only whether the misconduct was a ground for dismissing him. The latter asks whether in all the surrounding circumstances the only course reasonably open to the employer was to dismiss him. In other words, was it, as the Board said in para 17 of its judgment in *Bissonauth v The Sugar Fund Insurance Bond* [2007] UKPC 17, "the only option"?

25. The magistrate's misdirection in relation to the central inquiry required of her under the Act entitled, indeed obliged, the Supreme Court to conduct that inquiry for itself. The Board has already addressed the strength of the company's case against the respondent, in particular in paras 11, 16 and 19 above. It suffices to say no more than that the Board sees no reason to interfere with the Supreme Court's conclusion that the company had failed to establish that it could not in good faith take any other course than to dismiss the respondent.

26. The Board notes that the Supreme Court located a separate ground for its conclusion in the letter dated 1 March 2007, quoted in para 15 above, by which the company paid a severance allowance to the respondent at the normal rate. The Supreme Court held that the company's payment was inconsistent with any perceived entitlement summarily to dismiss him for misconduct. The Board brings a degree of caution to its assessment of this ground. It would be unfortunate if the law was understood to discourage gestures which might in some cases resolve conflict. In the letter the company described the payment as a gesture of goodwill and stressed that it was made notwithstanding that in its view the respondent had been guilty of gross misconduct. So,

taken alone, the terms of the letter do seem successfully to clothe the payment as without prejudice.

27. There are, however, two linked aspects of the wider circumstances relating to the letter which go at any rate some way to justifying the Supreme Court's interpretation of its effect. The first is that, at a hearing before the magistrate in 2008, Mr Pursem, no doubt by reference to the payment of severance allowance at normal rate, applied successfully to amend his plea so as to argue that, even if the company had not been entitled to dismiss the respondent summarily for misconduct, it had been entitled to terminate his employment by reason of a mutual loss of confidence. The second is that, at a hearing before her in 2010 at which Mr Baissac was cross-examined about the payment, he

(a) accepted that it was an afterthought;

(b) said that "nos legal advisers nous avaient recommendé qu'il n'y avait pas de raison pour le *dismiss*"; and

(c) explained that, as a matter of goodwill and in the light of the respondent's seniority, it was thought necessary to pay him a severance allowance at normal rate.

28. Now it is true that Mr Baissac's volunteering of the interesting admission that the company had received legal advice that there was no ground to dismiss the respondent ran counter to what he had earlier said. The Board says only that, in the light of its analysis of the case set out above, it would come as no surprise if the legal advice to the company had been that there was no ground summarily to dismiss the respondent for misconduct and that it should seek lawfully to terminate his employment, albeit, of course, on payment of severance allowance at the normal rate. Nevertheless the Board declines to attach to the payment the degree of weight which the Supreme Court saw fit to attach to it.

29. To its grounds of appeal the company adds a complaint that, in ordering it to pay interest on the award to the respondent, the Supreme Court directed payment at a rate of 12% pa without having explained why it favoured that rate. Section 36(9) of the Act conferred on the court a discretion to order interest to be paid on an award of severance allowance "at a rate not exceeding 12%"; so the rate of interest identified by the Supreme Court was at the extremity of its discretion. The problem for the company is that in his initial claim to the Industrial Court the respondent had included a claim for interest at a rate of 12% pa and that at no time had the company sought to challenge it. For completeness, and of course without prejudice to all its other submissions, it should have done so. In such circumstances it can have no valid complaint. The Supreme Court

was not obliged to explain its reasons for an aspect of its decision which did not appear to be in issue.

30. So the Board dismisses the company's appeal and orders it to pay the respondent's costs of it.

LADY ARDEN: (dissenting)

31. For my own part I prefer the opposite outcome on the principal issue. Under section 32 of the Labour Act 1975 of Mauritius (set out in the Board's judgment at para 21 above) an employer could not dismiss an employee without paying the severance allowance unless two conditions were fulfilled: first, there had to be misconduct, and second, the employer must have had no option but to dismiss the employee. If those two conditions are met, the employer could terminate the employment without giving notice. It is to be noted that for the purposes of the first condition nothing is said in the statute about the seriousness of the misconduct. That is dealt with in the second condition which makes it clear that the employer may dismiss the employee summarily only if the misconduct was so serious that, for example, to continue his employment (scilicet, during the notice period) would damage the interests of the employer ("*he cannot in good faith take any other course*; …").

32. Mr de Spéville held high office in the appellant company. He was an accountant and senior officer and was, according to the magistrate, "unofficially number 2" in the company. It appears that at the time of the payments in issue he was the "main" signatory for cheques drawn on the company's bank account. It is a reasonable inference that, as an accountant and the main cheque signatory, it was his responsibility to ensure that the cheques he signed on behalf of the company were for properly vouched expenses or other liabilities of the company, and that such payments were duly recorded in the company's accounting records.

33. In my judgment, the Magistrate clearly considered both conditions for a valid summary dismissal. It is necessary to examine her reasoning as well as her conclusion. What the Board has held is that she failed to consider the second condition. But that condition, as I have explained, is in my judgment about the degree of seriousness of the conduct of the employee. In my judgment, the Magistrate considered section 32(1)(b) of the Labour Act 1975 and the degree of seriousness of the conduct in the following passage from her judgment:

> "However, section 32 of the Labour Act l975 provides that no employer shall dismiss a worker unless he cannot in good faith take any other course. Moreover, the burden lies on the employer to establish that the dismissal of the employee, on grounds of gross

misconduct, is justified and it could not take any other course. This means that the employer has the burden to prove that the impugned acts of the employee amount to a misconduct [faute lourde ou grave] justifying his dismissal. As stated in the case of *Harel Frères Ltd v Veerasamy* [1968 MR 218] and which was quoted with approval by their Lordships of the Privy Council in the case of *Saint Aubin Limitée v Doger de Speville* [2011] UKPC 42, 'termination would only be unjustified 'where the employer has no valid reason at all to discontinue employing a worker'.

In the light of the above extract, it is for this court to determine whether the UDL had a valid reason to dismiss the plaintiff in the present circumstances.

It is apposite at this juncture to refer to the principles which are applicable in order to determine whether UDL as an employer was entitled to summarily dismiss the plaintiff in these circumstances. The determination of the question of justified dismissal depends essentially on the degree and seriousness of the misconduct which is proved. It is helpful to refer to the following passage from Fokkan's *Introduction au Droit du Travail Mauricien*, 1ère edition at p 196 which sums up the position in the light of French doctrine and jurisprudence as well as the relevant statutory provisions under our law:

> 'L'élément clef dans l'appréciation de la faute semble être sa gravité. Il existe en effet divers degrés de faute (*Harel Frères Ltd v Jeebodhun* [1981 MR 189]). Au bas de l'échelle il y a les fautes légères qui elles ne justifient pas un licenciement et entraîneraient en cas de licenciement le paiement de l'indemnité de licenciement au taux punitif de même que l'indemnité de préavis. La faute n'étant que légère l'employeur aurait dû sanctionner l'employé autrement que par le licenciement. Le deuxième degré de faute est la faute sérieuse. Bien que la faute justifie ici la sanction ultime du licenciement, elle n'est pas considérée comme suffisamment grave pour écarter l'application de la section 34, c'est-à-dire le paiement de l'indemnité minimum légale et de l'indemnité de préavis. Au sommet de la hiérarchie des fautes nous retrouvons les fautes graves qui elles justifient un 'summary dismissal', c'est-à-dire sans préavis et donc éventuellement sans l'indemnité de licenciement dans la mesure où l'employeur ne pouvait 'in good faith take any other course.' Seul donc une telle faute

> grave constitue un misconduct au sens de la section 32(1)(b).
>
> It would seem that the misconduct contemplated in the Labour Act 1975 is close to the 'faute grave'. The Black Law Dictionary 5th ed defines 'misconduct' as the 'transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour.' It seems therefore that the act constituting the misconduct must be either wrong or improper. The French Cour de Cassation took the view that 'la faute grave résulte d'un fait ou d'un ensemble de faits imputable au salarie qui constitue une violation des obligations découlant du contrat de travail ou des relations de travail d'une importance telle qu'elle rend impossible le maintien de l'intéressé dans l'entreprise pendant la durée de préavis'.
>
> Conclusion
>
> Based on the appreciation of the facts by the court as illustrated above, the state of our Law and the position of the courts, there is no doubt that gross misconduct has been fully established and that UDL was fully justified to dismiss the plaintiff summarily."

34. In this part of her judgment, the Magistrate cited a passage from the Board's judgment in *Saint Aubin* dealing with summary dismissal in which the conditions for summary dismissal without any severance payment were not shown. She did so in the context of the employer having "no valid reason at all" to discontinue the employment of the employee. I read her use of the words "no valid reason at all", ie no option, as a reference to the second condition, ie that in section 32(1)(b)(i). This understanding of her judgment is confirmed by her next conclusion, through the work of *Fokkan*, which in turn cited a decision of the Cour de Cassation in France, that the requirement of section 32(1)(b)(i) meant that the employer had to show not simply misconduct justifying summary dismissal but also *faute grave*, justifying a refusal to pay any severance payment or salary during the notice period. The passage which the Magistrate cites from the Cour de Cassation is clearly concerned with misconduct meeting the second condition. Roughly translated, it says that "the serious misconduct results from a fact or a set of facts attributable to the employee which constitutes a breach of the obligations arising from the employment contract or relationship of such importance which makes it impossible to maintain the employee in the company during the period of notice." That again is a reference to the employer having no option to act other than as he did. The Supreme Court noted that the Magistrate had not cited any particular decision of the Cour de Cassation but I am prepared to accept that the passage cited

forms part of its jurisprudence: it may be that the Labour Act of 1975 was modelled on the French reforms of unfair dismissal in 1973, but that is not an essential part of my conclusion as it has not been the subject of submissions. The decision of the Cour de Cassation is clearly directed to the second condition even if the Magistrate did not state that her conclusion was on the basis of 32(1)(b)(i) in terms. *Fokkan* demonstrates that the approach of French law is to regard the second condition as requiring proof of *faute lourde ou grave*.

35. Accordingly, the Supreme Court in my judgment erred when it held otherwise:

> "As regards the first limb of the submission of Mr Duval SC, in the absence of any specific pronouncement by the learned Magistrate that she had considered whether the employer had in good faith no other course than to summarily dismiss Mr de Spéville, it cannot be assumed that she did in fact consider this requirement set down in section 32(l)(b)(i) and more importantly, whether in her view, this requirement had been satisfied."

36. Nor did the Supreme Court itself come to any view on section 32(1)(b)(i) as the Board predicates in para 25. The Supreme Court took the view that there was an admission of liability by paying the severance allowance ex gratia and that it could not come to any other view other than that the company could not satisfy section 32(1)(b)(i). I agree with what the Board say about the payment of the superannuation allowance: it was, as the Magistrate found, not an admission of liability or an admission that the employer could have done something else apart from dismissing Mr de Spéville. The Supreme Court were wrong to give it the weight they did.

37. The Supreme Court held that the charge against Mr de Spéville at trial was not that he had negligently miscalculated the payments to be made to Mr Rivalland but that he had failed to consult the board resolution. As I see it, the Magistrate's crucial holding that the respondent's misconduct in this regard achieved the requisite degree of seriousness was based not simply on the evidence that he had indeed miscalculated the payments to be made to Mr Rivalland and had done so without proper documentary evidence to vouch for the large sums of money involved. He purported to make these payments simply on the oral authority of the Chair. Mr de Spéville's case is that, even if he had looked at the board resolution, he would have found it open to interpretation supporting his actions. But that is not enough for three independent reasons. First, he never looked at the resolution. That meant that he did not have any documentary evidence that could constitute an audit trail for the payment. There was no documentary source, therefore, duly recorded in the accounting records of the company as the justification for these substantial payments for later review by the auditor. That is what a proper audit trail would have required, and its absence was a serious error for an accountant. Second, if the resolution was obscure, then his duty as an accountant

(especially one who was also "main" signatory on the company's cheques) was to ask the board to pass another resolution putting what they had agreed beyond doubt before he made the payment (hence the judge's references to board decisions being faithfully recorded: see below). Third, he took account of payments which the company ought not to have been making without proper disclosure to the revenue authorities: I am not suggesting that he knew this to be the case but that fact underscores the danger for the company of his not vouching payments in a proper way (and, it may reasonably be inferred, it may also have put the company at risk of fiscal penalties).

38. When it comes to considering the second condition, the error of the accountant was particularly serious because he was a senior officer and by virtue of his high office he had to be capable of working without supervision by a superior officer when making payments on behalf of the company. Since the company was able to show irregularities in the making of the payments to Mr Rivalland, it had therefore shown that he could not be trusted to work without supervision. The employer was not obliged to accept his continuance in office in those circumstances. It could not be expected to create some system to monitor his work so that irregularities could not happen again. Section 32(1)(b)(i) was in those circumstances clearly fulfilled. This was the view of the Magistrate, who heard the evidence of M Heerallal, the accountant who subsequently investigated vouching for the payments, as appears from the following passage in her judgment:

> "In relation to the rest of the overpayment made to M Rivalland, namely Rs 5,221,020.00 [Ex Gratia payment by Rs 4,871,020.00 and management fees by Rs 350,000.00], the court notes that the plaintiff has calculated those two elements without having taken prior cognizance of the Board Resolutions. The plaintiff has been the accountant at UDL for many years. He was fully aware of his duties and responsibilities as accountant. As such he ought to have known that he needed to see the said relevant documents before implementing any decision. This he failed to do. Instead he relied on the words of Messrs Piat [Chairman of the Board] and De Spéville [Chairman of the Corporate Governance Committee]. Had he verified the minutes of the said Board Resolution [Document AR], the plaintiff would have seen that the Board had decided to pay to M Rivalland 'une annee de salaire comme ses prédeceseurs' and not one year remuneration [salary and fringe benefits]. …
>
> As rightly pointed out by Counsel for the employer in his submissions, the defendant company is a listed company and the shareholders are entitled, in all circumstances, to expect that the minutes of the Board are faithfully recorded and correctly implemented by those who are paid big money to run the said

> company in the shareholders' interests. In miscalculating those sums and in complete disregard of the Board Resolutions, the plaintiff has caused a great deal of prejudice to the company. The court is of the view that the employer was fully entitled to consider that in his capacity as accountant, the plaintiff could not have made such mistakes."

39. The Supreme Court in my judgment misunderstood the position when it said that Mr de Spéville was not given the opportunity to meet the charge that he relied on fake instructions of a fabricated document. That was not the charge against him. Nor did it follow from the charge before him, as the Supreme Court held, that he was being said simply to have paid the wrong amounts or that the Magistrate wrongly failed to assess the evidence on what ought to have been paid. Accordingly, there was in my judgment no basis on which the Supreme Court could interfere with the Magistrate's decision. I would, therefore, have allowed this appeal. No issue as to interest on that basis arises. Had it done so, I would have agreed with the Board on that point.