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NICOLAOS
MARCOULLIS
v.
C. D. HAY
& SONS LTD.

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

NICOLAOS MARCOULLIS,

Appellant,

v.

C. D. HAY & SONS LTD.,

Respondents.

(*Case Stated No.* 163).

Master and servant—Employee on regular leave abroad—Failed to return on expiration of his leave—Termination of his employment—Whether employee left his employment voluntarily—And whether his employment had come to an end voluntarily—Positive action by employee showing that master and servant relationship was terminated by him.

Court of Appeal—Case Stated—Decision of Industrial Disputes Court—Court of Appeal not prevented from deciding any issue of law not decided by trial Court once all the relevant facts are before it.

The appellant, who had been in the employment of the respondents since May 1, 1971, went to England on August 10, 1974, after obtaining leave of absence abroad for three weeks for health reasons. He did not return to his duties on the expiration of his leave but on September 16, 1974 he wrote* to the respondents enquiring about his position in the company as he had heard rumours about redundancies in their company. The respondents wrote** back on October 17, 1974 and informed him that as they did not hear from him upon the expiry of his leave they considered him as having resigned from the company. The appellant alleged that he wrote two other letters, one dated August 25, 1974 and one dated September 30, 1974, but these letters*** were never received by the respondents.

When the appellant applied to the Committee of the Provident Fund of the personnel of the respondent to be paid his benefits under the Fund the Committee took the view that the

* See the letter at p. 137 *post*
** See the letter at p. 138 *post*
*** See these letters at p. 137 and p. 138 respectively.

appellant had left the respondents' employment voluntarily and, therefore, in accordance with the Regulations of the Fund, he was not entitled to be paid the amount in "B account" that is to say the amount representing the contribution of the respondents.

By an application to the Industrial Disputes Court the appellant sought a declaration that the relationship of master and servant between him and the respondents was still continuing, having never been lawfully terminated, and, therefore, he was entitled to be paid his salary and all other benefits.

The Industrial Disputes Court, being of the view that it was called upon to decide only if the appellant had been dismissed from the service of the respondents or whether he had left it voluntarily, held that the appellant had left voluntarily the employment of the respondents; and in reaching such view it evaluated the facts from an objective angle irrespective of what the parties concerned thought that it had happened (see *Nestoridou v. D. J. Demades & Sons Ltd.*, (1971) A.T.R. 86).

The appellant appealed by way of a Case Stated.

Counsel for the appellant contended (a) that the Court below failed to decide on the basic issue in this case, namely whether the employment of the appellant with the respondents had lawfully come to an end; (b) that some positive action on the part of either the respondents or of the appellant was necessary in order to find that the master and servant relationship between them had come to an end.

Held, (1) that this Court is in full agreement with the conclusion reached by the Industrial Disputes Court to the effect that the appellant left the employment of the respondents voluntarily; and that this is a correct application of the law to the facts of this particular case.

(2) That, in effect, the Industrial Disputes Court did find that the appellant's employment with the respondents had come to an end lawfully; and that this is to be derived by inevitable and inescapable implication from the fact that the Industrial Disputes Court found that the appellant left voluntarily the service of the respondents.

(3) That, moreover, there being nothing to prevent this Court from deciding any issue of law which, allegedly, the Industrial Disputes Court did not decide, once all the relevant

facts are before it, there is no difficulty in reaching the conclusion that the employment of the appellant with the respondents came lawfully to an end due to his having left voluntarily such employment.

(4) That the whole conduct of the appellant does amply constitute positive action on his part showing that the master and servant relationship between him and the respondents was terminated by him (see the *Nestoridou* case *supra*): and that, accordingly, his appeal will be dismissed.

Appeal dismissed.

Cases referred to:

Nestoridou v. D. J. Demades & Sons Ltd., (1971) A.T.R. 86;

Soproma S.p.A. v. Marine & Animal By-Products Corporation [1966] 1 Lloyd's Rep. 367 at p. 387;

Theodorou v. Americanos & Others (1969) A.T.R. 160;

Charalambides v. Frozopak Ltd., (1970) A.T.R. 130;

Katikki v. Stavrakis (1970) A.T.R. 185.

Case Stated.

Case Stated by the Chairman of the Industrial Disputes Court relative to his decision of the 31st December, 1976, in proceedings under sections 3 and 9 of the Termination of Employment Law, 1967 (Law 24 of 1967) instituted by Nicolaos Marcoullis against C. D. Hay & Sons Ltd. whereby it was found that his employment with the respondents had been terminated due to his having voluntarily abandoned such employment.

A. S. Angelides, for the appellant.

K. Chrysostomides, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:-

TRIANTAFYLLIDES, P.: In this appeal by way of a Case Stated, the appellant complains against a decision of the Industrial Disputes Court (in application No. 180/75) by virtue of which it was found that his employment with the respondents had been terminated due to his having voluntarily abandoned such employment.

The facts of the case, as they appear from the Case Stated, are as follows:-

The appellant, who had been in the employment of the respondents since May 1, 1971, was, in July 1974, called up for service in the National Guard, as a result of the Turkish invasion of Cyprus; on August 1, 1974, he was discharged from the National Guard, after the respondents had taken steps to that effect, in view of the fact that his services were needed at their garage, where he was in charge of a section.

On August 10, 1974, the appellant, who had obtained before July 1974 leave of absence abroad for three weeks for health reasons, went to England with his wife and one of his two minor children, having obtained, through the respondents, return tickets. Prior to his departure he took part at a meeting of the senior staff of the respondents at which there was discussed the question of the termination of the employment of respondents' personnel due to redundancies. He returned to Cyprus on December 24, 1974.

After his return he handed to the respondents a copy of a letter dated August 25, 1974, and addressed to them by him from London, which, however, was never received by them in Cyprus, and which reads as follows:-

> "I am writing to you to inform you that I have arrived in London and I will try to meet Mr. Ridgway.
>
> No doubt the situation had worsened since I left and I do not know the exact situation in C. D. Hay. Please let me know as soon as possible my position in the Company as I do not want to return and find myself redundant. As soon as I have your reply confirming my position I will immediately return".

On September 16, 1974, he wrote to the respondents the following letter, which was received by them, and reads as follows:-

> "I am writing to you in the hope that you will be able to advise as to my present position in the Company. Rumours of wide C. D. Hay redundancies have been spreading around, even in London.
>
> Please let me know officially as soon as possible, as I have to think about my future".

The appellant alleges that he wrote a further letter to the respondents on September 30, 1974 (copy of which he gave to them on his return from England) which, however, was never received by them in Cyprus, and which reads as follows:-

"This is to confirm my two previous letters to you dated 25th August and 16th September, 1974, requesting confirmation of my position at C. D. Hay. So far I have had no reply from you and this I find extraordinary.

I did manage to see Mr. Ridgway some time ago and asked him about C. D. Hay, but there was little he could tell me apart from the fact that the motor trade was ruined in Cyprus.

Looking forward to having a reply soon".

On October 17, 1974, the respondents replied to the appellant's letter of September 16, 1974, as follows:-

"Thank you for your letter dated the 16th September enquiring about your position at C. D. Hay and Sons Ltd.

As you may recall you requested leave without pay for three weeks from the 10th August to take your wife to London for medical treatment. This was granted to you as a special favour.

As we did not hear from you upon the expiry of your leave we considered you as having resigned from the Company and employed someone else in your position.

We do hope you will be able to obtain a good job in London and wish you every success in it".

In the meantime, on October 4, 1974, the appellant had secured an employment permit in England and on October 7, 1974, he found employment as Service Manager with Kenning Car Mart Ltd., and he worked in the employment of that concern until his return to Cyprus in December 1974.

On October 25, 1974, he addressed to the respondents the following letter:-

"Thank you for your letter dated 17th October regarding my position at C. D. Hay & Sons Limited. It is true that I was granted three weeks leave as from 10th August, but as you know, the situation has worsened since and I could not communicate with you, although I had written to you four times prior to this letter.

As you may probably know, I kept in constant touch with Mr. Ridgway since I arrived here, reassuring him about my intentions to return to C. D. Hay as soon as I received your reply. In the circumstances, you do realise that it was vitally important for me to know my position before returning to Cyprus, as I do not want to return and find myself out of work. I am, therefore, rather surprised to read that you have considered me as having resigned from the Company.

However, I do not want to dispute the fact that I am no longer a C. D. Hay employee. The only problem, as you know, being the Provident Fund. I shall be reasonably happy to be declared redundant or, my 'service no longer required', and I am prepared to sign a declaration that C. D. Hay & Sons have no legal or other obligations towards me. I do hope that you will be kind enough to agree to this.

I look forward to receiving your reply together with a statement of money I am to receive from the Company in final settlement, *i.e.* Provident Fund (A+B), August salary. I also think I owe the Company about £20.- which will naturally be deducted.

I am currently the Service Manager of Kenning Car Mart at Acton, and shortly I am going on a Management Course. I took this job after I consulted Mr. Ridgway who strongly urged me to accept it. I am happy that I found a good job but feel sorry for parting with C. D. Hay.

I do hope that things will sort themselves out and we shall meet some day. Please let me know next time you are in London, we can always have a drink.

Looking forward to your reply".

The respondents replied to him by a letter of November 12, 1974, which reads as follows:-

"Thank you for your letter of the 25th October.

As our Company records show that you left Cyprus on leave and never return it will not be possible for the Board to accept your request for considering you as redundant.

However, I have passed on your request to the Provident Fund Committee who will decide whether or not you will be entitled to withdraw both A and B accounts. The Committee will meet within the next few days and I am sure you will be notified of their decision soon.

Wishing you success in your new career".

The Committee of the Provident Fund of the personnel of the respondents took the view that the appellant had left the respondents' employment voluntarily and, therefore, in accordance with the Regulations of the Fund, he was not entitled to be paid the amount in "B account", that is to say the amount representing the contributions of the respondents.

It is a fact that, on August 26, 1974, the respondents, by a notice in the press, had called all their mechanics and other personnel, except those serving in the National Guard, to report for duty and it was stated in such notice that if they failed to do so they would be replaced by others.

But, as correctly pointed out by counsel for the respondents, this notice could not reasonably be taken as referring to the appellant, because he was abroad at the time, on leave which had not yet expired.

By his application to the Industrial Disputes Court the appellant had sought a declaration that the relationship of master and servant between him and the respondents was still continuing, having never been lawfully terminated, and, therefore, that he was entitled to be paid his salary and all other relevant benefits.

It is correct that the Industrial Disputes Court did not pronounce expressly on this issue, as it took the view that it was called upon to decide only if the appellant had been dismissed from the service of the respondents or whether he had left it voluntarily; and, in the light of the facts already set out above in this judgment, as well as of other material, which, in our opinion, need not be referred to by us specifically, it held that the appellant had left voluntarily the employment of the respondents.

In reaching such a view the Industrial Disputes Court made it clear that it had evaluated the facts from an objective angle irrespective of what the parties concerned thought that it had happened; it appears that, in this connection, the Industrial Disputes Court adopted the approach which it had expounded as the correct one, in such circumstances, on previous occasions (see, for example, *Nestoridou v. D. J. Demades and Sons Ltd.*, (1971) A.T.R. 86).

We are fully in agreement with the conclusion reached by the Industrial Disputes Court to the effect that the appellant left the employment of the respondents voluntarily. We regard this as a correct application of the law to the facts of this particular case and we really fail to see how any other conclusion could have been reasonably reached in the circumstances.

Counsel for the appellant, who, obviously, was very eager to upset the above finding of the Industrial Disputes Court, because it results in his client receiving a smaller amount from the Provident Fund than he would have received had he been dismissed from the respondents' employment, has relied on the *Nestoridou* case, *supra*, in submitting that some positive action on the part of either the respondents, as the employers, or of the appellant, as their employee, was necessary in order to find that the master and servant relationship between them had come to an end; and, counsel for the appellant, has complained, further, that the Industrial Disputes Court has failed to decide on the basic issue in this case, namely whether the employment of the appellant with the respondents had lawfully come to an end at all.

We are of the opinion that, in effect, the Industrial Dis-

putes Court did find that the appellant's employment with the respondents had come to an end lawfully; in our view this is to be derived by inevitable and inescapable implication from the fact that the Industrial Disputes Court found that the appellant left voluntarily the service of the respondents.

Moreover, we think that, in any event, there is nothing to prevent us from deciding ourselves any issue of law which, allegedly, the Industrial Disputes Court did not decide, once all the relevant facts are before us (as was done, for example, in *Soproma S.p.A. v. Marine & Animal By-Products Corporation,* [1966] 1 Lloyd's Rep. 367, 387); and, we have no difficulty in reaching the conclusion that the employment of the appellant with the respondents came lawfully to an end due to his having left voluntarily such employment (as was found to be the position in a number of similar cases such as *Theodorou v. Americanos and Others,* (1969) A.T.R. 160, *Charalambides v. Frozopak Ltd.,* (1970) A.T.R. 130, *Katikki v. Stavrakis,* (1970) A.T.R. 185).

Also, we are of the opinion that the whole conduct of the appellant as recounted in this judgment does amply constitute positive action on his part showing that the master and servant relationship between him and the respondents was terminated by him; thus, the element envisaged in the *Nestoridou* case, *supra,* does clearly exist.

For all the above reasons we find no merit in this appeal and it is dismissed accordingly; but, taking into account the fact that the appellant went initially away to England on regular leave granted to him by the respondents and had to leave their employment due to the tragic situation which supervened in Cyprus after the Turkish invasion in the summer of 1974, we are not prepared to make any order as to costs against him.

Appeal dismissed.
No order as to costs.