



Easter Term

[2019] UKPC 17

Privy Council Appeal No 0022 of 2016

JUDGMENT

**Gunesh (Appellant) v The National Transport Corporation and another (Respondents)
(Mauritius)**

From the Supreme Court of Mauritius

before

Lord Kerr

Lady Arden

Lord Kitchin

JUDGMENT GIVEN ON

13 May 2019

Heard on 27 February 2019

Appellant

Edward Risso-Gill

Simon Livingstone

(Instructed by Janes Solicitors)

Respondent

Gilbert Ithier SC

(Instructed by Seebaluck Chambers)

LADY ARDEN:

Matters for determination on this appeal

1.

Mr Rama Gunesh brings this appeal, with leave of the Supreme Court (Court of Civil Appeal) of Mauritius (hereafter the Court of Civil Appeal), against the dismissal of his claim against the respondent (“NTC”) for damages for wrongful termination of his long-standing employment as head of stores. This followed a hearing by a disciplinary committee (“the committee”). The Supreme Court (Caunhye J) dismissed his claim and the Court of Civil Appeal (Chief Justice Matadeen and Devat J) dismissed his appeal. Mr Gunesh challenges the trial judge’s findings of fact and additionally contends that the trial judge imposed on him the employer’s burden of proving that his dismissal was justified. He also contends that the judge was wrong not to admit in evidence transcripts of the evidence given to the committee. The Board has considered the evidence de bene esse. Even with the benefit of this additional evidence and argument, however, the Board considers that the appeal must be dismissed.

Background facts

2.

NTC ran a fleet of Nissan SP 215 buses for public transport from several depots, including one at Souillac. Mr Gunesh's duties included management of the stores of NTC and ensuring the maintenance of proper internal control with regard to stock. He also had to liaise with the mechanical engineers and establish procurement programmes in line with NTC's policies and stock management principles. There were four charges against him. The most serious charge related to his authorisation of a purchase of nine main shafts for the buses in February 2004, and this appeal relates to that charge.

3.

The charge against Mr Gunesh was that he had not been entitled to follow NTC's Immediate Quotation procedure ("IQ procedure") when making a purchase of nine main shafts at a price of Rs 45,000 per unit which was over 100% more (Rs 19,500 per unit) than NTC had previously approved for this item. Mr Gunesh contended that the head of engineering, Mr Rajcoomar, had authorised him to make this purchase but NTC (among other matters) denied this. Indeed Mr Rajcoomar, who did not give evidence to the committee due to absence abroad, did not know that Mr Gunesh had used the IQ procedure to order nine main shafts in February 2004. On this matter, the judge rejected Mr Gunesh's case on the facts and concluded that:

"It is abundantly plain therefore that the evidence overwhelmingly established the charges of gross misconduct in respect of the plaintiff which would justify the termination of his employment by Defendant No 1. Furthermore, as has been amply established by the testimony of witnesses Mallam Hassam and Modee, the disciplinary committee was at the material time of the disciplinary hearing in presence [possession] of all the material facts and circumstances concerning the acts and doings of the plaintiff in order to find the charge of gross misconduct proved against the plaintiff."

4.

Mr Gunesh's case was that the relevant purchase by the IQ procedure was properly authorised. Mr Rajcoomar, head of the engineering department, had orally told him to procure these main shafts because a number of buses operating from the Souillac depot had noisy gearboxes which might shortly require replacement. Mr Gunesh made a note of this conversation on a document known at trial as Document P. He had no written instruction from Mr Rajcoomar. Mr Gunesh went ahead and initiated the system for acquiring goods urgently. This involved internal approval but Mr Gunesh did not disclose to the relevant authority that an order ("the Cassamally live tender") had already been placed with another supplier, Cassamally, which had failed to deliver in accordance with the agreed timetable. He did not know about the Cassamally live tender when he got internal approval but he was aware that had happened before he placed the order. NTC contended that he should have disclosed the Cassamally live tender to the committee which gave internal approval.

5.

In fact, NTC suffered no financial loss through Mr Gunesh's actions because Mr Gunesh arranged for the nine main shafts, which the judge held NTC found to be unsuitable, to be returned to the suppliers and for their cost to be debited to the suppliers' accounts with NTC.

6.

Mr Gunesh has filed several grounds of appeal. He no longer relies on any violation of his constitutional rights. The Board has grouped his remaining grounds into three grounds, as counsel did in argument.

Mr Gunesh's first ground: was there a reversal of the burden of proof?

7.

Mr Edward Risso-Gill, appearing with Mr Simon Livingstone, for Mr Gunesh submits that, once Mr Gunesh had shown that he had been dismissed summarily, the onus shifted to the employer to show that summary termination was justified. He cites *Pamplemousses/Rivière du Rempart District Council v Hurbungs* 2010 SCJ 382, and article 1315 of the Civil Code, as authority for the proposition that the employer must show that any summary dismissal was justified. Article 1315 of the Civil Code was not cited below, but, as it is a point of law and there was no objection to its introduction, the Board allows it to be raised.

8.

Mr Risso-Gill further submits that the judge had treated NTC's burden as limited to raising a *prima facie* case of justification. The Court of Civil Appeal had upheld the judge's decision, holding that NTC's onus was an evidential one, by which, on his submission, they meant simply the burden of raising the issue.

9.

Mr Gilbert Ithier SC, for NTC, submits that under Mauritian law, once the employee establishes a breach of contract, the evidential burden switches to the employer and the employer has to prove the charges against the employee. In this case they were proved. It was then for the judge, on the whole of the evidence, to decide whether the employee had satisfied the legal burden of proof. The evidential burden had shifted in the course of trial. Mr Ithier submits that the judge was clearly aware of this when he held that the evidence "overwhelmingly established" the charges of gross misconduct against Mr Gunesh. This was in line with *Phipson on Evidence*, 19th ed (2018), para 6-06, which states that:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. ... This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting." (footnotes omitted)

10.

The Board agrees with Mr Ithier and with the Court of Civil Appeal. The judge's conclusion (set out at para 3 above) constitutes his reasoning on what might be called the ultimate issue in this case. In this case, the ultimate issue was whether Mr Gunesh's dismissal was wrongful. Likewise the extract from *Phipson* is also dealing with the ultimate issue. When the Court of Appeal referred to the evidential burden on the employer, they were using that term as referring to the burden which the law places on the defendant to prove a particular fact in the case (justification), on the footing that, as *Phipson* indicates, as a matter of law there is only one issue to be proved. The burden of proving that issue is the legal burden of proof and the burden of proving any other matter is termed evidential. It is inaccurate to speak of a burden of proof as "shifting". There are two possible burdens - one on the employer to prove particular facts said to establish justification; the other on the employee to discharge the ultimate burden. These arise according to the cases which the respective parties make. They are separate burdens arising in different contexts. It is not a case of a single burden moving from one party to the other. Where, as here, the employer raises a particular defence, it must adduce evidence in support of that defence; hence the use of the term, "evidential burden". This is the burden

which the lower courts recognised fell on NTC in this case. The Board sees no basis for concluding that the Court of Civil Appeal or the judge merely imposed on NTC the burden of raising the issue of justification.

Mr Gunesh's second ground: was the judge wrong to refuse to admit in evidence transcripts of the disciplinary hearing and Document H?

11.

Mr Risso-Gill argues that the trial judge should have admitted in evidence the transcripts of the hearing before the committee, and that they would have shown that Mr Rajcoomar had given evidence which supported Mr Gunesh's case that Mr Rajcoomar had authorised him to make a speedy purchase of main shafts. Under the Northern Transport principle (after *Northern Transport Co Ltd v Radhakisson* [1975] MR 228; 1975 SCJ 223), an employer cannot in seeking to justify a summary termination of a person's employment contract, rely on grounds that were not relied on at the disciplinary hearing. In this case, there had been an impermissible change of case. If the judge had had the transcripts of the evidence given to the committee, he would have seen that Mr Gunesh had been consistent in his evidence throughout and if he had done that, his assessment of Mr Gunesh's evidence overall might have been different.

12.

Mr Ithier agrees that under Mauritian law the trial judge had to decide not whether NTC's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (compare *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17), but whether NTC were in fact justified in dismissing him. The transcripts of the committee hearing were only admissible in evidence if the employer had changed his case from that relied on before the committee. The judge asked whether counsel could point to any such inconsistency in NTC's case, but counsel did not take up that opportunity.

13.

The Board agrees with Mr Ithier. The judge made it clear at the trial that in his judgment there was no change of case, and Mr Gunesh's counsel did not gainsay the judge at trial on this point. Moreover, in the Board's judgment, no difference of case is perceptible. While NTC called two new witnesses at trial, on proper analysis this step did not alter the nature of its case. The first new witness (Mr Mallam Hassam) gave evidence on a different point. Mr Bhageerutti, deputy head of stores and the second new witness, confirmed the evidence of Mr Modee, NTC's internal auditor. Like Mr Modee, he said that the IQ procedure was only used for buses which had broken down, and that the authorisation of a purchase was not in the discretion of Mr Gunesh.

14.

The judge was therefore correct not to admit transcripts in evidence. Mr Risso-Gill also seeks to add to the record available to the Board Document H, a small bundle of documents which includes Document P. The trial judge had these documents, and so there is no reason why they should not be used on this appeal.

Mr Gunesh's third ground: did the trial judge make perverse findings of fact?

15.

As Mr Risso-Gill accepted, it is well established that there must in general be a "violation of some principle of law or procedure [such that] if that proposition be corrected the finding cannot stand." (*Devi v Roy* [1946] AC 508, proposition 4). In the Board's judgment, contrary to the

submission of Mr Risso-Gill, this proposition must apply to an assessment of primary facts and the drawing of inferences, such as findings as to whether a person had authority or was wrongly dismissed.

16.

Mr Gunesh accepted that he only had authority to deploy the IQ procedure if the head of engineering approved its use. His case was that that approval was given by Mr Rajcoomar and that it could be given even if the relevant bus was not off the road for repair, ie was not non-operational, in anticipation of the disruption that its becoming non-operational would cause.

17.

On this part of Mr Gunesh's case, Mr Risso-Gill principally submits that Mr Rajcoomar had agreed in his evidence before the committee that he had in fact authorised Mr Gunesh to make an immediate purchase of main shafts. Mr Risso-Gill submits that NTC had no answer to Mr Rajcoomar's evidence on this point and that it was in effect perverse for the judge to hold that there was no authority. He further submits that, in considering the judge's findings, the Board should take account of the 18-month delay in the delivery of the judge's judgment.

18.

The Board notes, however, when Mr Rajcoomar gave authority for another urgent purchase on 6 January 2004, he wrote on the list of required spares (which the judge called Document P) "S/Supt [Stores Superintendant] for needful" and initialled it. That list did not include any main shafts. Mr Gunesh relied on a further list of required spares, including two main shafts, on the reverse of the list initialled by Mr Rajcoomar. This list was endorsed with notes by himself including a note: "To ensure the availability of all the important items," after stating that eight buses at the Souillac depot had noisy gear boxes. Mr Rajcoomar had not initialled this list. He did not dispute that he had told Mr Gunesh to take action with regard to the noisy gear boxes in question to avoid buses having to be taken off the road, but he did not know that Mr Gunesh had subsequently used the IQ procedure.

19.

Moreover, NTC's bin records showed that main shafts were "slow-moving" items, ie that the engineering department used them only once in the preceding two years. One was needed in June 2004, but the engineering department used one it already had in stock.

20.

In addition, Mr Gunesh criticises as unfounded the judge's finding that Mr Gunesh, contrary to his own evidence, knew about the Cassamally live tender when internal approval was obtained. Yet Mr Gunesh in any event accepted that someone had informed him of it before he placed the order. He sought to explain his failure to take any step to have the internal approval confirmed by saying that Mr Ramjattton, a member of the two-person internal committee, already knew about the Cassamally live tender. That is an explanation which the committee and the judge might understandably have regarded as unsatisfactory.

21.

In those circumstances, in the opinion of the Board, Mr Gunesh's principal challenge to the judge's findings of fact does not meet the test for challenging concurrent factual findings on an appeal to it. The Board does not consider that the delay in delivering judgment is relevant in this case and in any event, the point was not taken in the Court of Civil Appeal so that the Board does not have their views on this point.

22.

Mr Risso-Gill relies on other matters in his skeleton argument. But given that his principal point fails the Board does not consider that those points, either singly or cumulatively can meet the stringent conditions for a successful appeal to the Board where the local courts have made concurrent findings of fact.

23.

In the circumstances the Board dismisses the appeal and refuses permission for the additional evidence to be adduced.