Coprim Ltee v. Menage (Mauritius) [2008] UKPC 12 (21 February 2008)

Privy Council Appeal No 42 of 2006

Coprim Ltée *Appellant*

v.

Yves Menagé *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 21st February 2008

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Present at the hearing:-

Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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[Delivered by Lord Rodger of Earlsferry]

1. The appellant is Coprim Ltée ("Coprim"), a company which carries on an estate agency business in Port Louis. The respondent is Yves Menagé who was employed by Coprim, as one of a team of six employees ("salesmen") who actually bought and sold the houses, under a contract of employment from September 1990 until the disputed events culminating on 30 June 2001.

2. For some time before March 2001 Coprim had not been trading successfully. Its directors, Mr Gérard Maujean and Mr Denis Maujean, considered that its operations would have to be reorganised. It appears that these matters had been under discussion over a period of time, but action was postponed because Mr Gérard Maujean had to undergo an operation. In any event, by the end of March 2001, the directors had come to the conclusion that any reorganisation would have to involve changes affecting the company's 17 employees. Accordingly, on 31 March 2001, the directors sent a letter to the company's employees, including the respondent, which was headed "Préavis de Licenciement Economique" and was in these terms:

> "Nous avons le regret de vous aviser que nous sommes contraints de donner le préavis légal de licenciement à tout le personnel de la Compagnie, avec effet au 30 juin 2001. Les importantes pertes encourues au cours des 4½ années écoulées nous y obligent.
>
> Il est toutefois entendu que cette période de trois mois nous permettra d'approfondir toutes les possibilités qui sont à notre portée, pour assurer la survie de l'entreprise. Un plan de réorganisation est à l'étude, dont nous communiquons les grandes lignes à tous ceux que cela concerne.
>
> Nous restons à votre disposition pour vous fournir tout complément d'information et pour recevoir toute suggestion constructive.
>
> Recevez, Monsieur, l'assurance de nos sentiments les meilleurs."

On 2 April all the employees, including the respondent, signed a document, acknowledging receipt of the Préavis de Licenciement Economique.

3. As a memorandum dated 30 March made clear, part of the plan of reorganisation which the directors had in mind was for the legal relationship between the company and its six salesmen, including the respondent, to be changed significantly. Whereas they had hitherto been employees, working under a contract of employment, the intention was that, from 1 July 2001, they would act as "agents commerciaux" carrying on "une activité freelance avec la carte Coprim". So, instead of being employees of the company, they would become, in effect, self-employed and would carry out work for the company on a freelance basis, but having the benefit of the Coprim name.

4. Although this was the general plan outlined by the directors, the details had not been finalised by 31 March. The letter sent on that date envisaged that discussions would take place over the period running up to 30 June. That in fact happened, with meetings apparently taking place on five occasions, culminating on 29 June. Different proposals were put forward at different stages. For instance, a letter of 30 May from the directors referred to an exchange of views and described a scheme under which the six agents, such as the respondent, would receive a sum by way of compensation for the loss of their contracts of employment. In addition, they would be paid a basic monthly salary of Rs 5,000, from which a deduction of Rs 3,000 would be made to cover the cost of the office which they would be able to use at Curepipe. The agents' main remuneration would be on the basis of a commission fixed at three times the level of the commission which they had been earning under their existing contract of employment. These terms would run for an initial period of 18 months. By 15 June, the position had changed. In particular, it was now envisaged that the agents, including the respondent, would undergo a course of training by experts brought in from France. Moreover, they were no longer to receive any basic salary but payment by commission on an enhanced scale. For the first three months they would not have to contribute to the cost of the office at Curepipe and, after that, they would have to bear the cost in a proportion that was still to be worked out. These terms were again to continue for 18 months until 31 December 2002. Common to all the proposals was the idea that the agents would have the exclusive right to use the name Coprim and so to benefit from the goodwill associated with it. The directors stressed the advantages that those taking part would derive from the scheme which had been put in place after a lot of effort.

5. On 29 June 2001 the company arranged a meeting with the agents at which, it was envisaged, the necessary formalities for implementing the new arrangements would be carried out. In particular, the employees would receive cheques for the sum due to them by way of compensation – in the case of the respondent, the sum was Rs 238,397. Before the meeting began, however, the respondent handed the receptionist a letter addressed to the directors. In it he said:

> "Je prends acte de votre avis de me licencier pour raisons économiques le 30 juin 2001 qui, par ailleurs, n'est pas conforme à la loi tant dans la forme que dans le fond.
>
> Je prends aussi acte de votre décision unilatérale de répudier mon contrat de travail et de me proposer une nouvelle offre à conditions imposées par vous, tout aussi unilatéralement; et que je trouve totalement inacceptable.

> J'ai décidé de mettre l'affaire entre les mains de mes hommes de loi. Ils vous soumettront une demande dans les jours qui suivent.
>
> Veuillez agréer, Messieurs, l'expression de mes salutations distinguées."

6. Despite having delivered this letter, the respondent actually attended the meeting, in the course of which he was offered a cheque for the compensation and asked to sign a receipt (quittance) in these terms:

> "Je, soussigné, Yves Menagé, reconnais avoir reçu ce jour la somme de Rs 238,397 représentant le montant que j'accepte, suite aux négociations préalables, comme compensation finale pour la fin de mon contrat de travail avec COPRIM Ltée, qui prend effet à partir du 1er juillet 2001.
>
> Je déclare que je n'ai autre réclamation de quelque nature que ce soit envers COPRIM Ltée.
>
> Fait en deux exemplaires, à Port Louis, ce 29 juin 2001."

There were spaces for the document to be signed by two directors and by the respondent. The respondent refused to sign the receipt and did not receive the sum in question. But, towards the end of the meeting, the respondent was offered the opportunity to continue to work under his existing terms and conditions of employment. The respondent left the meeting early, however, without agreeing to any of the proposals and without responding to the offer to continue his employment on the existing terms. After that, he carried out no work for Coprim. At the meeting the five other salesmen accepted the new terms, and signed the receipt for their compensation, discharging any claims against the company.

7. Subsections (1) and (2) of section 39 of the Labour Act 1975 ("the Act") provide that an employer of more than 10 workers who intends to reduce the number of workers either temporarily or permanently "shall give written notice to the Minister, together with a statement of the reasons for the reduction." By section 2 of the Interpretation and General Clauses Act 1974, "Minister" is defined as "the Minister to whom responsibility for the department or subject to which the context refers has been assigned" – in this case, the Minister of Labour, Industrial Relations and Employment. By section 39(3) of the Labour Act, the Minister must then refer the matter to the Termination of Contracts of Service Board for consideration. Section 39(4) provides that, notwithstanding any other provision in the section, no employer is then to

reduce the number of workers in his employment either temporarily or permanently before the lapse of 120 days from the notice, or pending the decision of the Board, whichever is the later.

8. Section 39(5) then provides:

> "Where an employer-
>
> (a) reduces the number of workers in his employment either temporarily or permanently without giving to the Minister the notice required under subsection (2);
>
> (b) acts in breach of subsection (4),
>
> he shall, unless good cause is shown, pay to the worker whose employment is terminated a sum equal to 120 days' remuneration together with a sum equal to six times the amount of severance allowance specified in section 36(3)."

9. It is common ground that Coprim had 17 employees in 2001 and that the company did not give notice to the Minister of an intention to reduce the number of workers in its employment.

10. On 10 July 2001 the respondent commenced proceedings by proecipe in the Industrial Court. He referred to the directors' letter dated 31 March 2001 addressed to him and the other employees and remitted to them on 2 April. He alleged that in the letter Coprim had given notice of redundancy (préavis de licenciement économique). He then averred that the company had failed to comply with the requirement to give notice to the Minister under section 39(2) of the Act and that, by virtue of section 39(5), the company was accordingly bound to pay him 120 days' salary in lieu of notice and a sum equivalent to six times the normal rate of severance allowance.

11. After a hearing, including evidence from the parties, in a judgment dated 31 May 2004, His Honour Mr Razack Hajee Abdoula, the President of the Industrial Court, upheld the respondent's claim and awarded him the sum which he had sought, amounting in total to Rs 1,548,125, with interest at the legal rate on the severance allowance from 1 July 2001 until payment. Coprim appealed to the Supreme Court. On 12 May 2005 the Supreme Court (K P Matadeen Ag SPJ and A F Chui Yew Cheong J) dismissed the appeal. Coprim appealed to the Board.

12. Although Mr de Spéville mentioned a number of minor points (not taken in the Supreme Court) about the calculation of the sum claimed by the respondent, the attractively presented submissions of counsel on both sides concentrated on the effect of the letter of 31 March to the

respondent and other employees. On behalf of Coprim, Mr de Spéville stressed the wider context against which the terms of that letter had to be considered. In March 2001 the need for changes in the way that the company operated had already been under discussion for a period of months. As the terms of the letter made clear, those discussions were going to continue in the months to come. What, precisely, the eventual outcome of those discussions would be could not be predicted at the end of March. So it would be wrong to interpret the letter as giving the respondent a definitive notice of redundancy as from 30 June. Indeed, it was clear that, even as late as the afternoon of 29 June, the company had not finally made up its mind to dispense with the respondent's services under his existing contract conditions, since he was offered the opportunity to continue his employment on his existing terms. Even after the respondent had started the present proceedings, on 12 July 2001 the directors of Coprim had written to him to say that they remained open to a constructive dialogue in everyone's interest. In these circumstances, the company had been under no obligation to give notice to the Minister on 31 March. That obligation would have crystallised, at the very earliest, towards the end of June when it became clear that the company was indeed going to go ahead with the planned changes in their employment with effect from 1 July.

13. By contrast, Mr Moollan argued on behalf of the respondent that the position was absolutely clear from the terms of the letter of 31 March. Its heading, "Préavis de Licenciement Economique", was expressed in precise legal language, as was the rest of the letter. All its terms, from the opening expression of regret onwards, indicated that it was a formal notice that the respondent and his fellow employees were to be dismissed on economic grounds with effect from 30 June. Of course, the letter went on to indicate that discussions would take place about what might happen after 30 June, and, in particular, about the freelance terms upon which the six salesmen might be able to work in future. The fact that the letter referred to those discussions and to the possibility of a different form of employment after the end of June did not detract from the simple fact that the company had given the respondent notice of termination of his contract of employment. It followed that the letter evinced an intention on the part of the company to reduce the number of its employees. Although notice should therefore have been given to the Minister in terms of section 39(2) of the Act, no notice had ever been given. Having regard to section 39(5) of the Act, the respondent was entitled to the sums which he claimed.

14. Counsel further argued that, once the respondent had been given notice of the termination of his employment in the letter of 31 March, he was entitled to proceed on the basis that he was to be dismissed with

effect from that date. That was what he had done when he delivered his letter to the company receptionist before the meeting on 29 June. The offer by the company, in the course of that meeting, to continue the respondent's employment on his pre-existing terms was accordingly legally irrelevant.

15. The arguments for the appellant must be rejected. Their Lordships proceed on the basis that - as counsel for Coprim argued - at the end of March 2001, when they wrote the letter to all the company's employees, the directors had not finally made up their minds as to the precise terms that might be on offer to the salesmen, such as the respondent, with effect from 1 July 2001. Those were for discussion and were, in fact, discussed over the period until the end of June. Nevertheless, all the documentation shows that, from the very outset at the end of March, the core of the scheme was that the existing contracts of employment of the six salesmen were to be terminated and that the company would move to a position where it obtained their services on a freelance basis. In other words, they would change from being full-time employees of the company to being self-employed salesmen, remunerated on the basis of commission. The small salary element envisaged in the first draft scheme was dropped in the course of negotiations. That being so, there is nothing in the surrounding circumstances which negates or qualifies the straightforward language of the letter of 31 March. It was a letter giving notice of the termination of the respondent's employment from 30 June 2001.

16. The fact that the letter was dated 31 March and that the termination of the recipients' employment was to take effect on 30 June is consistent with the requirement of section 31(3(a)) of the Act that a worker, such as the respondent, who had been employed by the company for not less than 3 years, should be given not less than three months' notice of the termination of his employment. The correct, formal, and legalistic language of the letter would also suggest that it had been prepared on legal advice.

17. In these circumstances their Lordships have no hesitation in holding that the letters of 31 March 2001 to the respondent and other employees gave notice of an intention to terminate their employment on 30 June. This was part of a cost-cutting scheme and, even if the company envisaged that it would retain the services of the six members of the sales force on a freelance basis, it was indeed intending to reduce the number of its employees by terminating their contracts of employment with the company. This is confirmed by the terms of the Quittance which the employees had to sign in return for their compensation cheque: the compensation was described as "compensation finale pour la fin de mon contrat de travail avec COPRIM Ltée". Those former employees who

chose to continue under the new arrangement were no longer parties to a contract of employment, a contrat de louage. Instead, the relationship was one of mandate, as set out in the "Mandat d'Agent Immobilier". As article 1 explained, it was governed "par les provisions du Code Civil, relatives aux rapports entre Agent Commercial et Mandant."

18. It follows that, since the number of employees was being reduced, Coprim should have given notice to the Minister in terms of section 39(2) of the Act. It is not necessary for present purposes to decide at what point that notice should have been given, since the simple fact is that Coprim reduced the number of its employees without ever giving notice to the Minister. In terms of section 39(5), therefore, "unless good cause is shown," the respondent is entitled to a sum equal to 120 days' remuneration together with a sum equal to six times the amount of severance allowance.

19. Mr de Spéville submitted, however, that in this case the conduct of the respondent in response to the actions of the company amounted to good cause for holding that he is not entitled to the sum specified in section 39(5). By participating in the discussions with the company about the terms of any employment after 30 June, the respondent had, in effect, led the company to believe that, like the other members of the sales force, he would go ahead under the new terms. But, as became clear only shortly before the final meeting on 29 June, he had not actually intended to do so. Instead, he had apparently taken legal advice on the position if he did not accept the new terms and had then abruptly issued his letter of 29 June. Moreover, while, at the meeting on 29 June, the company had acted very responsibly in offering to continue the respondent's employment on his existing terms, he had not even bothered to reply to that offer. These were circumstances which would justify the court in holding that there was good cause for the company not being required to pay the penal sum in section 39(5).

20. The Board cannot accept this argument.

21. First, the Board recalls that the notification requirement in section 39(2) is no mere formality, but is the key to the system under which the Termination of Contracts of Employment Board considers the proposals of an employer to reduce the size of his workforce. If the Termination Board finds that the reduction is not justified, the employer is then bound to pay a sum equal to 6 times the severance allowance or to reinstate the worker in his former employment: section 39(6). That whole system would be rendered ineffective, if a failure to notify the Minister did not carry with it a sanction that was potentially as onerous for the employer as the possible outcome of any consideration by the Termination Board of

his proposed reduction in his workforce. The exception, "unless good cause is shown," must therefore be interpreted and applied in such a way as not to undermine that important sanction in section 39(5).

22. Secondly, in acting as he did, the respondent was simply using the rights which the law accorded to him as an employee who had been given due notice of his employer's intention to terminate his employment. In particular, although, as the Board discussed in *Mauvilac Industries v Ragoobeer* [2007] UKPC 43, at para 10, dismissal is a unilateral act which does not require any action by the person who is dismissed, nevertheless, once notice has been given, the employer cannot withdraw it without the consent of the employee. The employee can therefore take advantage of any rights accruing to him as a result of the notice of dismissal. In particular, he is quite free to refuse any offer of re-employment made by the employer. See, for instance, G H Camerlynck, *Traité de droit du travail*, vol. 1 *Le contrat de travail* (1968), p 273:

> "Enfin le salarié peut refuser la réintegration offerte par le patron responsable de la rupture et conserver ses prérogatives notamment le bénéfice du préavis."

The author cites the decision of the Chambre Sociale of the Cour de Cassation of 11 March 1954, Bull civ IV 131. In addition, see the decisions, also of the Chambre Sociale, of 17 January 1990, D 1990 Somm 38 - cited with approval by the Supreme Court in *S B Seethiah v Cie de Beau Vallon Ltée* 16 July 1991 - and of 11 December 1991, JCP Ed E 1992 320. The law is stated to the same effect in D Fokkan, *Introduction au droit du travail mauricien*, vol 1, *Les relations individuelles de travail* (1995), p 248. Their Lordships therefore respectfully agree with the Supreme Court when it said that, in the present case, the notice given by the directors in the letter of 31 March 2001 "in any event could not be revoked unilaterally."

23. That being the situation, there is nothing in the conduct of the respondent which is open to substantial criticism. The Board will assume that – as the language of his letter might suggest – the respondent had taken legal advice about his situation before the letter was composed and sent. That was something which anyone faced with the prospect of having his employment terminated might be well advised to do. Moreover, since Coprim had no power to withdraw the notice in its letter of 31 March without the respondent's consent, it was open to him, if he wished, to act in the way which made the most of the legal rights accruing to him as a result of the notice. In particular, he was under no obligation whatever to consider the belated offer from Coprim to continue

his employment on the same conditions as before. In short, the respondent did what he considered most advantageous for himself in the situation which Coprim had created. He cannot be criticised for that. Nor does it make the situation in any way special.

24. The Board can therefore find nothing in the circumstances advanced by Coprim which would constitute good cause for holding that the company should not be held liable to pay the sums specified in section 39(5) of the Act. Any other conclusion would compromise the policy of the legislature, which is designed to provide employees with the safeguard of the scrutiny of the Termination Board whenever an employer plans the kind of reduction in its workforce that Coprim planned and carried through.

25. For these reasons, which are substantially the same as those of the Supreme Court, their Lordships dismiss the appeal with costs.