Mauvilac Industries Ltd v. Ragoobeer (Mauritius) [2007] UKPC 43 (25 June 2007)

Privy Council Appeal No 33 of 2006

Mauvilac Industries Ltd *Appellant*

v.

Mohit Ragoobeer *Respondent*

FROM

THE COURT OF APPEAL OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 25th June 2007

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

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[Delivered by Lord Rodger of Earlsferry]

1. The appellant is Mauvilac Industries Ltd ("Mauvilac"), a company which manufactures, produces and markets paints in Mauritius. The respondent is Mr Mohit Ragoobeer who was employed by Mauvilac from 1977 until he was dismissed for misconduct in 2001. In the present proceedings, begun by proecipe in the Industrial Court, under section 36(7) of the Labour Act 1975 ("the 1975 Act"), Mr Ragoobeer seeks payment of a sum equal to six times the amount of the severance allowance that would be due to him under section 36(3). Mauvilac, for

its part, contends that Mr Ragoobeer was validly dismissed under section 32(1)(b) and that therefore no severance allowance at all was payable: section 35(1). Mauvilac further submits that, even if his dismissal was not effected within the appropriate time-limit, it was still entitled to dismiss Mr Ragoobeer by giving him notice and paying him the appropriate severance allowance in terms of section 31(3)(a) of the Act.

2. In early 2001 problems emerged in connexion with the accounts of one of Mauvilac's customers, Quincaillerie Monaco. The suggestion was that Mr Ragobeer might be responsible for the discrepancy in the accounts. Mauvilac convened a disciplinary committee which held a hearing on 28 March 2001, after which the executive director of Mauvilac wrote to Mr Ragoobeer informing him that the committee had come to the conclusion that he could not be held responsible for any discrepancies, but giving him a severe warning about the way he had handled the account.

3. Subsequently, further apparent serious breaches of duty on the part of Mr Ragoobeer relating to the accounts of Quincaillerie Monaco were brought to the attention of Mauvilac's management. By letter dated 11 May, the executive director suspended Mr Ragoobeer and asked him to appear before a disciplinary committee to be held on 17 May so that he could give his explanation of the situation. In the event, the committee hearing did not take place until 30 May and the committee did not report to Mauvilac until 4 June. On the same day as he received its report, the chief executive of Mauvilac wrote a letter to Mr Ragoobeer, informing him that the board had come to the conclusion that he had committed an act of gross misconduct in the course of his employment. The chief executive continued: "In view of the seriousness of the matter, we have no other alternative but to terminate your contract with immediate effect."

4. The next day, 5 June, the letter was sent to Mr Ragoobeer by registered post. The magistrate found, and it is now accepted, that Mr Ragoobeer received the letter on 7 June. It follows that he did not receive notice of the termination of his contract of employment until 7 June. This was not in any respect due to any "faute" on his part.

5. The legal issues to which these facts give rise relate to the 1975 Act which replaced The Termination of Contracts of Service Ordinance 1963 ("the 1963 Ordinance"). Section 6 of the Ordinance provided inter alia:

> "(1) An employer may not set up as a good and sufficient casue for the summary dismissal of a worker -

...

(c) the filing in good faith of a complaint or the participation in a proceedings against an employer involving alleged violation of laws or regulations....”

(2) An employer may not dismiss a worker for alleged misconduct except in a case where he cannot in good faith be expected to take any other course and unless such dismissal is effected within seven days after the employer becomes aware of such misconduct.”

6. Section 32 of the 1975 Act is headed “Unjustified termination of agreement”. It provides inter alia:

“(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 law;

(b) for alleged misconduct unless -

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

(ii) the dismissal is effected within 7 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.

(b) The worker may, for the purposes of paragraph (a), have the assistance of a representative of his trade union, if any, of an officer or of his legal representative.

(3) (a) Subject to paragraph (c), a worker whose employment has been unjustifiably terminated may refer the matter to an officer and shall be allowed the assistance of a representative of his trade union, if any.

> (b) Where a reference under paragraph (a) does not result in the matter being satisfactorily settled, the worker may lodge a complaint with the Court and shall be allowed the assistance of a representative of his trade union, if any.
>
> (c) No worker shall, under paragraph (a), refer a matter to an officer unless he does so within 7 days after he has been notified of his dismissal."

7. As the Supreme Court pointed out in *Happy World Marketing v Agathe* 2004 MR 37, the genesis of the provisions in both the 1963 Ordinance and in the 1975 Act is to be found in the Termination of Employment Recommendation 1963 ("the Recommendation") (No 119) of the International Labour Organisation ("the ILO") which was adopted on 26 June 1963, a few months before the 1963 Ordinance was passed.

8. Paragraph 3 of the Recommendation provides inter alia:

> "The following, inter alia, should not constitute valid reasons for termination of employment:
>
> ...
>
> (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations...."

Paragraph 4 is to this effect:

> "A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body."

Finally, paragraph 11 provides inter alia:

> "(1) In case of dismissal for serious misconduct, a period of notice or compensation in lieu thereof need not be required, and the severance allowance or other types of separation

> benefits paid for by the employer, where applicable, may be withheld.
>
> (2) Dismissal for serious misconduct should take place only in cases where the employer cannot in good faith be expected to take any other course.
>
> (3) An employer should be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.
>
> (4) A worker should be deemed to have waived his right to appeal against dismissal for serious misconduct if he has not appealed within a reasonable time after he has been notified of the dismissal.
>
> (5) Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him."

The resemblances between the legislation in 1963 and 1975 and the ILO Recommendation show beyond any doubt that the legislation was framed with paras 3, 4 and 11 of the Recommendation in mind. This was expressly recognised by the Supreme Court in *Savanne Bus Service Co Ltd v Peerbaccus* 1969 MR 139.

Date of Effective Dismissal

9. It is common ground that Mauvilac dismissed Mr Ragoobeer for misconduct. But, in terms of section 32(b) of the Act, it was not to dismiss him on that ground unless it could not, in good faith, take any other course and the dismissal was effected within 7 days of the completion of the committee hearing. Mr Ragoobeer does not suggest that Mauvilac could in good faith have taken any other course. It is common ground that in this case the hearing itself was completed on 30 May, even though the committee took further time to make its report. Mauvilac also accepts that, if the dismissal was only effected when Mr Ragoobeer received the letter from the company on 7 June, it was not effected within 7 days of the completion of the hearing, as required by section 32(1)(b)(ii)(A).

10. The first point to be decided is when the dismissal took effect. Clearly, dismissal is a unilateral act: to take effect, it does not require any action by the person who is dismissed. Some unilateral acts are effective without the person affected having to be told about them (actes non-réceptices), others only when the person affected is told about them (actes réceptices). See J Martin de la Moutte, *L'Acte juridique unilatéral*

(1951), p 189, para 197: "l'acte réceptice atteint donc sa perfection lorsque la manifestation parvient à la connaissance du destinataire", cited with approval by the Supreme Court in *Happy World Marketing Ltd v Agathe* 2005 MR 37, 39. While the borderline between the two categories may not always be easy to determine, their Lordships have no doubt that dismissal of an employee is an acte réceptice, which takes effect only when the employee is notified. See, for example, Martin de la Moutte, *L'Acte juridique unilatéral*, p 175, para 181, where, giving clear-cut examples of actes réceptices, the author says: "En tout premier rang, on cite la résiliation du contrat, lorsqu'elle est possible, qui paraît constituer le type de l'acte dont l'existence est subordonnée à une notification." Having given the example of the termination of a lease, he continues: "Il en va de même pour la résiliation du contrat de travail." Confirmation of notification as being the decisive moment for purposes of section 32 of the 1975 Act is to be found in subsection (3)(c) which requires an employee who is going to challenge his dismissal as being unjustified to do so within 7 days "after he has been notified of his dismissal".

11. During the hearing before the Board there was some discussion of various hypothetical examples where a letter notifying an employee of his dismissal reached his address within 7 days, but for some reason the employee did not know about it or read it until after the expiry of 7 days. The Board does not need to explore these questions in this case since it is agreed that Mr Ragoobeer read the letter on the day that it arrived. In these circumstances, in respectful agreement with the Court of Appeal, their Lordships are satisfied that Mr Ragoobeer's dismissal became effective on 7 June 2001 and not before.

Unjustified termination

12. Was the termination of Mr Ragoobeer's contract of employment on 7 June "unjustified" in terms of section 32 of the 1975 Act? On behalf of Mauvilac, Mr Sauzier contended that it was not: he pointed out that subsection (2)(a) is the only place in the body of the section where a termination is described as "unjustified". Hence, he argued, a termination should not be regarded as "unjustified" unless the employer fails to give the employee an opportunity to answer any charges of misconduct that are made against him. Their Lordships are unable to accept that submission.

13. The heading of section 32 makes it clear that the section, as a whole, is dealing with unjustified termination of an employment agreement or contract. That is reflected in the structure of subsection (1) which specifies two grounds on which an employer is not to dismiss a worker – and where, accordingly, any termination of his employment

must be unjustified. The first is where the employee is dismissed only because he made a complaint against his employer in good faith, or took part in a proceeding against his employer, involving an alleged violation of the law. The second ground on which an employer is not to dismiss an employee is for alleged misconduct – unless two requirements are met. Again, obviously, any termination of the employee's contract of employment will be unjustified unless the two requirements are met. The legislation treats subsection (1)(a) and (b) as, in effect, describing terminations which are unjustified. They reflect para 11(2) and (3) of the ILO Recommendation. In subsection (2), the draftsman then identifies a specific situation where, even though the requirements of subsection (1)(b) are met – the employer could not do anything else and the dismissal takes place within 7 days – the dismissal is nevertheless "deemed to be unjustified". In substance, if not in form, it corresponds to para 11(5) of the Recommendation.

14. To adopt the construction advanced by Mr Sauzier and limit the notion of an unjustified termination to section 32(2)(a) cases would be false to the scheme of the section and, indeed, of the Recommendation lying behind it. It would also make nonsense of the way that the provision operated in practice. For instance, if the employer could have taken some measure short of dismissal, then, by reason of subsection (2)(b)(i), the employee's employment must have been "unjustifiably terminated" for the purposes of subsection (3)(a). Otherwise, the employee would not be able to challenge his dismissal by referring it to an officer and having the assistance of a trade union representative.

15. Of course, it may seem strange to describe the termination of an employee's employment for established misconduct as "unjustified" merely because the necessary notice reaches the employee eight, rather than seven, days after the completion of the disciplinary hearing. Nevertheless, the legislature has adopted a policy of laying down a fixed time limit – clearly, with the Recommendation of the ILO in mind and with the aim of ensuring that both parties know where they stand as quickly as possible. See *Mahatma Gandhi Institute v Mungur P* 1989 SCJ 379 where the Supreme Court described the time-limit as being based on sound principles and added:

> "Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct."

In subsection (3)(c) the legislation imposes a corresponding obligation on employees to act quickly: an employee cannot challenge his dismissal as being unjustified by referring it to an officer under subsection (3)(a), unless he does do so within 7 days of being notified of his dismissal. The courts must respect the policy which lies behind the time-limits that the legislature has imposed.

16. Their Lordships are therefore satisfied that, by 7 June, the statutory period had passed and Mauvilac was therefore not entitled to dismiss Mr Ragoobeer for alleged misconduct under section 32(1)(b). It follows that the termination of his employment was unjustified.

Simple or six-fold severance allowance?

17. If Mauvilac was not justified in terminating Mr Ragoobeer's employment under section 32(1)(b) because it did not do so within the time-limit, then section 35(1), which excludes the payment of a severance allowance where the employee is dismissed under section 32(1)(b), does not apply. That is common ground. The parties are divided, however, on the appropriate award by way of severance allowance.

18. Mr Ragoobeer contends that, since the termination of his employment was not justified, under section 36(7) of the 1975 Act he is entitled to be paid a sum equal to 6 times the appropriate severance allowance:

> "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 6 times the amount of severance allowance specified in subsection (3)."

Mauvilac contends that, since Mr Ragoobeer had in fact acted improperly, it was entitled to terminate his contract of employment on giving him the appropriate notice and paying him simply the appropriate severance allowance.

19. Mauvilac bases its stance on a line of cases which began while the 1963 Ordinance was in force. As originally drafted, section 7(4) of the Ordinance simply provided that, if the magistrate of the Industrial Court found that the termination of employment was not justified, he could order that the employee, if not reinstated, should be paid adequate compensation or afforded such other relief as was provided in the Ordinance. By section 5 of The Termination of Contracts of Service

(Amendment) Ordinance 1966, however, section 7(4) was amended so as to read:

> "The Magistrate of the Industrial Court shall be empowered, if he finds that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid six times the amount of severance allowance calculated in accordance with the provisions of section 11 of this Ordinance."

Although the amendment introduced the six-fold penalty, the provision simply conferred a power on the magistrate to make such an order. Section 7 was further modified by section 4(a) of The Termination of Contracts of Service (Amendment) Act 1971. Section 7(5) now provided:

> "The Magistrate of the Industrial Court shall, if he finds that the termination of the employment was unjustified, order that the worker shall be paid a sum equal to six times the amount of severance allowance calculated in accordance with the provisions of section 11."

In effect, this provision was the forerunner of section 36(7) of the 1975 Act.

20. In *Harel Frères Ltd v Veerasamy* 1968 MR 218 the employees were drivers of a caterpillar which had broken down in circumstances which suggested that it had been sabotaged. Their employer dismissed them for serious misconduct on the basis that they had been responsible for the sabotage. The magistrate in the Industrial Court held that the employer had failed to prove that the two employees were responsible and so had failed to prove serious misconduct on their part. In these circumstances, on the view that the termination of the employees' employment had been unjustified, the magistrate ordered the employer to pay six times the appropriate severance allowance. The Supreme Court agreed with the magistrate that the employer had failed to prove that the employees had been responsible for the damage. It held, however, that he ought to have gone on to consider whether the employees' actions had been suspicious and had, therefore, given their employer a valid reason for terminating their employment, albeit on payment of the appropriate severance allowance. Having referred to situations where the employer would be justified in terminating an employee's contract, the Supreme Court continued:

> "If, on the other hand, the conduct of the employee is not such as would amount to the misconduct contemplated by the said section 6 and 9, but such nevertheless as would justify the employer in not continuing to employ him, then the latter is entitled to put an end to the worker's employment, but he must pay him any severance allowance due in accordance with section 9 and 11 of the Ordinance and, possibly also, give him the required notice.
>
> This being the effect of subsection (3) of section 7 of the Ordinance, the jurisdiction of the magistrate under subsection (4) of that section to mulct an employer in six times the severance allowance is limited to those cases where the employer has no valid reason at all to discontinue employing a worker. It will, therefore, be the magistrate's duty in any case of termination of employment referred to him in which the employer pleads as in the present case to enquire whether there was any reason for such termination and, if there was, whether it justified the summary dismissal of the worker or simply the discontinuance of his employment with payment of severance allowance."

21. In *Savanne Bus Service Co Ltd v Peerbaccus* 1969 MR 139 the Supreme Court took its thinking a stage further. Whereas in *Harel Frères* the employer had failed to prove serious misconduct, in *Savanne Bus Service Ltd* the employer had proved serious misconduct on the part of the employee, but had not effected his dismissal within the statutory seven-day period. Applying the approach in *Harel Frères*, the court held that:

> "the jurisdiction of the magistrate under section 7(4) to mulct an employer in six times severance allowance is limited to those cases where the employer has no valid reason at all to discontinue employing a worker and, in any case of termination of employment referred to him in which the employer pleads, as the appellant, the magistrate's duty is to enquire whether there was any reason for such termination, and, if there was, whether it justified the summary dismissal of the worker or simply the discontinuance of his employment with payment of severance allowance. In this case the magistrate has found, quite rightly in our view, that there was a valid reason for the termination of the respondent's employment and that the appellant would have been entitled to dismiss the respondent summarily, but for

> his failure to comply with the conditions of section 6(2) of the Ordinance. On such failure the appellant should merely be deemed to have waived his right to dismiss the respondent summarily and, consequently, that kind of termination was not justified. On the other hand, since there was a valid reason for the termination of the respondent's employment, such termination with payment of any severance allowance due was justified and the magistrate was wrong to award to the respondent six times the allowance."

22. Relying on essentially that reasoning, Mauvilac contends that, since there was a valid reason for terminating Mr Ragoobeer's employment, the only effect of its failure to dismiss him within the statutory period of 7 days laid down in section 32(1)(ii) was that it must be deemed to have waived its right to dismiss him summarily. But it could still terminate his employment on payment of the appropriate severance allowance calculated in accordance with section 36.

23. The Supreme Court rejected that argument and followed the approach which it had adopted in *Happy World Marketing Ltd v J P Agathe* 2004 SCJ 154. In that case, the Supreme Court distinguished the decision in *Savanne Bus Service Ltd* on the ground that it had been decided under the 1963 Ordinance. In addition, it overruled two decisions where the approach in *Savanne Bus Service Ltd* had been applied to the 1975 Act.

24. In considering the authorities, their Lordships would not be disposed to distinguish the cases on the 1963 Ordinance on the basis that section 6(2) said that "an employer *may* not dismiss a worker for alleged misconduct..." whereas section 32 says "No employer shall dismiss a worker... for alleged misconduct...." And, indeed, the terms of the Supreme Court's judgment in *Happy World Marketing Ltd v Agathe* indicate that, in truth, it was departing from the reasoning in the earlier decisions. Therefore, while, as it will explain, the Board considers that the earlier decisions can be distinguished, it too prefers simply to consider the validity of the two competing interpretations.

25. It respectfully seems to the Board that the approach adopted in *Happy World Marketing Ltd v Agathe* and in the present case is to be preferred. In a case like the present or *Savanne Bus Service Co Ltd v Peerbaccus* the reality is that the employer sets out to terminate his employee's employment on the ground that he had been guilty of serious misconduct. Moreover, the employer proves that the employee was guilty of serious misconduct and gives the employee notice of dismissal

on that ground. The problem arises because the notice is given too late and so the dismissal is not effected within the seven-day period laid down by the legislature. For that reason, the employer is not justified in dismissing the employee on the ground of his serious misconduct. But the fact that the notice is given late does not alter the ground on which the employer purports to dismiss the employee: it is his serious misconduct and remains his serious misconduct even though the dismissal is not effected in time. So in such a situation the employer dismisses his employee for misconduct in a situation where the law says that, by reason of delay, he is not justified in doing so. In these circumstances, under section 36(7) - by contrast with section 7(4) of the 1963 Ordinance as it stood when *Harel Frères Ltd v Veerasamy* 1968 MR 218 and *Savanne Bus Service Co Ltd v Peerbaccus* 1969 MR 139 were decided - the magistrate is not simply empowered but obliged to order the employer to pay the six-fold penalty. In that respect the earlier decisions are indeed distinguishable.

26. What is not legitimate, in their Lordships' view, is to allow the employer to avoid the penalty prescribed by the legislature by, in effect, ignoring what he actually did and asking whether he might have had some other reason for terminating his employee's contract in a different way - and then treating him as if he had done so. That is, in substance, to adopt a stratagem that defeats the intention of the legislature. Leaving aside any other difficulties, this appears to their Lordships to be the fundamental objection to the approach adopted in *Savanne Bus Services Ltd* applying so as to avoid the mandatory terms of section 36(7) of the 1975 Act. They understand the Supreme Court to have been putting forward essentially the same objection in *Happy World Marketing Ltd v Agathe* when it said:

> "If an employer does not dismiss a worker within the mandatory statutory limit of seven days, he is deemed to have waived his right to dismiss the worker for serious misconduct and not to pay severance allowance (section 35(1) of the Act) so that any subsequent dismissal becomes unjustified and attracts severance allowance at the punitive rate, irrespective of whether he has or not a valid reason to discontinue with the employment of the worker, with or without payment of severance allowance at the normal rate – vide section 36(7) of the Act."

27. Obviously, in a case like the present where the notice of dismissal is only a day late, the six-fold penalty can seem harsh and this doubtless explains why the Supreme Court was formerly prepared to adopt an

interpretation of the legislation which mitigated this harshness. But the legislature was entitled not only to lay down a time-limit but - subject, of course, to any relevant provisions in the Constitution - to prescribe the penalty that is to attach to a failure to comply with that time-limit. In this case the legislature chose, as it was entitled to, a single, undifferentiated, sanction. Inevitably, those who just miss the deadline feel that it is unfair that they should be treated no differently from those whose failure is much worse. The particular impact of the sanction in a case like the present cannot, however, justify the courts in ignoring the plain meaning of section 36(7) of the Act.

Disposal

28. For these reasons the appeal must be dismissed.