Hilary Term
[2015] UKPC 5
Privy Council Appeal No 0086 of 2012

JUDGMENT

Seetohul (Appellant) *v* Omni Projects Ltd (Respondent)

From the Supreme Court of Mauritius

before

Lady Hale
Lord Wilson
Lord Hughes

JUDGMENT GIVEN ON

3 February 2015

Heard on 15 January 2015

Appellant	*Respondent*
Yashley Reesaul	The Respondent did not appear and was not represented
(Instructed by Naresh Seetohul)	

LORD HUGHES:

1. Dr Seetohul (the plaintiff) was employed as an Education Officer by Omni Projects Ltd (the defendants). He brought a claim against the defendants in the Industrial Court, alleging that he had been unlawfully dismissed. He claimed three months' remuneration (about 49000 rupees), coupled with severance allowance at the punitive rate of six times the norm which is prescribed in certain circumstances by statute (about 470,000 rupees). He succeeded before the Industrial Court, but failed in the Supreme Court, which allowed the defendants' appeal and reversed the first instance decision. The plaintiff appeals further to the Board.

2. The plaintiff wished to be absent from work for about a fortnight in September 2003 (from about 15/16th to 25/26th) to attend an international conference connected with a separate position which he held independently of his employment. He needed the consent of the defendants, who were entitled, as he accepted, either to agree or to refuse. The defendants were unable to spare him, given the time of the academic year, the time he had already had away from work, and the number of applications for leave which he had made - one had been for the much longer period of 1 September to 27 October 2003. The Industrial Court found that the plaintiff knew full well as early as July 2003 that his application for leave to attend the conference had been refused, but that when the time came he left anyway. It also found that more or less as he left on Friday 12 September, the plaintiff handed in to the defendants a letter reiterating his request for leave, saying that he had had no reply, and announcing that he would take silence for approval. On the findings of the Industrial Court, that letter was written when he knew his application had been refused.

3. On Tuesday 23 September the defendant employers wrote to the plaintiff a letter which is at the centre of the helpful submissions made on his behalf before the Board by Mr Reesaul. It said this:

> "It is viewed with concern that you have not been attending duty since Monday 15 September 2003 without any valid reason whatsoever. You are therefore required to report to your work forthwith, failing which your absence will be construed as an abandonment of your post and the management reserves its right to take whatever action which it may be advised against you."

4. That letter would, it is agreed, have been delivered in the ordinary course of post on Wednesday 24 September. The plaintiff was at that stage out of the country. He returned on Thursday 25 September, apparently late in the evening. The following day he did not report for work in the morning, but he did go in to the College at about 2 pm, too late for any work that day. He met the manager of the defendants, and handed him a letter in which he said that he would be in for work on Monday (29 September). The manager told him that the defendants would consider the position and that he should report on Monday for a decision. When he did so on the Monday he was dismissed.

5. Employment law in Mauritius is based upon French law, but with statutory modifications. At the time of these events, the statutory law was contained in the Labour Act 1975, as amended. Two sections of that Act are relevant. Section 30 deals with breach of an employment contract and is headed "Termination of employment". It provides by section 30(4):

> "(4) An agreement shall be broken -
>
> > (a) by the worker, where he is absent from work, exclusive of any day on which the employer is not bound to provide work, without good and sufficient cause for more than two consecutive working days;
> >
> > (b) by the employer, where he fails to pay the worker the remuneration due under the agreement."

Section 32 deals with unjustified termination of employment. It provides, first, for the machinery and procedure of dismissal for misconduct. Next, it provides by subsection (3) for a worker who asserts that he has been unjustifiably dismissed to have a right of complaint to the court. Then, by subsections (4) and (5), it provides as follows:

> "(4) Where a matter is referred to an officer or to the Court under subsection (3), the employer may not set up as a defence that the worker has abandoned his employment unless he proves that the worker has, after having been given written notice -
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> > (a) by post with advice of delivery; or
> >
> > (b) by service at the residence of the worker,

> requiring him to resume his employment, failed to do so within a time specified in the notice which shall not be less than 24 hours from the receipt of the notice.
>
> (5) Subsection (4) shall not apply in relation to a worker who has notified the termination of his employment in writing."

6. The defendants had responded to the plaintiff's court claim by saying that the plaintiff had "abandoned his work and unilaterally put an end to his employment before 29 September". The Industrial Court treated that as a plea that he had abandoned his job and treated the letter from the defendants of 23 September, quoted at para 3 above, as a notice under section 32(4). It went on to hold that the plaintiff's reporting to the College at 2 pm on Friday 26 September was within 24 hours of his actual receipt of this letter. On that basis, it allowed the plaintiff's claim.

7. The Supreme Court allowed the defendants' appeal substantially on the basis of its earlier, and established, decision in *Mauritius Agricultural & Industrial Co Ltd v Permanent Secretary, Minister of Labour & Social Security on behalf of Auckloo* [1974] MR 34 ("*Auckloo"*). That case had been decided on earlier statutory provisions but there were material similarities with sections 30(4) and 32(4) of the Labour Act 1975. The first provision considered, section 6(5) of the Employment and Labour Ordinance, had provided that an employee who was absent through illness but did not notify his employer of his illness within five days, was deemed to have broken his contract. The second provision, section 7(3) of the Termination of Contracts of Service Ordinance, was in terms similar to section 32(4) here under consideration. The employee in *Auckloo* had been absent for fifteen days before he gave notice of his illness to his employers, and they refused to continue his employment. The Supreme Court held that the employers were not relying on the worker's abandonment, but rather on his having brought his employment to an end by the kind of breach expressly dealt with by section 6(5) - in other words a repudiatory breach. The court found that section 6(5) was a statutory equivalent of French case-law on the subject of unexplained absence amounting to a repudiatory breach. Having pointed out that the two different statutory provisions needed to be reconciled, the court there said:

> "In our view, a distinction must be drawn between abandonment of work and absence from work. Absence is a mere fact independent of any mental element. Abandonment, on the contrary, implies a specific intent - viz the intent of the worker not to resume work and to treat the agreement as dead. On such a view, there is no conflict between the two enactments. To plead

> abandonment of work implies saying two things: first, the worker was absent from work, and second, he intended not to resume work. The effect of section 7(3) is that the employer will not be allowed to prove that specific intent unless he has first taken steps to remove any possible controversy – viz by calling on the worker to resume work. But section 7(3) in no way debars the employer from proving the mere fact of absence from work: he may do so if, for instance, it is relevant to a defence based on section 6(5). We hold that in this case the defence was not abandonment of work, but absence from work coupled with a failure to notify illness."

8. For the plaintiff, Mr Reesaul's contention is that this drives a coach and four through the statutory requirements of section 32(4). Says Mr Reesaul, abandonment consists of absence plus intention not to return and this calls for the statutory safeguard under section 32(4) of an ultimatum. It cannot be right, he submits, that mere absence, without the added ingredient of intention not to return, should be immune from the same statutory safeguard.

9. In the Board's view, however, the distinction made in *Auckloo* is well founded in the statutory provisions, which must, as the Supreme Court held, be reconciled one with the other. Section 30(4) is concerned with a repudiatory breach, that is to say one which brings the contract to an end, whether the employee wishes to do so or not. Conversely, section 32(4) is concerned with an employee who deliberately abandons his job, subjectively intending to do so. There may be an overlap in some cases between the two situations, but they are not the same. An employee may well commit a repudiatory breach by way of unauthorised absence for several days but nevertheless hope that he will get away with it and remain in his employment - indeed that seems to have been the situation of the present plaintiff. Nor is it correct that abandonment is necessarily absence coupled with intention not to return. That is only one form of abandonment, which could equally involve no absence at all, for example where an employee denounces his job in the course of a heated argument with his employer. That there should be a requirement for a statutory safeguard of a written ultimatum to the employee in such a case makes perfectly good sense, but it does not follow that the statute imposes that requirement also in the case of an employee who commits a repudiatory breach, and it does not.

10. Mr Reesaul sought to distinguish *Auckloo* on the basis that it involved not only absence but a failure to give notice of illness. It is true that the particular facts of that case involved a repudiatory breach by way of failure to give notice of illness, but that is because those were the terms of the breach provision there under consideration, section 6(5). But the principle which underlies *Auckloo* applies equally to the slightly different breach provision of section 30(4).

11. Since the time of this dispute, the statutory labour law has been altered by Parliament. The Board was told that the rule in section 30(4) treating more than two days' unjustified absence as a repudiatory breach was first modified to apply only to a second or later absence of this description, and then removed altogether, so that it is not present in the current Employment Rights Act 2008 as amended in 2013. That, however, only demonstrates that the law prior to these adjustments, was as declared by the Supreme Court.

12. Next, Mr Reesaul submitted that the letter of 23 September (para 3 above) amounted to an offer to re-engage the plaintiff, which he accepted by presenting himself at work at 2 pm on Friday 26th. In consequence, he submitted, any previous breach was spent. The Board does not agree that the letter can bear this construction, especially given the final clause under which the defendants reserved their right to deal with the plaintiff in any manner advised; that warning is inconsistent with an offer to re-engage. In any event, even if the letter could bear this construction, it would require acceptance according to its terms, that is to say by the plaintiff presenting himself forthwith for work. On any view he did not do so; rather, he waited until late in the college day on Friday 26th to arrive and then did no more than announce that he would come in on Monday. Even if, as Mr Reesaul suggested, the letter could be read as requiring attendance as soon as reasonably practicable, the plaintiff did not so attend; that he said that he was tired after his flight did not make it impracticable to attend earlier.

13. For these reasons, the Board concludes that there is no error in the conclusion of the Supreme Court. It might have added that even if the letter of 23 September was to be regarded as an election to proceed under the provisions of section 32(4), and as giving the plaintiff 24 hours to present himself, starting with receipt in ordinary course of post, that period elapsed well before 2 pm on Friday 26th.

14. The Board is most grateful to Mr Reesaul for undertaking this case at short notice and for presenting every argument which could properly be put on the plaintiff's behalf. It follows, however, that despite his arguments, this appeal must be dismissed.