[2012] UKPC 23
Privy Council Appeal No 0009 of 2011

JUDGMENT

Smegh (Ile Maurice) Ltée (Appellant) *v* Dharmendra Persad (Respondent)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY LORD DYSON ON

28 May 2012

Heard on 29 March 2012

Appellant	*Respondent*
Anil Gayan SC Ms Jane Jouanis (Instructed by M. Mardemootoo)	Sunil Bheero

LORD DYSON:

1. The appellant ("Smegh") runs La Plantation Hotel in Mauritius. The respondent ("Mr Persad") was employed by Smegh as its financial controller at a monthly salary of Rs 47,125 from 25 October 1988 until he was summarily dismissed on 25 March 2005. He instituted proceedings in the Industrial Court of Mauritius on 31 March 2005 claiming 3 months' wages in lieu of notice and severance allowance for unjustified dismissal. On 13 October 2008, Mr Magistrate B Marie Joseph (Vice-President of the Court) found in his favour and awarded him the sum that he claimed with interest at 12% per annum on the severance allowance plus costs. Smegh's appeal was dismissed with costs on 22 June 2010 by the Supreme Court (A.F. Chui Yew Cheong and G. Angoh).

2. The relevant statutory provisions are to be found in the (now repealed) Labour Act 1975 ("the 1975 Act"). A contract of employment may be terminated on notice (section 31) or summarily for misconduct (section 32(1)(b)). The worker must be afforded an opportunity to answer a charge of misconduct (section 32(2)(a)) and a dismissal must be effected within 7 days of the completion of a hearing held for that purpose (section 32(1)(b)(ii)(A)). A worker whose employment has been unjustifiably terminated may refer the matter to an officer of the Ministry of Labour and Industrial Relations; and where such a reference does not result in the matter being satisfactorily settled, the worker may lodge a complaint with the Industrial Court (section 32(3)(b)). A worker, who has been in continuous employment for 12 months or more and whose employment has been terminated, is entitled to a severance allowance (section 34) unless (section 35(1)) he is dismissed for misconduct in accordance with section 32(1)(b). The amount of severance allowance payable to the worker shall be half a month's remuneration for every 12 months where the worker is remunerated at intervals of not less than one month (section 36(3)). Section 36(7) provides that "The Court shall, where it finds that the termination of the employment of a worker.....was unjustified, order that the worker be paid a sum equal to 6 times the amount of severance allowance specified in subsection (3)".

3. The dismissal of Mr Persad was based on 3 charges of misconduct. The first charge alleged:

> "Whilst being the Financial Controller at La Plantation Hotel, on about 25th September 2004, you took it upon yourself without the authority of the General Manage o[r] the Resident Manager to give instructions to Reservations Department not to present any bills to guests Barone Vincenzo upon departure as allegedly all the expenses for their stay in

the hotel for period 25.09.04 to 07.10.04 would be settled by one Mr Vincente Panasiti from Switzerland.

On or about 09.10.04, you caused to be sent the invoices to Mr Vincente PANASITI in Switzerland and gave the assurance to management that payment would be effected at latest 31st October 2004, and that you would personally in case of default guarantee payment.

As at 06.12.04, no such payment has been effected and this is to the prejudice of La Plantation Hotel."

Mr and Mrs Barone were guests of the hotel. Mr Panasiti is Mrs Barone's father. The bill was eventually settled on 30 December 2004.

4. The second charge alleged:

"Whilst being the Financial Controller at La Plantation Hotel, in breach of your duties, you failed to ensure that contracts were duly established for exhibitors at La Plantation Hotel for the period September to November 2004 with the result that monthly fees could not be recovered from some exhibitors to the prejudice of the hotel namely:-

Exhibitors	Sept 04	Oct 04	Nov 04
B N Baichoo	Nil	Nil	Nil
Cie Historic Marine	Nil	Nil	Nil
Cie Paradise Art	Nil	Nil	Nil
Mr Ronney	Nil	Nil	Nil
Mr Teeluckdharry	Nil	Nil	Nil

5. The third charge alleged:

"Whilst being the Financial Controller at La Plantation Hotel, you failed to ensure that all creditors of the hotel were paid evenly with the result that some were regularly paid whilst others were not so paid and this to the detriment of the suppliers causing damage to the reputation of the hotel."

6. These charges were first notified to Mr Persad by Smegh's letter dated 15 December 2004 which, after setting out the charges in full, stated: "Management takes a serious view of the above charges, any of which if established will amount to gross misconduct capable of justifying dismissal".

7. Mr Persad had been suspended from employment on 1 December 2004. Smegh set up a disciplinary committee meeting on 22 March 2005 to consider the three charges and to give him an opportunity to answer them as required by section 32(2)(a) of the 1975 Act. Both Mr Persad and Smegh were represented by counsel. The committee comprised one person, Mr Achanah Chiniah. Evidence was given by Mr Persad and several witnesses on behalf of Smegh. It is not clear whether the General Manager (Mr Clerbout) gave evidence, but he was certainly present. The report of the hearing does not purport to be a complete record of what was said, but it is the only evidence of what occurred. It states that Mr Clerbout was "at the disposal of the committee".

The first charge

8. According to the report of the hearing, the evidence was mainly directed to the complaint that Mr Persad was responsible for the delay in securing payment of the hotel bill and that he had failed to keep his promise to settle the bill himself. The report notes that Mr Clerbout "was very upset about the failure of Mr Persad to keep his promise to settle the outstanding bill on behalf of the Vincenzo family". There is no reference to a complaint that Mr Persad had not been authorised to instruct the Reservations Department to look to Mr Panasiti to settle the Barones' bill. Counsel for Mr Persad is recorded as having said that, as financial controller, Mr Persad had "enough authority to be lenient towards guests. But in this particular case he kept the GM aware of the progress of the case". The committee found that, in failing to have the bill settled as promised to the General Manager, Mr Persad cast a doubt in the mind of Management as to his being a reliable member of the senior staff; his statement that he kept the General Manager aware of the progress in the settlement of the account "was at no time indicated to the Committee by the [General Manager]"; and with modern means of communication, "it should not have been so difficult to get payment effected". The committee's "recommendation" was that Mr Persad was "blameworthy as he was unable to convince the Committee that he did everything within his possibilities to ensure prompt payment by/or on behalf of guests Vincenzo".

9. At the hearing before the Industrial Court, Mr Persad admitted having given instructions to the Reservations Department not to claim payment from Mr Barone on the basis that the bill would be settled by Mr Panasiti. He said that he had been authorised to do so by the General Manager. After the guests had departed from the hotel, the invoice was mistakenly sent to Mr Barone instead of Mr Panasiti. It was returned by Mr Barone and sent to Mr Panasiti who settled it. He also said that, as

financial controller, he enjoyed certain privileges ("cession") which he could have used to cover the cost of the Barones' stay if the bill had not been settled. He was extensively cross-examined.

10. The Court said (correctly) that the burden was on Smegh to prove that (i) Mr Persad had given instructions not to present a bill to the Barones without the authority of the General Manager; (ii) he had said that the bill would be settled by Mr Panasiti; (iii) on 9 October 2004, he forwarded the bill to Mr Panasiti and gave an assurance that the bill would be settled by 31 October, failing which he would settle it himself; and (iv) by 6 December, the bill had not been settled. Mr Persad said that he been authorised by the General Manager to present the bill to Mr Panasiti rather than the Barones. Subject to that, he admitted facts (i) to (iv). The General Manager did not give evidence at the trial. Instead, Smegh called two more junior employees neither of whom testified that Mr Persad had no authorisation from the General Manager.

11. Mr Persad called two witnesses whom he had not called at the committee meeting. These were Mr Cooroopdass and Mr Rajkumarsingh. Mr Cooroopdass had joined the Appavou Group (of which Smegh forms part) in 1989. He was Chief Executive Director of the Group at the time of the dismissal of Mr Persad. He retired in February 2005 after a disagreement with the Group. Mr Rajkumarsingh joined the Appavou Group in March 1999. At the time of his resignation in January 2005, he was Group Internal Auditor, Financial Director and Assistant Managing Director of the Group. Mr Cooroopdass was unable to give any evidence directly bearing on the first charge, although he said that he found the reasons for the suspension of Mr Persad to be somewhat vague and he thought that there appeared to be "some sort of a building up of a case". Mr Rajkumarsingh said that he personally enquired into the issue which had led to the disciplinary proceedings. He found that the hotel records showed (correctly) that the Barones were included in the list of debtors. Everything was in order. He also noted that the reason for the delay in payment was that the bill had not included details of the hotel's bank account. At that time, it was the accountant who was responsible for following up debtors. The Magistrate was clearly impressed with Mr Persad as a witness. The judgment includes the following:

> "On the other hand, the Plaintiff maintained that he discussed with the General Manager and sought his green light before giving the instructions he gave, which version the Defendant failed to satisfactorily rebut. He also gave a cogent and plausible account of the circumstances in which the guests were introduced to him and he accepted to facilitate the special treatment they were given. He did not rest content with his sole word that everything was in order in as much as the guests were duly included in the debtors' list, there were plausible explanations as to the delay in the settlement of the bill and that the bill was duly paid subsequently. As a matter of fact, he called an appropriate witness in the person Mr Rajkumarsingh who confirmed all this. This witness

> impressed me as a witness of truth and his evidence stands both unshaken and unrebutted. Of note also, the Plaintiff readily accepted to sort out the matter and even offered to settle the debt personally. This is indeed a conduct that tends to show his good faith in the matter.
>
> In the light of the observations set out above, I consider that it would be unreasonable to hold that there had been some sort of shortcoming on the part of the Plaintiff in relation to the problem subject matter of the first charge amounting to gross misconduct. In fact, I would even go to the extent of saying that this charge was not justifiable."

12. The Court of Appeal said that the material issue was whether Mr Persad acted without the authorisation of the General Manager. After a brief review of some of the Magistrate's findings, they said that they would not interfere with his appreciation of the evidence and his findings because he had not misdirected himself or made findings which were manifestly wrong, perverse or unwarranted.

The second charge

13. Mr Persad is the only witness whose evidence on this charge is recorded in the report of the committee meeting. He said that it was not his responsibility to deal with the contracts of exhibitors at the hotel. That was the responsibility of the General Manager and the Resident Manager. The Committee found that it was one of Mr Persad's main duties to leave no stone unturned to obtain revenue from all sources, including from the exhibitors; he should have ensured that the contracts were finalised to enable prompt payment; the responsibility was his and not that of Miss Hema Persad, who was only one of his assistants; and being Head of the Accounts Department, he had to devise ways and means to follow closely the operation of the department, especially where revenue was concerned.

14. Before the Industrial Court, Mr Persad said that it was the practice in all the hotels in the Appavou Group for the General Manager or the Deputy General Managers to draft contracts with exhibitors. As Financial Controller, he was only concerned with the execution of the contracts. In the case of the particular exhibitors in question, there were no contracts. His evidence was supported in terms by Mr Cooroopdass. He said that the Financial Controller would normally only become aware of the existence of a contract on being informed by the General Manager. Mr Rajkumarsingh confirmed that contracts with exhibitors were the responsibility of the Resident Manager and the Entertainment Manager. The follow-up of these contracts was the responsibility of the Accountant. Mr Ramen gave evidence on behalf of Smegh. As a Human Resource Manager, he said that he was familiar with the organisation of all the hotels in the Group. He said that in all the hotels the

responsibility for the drafting and signing of contracts with exhibitors lay with the Financial Controller. But he admitted in cross-examination that he had never worked at the La Plantation Hotel and when it was put to him that Mr Rajkumarsingh had said that contracts with exhibitors were the responsibility of the Resident Manager, he said that he did not have anything to say about that.

15. The Magistrate preferred the evidence of Mr Persad's witnesses to that of Mr Ramen. He held that Smegh had failed to substantiate the second charge and found that there was no proof of shortcomings amounting to gross misconduct as alleged.

16. The Court of Appeal dismissed the appeal in relation to the second charge for the same reasons as it dismissed the appeal in relation to the first charge.

The third charge

17. Mr Persad told the committee that, as there was a cash flow problem, payment of debts had to be made on an agreed priority basis. The committee said that it was "in doubt whether payment was effected justifiably so that all the suppliers were receiving a fair consideration". It "recommended" that Mr Persad had caused prejudice to the image of the hotel by discriminating among the suppliers in the payment of their bills.

18. Before the Magistrate, Smegh did not call any evidence to substantiate the third charge. Mr Persad said that the selective payment of particular creditors could not be avoided in view of the hotel's cash flow difficulties and that the decisions that were made were with the agreement of the General Manager. This evidence was corroborated by Mr Cooroopdass. The Magistrate accepted this evidence and made the same findings in relation to the third charge as he had done in relation to the second charge. Likewise, the Court of Appeal treated the appeal in relation to the third charge in the same way as in the appeal relation to the other charges.

Discussion

19. It is accepted on behalf of Smegh that the Court of Appeal applied the correct test. In other words, the appeal could only succeed if the Industrial Court erred in principle by asking itself the wrong question or making findings which were perverse or manifestly wrong. In *G. Planteau De Maroussem v Dupou* [2009] SCJ 287, the Supreme Court of Mauritius held that the question whether an employee has been unjustifiably dismissed was a matter for the court and not the employer's disciplinary committee. The court said:

> "The aim of a disciplinary committee, as we have said, is merely to afford the employee an opportunity to give his version of the facts before a decision relating to his future employment is reached by his employer. It is no substitute for a court of law, nor has it got its attributes. Furthermore, the employer is not bound by the recommendations of the disciplinary committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court"

20. The Board agrees. It would be remarkable if the exclusive jurisdiction to decide whether a worker has been unjustifiably dismissed in a particular case were to be vested in the employer. The denial to workers of the right of access to a court to decide such a question could only be achieved by the clearest statutory language. It is unnecessary to look further than sections 32(3)(b) and 36(7) to see that the 1975 Act explicitly recognises the court's jurisdiction. Section 36(7) could not be clearer: "The Court shall, *where it finds that the termination of the employment of a worker....was unjustified....*" (emphasis added). Mr Persad invoked this jurisdiction when he issued proceedings in the Industrial Court. The findings of the committee have no statutory status. The committee is simply the means by which Smegh discharged its obligation under section 32(2)(a) to afford Mr Persad an opportunity to answer the charges made against him. Section 32(2)(a) provides that, in the absence of such an opportunity, the dismissal is deemed to be unjustified. It does not provide that the findings of a committee are conclusive. The obligation to afford an opportunity to be heard is no more than an obligatory part of the employer's internal procedure for dismissing an employee.

21. None of this has been seriously in issue in the present appeal. Rather, the argument focused on a principle which found expression in *The Northern Transport Co Ltd v Radhakisson* [1975] SCJ 223 and has been restated more recently in *Mauritius Co-operative Savings and Credit League Ltd v Khulshid Banon Muhomud* [2012] SCJ 107. In *Northern Transport,* the worker who had been dismissed gave one account of the facts to his employer (on the basis of which the employer dismissed him) and a completely different account to the Court which was deciding whether the dismissal had been unjustified. The Supreme Court said:

> "The Magistrate in finding for the respondent accepted the version given in Court by the respondent which is contrary to the one he gave to his employer on the day of the occurrence and which led to his dismissal. In so doing the Magistrate made a wrong approach to the problem posed to him as the issue he has to decide was whether the appellant was justified, on the facts before him at the time, to dismiss the respondent. "

22. In *Mauritius Co-Operative Savings*, the employer sought to rely on allegations before the Magistrate which did not form part of the charges which were considered by its disciplinary committee. The Supreme Court applied *Northern Transport* and held that the Magistrate had been right not to have regard to the new allegations in deciding whether the termination had been justified.

23. The Board would endorse the approach adopted in both of these cases. The question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal. If the dismissal is justified on that material, it is not open to the worker to complain on the basis that there was other material of which the employer was not, and could not reasonably have been, aware which, if taken into account, would have rendered the dismissal unjustified. The Board does not understand the correctness of this principle to have been in issue in the present case.

24. Thus, if Mr Persad succeeded before the Industrial Court on the basis of a case which he did not run before the committee and/or of which Smegh was not and could not reasonably have been aware at the time of the dismissal, then the *Northern Transport* principle would have been infringed by the Court and the appeal should have been allowed.

25. There is no suggestion that Mr Persad changed his account in a material respect in relation to any of the 3 charges. The version he gave to the committee was essentially the same as that which he gave to the Court. After giving a full account of his case in relation to all the charges (including his case that he had been authorised by the General Manager to give the controversial instructions to the Reservations Department), Mr Persad told the Court that "he had explained all this at the disciplinary hearing" (p 180 line 20 of the Record). The only respect in which there is any material difference between the account recorded in the committee's report and the evidence given at the trial is that, in relation to the first charge, the former contains no clear reference to evidence by Mr Persad that he had been authorised by the General Manager to give the instructions to the Reservations Department. But the Magistrate accepted the entirety of Mr Persad's evidence. This must have included his statement that he had explained the whole of his case to the committee. It should also be noted that the report records (p 246 of the Record) that Mr Persad denied all the charges. The first allegation set out in the first charge was that he had instructed the Reservations Department to send the Barones' bill to Mr Panasiti without the authority of the Resident Manager. This was a serious allegation. It is inherently unlikely that Mr Persad did not give evidence on this important point. It is unfortunate that the report contains no reference to what Mr Persad said about the allegation of lack of authority. But as already stated, the report does not purport to be comprehensive.

26. In the argument before the Board, much was made by counsel for Smegh of the fact that Mr Persad called witnesses who had not given evidence before the committee, notably Mr Cooroopdass and Mr Rajkumarsingh. It is true that the Magistrate was impressed by the evidence of these witnesses and relied on it as corroborating the account given by Mr Persad. But the Board does not consider that this means that there was an infringement of the *Northern Transport* principle. First, the principle should not be extended to preclude a worker from relying in court on fresh evidence which does no more than support the case which he has always run. As was said in *G. Planteau De Maroussem*, an employer's disciplinary committee is no substitute for a court of law. It is the court which is given the power to decide whether a dismissal was justified. In the present case, the fresh evidence did no more than corroborate Mr Persad's account which, in material respects, the committee had rejected and the Magistrate accepted. Secondly, at the time of the dismissal, Mr Coorropdass and Mr Rajkumarsingh were senior executives of the Group of which Smegh formed part. They gave evidence about matters which lay within their own spheres of responsibility. Their knowledge of such matters must be imputed to Smegh. In any event, Smegh could have taken statements from them and called them to give evidence before the committee. In these circumstances, Smegh cannot be heard to say that it was unaware of what they could say.

Conclusion

27. This appeal must be dismissed. The Magistrate reached a conclusion on the facts which was plainly open to him. He heard the witnesses and made an assessment of their evidence. His decision was not perverse or manifestly ill-founded. Indeed, the contrary was barely argued before the Board. The only point of substance that was pressed on the Board was that to some extent the Magistrate based his findings on evidence that was not deployed by Smegh before the committee. But for the reasons given, this cannot avail it on the facts of this case. Since the decision of the Magistrate cannot be impeached, the Court of Appeal was right to dismiss the appeal.

28. The Board would merely add that much of the difficulty raised by this case has resulted from the fact that the record of the hearing before the committee was incomplete in material respects. It is important that employers accurately record what is said at disciplinary hearings so as to reduce the scope for subsequent dispute. It is also good practice to supply a copy of the record to the worker as soon as possible after the completion of the hearing. This was not done in the present case.

29. Submissions on costs should be made in writing within 28 days.