Michaelmas Term

[2019] UKPC 42

Privy Council Appeal No 0052 of 2018

JUDGMENT

Mauritius Shipping Corporation Ltd (Appellant) v Employment Relations Tribunal and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr

Lord Hodge

Lady Black

Lord Briggs

Lord Kitchin

JUDGMENT GIVEN ON

21 November 2019

Heard on 15 October 2019

Appellant	Respondent
James Guthrie QC	Hafsah Masood
(Instructed by AxiomStone Solicitors)	(Instructed by Royds Withy King LLP (London))

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LADY BLACK:

1.
The appellant is a private limited company, incorporated in 1986, and owned by the Government of Mauritius. Between November 2015 and January 2016, it made redundant a number of employees, including the 11 co-respondents in these proceedings. This appeal arises from the litigation that followed upon those redundancies.

2.
Upon being informed of the decision to make them redundant, the co-respondents registered complaints with the Permanent Secretary, as they were entitled to do under section 39B of the Employment Rights Act 2008 ("the Act"), which makes provision concerning the reduction, by an employer, of the number of workers in his employment. The Permanent Secretary referred the matter to the Employment Promotion and Protection Division of the Employment Relations Tribunal ("the Tribunal"), the first respondent in these proceedings.

3.
The Tribunal found that the appellant's reduction of its workforce, and in particular the termination of the employment of the co-respondents, was unjustified and, on 9 May 2016, ordered the appellant to pay severance allowance to the co-respondents.

4.
The appellant sought to challenge the Tribunal's decision by judicial review, lodging its application for leave to apply for judicial review on 20 July 2016. The Supreme Court heard the application in November 2016 and, by a judgment dated 21 August 2017, refused leave. It was not persuaded that the grounds of challenge that the appellant wished to advance were arguable. But it also refused leave on the quite separate ground that the application had not been made sufficiently promptly, with no reasons for this lack of expedition having been advanced.

5.
The appellant appeals as of right to the Board, challenging both the Supreme Court's decision that it had failed to launch proceedings sufficiently promptly ("the promptness issue") and its decision that the proposed judicial review case was not arguable.

6.
Having had the advantage of reading the parties' written cases in advance of the hearing, the Board determined that it would be appropriate to commence with oral argument from all sides on the promptness issue. Following oral argument on this issue, the Board deliberated and concluded that the Supreme Court had been entitled to hold that the appellant had failed to launch its proposed application for judicial review sufficiently promptly, and therefore to refuse to give leave for it to proceed. This meant that the appeal to the Board must inevitably be dismissed, rendering it unnecessary to rule upon the appellant's challenge to the Supreme Court's determination that the proposed judicial review was not arguable. The parties were informed immediately of the Board's decision, and short oral reasons were given for it. The purpose of this judgment is to amplify those short reasons.

The requirement of promptness

7.
An application for judicial review must be made promptly, and in any event within three months from the date when the grounds for the application first arose. The Supreme Court cited, in this regard, the cases of Karamuth v Universal Hotels Ltd [1992] SCJ 420, Bagha v The Public Service Commission [1996] SCJ 146 and Securiclean (Mauritius) Ltd v The Ministry of Local Government & Outer Islands [2015] SCJ 327.

8.
It is important to bear in mind that an applicant cannot rely upon having three months in which to launch a judicial review application. The primary requirement is that the application be made promptly. The requirement that it be made in any event within three months is a "longstop". It is well established, and the appellant accepts, that, depending on the circumstances of the case, an application made within three months may not qualify as having been made promptly, in which case, leave to apply for judicial review may be refused.

The Supreme Court's reasoning

9.
In the present case, the Supreme Court considered that it was not sufficient that the application had been made within three months. In its view, "the present case is of the type requiring celerity from the applicant", and it had not applied promptly enough. It based this on a number of considerations. They included that:

i)
monetary compensation for redundancy was involved;

ii)
delay was likely to cause substantial hardship or substantial prejudice to the co-respondents;

iii)
the legislation (section 39B(8)(a) of Part VIIIA of the Act) imposed a strict time limit on the Tribunal, requiring it to hear the case and give its award within 30 days of the matter being referred to it by the Permanent Secretary, albeit with an extension for a further 30 days being possible "in exceptional circumstances" (section 39B(8)(b));

iv)
no reasons had been advanced for failing to act expeditiously.

Appellant's submissions on the promptness issue

10.
The appellant submits that the Supreme Court's finding that its application was not made promptly was unjustified and wrong. It was not reasonable, the appellant says, for the Supreme Court to take into account that financial hardship was likely to be caused to the co-respondents, as the same might be said of many cases involving a money claim. It submits that the decision of the Tribunal was not straightforward, and the delay in challenging it was not outside the ordinary scheme of things. Complaint is made that the court failed to take account of the difficulties encountered by the appellant in obtaining the record of the Tribunal proceedings, reference being made to two letters written by

the appellant's legal representative (19 May 2016 and 6 June 2016) seeking a complete copy of the record from the Tribunal.

11.
The appellant also seeks to impugn the Supreme Court's decision by reference to the fact that the application was not heard before that court until 24 November 2016 and judgment was not given until 21 August 2017.

Discussion

12.
There is a high hurdle for the appellant to surmount in seeking to persuade the Board to reverse the Supreme Court's decision that leave to apply for judicial review should be refused because the application had not been made promptly. The Board would have to be satisfied that the Supreme Court's decision was one which was not open to it. It is not so satisfied.

13.
Dealing first with the question of the time that elapsed between the launch of the application for judicial review and the Supreme Court's own decision, in the Board's view, this cannot assist the appellant. It is simply not relevant to the appellant's quite separate obligation to act promptly in launching the application in the first place.

14.
Turning next to the considerations upon which the Supreme Court relied in concluding that the appellant had not acted sufficiently promptly, it was inevitable that the appellant would face difficulty in persuading the Board to interfere with the conclusions of a local court with superior knowledge of the workings of the employment legislation applicable in this case, of the litigation process in Mauritius, and of the degree of promptness that could properly be expected of a litigant seeking to bring a judicial review challenge in circumstances such as the present. Having scrutinised the Supreme Court's decision with the assistance of Mr Guthrie QC for the appellant, the Board was not persuaded that the considerations it took into account were anything other than relevant and capable of bearing the weight that was placed upon them.

15.
A central factor, as the Supreme Court recognised, was that the litigation concerned the termination of the co-respondents' employment. Loss of one's employment can give rise to financial hardship of a particularly fundamental nature. In imposing a short time limit upon the Tribunal's resolution of complaints relating to redundancy, Part VIIIA of the Act recognises and underlines the importance of expedition in such cases. The awards of monetary compensation made to the co-respondents by the Tribunal remained unsatisfied pending the judicial review proceedings, and the Board cannot accept the appellant's submission that it was not proper to take into account the financial hardship that was likely to be caused to these co-respondents by delay.

16.
The Board is similarly unpersuaded that there is any material flaw in the Supreme Court's approach to the difficulties which the appellant said had delayed the commencement of the judicial review proceedings, namely that the Tribunal's decision was not straightforward and that there had been problems in obtaining the record. Even though it was clear that the co-respondents were taking a point about delay, the appellant had not sought to file, with the Supreme Court, an affidavit explaining it, and exhibiting the letters written to the Tribunal. However, the Board granted the appellant the

indulgence of putting that procedural omission to one side, in order to explore the relevance of the complete copy of the record, and to consider whether its late arrival might, in fact, have prejudiced the appellant's ability to launch judicial review proceedings. Having looked into those matters, the Board was clear that the absence of a copy of the record should have presented no obstacle to the commencement of the application for leave to apply for judicial review. The Tribunal's award came complete with reasons, dated 9 May 2016. Given that the proposed application to the Supreme Court was by way of judicial review, concerned with the legality of the Tribunal's determination, and not by way of an appeal on the merits, the Board can see no reason why any further documentation from the Tribunal was required to equip the appellant to identify the potential challenges and commence a prompt judicial review application. For completeness, the Board observes that the letter of 6 June 2016 acknowledges that minutes of the proceedings had been sent by email to the appellant's attorney, although it does not base its decision on the availability of the minutes, recognising that there are mixed recollections now about whether they were actually received by email, and noting also that the minutes appear not to be the same as the complete record.

17.
In summary, the Board finds no basis to impugn the decision of the Supreme Court to refuse to give leave for the judicial review application because it failed the requirement of promptness in Order 53 Rule 4. It necessarily follows that the appeal must be dismissed.