

IN THE SEYCHELLES COURT OF APPEAL

BODCO LTD

APPELLANT

versus

MR. WILLIAM HERMINIE

(Minister of Social Affairs & Manpower)

1ST RESPONDENT

MR. RONNEY SAUVAGE

2ND RESPONDENT

Civil Appeal No: 5 of 2000

[Before: Ayoola, P., Silungwe & De Silva, J.J.A]

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Mr. P. Boulle for the Appellant
Mr. W. Lucas for the Respondents



JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The simple question that has arisen on this appeal is whether a worker who was in "continuous employment" in terms of the Employment Act, 1990 or the Employment Act, 1995 ("the Acts") until he attained retirement age, but has, pursuant to approval given by the Minister to remain in employment beyond that age, been offered and has accepted an employment, the duration which is fixed by a fresh contract of employment, continues to be in "continuous employment" as defined by the Acts or is employed on a "fixed term contract" also as defined by the Acts.

The facts from which this question arose have been helpfully narrated in the judgment of the Supreme Court. They can be stated as follows. Mr. Ronney Sauvage, ("the 2nd defendant") was in the employment of Bodco Ltd ("the appellant company") from 4th January 1978 on a "continuous contract of employment" as defined by the Acts until he reached the retirement age of 63 years on 1st October 1994. Thereafter, on 10th January, 1995, formal approval was granted to him by the Competent Officer in terms of Section 69(1) of the

Employment Act, 1990, "to remain in employment or take up employment beyond the retirement age for a period of two years."

On 18th January 1995 the appellant company by a letter dated 18th January 1995, having therein noted the Government approval for the 2nd respondent "to remain in employment beyond the statutory retirement age for a further two years", offered him employment as from 1st January 1995 for a two year period on terms and conditions stated in the letter. The 2nd respondent, apparently, accepted the offer. After the two year period had elapsed, the Ministry of Employment and Social Affairs ("the Ministry") on 17th April 1997 conveyed to the 2nd respondent an approval that he remain in employment beyond retirement age for a period of one year. Before the expiration of the period of one year the 2nd respondent resigned from the appellant's company's employment.

Subsequent to his resignation which was accepted by the appellant company, the 2nd respondent initiated a grievance procedure under the 1995 Act which resulted, eventually, after an award by the Competent Officer and an appeal to the Minister who substantially confirmed the award, in an award in favour of the 2nd respondent, inter alia, for:-

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|-----|---|------------|
| (a) | 223 days compensation for length of service – | R52,490.77 |
| (b) | 18 years severance pay - | R22,995.00 |

The appellant company brought an application by petition pursuant to the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995 for certiorari to quash the decision of the Minister confirming the award. The ground of the application was that the Minister failed to take into account that the 2nd respondent was on a fixed term of employment for a period of 1 year by virtue of the second approval to remain in employment mentioned earlier in this judgment.

The Supreme Court (Perera, J.) dismissed the application. This is an appeal from that decision.

It is convenient to quote fully the passage from the judgment of the Supreme Court containing the reasoning which led to the dismissal of the application thus:-

“What is relevant for continuity is not the nature of the contract or the series of contracts, but the existence of an employment relationship under the same employer. The 2nd respondent continued to be in employment of the petitioner. It is therefore not open to the petitioner employer to seek to divorce the contract of employment, which under normal circumstances ought to have terminated on the day the 2nd respondent reached the age of retirement, from the two succeeding approvals granted by the Minister under Section 66(1) of the Act to remain in employment, though for fixed periods, as there was continuity of employment under the same employer. In short, although the two extensions of the original continuous contract fall into the definition of “*fixed term contracts*”, merely by reason of the stipulation of a fixed period, yet in determining terminal benefits, an employee cannot be deprived of his rights and benefits under the original continuous contract as the extensions for fixed periods were given under Section 66 and not as separate contracts. The letters from the Minister dated 10th January 1995 and 17th April 1997 specifically approves that the 2nd respondent “*remains in employment beyond retirement age*”. The reference in the letter of 10th January 1995 to “*or take up employment*” necessarily refers to, in the light of Section 66, a situation where the 2nd respondent decides to take up employment “*with another person.*” The 2nd respondent therefore, remained with the same employer beyond the retirement age.”

Mr. Boule, Learned Counsel for the appellaut company, criticised the reasoning of the Learned Judge on two grounds, namely: first, that the Learned Judge’s view that the 2nd respondent was in continuous employment was a misrepresentation of the law; and, secondly, that the Learned Judge failed to take into consideration the evidence that the 2nd respondent had in fact discontinued his employment after retirement. It was argued that the reasoning of the Learned Judge that “in determining terminal benefits an employee cannot be deprived of his rights and benefits under the original continuous contract as the extensions for fixed periods were given under Section 66 and not as separate contracts” was flawed because:-

- (i) no legal provision was relied on for the view;
- (ii) the subject matter of the dispute was not “terminal benefits”; and
- (iii) section 66 of the Act mentioned by the Learned Trial Judge did not add to or subtract anything from the clear provisions of the Act applicable to fixed term contracts.

For his part, Mr. Wilby Lucas, Learned State Counsel for the respondents, argued that the 2nd respondent had continued in “continuous employment” with his original employer, the appellant company, notwithstanding that the terminal date of the “continuous employment” was twice extended by the approvals granted by the Minister. It was submitted that there was neither a break in the service or change in the employment of the 2nd respondent.

Section 19(1) of the Employment Act, 1995 (“the 1995 Act”) (as did the 1990 Act) recognises four types of contract of employment as follows:-

- (a) A contract of employment of continuous employment;
- (b) A contract of employment for a fixed term.
- (c) A contract of employment of a part time worker.
- (d) A contract of employment for the employment of a casual worker.

Types (c) and (d) are not relevant to this appeal. Section 2 of the 1995 Act (as well as Section 2 of the 1990 Act) defined “continuous employment” as meaning “consecutive employment for an unlimited period,” while the same section (as did a similar section in the 1990 Act) defined “fixed term contract” as meaning “consecutive employment for a fixed term.”

Section 2 of the 1995 Act defined “fixed term” as follows:-

“Fixed term” in relation to a contract of employment and subject to section 19(2), means a term exceeding 21 days the period of which is expressed by reference either to its duration in time or to the duration of a specific scheme or project or of specific works.”

Section 19(2) of the 1995 Act provides that:-

“Where a contract for a fixed term is expressed to be for a period determined by reference to its duration in time,

the contract, shall be for such period, not less than 21 days, as may be determined by the parties to the contract.”

Section 69(1) of the 1990 Act (as well as Section 66(1) of the 1995 Act) provided that:-

“A person who has attained retirement age shall not, without the written approval of the Competent Officer or after such approval has been withdrawn, remain in the employment of, or take up employment with, another person.”

Section 69(2) (66(2) of the 1995 Act) provides that:-

“An employer shall not employ a person who has reached retirement age unless that person has the written approval of ... and such approval has not been withdrawn.”

“Retirement age” is defined in Section 2 of the 1990 and 1995 Acts as meaning “the age at which a person qualified for a retirement pension under the Social Security Act 1987.”

Although Section 2 defined “continuous employment” as employment for an unlimited period, it is evident that even the period of a “continuous employment” is limited by Section 69(1) of the 1990 Act and section 66(1) of the 1995 Act. The Learned Trial Judge seemed to have taken the view that where the worker is permitted pursuant to Section 69(1) of the 1990 Act or section 66(1) of the 1995 Act to remain in employment beyond the statutory limit of the duration of a continuous employment, employment in the additional period remains part of the original continuous employment. He said:-

“The 2nd respondent’s service was continuous and unbroken until he resigned on 9th August 1997 by virtue of the approval granted by the Minister to remain in employment beyond the retirement age in terms Section 66 of the Act.”

Mr. Boulle, arguing to the contrary, submitted that once duration of a contract of employment is stipulated by the agreement of the parties the contract ceases to be a contract of "continuous employment" but one for a "fixed term."

There seems to be considerable merit in Mr. Boulle's submissions. Reading the definition of "continuous employment" in Section 2, the provision of Section 19(2), and the provisions of Section 66 together, it is clear that "continuous employment" is continuous employment the duration of which is limited only by the statutory retirement age. Where the worker, upon approval granted in that regard pursuant to the Acts, remained in the same employment the duration of his employment after the retirement age is determined by the agreement of the parties and not by statute, as it would have been in the case of the duration of continuous employment. A proper reading of section 66(1) of the 1995 Act and Section 69(1) of the 1990 Act, paying due attention to the relevant punctuation marks, shows that a person who has attained the retirement age cannot:-

- (i) remain in the employment of another person; or,
- (ii) without the requisite approval take up employment with another person.

The intendment of the Acts is not to provide for an elongation of the duration of an original "continuous employment" which comes to an end on the attainment by the worker of retirement age, but to make it clear that a person who has attained retirement age cannot, unless he has the requisite approval, be employed by another person. "Another person" in Section 66 of the 1995 Act (or 69(1) of the 1990 Act) was not inserted in the Acts to distinguish the person with whom the worker had previously been in employment from any other person, but to emphasise the liberty that the worker has of being self-employed after attaining retirement age. An approval by the Competent Officer for a person to remain in the employment of another person or to take up employment with another person, may state the limit of the period within which the worker could be in such employment. However, such approval is not a substitute for the agreement of the parties in regard to the duration of the period of employment or the conditions and terms of the employment, nor does it revive or prolong a

continuous employment which had reached a terminal date by statute upon the worker attaining the retirement age.

In view of what has been said above, the statement of the Trial Judge that "the two extensions of the original continuous contract fall into the definition of fixed terms contracts", can only be correct if it is understood to mean that the contracts of employment which were made subsequent to the several extensions were fixed term contracts. The Learned Judge was in error in approaching the matter as if the approval given to the 2nd respondent to be employed by another person (including his previous employer), rather than being self-employed, amounted to extensions of an original continuous contract. The approval is merely a permission granted to the worker to be in the employment of "another person" who may include his previous employer.

It is not appropriate to regard a continuous contract to which has been sub-joined a contract of employment made possible by the approval under Section 66 as one "continuous and unbroken" contract. Even if it is, the facts in this case do not support the Learned judge's opinion that the "2nd respondent's service was continuous and unbroken until he resigned on 9th August 1997." The facts are clear that whereas the 2nd respondent attained the retirement age on 1st October 1994, the approval he obtained to "remain in employment or take up employment beyond retirement age" was not sought and given until 10th January, 1995 and the fresh offer of employment made to him by the appellant company was not made until 18th January 1995. The employment offered to him was from 1st January 1995 for a period of two years. That period expired on 31st December 1996. The second approval to remain in employment for one year was granted to the 2nd respondent on 17th April 1997. Between the end of the continuous contract of employment and the first subsequent contract of employment there was a gap of about four months. Between the first subsequent contract of employment and the second one there was a gap of more than three months. In these circumstances it was erroneous to regard the three contracts, even in the literal sense, as "continuous and unbroken."

It is expedient to explain reference made in this judgment to the Employment Acts of 1990 and 1995. Up to the promulgation of the 1995 Act in

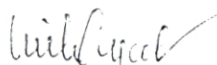
March 1995 the relevant Act was the 1990 Act which came into effect on 1st September 1990. The provisions of the two Acts relevant to this appeal are substantially the same. Nothing turns in this appeal on the fact that the 2nd respondent attained retirement age and obtained the first approval to remain in the employment of another person during the currency of the 1990 Act and that the 1995 Act had come into effect when other subsequent events took place.

The Supreme Court should have granted the application of the appellant company since the 1st respondent had proceeded on the erroneous view that compensation to be granted to the 2nd respondent was to be calculated pursuant to Section 47(2)(b)(i) of the 1995 Act rather than Section 47(2)(b)(ii) of the Act. This error emanated from the error he fell into in treating the contracts of employment as one of continuous employment. It is pertinent to observe that the material fixed term contract for the calculation of compensation pursuant to Section 47(2)(b)(ii) to this case is the latter of the two fixed term contracts.

For these reasons, the appeal succeeds. The judgment of the Supreme Court is set aside. In place therefor is judgment granting the appellant company's application. An order is hereby made for the writ of certiorari quashing the decisions of the 1st respondent contained in the letter Ref: Rev/162/97 dated 3rd August 1998 as amended by letter dated 7th August 1998 in so far only as it awarded to the 2nd respondent:-

- (i) 223 days compensation for length of service at the rate of 1 week's pay for each month of service; and
- (ii) 18 years severance pay at the rate of one day's pay for each year of service.

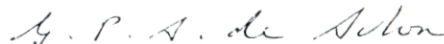
The appellant is entitled to the costs against the 1st respondent being costs of the application in the Court below and costs of the appeal.



E. O. AYOOLA
PRESIDENT



A. M. SILUNGWE
JUSTICE OF APPEAL



G. P. S. DE SILVA
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 3rd day of November 2000.