Trinity Term

[2015] UKPC 27

Privy Council Appeal No 0068 of 2014

JUDGMENT

Boufoy-Bastick (Appellant) vThe University of the West Indies (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lady Hale

Lord Kerr

Lord Wilson

Lord Hughes

Lord Hodge

JUDGMENT GIVEN ON

8 June 2015

Heard on 30 April 2015

Appellant	Respondent
Martin Griffiths QC	Christopher Kelman
Robert-Jan Temmink	
(Instructed by Fox Williams LLP)	(Instructed by Myers Fletcher & Gordon)

LORD WILSON: (gives the opinion of the Board)

1.
Dr Boufoy-Bastick ("Dr Bastick") was a senior lecturer in the Department of Education and Psychology at the University of the West Indies. He attained the age of 65 on 7 June 2007 and so was required to retire on 31 August 2007. Under the university's rules he is entitled to supplementary pension benefits only if, immediately prior to retirement, he had completed ten years of continuous service with the university. Dr Bastick claims an entitlement to those benefits and the university disputes it. The university contends that his service with it began on 6 October 1997 and therefore that, albeit by only 36 days, it fell short of ten years. Dr Bastick has two contentions. The first is that his service began on 11 August 1997 and so continued for more than ten years. The second, upon which, at any rate before the Board, he attaches greater weight, is that, even if his service began only on 6 October

1997, he nevertheless completed ten years of service within the meaning of the rule. Thus, according to this second contention, a year in the context of this rule does not have to amount to 365 days.

2.
On 18 November 2011 Beckford J, sitting in the Supreme Court, upheld Dr Bastick's first contention and declared that he was entitled to the benefits. But on 31 July 2013, by a majority, the Court of Appeal allowed the university's appeal and set aside the declaration made by Beckford J, for reasons which it gave on 4 October 2013. In the majority were Morrison and Brooks JJA. Panton P, President of the Court, dissented: he agreed with Beckford J that Dr Bastick's first contention was valid. Dr Bastick now appeals to the Board.

3.
In April 1997 Dr Bastick was a senior lecturer in education and psychology at the University of the South Pacific in Fiji. By letter dated 27 April 1997 to the University of the West Indies ("the university"), he applied for appointment to the vacant position of senior lecturer in the psychology of education there. He attached a lengthy CV and said that he would be able to take up the appointment on 1 September 1997.

4.
Enclosed with a letter from the university to Dr Bastick dated 4 June 1997, which he received in Fiji on 15 July 1997, was the university's formal offer to him of appointment to the vacant position. In the letter the university wrote:

"The effective date for the commencement of your appointment will be the day you assume duties. If you are unable to determine that date when signing the copy of your offer [to indicate your acceptance], you may leave it blank and send us the necessary information later when travel arrangements have been made."

5.
Dr Bastick did not sign the copy of that offer. Instead he sought variation of its terms. The result was a revised offer which the university set out in 11 numbered paragraphs of a letter dated 30 July 1997 and sent to him in Fiji. Under the words "I accept appointment on the terms set out above", Dr Bastick appended his signature on a copy of the letter dated 30 July; he dated it 11 August 1997; and, under cover of a letter also dated 11 August 1997, he returned it to the university, which received it on 14 August 1997. So the letter dated 30 July 1997 represents the initial contract between the parties.

6.
Of the 11 paragraphs in the letter dated 30 July 1997, six are relevant.

7.
Paragraph 2 provided that "the appointment is for the period [BLANK] to August 31, 2000 in the first instance" but that it was terminable by six months' notice on either side. The university's decision not to insert the starting-date of the period was as foreshadowed in its letter dated 4 June 1997. Nor did Dr Bastick insert a date when he signed and returned a copy of the later letter. In his covering letter dated 11 August 1997 he wrote:

"You will notice that the starting date has been left blank. I will be commencing duties in October and will let you know the exact date as soon as the travel arrangements have been made."

8.

Paragraph 3 provided that the appointment was subject to the university's rules.

9.
Paragraph 5 identified Dr Bastick's salary and stated "your incremental date is September 1 and you will receive an increment in 1998".

10.
Paragraph 6 stated that Dr Bastick would be required to comply with the conditions of the Federated Superannuation Scheme for Universities ("the FSSU"); that he would contribute 5% of his salary to it and that the university would contribute the equivalent of 10% of it.

11.
Paragraph 9 provided that the university would pay for Dr Bastick and his family to make the initial journey from Fiji to Jamaica and that it would make a specified contribution to the cost of transporting their household and personal effects.

12.
Paragraph 10 provided that the university would make similar payments on the termination of Dr Bastick's appointment but that the payments would not be made if Dr Bastick were, by notice, to terminate the appointment before the end of the first year of service; and that the payments would be reduced by a specified proportion if he were to do so before the end of his second year of service and by a lesser specified proportion if he were to do so before the end of his third year of service.

13.
By letter dated 21 August 1997 sent by fax from Fiji, Dr Bastick informed the university that he and his family would leave Fiji on 27 August 1997 for a short holiday and to visit universities in Europe; that they would travel from Paris to Jamaica on 6 October 1997; and that the head of educational studies should be advised that he would be available from that date onwards.

14.
Dr Bastick duly arrived in Jamaica with his family on 6 October 1997. He went straight to the university campus and, apparently on that very day, he began to teach. In prior weeks he had done the work preparatory for the teaching. The university has never suggested that, by virtue of his arrival on 6 October 1997, Dr Bastick failed to conduct all the teaching, to attend all the meetings and to discharge all the other functions, which the contract required of him during the academic year 1997/1998. The university's academic year begins on 1 September and ends on 31 August and the long vacation, which appears to run from 11 June to 31 August, therefore falls within its academic year.

15.
The university paid Dr Bastick's salary with effect from a date in October 1997, probably 6 October but possibly 1 October.

16.
When, following Dr Bastick's retirement in 2007 and the emergence of the present dispute, the university produced the copy of its letter dated 30 July 1997 which he had countersigned and sent back to it, Dr Bastick noted that, at some stage, someone in the university had by hand inserted the date 6 October 1997 into the space which had been left blank. In that regard Dr Bastick does not have cause for complaint: for the terms of his covering letter dated 11 August 1997, set out in para 7

above, had expressly contemplated the insertion into it of the precise date in October 1997 when he would arrive in Jamaica.

17.
In 2000 the university extended Dr Bastick's appointment for a further three years and in 2003 it extended his appointment indefinitely, subject, as before, to his compulsory retirement at age 65 and to six months' notice on either side.

18.
Clauses 23 to 33 of the university's rules, incorporated into its contract with Dr Bastick by paragraph 3 of the letter dated 30 July 1997, are entitled "Superannuation". Clauses 23 to 25 address contributions to the FSSU, which is an international money-purchase pension scheme for university staff. Clauses 26 to 33 are entitled "Alleviation of Superannuation Hardship". Clause 26 introduces it as follows:

"In addition to the FSSU, the university operates a scheme for the alleviation of superannuation hardship. The object of this provision is … to give members of staff an assured income of a certain amount by way of annuity."

Clause 27(a) provides that the scheme applies to members of the permanent academic staff who retire from full-time service with the university at or above the age of 60 and whose FSSU pension, as defined in clause 29, is less than the rate specified in clause 30. Clause 27(b), the centre-piece of this appeal, provides:

"No member of staff should be eligible for benefits under the scheme unless he or she has done ten years continuous service with the University immediately prior to retirement."

19.
Albeit faintly, Dr Bastick constructs an argument upon the provisions in the rules referable to the rate of pension up to which the scheme for alleviation of hardship will raise the pension generated by the FSSU. Clauses 30 and 31 explain that the rate will be two-thirds of final salary but that, for every year of service less than 35 years, it will be reduced by a specified amount which differs according to the member's final status. Clause 32 provides that, for the purpose of clause 30, periods of service of at least six months should be treated as a year but that periods of less than six months should be disregarded. Thus, for example, a member who has served for 34 and a half years will be treated as having served for 35 years and will suffer no reduction from the uplift to two-thirds. Dr Bastick's argument is that clause 32 also governs clause 27(b) and that therefore its effect is that a member who has in 1997-1998 served for a year less only 36 days should be treated as having served for the whole of that year. But clause 32 is expressed to apply "for the purpose of clause 30" and the argument is impossible. If anything, it goes the other way by implying that an entitlement to round a period up to a year needs a special provision.

20.
Three other clauses in the rules are worthy of note.

21.
Clause 1 provides that a member's salary is calculated by reference to the date when he obtained the minimum qualifications for the post and to relevant experience and that "one increment [is] awarded for each year of relevant experience".

22.

Clause 34(a)(i) provides that, subject to the terms of their contract, members of the academic staff must retire on 31 July following the date on which they attain retirement age.

23.
Clause 103(c) provides that the university will normally grant a settling-in loan to new members of staff holding a three-year appointment.

24.
The Board turns to address Dr Bastick's first contention, namely that his service with the university began on 11 August 1997 when, by his letter of acceptance of its offer of appointment, the contract between them was made. With respect to Beckford J and Panton P, with whom the contention found favour, the Board cannot accept it. The contract was not that the appointment should take effect immediately. It was that it should take effect on the date in October 1997 when Dr Bastick would assume his duties. In compiling three successive editions of his CV in years following 1997 Dr Bastick was correct to identify his date of appointment to the university as having been October 1997. He accepts that his salary was not paid in respect of a period prior to October 1997 so the contention requires him to maintain, however improbably, that the first seven weeks of his service with the university were unremunerated. In a passage endorsed by Panton P, Beckford J concluded that, had he accepted a position elsewhere between 11 August 1997 and 6 October 1997, Dr Bastick would have been in breach of contract. If her hypothesis was his acceptance after 11 August 1997 of an offer of employment elsewhere with effect from October 1997, the Board would agree with her. If, however, as seems more likely, her hypothesis was his undertaking temporary work elsewhere between 11 August 1997 and October 1997, the Board would disagree with her. It prefers the construction of the contract favoured by Brooks JA that, in respect of the weeks prior to October 1997, he remained a free agent. Although the contract in the present case was made only weeks before the appointment's agreed starting-date, university posts are no doubt sometimes filled by contracts made months, perhaps even years, before the starting-date for which they provide. Had Dr Bastick's appointment with effect from October 1997 been made pursuant to a contract made, for example, on 11 August 1996 rather than on 11 August 1997, his first contention would have required him to maintain that he had performed 11 years of service with the university rather than ten. This consequence of his contention confirms its invalidity. Dr Bastick's service with the university (and, for that matter, his employment with the university) began on 6 October 1997.

25.
Dr Bastick introduces his second contention with the citation of valuable, if well-known, authority on the need to construe the words of a contract (including of a rule incorporated into a contract) in their context. Thus, in Investors Compensation Scheme Ltd v West Bromwich Building Society[1998] 1 WLR 896, Lord Hoffmann, in articulating the first of his five principles at p 912, defined contractual interpretation as "the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties … at the time of the contract". His fourth principle, set out at p 913, was that the meaning which a document would convey to a reasonable man was not the same as the meaning of its individual words, which was a matter of dictionaries and grammars. In the same case Lord Lloyd of Berwick had suggested at p 902 that a useful starting-point for ascertaining the meaning of the document was for the court to put itself into the position of the ordinary investor to whom, in that case, it was addressed. In Rainy Sky SA v Kookmin Bank[2011] UKSC 50, [2011] 1 WLR 2900, Lord Clarke of Stone-cum-Ebony observed at para 21 that, if there were two possible constructions of a document, the court was entitled to prefer the one which was consistent with common sense and

added at para 25 that, in the event of competing interpretations, the working assumption should be that a fair construction best matched the reasonable expectations of the parties.

26.
The decision of the Court of Appeal in British Airways Pension Trustees Ltd v British Airways PLC [2002] Pens LR 247 concerned the construction of the terms of a pension scheme. Arden LJ accepted at para 26 that no special rules of construction applied to the terms of such a scheme. But she observed at para 28 that a scheme should be construed so as to give a reasonable and practical effect to it; that technicality should be avoided; and that, if the consequence of one of the permissible interpretations was impractical or over-restrictive, another of the interpretations might well be appropriate.

27.
So the Board asks itself: would a reasonable person understand the meaning of the words “ten years continuous service” in clause 27(b) to extend to a lecturer who, by agreement, began service only on 6 October 1997 but performed no fewer duties than if he had begun service on 1 September 1997 and who thereafter served continuously until 31 August 2007? What would a reasonable person in the position of Dr Bastick in August 1997 have understood in that regard? Are there considerations of common sense and fairness which help to answer these questions?

28.
Take a student at the university who arrived on campus on 1 September and left on the first day of the long vacation, which appears to be 11 June. Would he not contend, and would the reasonable onlooker not agree, that he had completed a year of his studies? Or take a prisoner sentenced to ten years. A variety of rules means that the sentence need not mean, and often does not mean, that the prisoner must serve a full ten years. These two preliminary examples indicate only that in particular contexts there can be some flexibility in the concept of a year. So the focus must turn to the particular context of Dr Bastick’s appointment.

29.
The Board is persuaded that in no less than three different respects the university must reasonably be taken to have agreed with Dr Bastick, or otherwise accepted, that, notwithstanding his arrival only in October 1997, Dr Bastick would by 31 August 1998 have completed a year of service for the purposes of their contract – thus including the purposes of clause 27(b).

30.
First, by paragraph 5 of its letter dated 30 July 1997, the university agreed with Dr Bastick that on 1 September 1998 he would, as indeed he did, receive an increment in his salary: see para 9 above. But under clause 1 of the university’s rules an increment is awarded for each year of relevant experience: see para 21 above. It follows that the university and Dr Bastick agreed that by 31 August 1998 Dr Bastick would have completed a year of relevant experience.

31.
Second, by paragraph 10 of the same letter, the university set out the terms on which it would contribute towards Dr Bastick’s relocation expenses in the event of his termination of the appointment before the end of his third year of service: see para 12 above. Since, by paragraph 2, the appointment expired on 31 August 2000, it follows that the university and Dr Bastick agreed that by that date he would, absent earlier termination, have completed three years of service and, more particularly, that by 31 August 1998 he would, absent earlier termination, have completed his first year of service.

32.
Third, by clause 103(c) of its rules, the university will normally make a settling-in loan to new members holding a three-year appointment: see para 23 above. It made a settling-in loan to Dr Bastick. Since his appointment expired on 31 August 2000, it follows that, although well aware that he had taken up his appointment only on 6 October 1997, the university accepted that, for the purposes of the rules, his appointment was for three years. By Mr Kelman, its admirable advocate, the university submits to the Board that, by making a settling-in loan to Dr Bastick, the university had stretched the rule in his favour. The Board concludes, however, that, rather than stretching the rule, the university did no more than properly to apply it.

33.
The Board adds in parenthesis that a further clue to the proper interpretation of the words “years [of] service” in clause 27(b) is found in clause 34(a)(i) of the rules, which provides for retirements to take place on 31 July subject to contrary contractual provision: see para 22 above. Even if, as in Dr Bastick’s case, contracts normally provide for retirement on 31 August, it seems improbable that, in providing for a default date of 31 July, the university considered that a member’s final period of service from 1 September to 31 July would not count as his final year of service for the purposes of clause 27(b).

34.
Thus the humble advice of the Board to Her Majesty is that Dr Bastick’s appeal should be allowed; and that, pursuant to the realistic agreement of both parties before the Board that costs should follow the event, the university should be ordered to pay Dr Bastick’s costs of the appeal to the Board and in the courts below.

35.
In the judgments of the Court of Appeal the stance adopted by the university in relation to Dr Bastick’s claim was subjected to severe criticism, and not merely by Panton P. Thus Brooks JA, while regarding himself constrained to find in its favour, described the university’s stance as disgraceful. It is a paradox that a party should receive less criticism when it has lost than when it has won. But, with respect to the Court of Appeal, the Board does not associate itself with its strictures on the university, which has a duty to administer the scheme for alleviation of superannuation hardship responsibly and therefore to defend the boundaries of entitlement under it. It was at any rate arguable that Dr Bastick did not qualify under the terms of the scheme and, although at its own risk in relation to costs, the university was entitled to present its argument in court. It need have no fear that the Board’s conclusion entitles many members whose service has fallen short of 365 days to be attributed with a year of service for the purposes of clause 27(b). The narrow scope of the Board’s decision reflects the singular facts set out above.