ATCHIA S O v AIR MAURITIUS LTD

2017 SCJ 181

Record No. 107041

SUPREME COURT OF MAURITIUS

In the matter of:

Sulliman Osman Atchia

Plaintiff

v/s

Air Mauritius Ltd

Defendant

INTERLOCUTORY JUDGMENT

The defendant is the national airline company of Mauritius and the plaintiff was previously employed by the defendant since 01 September 1972.

The claim of the plaintiff, as can be culled from the averments in his plaint with summons, is that on 21 August 2009 he was forced to retire and was requested to hand over all the assets of the defendant company that were in his possession despite the fact that (a) there has been a *communiqué* issued by the Ministry of Employment, Labour and Industrial Relations whereby retirement age was extended to 65 years; and (b) there has been several requests made by him to work until September 2010.

The plaintiff claims that in view of his "*forced retirement*" the defendant company is indebted to him in the sum of Rs 3,655,332. The plaintiff has further claimed Rs 46,665 as monthly pension and the sum of Rs 2 million as damages and prejudice suffered.

The defendant initially raised several *plea in limine litis* but it was later agreed that these will be taken on the merits.

However, at this stage of the proceedings, I am called upon to rule on a new preliminary objection raised by the defendant to the effect that pursuant to the transitional provisions at section 71 of the Employment Relations Act, coupled with section 49 of the Act, an employee can only retire at a date other than that provided for in his contract of employment, if and only if there was consensual agreement between the employer and employee.

It is not disputed that as per his contract of employment dated 26 October 2004 the plaintiff was to retire at the age of 60 years i.e. as from 21 August 2009 (20 August being the last day of work). On 31 October 2008, the Ministry of Employment, Labour and Industrial Relations issued a communiqué to the effect that the retirement age has been extended to 65 years. The Employment Rights Act, which came into force in February 2009, provided that a worker, whose month and year of birth was mentioned in the first column of the First Schedule was to retire at the date specified in the second column of the Schedule. According to that table the plaintiff was to retire on 20 September 2010. On 3 and 14 August 2009, the plaintiff informed the defendant that he intended to retire on 20 September 2010, as per the new legal provisions. This request was not acceded to by the defendant, and the plaintiff was made "*to retire*" as per the contractual date, that is 21 August 2009 (last day of work 20 August 2009).

The transitional provision at section 71(1) of the Act, as at 2009, provided as follows –

> "*The terms and conditions on which a person was employed immediately before the commencement of the Act shall continue, unless the worker and the employer agree otherwise*".

The defendant therefore argued that given that there was no such agreement, the contractual date should prevail.

The plaintiff on the other hand claims that the Employment Rights Act is "*d'ordre public*" and the contractual terms of the contract of employment cannot displace the general rule established by the Act, namely that the retirement age has been prolonged to specified dates as per the First Schedule. In support he relied on the general statement made by the court in the case of **Oxenham V v France Maritime Agency Ltd** [2016 SCJ 10] that the (now repealed) Labour Law was "*a législation d'ordre public*". Counsel submitted that since the Employment Rights Act has replaced the Labour Law, the same reasoning should apply.

Article 6 of the Code Civil, under the preliminary title "*De la publication, des effets et de l'application des lois en général*" provides that "*On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes moeurs*." It stands to reason for example that a contract of employment cannot oust the application of the Employment Rights Act. In the present matter we are far from that scenario.

The Interpretation and General Clauses Act, at section 5(B) provides the following –

"*Effect shall be given to each enactment according to its true intent, meaning and spirit*."

Limiting ourselves to the retirement age issue, it is clear that the Employment Rights Act 2008 establishes a new scheme. A transitional provision by its very nature is to facilitate the transition from one statute to another, that is the old scheme to the new scheme, and is often intended to apply for only a limited amount of time.

As such we see that the approach taken by the legislator in that respect is two folded. Firstly, a graduated approach is taken *quoad* the retirement age itself, in that the Act in the First Schedule provided for a graduated introduction of the 65 years retirement age policy. The second aspect that can be gathered from the clear words of section 71(1) (transitional provisions) is that for contracts of employment prior the coming into force of the Act, the new retirement age is not mandatory unless both the employer and employee so agree. The transitional provision which is part and parcel of the Act cannot be simply ignored, the more so that the retirement age policy has not been given retrospective or retroactive effect.

In the circumstances, I consider that the intention of the legislator is clear as to the extent and purport of the transitional provision as set out in section 71(1). As rightly submitted by Senior Counsel for the defendant, this has later been confirmed by the amendment made to the legislation in 2013, whereby the Employment Rights (Amendment) Act 2013, makes a carve out at section 49, by inserting a new subsection (1)(A) which stipulates "*Notwithstanding any agreement or any provision to the contrary in any other enactment, an employer shall not require a worker to retire before the retirement age*." Clearly, it is only as from that amendment, which became effective as from 11 June 2013, that the legislator has decided on the inviolability of the statutory retirement age requirement.

However, the event which we are concerned with occurred in 2009, hence the 2013 amendment cannot be invoked in favour of the plaintiff.

I therefore consider that the point has been well taken and dismiss the plaint with summons, with costs.

O.B. Madhub
Judge

23 May 2017

For Plaintiff : **Mr H Duval SC, Mr D Appa Jala, of Counsel, Ms L Churitter, of Counsel instructed by Mr Attorney N Appa Jala SA**

For Defendant: **Mrs U Boolell SC, Ms A Pittea, of Counsel instructed by Mrs Attorney J Robert**