Michaelmas Term
[2015] UKPC 45
Privy Council Appeal No 0073 of 2014

JUDGMENT

Total Mauritius Limited (Appellant) *v* Abdurrahman (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Wilson
Lord Hughes

JUDGMENT GIVEN ON

11 November 2015

Heard on 14 October 2015

Appellant	*Respondent*
Maxime Sauzier SC Carolyn Desvaux de Marigny (Instructed by Forsters LLP)	Did not appear and was not represented

The judgment of the Board was delivered by **LORD WILSON:**

1. Total Mauritius Ltd (which the Board will call "Total") appeals against an order of the Supreme Court (A Caunhye and G Angoh JJ) dated 11 December 2013. The respondent to the appeal is a former employee of Total, namely Mr Abdurrahman (whom the Board will call "Mr A"). The order of the Supreme Court arose out of proceedings brought by Mr A against Total in the Industrial Court. On 19 December 2006 Total had summarily terminated Mr A's employment and in the proceedings Mr A sought wages in lieu of notice and a severance allowance at the punitive rate. On 11 March 2011 the Honourable N Oh San-Bellepeau, the President of the Industrial Court ["the President"], dismissed Mr A's claim. But, by its decision now under appeal to the Board, the Supreme Court allowed his appeal and ordered Total to pay him Rs 928,851 in the form of wages in lieu of notice and a severance allowance albeit at the normal rather than the punitive rate.

2. At the hearing before the Board only Total was represented. The Board had been forewarned that Mr A would neither attend nor be represented. Several days prior to the hearing his attorney had told the Board by letter that:

> "In view of the financial inability of respondent, the latter has instructed me that he does not want to take the least risk of being found liable for costs in case the appellant succeeds."

3. In 1979 Mr A began to be employed as an accountant by Currimjee Jeewanjee and Co Ltd. In 1986 he was transferred to work as a Sales and Marketing Manager for Elf Gaz (Maurice) Ltd ["Elf"] and, when in 2005 Total purchased Elf's assets, he began to work in the same capacity for Total. His final position, which took effect on 1 May 2006, was as LPG Business Development Manager for Total. He is to be taken as having worked for Total throughout the 27 years from 1979 until his dismissal in December 2006.

4. "LPG" stands for Liquid Petroleum Gas. One of the major parts of Total's business in Mauritius is the importation of LPG, which it there bottles into cylinders and then sells to distributors for onward retail sale. Its main distributor is, or in 2006 was, Messrs Yip Tong and Sons Ltd ["Yip Tong"]. In order to use a cylinder of liquid gas, one needs a regulator: Total also imported the regulators, of a size which fitted its particular cylinders, and it sold them to its distributors, again mainly to Yip Tong.

5. By letter dated 4 December 2006 Total wrote to Mr A as follows:

> "It has been brought to the Management's attention that a company of which you are an office bearer has been soliciting business with our main distributor, namely Messrs Yip Tong and Sons Ltd. In view of the post you hold within the company, such an accusation if proved could amount to a serious breach of your obligations towards the said company."

Total therefore invited Mr A to attend a hearing before a disciplinary committee. On 15 December 2006 the hearing took place, following which, by letter dated 19 December 2006, Total informed Mr A that he had "been found guilty as charged and that Management [had] no other alternative than to terminate [his] employment on grounds of gross misconduct with immediate effect".

6. The company to which Total referred in the opening sentence of its letter dated 4 December 2006 was Pick N' Pay Ltd. It was a company in which at all material times Mr A and his wife each held 50% of the issued shares. It had been Elf's practice to require its employees to sign an annual declaration of any secondary employment. In 2003 Mr A declared that he was an unremunerated director of Pick N' Pay Ltd, which he described, probably correctly at that time, as a supplier and distributor of fresh and frozen food, albeit as passive for the time being. At the foot of the declaration there was an annotation, apparently made by the Director General of Elf, that, insofar as Mr A's directorship of Pick N' Pay Ltd was non-executive, it was acceptable to Elf. When in 2004 he came to make a further declaration, Mr A made no mention of having any continuing directorship of Pick N' Pay Ltd. The President seems to have accepted his evidence that it was indeed in about 2004 that he resigned his directorship; that from then onwards he was the company's secretary but resigned from that position some time in 2006; that thereafter his relationship with the company was only as the holder of 50% of its shares; and that in 2006 its day-to-day management was conducted by his wife and in particular by his brother and not by himself.

7. The reference in Total's letter dated 4 December 2006 to the solicitation of business by Pick N' Pay Ltd was a reference to a letter dated 10 August 2006 which Pick N' Pay Ltd wrote to the manager of Yip Tong. The letter was headed "QUOTATION" and the subject of the letter was described as "GAS REGULATOR FOR RED GAS CYLINDERS". The text of the letter began as follows:

> "Further to your request, we have the pleasure to submit hereunder our best quotation and our product specification pertaining the above for your perusal."

Then, in a box, the company quoted a price of Rs 136 for each unit up to 1,500 units and of Rs 132 for each unit above 1,500 units. There then followed a technical specification of the regulator and proposed conditions in respect of packing, payment and delivery. The text ended as follows:

> "We hope that our offer will satisfy your requirements and look forward to your most valued order. Should you require any additional information, please don't hesitate to contact us."

At the foot of the letter was a signature, under which was typed "S A RAHMAN DIRECTOR".

8. Red gas cylinders were sold by Total. The regulators which Pick N' Pay Ltd were offering to sell to Yip Tong were regulators of a type which fitted the cylinders sold by Total and which Total itself sold.

9. S A Rahman is the name of Mr A's wife. In oral evidence to the President Mr A denied that the signature on the letter was that of his wife. But Mr A's brother, whom he called to give evidence, confirmed that the signature was indeed that of Mr A's wife. There was also evidence that before the disciplinary committee Mr A had admitted – surely inevitably – that, had Yip Tong accepted Pick N' Pay's quotation, the interests of Total would have been prejudiced.

10. The President held that an employee had a contractual obligation not to enter into competition with his employer during the period of his employment. He found that Mr A was in breach of the obligation. He observed that, while the main focus of Mr A's employment within Total was the promotion of sales, he held an interest in a company managed by his wife and his brother which was trying to compete by making sales in an area, and to a distributor, directly related to Total and therefore in the same market. In those circumstances – so held the President – Total had established that it had been entitled summarily to dismiss Mr A.

11. In its judgment on Mr A's appeal the Supreme Court roundly upheld the President's factual findings. It observed:

> "… the appellant had direct and close interests in a company, wholly owned by himself and his wife and managed by his wife assisted by his brother, which was soliciting business from one of the main clients of the respondent for the sale of the same type of products which the appellant was employed by the respondent to sell and market.

> On the basis of these proven facts, which were unequivocally of a nature to destroy the bond of trust by giving rise to a legitimate and *bona fide* suspicion on the part of the respondent, it was perfectly justifiable for the respondent … to terminate the employment of the appellant. The trust of the respondent … was at the material time impaired to such an extent that it was no longer possible in good faith for [it] to maintain the appellant in its employment in his capacity as Manager responsible for the sole and marketing of similar products …
>
> The appellant cannot therefore succeed for any of reasons invoked in the course of the appeal. All the grounds of appeal should accordingly fail."

12. In three concluding paragraphs, however, the Supreme Court addressed a different question, which led it to the conclusion that Total was nevertheless obliged to pay Mr A wages in lieu of notice and a severance allowance at the normal rate.

13. The different question was this: had Mr A been guilty only of a "faute sérieuse" rather than a "faute grave"? The answer of the Supreme Court was: yes.

14. Notwithstanding his expertise in the law of employment, it had not occurred to the President that it was necessary in the present case to address the distinction between a "faute sérieuse" and a "faute grave". Nor, as already appears, had counsel for Mr A included it in his grounds of appeal. At the hearing before the Supreme Court, however, the court had pointed out to the advocates that entitlement to compensation in the event only of "faute sérieuse" was always a live issue even if it had not been pleaded. No doubt Mr Sauzier SC, on behalf of Total, had not come prepared to address the distinction; but he accepts that the court gave him an opportunity to make submissions about it.

15. The distinction between dismissal for "faute sérieuse" and dismissal for "faute grave" is not expressly found in the Labour Act 1975. Section 34 provides for payment by the employer to the worker of severance allowance in three situations, of which the first is where the employer terminates the employment. Section 36 provides for the amount of the allowance, including, at subsection (7), for payment at the punitive rate where termination is unjustified. Section 35(1) provides however that no worker shall be paid severance allowance where he is dismissed pursuant to section 32(1)(b), which in turn precludes dismissal for alleged misconduct unless the employer cannot in good faith take any other course.

16. Notwithstanding the absence of any express reference to it in the Labour Act, Mr Sauzier accepts that the Supreme Court was – as a matter of law – correct to draw a distinction between dismissal for misconduct amounting only to "faute sérieuse", for which severance allowance at the normal rate would be payable, and dismissal for misconduct amounting to "faute grave", for which no severance allowance would be payable.

17. The Supreme Court introduced its discussion of this distinction by quoting with approval from the "Introduction Au Droit du Travail Mauricien" by Dr Fok Kan, 1st ed, p 196, as follows:

> "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. … 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)."

18. In the *Harel Frères* case, to which the learned author makes reference, the employer had employed the worker to cut sugar canes. One day during crop time the worker wrongly absented himself from work and went to cut canes for another planter for higher pay. He then falsely denied to the employer that he had done so. The Supreme Court upheld the decision of the Industrial Court that, although the worker was guilty of misconduct which entitled the employer to dismiss him, he was nonetheless entitled to wages in lieu of notice and severance allowance at the normal rate. The court cited paras 243 and 244 of the "Traité de Droit du Travail, Contrat de Travail", by Camerlynck, 1st ed. In his exposition of French law Camerlynck said:

> "243 Ainsi ont été considérés comme constituant une faute grave privative de l'indemnité de licenciement: …"

Camerlynck then described ten situations, of which the first was "les multiples absences irregulières et retards" and the ninth was "la concurrence déloyale". Camerlynck proceeded:

> "244. Par contre, n'ont pas été considérées comme fautes graves privatives de l'indemnité de licenciement: …"

Then, again, he described ten situations which were not to be considered faute grave, of which the fourth was "l'absence non autorisée n'ayant causé aucune perturbation dans la marche de l'entreprise …"

19. In concluding that the Industrial Court had been entitled to hold that the worker had not been guilty of "faute grave", the Supreme Court in the *Harel Frères* case stressed that his misconduct had been "an isolated act committed by someone who had given 19 years' loyal service to his employer". It made clear, however, that length of service would not always negative "faute grave" for "if a worker steals a hundred rupees from his employer's drawer, it is certainly not the length of his service which will determine whether or not he gets any severance allowance".

20. In the light of Mr Sauzier's concession that the issue before the Board is whether the Supreme Court was entitled to hold that Mr A was guilty of "faute sérieuse" rather than "faute grave", it is unnecessary for the Board to explain how the distinction fits together with the provisions of the Labour Act set out above. But the Board confesses that it perceives a conundrum which at present it feels unable to resolve. The conundrum is as follows:

(a) An employer cannot dismiss a worker for misconduct otherwise than pursuant to section 32(1)(b) of the Act (ie where, apart from being required to effect the dismissal speedily, the employer cannot in good faith take any other course).

(b) If dismissed pursuant to section 32(1)(b), the worker is not entitled to severance allowance: section 35(1).

(c) So how can a median situation exist in which, if the misconduct is "sérieuse" but falls short of "grave", an employer can dismiss a worker for it but the worker remains entitled to severance allowance?

21. Perhaps in another appeal the Board will be persuaded that the conundrum can somehow be resolved by reference to the terms of the Labour Act. Alternatively, however, it may be that the application of French law has imposed a gloss either on

section 32(1)(b) of the Act (with the result that there can be dismissal for misconduct outside its terms) or on section 35(1) (with the result that a dismissal for misconduct under section 32(1)(b) does not always preclude a right to severance allowance). To the Board it appears more likely that any such gloss is on section 32(1)(b). The final sentence of the quotation in para 17 above from Dr Fok Kan's work – "therefore only a 'faute grave' constitutes misconduct within the meaning of section 32(1)(b)" – so suggests. So does the judgment of the Supreme Court in *Mandary v State Informatics Ltd*, 2013 SCJ 396, which it delivered two months prior to its making the order under appeal.

22. In the *Mandary* case the court rejected an employee's appeal against a decision of the Industrial Court that, following its dismissal of him, the employer was not obliged to pay him wages in lieu of notice or severance allowance. The employee had been the employer's finance manager. A new company had been set up. It was designed to try to compete with the employer. The employer did not allege that, while working for itself, the employee had also been working for the new company. Its allegation, denied by the employee but found proved in the Industrial Court, was that, in his handwriting, he had helped to complete the statutory returns to the Registrar of Companies made by the new company (which perhaps was not then even operational) and that he had thereby assisted it. The Supreme Court described the conclusion of the Industrial Court, which it upheld, as being "that the appellant who was in breach of his duty of loyalty had committed a "faute grave" [and that the] employer had *therefore* acted *in good faith* in terminating the appellant's employment" (emphasis supplied).

23. It seems to follow therefore that, as Mr Sauzier submitted to the Board, an employee's "faute grave" is misconduct for which, within the meaning of section 32(1)(b)(i) of the Labour Act, the employer "cannot in good faith take any other course" than to dismiss him, with the result that, by virtue of section 35(1), he is not entitled to severance allowance; and that, notwithstanding the terms of section 32(1)(b), there can be a dismissal for "faute sérieuse" outside its terms and without that result.

24. If so, however, a puzzle arises: for, in the passage of its judgment set out at para 11 above, the gist of which it later repeated, the Supreme Court in the present case observed that it had no longer been possible in good faith for Total to have maintained Mr A in his employment. So why did it not follow that the misconduct was "faute grave"? The Board resolves to hasten onwards and to focus directly on the proper categorisation of Mr A's misconduct.

25. Camerlynck listed disloyal competition as an example of "faute grave": see para 18 above. In the second edition, published in 2009, of his book, already quoted, on the Mauritian law of employment, Dr Fok Kan described the boundaries of the employee's obligation not to compete with his employer as follows, at p 116:

> "En dehors des heures de travail, la liberté de l'employé reprend le dessus, celui-ci n'étant plus sous la subordination de l'employeur. Il peut ainsi s'adonner à d'autres activités, sous réserve d'une clause contraire prévue par le contrat de travail. Ce droit toutefois est sujet à ce qu'il ne fasse pas concurrence à son employeur. Cette obligation de non-concurrence de plein droit de l'employé peut être justifiée par l'obligation d'exécuter loyalement et en toute bonne foi ses obligations. En cas de violation de cette obligation, l'employé commet une faute grave, privative de l'indemnité de licenciement."

26. Mr Sauzier concedes that some breaches of an employee's duty not to enter into competition with his employer might not amount to "faute grave". Nevertheless it is clear from the quotations set out above from the works of Camerlynck, approved in the *Harel Frères* case, and of Dr Fok Kan that the starting point is that such a breach is "faute grave".

27. It is not clear whether the Supreme Court started from that point. At all events it gave only one reason for concluding that Mr A's misconduct was no more than "faute sérieuse", namely that he "had an unblemished record of continuous employment for a period of more than 27 years". On any view Mr A's long unblemished service was a relevant factor. Nevertheless it had been made clear in the *Harel Frères* case that, if for example an employee was guilty of theft even of a minor character, length of service would not by itself negative "faute grave": see para 19 above. Indeed, in *Soriété de Gérance de Mon Loisir v Ootim*, 1991 MR 64, the Supreme Court observed:

> "And, as the dictum in *Harel Frères Ltd* … also implies, where the act of misconduct is serious, one would require at least a combination of strong mitigating factors, and not merely long good service, to conclude that the worker does not deserve to be summarily dismissed."

28. The Board considers that on any view it was incumbent on the Supreme Court, when applying the distinction between "faute sérieuse" and "faute grave", to set Mr A's long unblemished record against the other factors which informed the degree of blameworthiness of his misconduct. These factors were as follows:

(a) By May 2006 Total employed Mr A in a senior capacity.

(b) It employed him to manage the development of an area of its business.

(c) That area of its business was its sales of liquid petroleum gas and of ancillary equipment such as regulators.

(d) So Total's employment of him in that capacity gave him particular insight into that particular market.

(e) Yet, although employed to manage the development of Total's sales in that area, he was a 50% shareholder in a family company which was taking steps which would erode Total's existing share of sales in that area.

(f) He had never disclosed his shareholding to Elf or to Total.

(g) The family company, managed by his closest relations, chose to proposition the company which was the main purchaser of Total's regulators.

(h) It offered to sell to them an apparently unlimited quantity of the very regulators which Total had been selling to them and which fitted Total's cylinders.

(i) As a 50% shareholder, he was likely to derive financial benefit from any success which the family company achieved in selling the regulators.

(j) At the hearing before the disciplinary committee he appears to have given no assurance that the family company would cease its efforts to sell the regulators.

29. The Board concludes that, taken together, the ten factors set out above render the breach of Mr A's duty of non-competition so fundamental that, even when placed in the context of his long unblemished record, it could not reasonably be regarded as other than "faute grave". On any view it was far worse than the breach in the recent *Mandary* case, which, according to the Supreme Court, the Industrial Court could not be faulted in having categorised as "faute grave".

30. The Board therefore allows the appeal and sets aside the order of the Supreme Court, with the result that the orders of the President, which included an order for Mr A to pay Total's costs, again take effect. In relation to the costs of the present appeal, the Board reminds itself of the letter from Mr A's attorney quoted at para 2 above. No doubt the effect of Mr A's decision not to participate in the hearing before the Board saved him from incurring further costs on his own behalf. But he did not consent to the allowing of the appeal and so did not obviate the need for Total to attend before the Board by counsel and to establish its case. The Board considers that it should order Mr

A to pay Total's costs of its appeal to the Board, together with those of his appeal to the Supreme Court.