1989 February 28

(SAVVIDES, KOURRIS, BOYADJIS JJ.)

PHIVOS HADJISAVVAS,

Appellant,

v.

REDUNDANCY FUND,

Respondent.

(Case Stated 253).

Employment — Termination of — Redundancy — The Termination of Employment Law, 1967—Sub-paragraphs (i), (ii), (iv) and (vii) of subsection (c) of section 18 — An employee cannot be held redundant unless his case can be brought within at least one of the sub-paragraphs of sub-section (c) interpreted independently of any other sub-paragraph.

Employment — Termination of — Redundancy — Claim against the Redundancy Fund — Burden of proof rests on claimant — Employee dismissed on ground of «contraction of the volume of work or business» — (Section 18(c)(vii) of the Termination of Employment Law, 1967 — Claim that he is entitled to compensation from the Fund — The onus to show that his dismissal was due to such contraction lay on him.

Employment — Termination of — Reduncancy — The differences between our legislation and English legislation on the subject — Section 91(2) of the English Employment Protection (Consolidation) Act, 1978 establishes a presumption that an employee's dismissal is due to redundancy, unless the contrary is proved—Moreover, the circumstances constituting redundancy in England (Section 81(2) of the same Act) differ from those defined in section 18 of our Termination of Employment Law, 1967 — Warning that in deriving guidance from decisions in English cases the aforesaid differences should always be born in mind.

The appellant was dismissed by his employers on the ground of «contraction of work or business». However, the work carried out by him, never ceased and, after his dismissal, it was not carried out by existing employees or independent contractors, but by new

employees employed shortly before or very shortly after his dismissal. The Industrial Disputes Court dismissed the appellants claim against the redundancy fund, stating, inter alia, that «redundancy exists when a business employs more employees than necessary». Hence this appeal by way of case stated. The question formulated for consideration by the Court is quoted at p. 150 post.

In its judgment the Court expounded the principles, which sufficiently appear in the headnote hereinabove. The Court distinguished the decisions in *Scarth v. Economic Forestry Ltd.* (1973) 1 ICR 322, NICR, and in *Sutton v. Revlone Overseas Corporation Ltd.* (1973) 1 RLR 173, NIRC and criticized the Industrial Disputes Court for quoting a passage from the Judgment of Lord Denning in *Johnson's* case, which gave unnecessarily to counsel for the appellant reason to complain. The Court finally concluded that the statement that «redundancy exists when a business employs more employees than necessary» is correct, if not isolated from the whole tenor of the Judgment. It should not, of course, be taken to mean that no cases of statutory redundancy may be envisaged, falling for example under para. (ii) of our section 18(c), where, due to changes in the skills needed on the part of the employees, some employees are dismissed and replaced by new employees possessing different skills. This question did not arise in the case of the present appellant because of the express reference to the contraction of the volume of work made in the employers' notice of dismissal.

Appeal dismissed with costs.

Cases referred to:

In re HjiCostas (1984) 1 C.L.R. 513;

Stylianides v. Paschalidou (1985) 1 C.L.R. 49;

In Re Louis Tourist Agency Ltd. (1988) 1 C.L.R. 454;

Alouet Clothing Manufacturers Ltd. v. Athanasiou and Another, (1988) 1 C.L.R. 626;

Johnson and Another v. Nottinghamshire Combined Police Authority [1974] 1 All E.R. 1082;

Scarth v Economic Forestry Ltd. (1983) 1 ICR 322, NIRC;

Sutton v. Revlone Overseas Corporation Ltd. (1973) IRLR 173, NIRC;

MacLaughlan v. Alexander Paterson Ltd. (1968) SLT 377 (Ct of Sess);

Rosie v. Watt (1966) 2 ITR 201, II.

Case stated.

Case stated by the Judge of the Industrial Disputes Court relative to his decision of the 29th August, 1987 in proceedings under section 16(1) of the Termination of Employment Law, 1967 (Law 24/67) instituted by Phivos Hji Savva against the Redundancy Fund whereby applicant's claim for redundancy payment was dismissed on the ground that his employment was not terminated on grounds of redundancy.

G. Michanikos, for the appellant.

Chr. Ioannides, for the respondent.

Cur. adv. vult.

SAVVIDES J.: The judgmemt of the Court will be delivered by Mr. Justice Boyadjis.

BOYADJIS J.: This is an appeal by way of Case Stated against the decision of the Industrial Disputes Court in Application No. 105/86, whereby the claim of the applicant-employee for redundancy payment from the respondent Fund was dismissed on the ground that his employment was not terminated by reason of redundancy.

The facts of the case as found by the trial Court are as follows:

Prior to March 16, 1974, the appellant was in the employment of a certain A. Chilides as a mechanic in the latter's garage in Nicosia. On the date aforesaid he had been transferred by his employer to another garage in Nicosia owned and run by the company Paris Motors Agency Ltd., in which Mr. Chilides was a director and one of the main shareholders. He there specialised in the repair of Citroen cars and at all material times he had become the best, most senior and most experienced mechanic for Citroen cars in the employment of the said company. In 1982 he was named assistant to the man in charge of the garage. This was a rather honorary «promotion» made in appreciation of his satisfactory services and did not entail any increase in his emoluments. He continued to work as a mechanic, training also his less experienced co-employees. Furthermore, he was helping

Mr. Antonakis, the man in charge of the garage, in testing the cars after their repair.

On 6.5.1985 the company re-employed their former employee Georghios Papadakis who had returned from abroad, where he had specialised in electronics, and appointed him a co-manager of the garage with the aforementioned Antonakis. Papadakis had better academic qualifications than the appellant who was, however, a more experienced mechanic.

On 20 July, 1985, the company addressed to the appellant a letter in the following terms:

«Μετά λύπης μου σας πληροφορώ ότι λόγω ύφεσης στις δουλειές της Εταιρείας μας, η θέσις σας ως βοηθός υπεύθυνος στο Γκαράζ παύει να υφίσταται.

Με βάση τον σχετικόν νόμον επιθυμούμεν να σας πληροφορήσουμεν ότι η υπηρεσία σας τερματίζεται την 31ην Αυγούστου 1985.

Σας ευχαριστούμεν δια την μέχρι σήμερον συνεργασίαν εις την Εταιρείαν μας».

Translated in English, the letter reads as follows:

«We regret to inform you that due to contraction in the volume of work of our company, your post of assistant to the person in charge of the garage is abolished.

Pursuant to the relevant law we wish to inform you that your employment is terminated on 31st August.

We thank you for your co-operation with our company until to-day».

The salary of the appellant at the time of the termination of his employment was £70 per week. On leaving his employment, he opened his own garage in Nicosia.

In 1983 when the new BX models of Citroen cars were imported in Cyprus, the volume of work in the garage had increased and continued to increase steadily ever since. There was always one expert on BX models in the garage, namely Antonakis.

After the re-employment of Papadakis on 6.5.1985, there were two experts in the garage on the aforesaid BX models.

On or about 15.8.1985 another mechanic employed in the garage, namely Charalambos Nicolaou gave notice to his employers voluntarily terminating his employment on 31.8.1985, i.e. on the date when the termination of the appellant's employment was due to take effect.

With the contemporaneous termination of the employment of the appellant and Charalambos Nicolaou, the company was faced with the problem of lack of sufficient number of experienced mechanics in the garage. To meet their needs in this respect the Company employed as mechanics a certain Georghios Georghiou as from 23.9.1985 and a certain Costas Mavronihis as from 30.9.1985. They were both employed at a salary of £40 per week each, increased to £45 per week on the second week of their employment. The company had previously employed as a mechanic another employee, namely Nicos Antoniou, whom they destined for their Limassol garage. His employment commenced on 29.7.1985, i.e. only nine days after they had given the appellant notice of termination of his employment on the ground of contraction of the volume of their work. The company did not withdraw their aforesaid notice of termination of the appellant's employment when, on receiving the notice from their employee Charalambos Nicolaou, they realised that they would be short of mechanics.

One of the aforenamed new employees of the company, namely Costas Mevronihis, terminated voluntarily his employment on 2.5.1986. The other three men are still employed in the garage.

Having found the material facts as stated hereinabove, the trial Court concluded that, at the material time, the appellant's employers were not faced with a state of redundancy entitling them to terminate the employment of the appellant for the reasons stated in their notice. In the circumstances, the Court added, the appellant was not entitled to any redundancy payment from the Fund. Referring to the legal basis of its decision the Court stated that, in its opinion, redundancy exists when an employer employs in his business more employees than necessary.

Being aggrieved with the aforesaid decision, counsel filed a notice of appeal by way of Case Stated under Rule 17 of the Rules

of Procedure set out in the Appendix to the Arbitration Tribunal Regulations of 1968, which continues to be in force by virtue of section 7 of the Annual Holidays with Pay (Amendment) Law of 1973 (Law No.5 of 1973). Pursuant to the aforesaid notice of appeal, the trial Court submitted for the decision of the Supreme Court the following legal question:

«Το Δικαστήριο ερμήνευσε σωστά τις διατάξεις του άρθρου 16(1) και 18(γ)(ι)(ιι)(ιν)(νιι) υπό το φως των πραγματικών περιστατικών που διαπίστωσε ότι περιβάλλουν και συνοδεύουν τον τερματισμό της απασχόλησης του αιτητή. Πιό συγκεκριμένα ερωτούμε. Βάσει των γεγονότων που διαπιστώσαμε σωστά καταλήξαμε ότι δεν δικαιολογείται πληρωμή λόγω πλεονασμού στον αιτητή».

Translated in English the question reads as follows:

«Whether the provisions of sections 16(1) and 18(c)(i)(ii)(iv)(vii) of the Law were correctly construed in the light of the facts found concerning the termination of the employment of the applicant. More particularly we ask whether, on the basis of the facts found by us, our conclusion that no payment to the applicant is justified on account of redundancy, is correct».

Counsel for the appellant submitted that we should answer the above question submitted to us in the negative. He began his attack on the decision of the trial Court by challenging some findings made by the Court. He abandoned his attempt when it was pointed out to him that under paragraph (4) of Rule 17 pursuant to which the present appeal was filed by way of Case Stated, the Supreme Court is vested with power only to decide the legal point formulated by the trial Court and return the case to it together with its opinion thereon. There was no allegation in this case either in the notice of appeal filed by the appellant or in the question (supra) as formulated by the trial Court, that there was no evidence at all on record warranting any of the findings made by the Court. The appellant is not entitled in the circumstances to challenge the findings of fact made by the trial Court. See in this respect: *In Re HjiCostas* (1984) 1 C.L.R. 513; *Stratis Stylianides v. Phaedra Paschalidou* (1985) 1 C.L.R. 49; *In Re Louis Tourist Agency Ltd.* (1988) 1 C.L.R. 454; and *Alouet Clothing Manufacturers Ltd. v. Erini Athanasiou and Another,* (1988) 1 C.L.R. 626.

Counsel for the appellant further submitted that, on the facts as accepted by the Industrial Disputes Court, the case for the appellant falls under paragraphs (i), (ii), (iv) and (vii) of sub-section (c) of section 18 of the Termination of Employment Law, 1967, taken either separately or cumulatively, which read as follows:

«18. For the purposes of this Law, an employee is redundant when his employment has been terminated for reasons other than those specified in the first proviso to sub-section (3) of section 16 of this Law -

(a) .....

(b) .....

(c) because of any of the following other reasons connected with the operation of the business:

(i) modernization, mechanization or any other change in methods of production or of organization which reduces the number of employees necessary;

(ii) changes in products or production methods or in the skills needed on the part of employees;

(iii) .....

(iv) marketing or credit difficulties;

(v) .....

(vi) .....

(vii) contraction of the volume of work or business».

Though, there might in theory be envisaged cases where the circumstances of an employer's business might fall in more than one of the paragraphs set out in section 18(c) above, an employee cannot be redundant within the meaning of the law unless his employment is terminated on account of the circumstance or circumstances set out in at least one of the aforementioned alternative paragraphs of section 18(c) of the Law, considered quite independently of any other paragraph. Therefore, it by submitting that the case of the present appellant falls within paragraphs (i), (ii), (iv) and (vii), taken cumulatively, learned

counsel meant that, none of the above paragraphs, if examined separately, covers the case of the appellant, it is an entirely wrong submission which we reject. We shall, therefore, examine whether at least one out of the four paragraphs relied upon by appellant applies to the facts of the present case as found by the Court.

Para. (i) of section 18(c) clearly does not apply for the following reason: Even if the allegation in the notice terminating the appellant's employment sent by his employers, that the post of assistant to the person in charge of the garage held by the appellant was abolished, were genuine, and even if the abolition of this rather «honorary» post amounted to «modernization, mechanization or any other change in methods of production or of organization», the change as aforesaid did not reduce the number of employees necessary, as expressly required in para. (i).

Para. (ii) of section 18(c) does not apply either, for the simple reason that the trial Court never found that, concerning the operation of the garage business, there had occurred any changes in production methods or in the skills needed on the part of the employees. Nor is there any such allegation in the notice terminating the employment of the appellant whom the Court found to have been the most experienced mechanic in the garage.

Para. (iv) of section 18(c) cannot possible apply, since there was never an allegation or finding that in terminating the appellant's employment, his employers acted by reason of any «marketing or credit difficulties».

Contraction of the volume of work or business is the reason set out in the notice terminating the appellant's employment, on account of which the termination was sought to be justified. It is the reason set out in para. (vii) of section 18(c). This reason had not been substantiated in Court. In the present case, where the appellant claims that he is entitled to payment of compensation from the Fund because his employment was terminated by reason of contraction of the volume of work or business in the garage where he was employed, the onus lay on the appellant to show that such contraction was the main reason of his dismissal by his employers. The law in Cyprus differs in this respect from the law applied in England where, under section 91(2) of the Employment Protection (Consolidation) Act 1978, an employee who has been dismissed by his employer, shall, unless the contrary is proved, be presumed to have been dismissed by reason of

redundancy. It is enough for the employee to allege that his dismissal arose from a redundancy situation for section 91(2) to operate and throw the burden of proof upon the employer to rebut the presumption of redundancy. No similar presumption exists in our law and, like in all other civil matters, it is for the person who alleges a matter to establish the facts upon which his allegation is based. In the case of the present appellant the trial Court found that at the material time of the termination of the appellant's employment there was an increase and not a reduction of the garage business which led the employers to employ at least three other mechanics to cope with the volume of work.

Relying on the fact that: (a) referring to the legal principle applicable in this case, the trial Court said that a redundancy situation exists when at the material time a business employs more employees than necessary; and (b) the trial Court appears to have been guided in its decision, inter alia, by certain extracts from the judgment of Lord Denning in *Johnson and Another v. Nottinghamshire Combined Police Authority* [1974] 1 All E.R. 1082, counsel submitted that the trial Court misdirected itself in law in view of the fact that the facts in *Johnson* case (supra) are clearly distinguishable from the facts of the present case and, therefore, what Lord Denning had said in that case has no application in the present case, and also because the decisions in *Scarth v. Economic Forestry Ltd.* (1973) 1 ICR 322, NIRC, and in *Sutton v. Revlone Overseas Cor Ltd.* (1973) IRLR 173, NIRC, show that a redundancy can occur even though the total output of work does not diminish. Counsel also submitted that the decisions in *MacLaughlan v. Alexander Paterson Ltd.* (1968) SLT 377 (Ct of Sess), and *Rosie v. Watt* (1966) 2 ITR 201, II, show that a redundancy situation might arise even if the dismissed employees are replaced by others. It all depends, counsel added, on the kind of work that the new employee is asked to perform.

Generally speaking, in deriving guidance from decisions in English cases on matters of redundancy, the Courts in Cyprus must always bear in mind that, apart from the fact that the presumption under section 91(2) of the English Act of 1978, to which we have already referred, does not apply in Cyprus, the circumstances that constitute redundancy in England as defined in section 81(2) of the Employment Protection (Consolidation) Act 1978 differ from those defined in section 18 of our Termination of Employment Law, 1967. A dismissal by reason of redundancy is

taking place in England if the dismissal is attributable wholly or mainly to:

(a) the fact that the employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him; or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact of the requirements of that business for employees to carry out work of a particular kind in the place where he was employed, have ceased or diminished, or are expected to cease or diminish.

The decisions in *Scarth* (supra) and *Sutton* (supra), cited by counsel for the appellant, turned on the construction of the English section 81(2)(b) (supra). In *Scarth*, the employee was engaged as a timber manager. In order to reduce their expenditute the employers decided that the services of a timber manager were no longer necessary and that his work could be carried out by other employees or by sub-contractors, even though it was not proposed to reduce the number of trees being cut. It was held that a redundancy did occur though the total output of work had not diminished. *Sutton* case (supra), where the applicant Sutton was employed as chief accountant of the company's plant in South Wales, was decided on a similar reasoning. Mr. Sutton had been dismissed following a major reorganisation of the administrative and financial structure of the company, leaving no need for the post of chief accountant whose work had been redistributed amongst his three subordinates. It was held that Mr. Sutton's dismissal occurred by reason of redundancy since the employer's requirements for a separate and additional employee to perform the particular work of a chief accountant had ceased.

The decisions in *Scarth* (supra) and *Sutton* (supra) are discussed in Colin Bourn's Redundancy Law and Practice, 1983 Edn., para. 6.27 under the heading «A reduction in the requirements for employees» where they are mentioned as examples of the following principle at p. 133:

> «A dismissal by reason of redundancy occurs under s.81(2)(b) where the employer's requirements for employees to carry out work of a particular kind has ceased or disminished. It is not necessary for the amount of work to have declined. Statutory redundancy is not confined to situations of

economic retraction but encompasses economy measures or other improvements in efficiency, which bring about a reduction in the number of employees who are required to perform a particular task ...»

The cases of *Scarth* (supra) and *Sutton* (supra) are clearly distinguishable on their facts and the issues therein raised from the case of the present appellant where the ground for his dismissal given by his employers in their notice terminating his employment was that his post of assistant to the person in charge of the garage was abolished due to contraction in their volume of work, something that the Court had not accepted. The duties of the appellant before and after 1982 when he was named assistant to the person in charge of the garage, were essentially the same, those of an experienced mechanic. The needs of the appellant's employers for employees to carry out the particular kind of work which the appellant had been employed to carry never ceased and after his dismissal the appellant's work was not carried out by existing employees or independent contractors but by new employees who were employed either very shortly before or very shortly after he had been dismissed.

Johnson's case (supra) cited by the trial Court is surely not directly relevant here and we do not think that the passages from the judgment of Lord Denning set out in the judgment of the trial Court are of any real assistance in determining the issue before it. They have given, unnecessarily, to counsel for the appellant reason to complain and argue against the judgment given against his client. Irrelevant for the same reasons are also the other two decisions relied upon by Mr. Michanikos for the appellant, namely, *MacLaughlan* case (supra) and *Rosie* case (supra). The decision in the first of these cases turned on whether the mere fact that the dismissed employee had been replaced was sufficient evidence to rebut the presumption of redundancy operating in England in favour of the dismissed employee. It was held that, though a crucial piece of evidence in such cases would be whether or not the employee had been replaced, such replacement would not be sufficient evidence to rebut the presumption where the employer had given the employee a testimonial praising his work and stating that the only reason for his dismissal was redundancy. The decision in the second case *Rosie v. Watt* (supra) is of no assistance to the appellant. Apart from anything else, being a decision taken in the early days by majority of the tribunal, with which its legal

chairman had dissented, was not considered correctly decided by the Court of Appeal in *Johnson* (supra).

We would like to conclude by saying that the trial Court did not misapply the law to the facts which it had accepted. The statement by the Court that «redundancy exists when a business employs more employees than necessary», on which counsel for appellant relied to found his argument that the Court misconceived the law is, in our view, correct if not isolated from the general tenor of the Court's judgment and with reference to the factual situation in connection with which it was stated. It should not, of course, be taken to mean that no cases of statutory redundancy may be envisaged, falling for example under para. (ii) of our section 18(c), where, due to changes in the skills needed on the part of the employees, some employees are dismised and replaced by new employes possessing different skills. This question did not arise in the case of the present appellant because of the express reference to the contraction of the volume of work of the garage made in the employer's notice of termination of appellant's employment as being the reason for such termination.

What we have stated hereinabove constitutes our answer to the single question posed for our consideration and decision and we remit the case back to the Industrial Disputes Court for the necessary action. Our answer is in fact a confirmation of its decision.

For all the above reasons the appeal is dismissed with costs.

Appeal dismissed with costs.