1988 December 22

(SAVVIDES J.)

IN THE MATTER OF AN APPLICATION BY LOUIS TOURIST AGENCY LTD., OF NICOSIA FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF A JUDGMENT AND/OR ORDER OF THE INDUSTRIAL DISPUTES COURT DATED 4.5.1988 IN APPLICATION NO. 572/86

(Application No. 126/88)

Evidence — Burden of proof — Wrongful dismissal — claim for damages before Industrial Disputes Court — Defence that claimant had retired voluntarily from the service with his employers — The Termination of Employment Law 24/67 as amended by Law 92/79 sections 3(1), 5, 6(1) and 7(1) — Burden of proof lies on the employers

The respondent filed an application in the Industrial Disputes Court claiming against his former employers (the present applicants) damages for wrongful dismissal. The present applicants alleged in their defence to the said application that the present respondent retired voluntarily from their service.

The trial Court ruled that the burden of proof was upon the present applicants who therefore had to start first adducing evidence.

Having obtained the necessary leave* the applicants applied for certiorari quashing the said ruling.

The Court having quoted verbatim sections 3(1), 6(1) and 7(1) of the said law and having explained the effect of section 5 of the same law,

Held, *dismissing the application*,

(1) Under section 6(1) the termination of such employment is presumed. To rebut such presumption applicants allege that the respondent himself terminated his employment and that he was not dismissed. This is an allegation which takes the case outside the ambit of section 6(1).

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*See (1988) 1 C.L.R. 405.

(2) Once the presumption operates in favour of the respondent and the applicants advance an allegation in rebuttal of such presumption the burden of proof lies upon them to establish that the claimant voluntarily retired from their employment by submitting his resignation

Application dismissed with costs

Application.

Application for an order of certiorari to remove into the Supreme Court for the purpose of quashing the ruling and/or order of the Industrial Disputes Court dated 4th May, 1988 whereby it was decided that the burden of proof was upon the applicants to start first adducing evidence

M Tsangarides with D Papadopoulos for the applicants.

Y Yiasemis, for the respondents

SAVVIDES J read the following judgment On the 30th June 1988 on an ex-parte application on behalf of the applicants in this case I granted leave to the applicants to apply for orders of certiorari and mandamus against the ruling of a Judge of the Industrial Disputes Court dated 4th May, 1988 In pursuance to such leave counsel for applicants filed the present application praying for an order of certiorari to remove into the Supreme Court for the purpose of being quashed the ruling and/or order dated 4th May, 1988, of the Industrial Disputes Court by means of which the Court decided that the burden of proof was upon the applicants to start first adducing evidence

The facts relevant to the present case are briefly as follows -

On the 1st September, 1986, Angelos Yiassemides filed an application in the Industrial Disputes Court under No 572/86 against the present applicants claiming (a) damages for wrongful dismissal, (b) the benefits or any emoluments he was entitled to under the law and/or collective agreements, (c) costs

The present applicants entered an appearance on the 16th February 1987, and in their grounds of defence they alleged that the said Yiassemides submitted his resignation and/or retired voluntarily from their service on/or about 31st July, 1986, and for this reason they denied his claim

After hearing argument in this respect by counsel for the present applicants the Court decided that under the provisions of s 6(1) of

The Termination of Employment Law No. 24/67 and relying on the summary procedure contemplated by law for the purpose of the speedy trial of this case decided that the burden of proof was upon the present applicants who had to start first adducing evidence.

In arguing his case counsel for applicants submitted that the Court wrongly relied on s 6(1) and s 7(1) of Law 24/67 and misinterpreted the provisions contained therein. The present case, counsel submitted, is not a case of termination of employment within the meaning of s.3(1) of Law 24/67 the effect of which, subject to the provisions of s.5, would be to shift the burden of proof on the employers but it is a case where the employee has himself submitted his resignation and/or retired voluntarily from the service of the applicants

Counsel contended that once the case does not fall within the exemptions enumerated in the said law by virtue of which the burden of proof is shifted to the employer, the general rule that the burden of proof lies on the person who makes an allegation, and in this case the respondent who was the applicant in the main application, applies and, therefore, the ruling of the Court contravenes such principle

Counsel for the respondent, on the other hand argued that the learned trial Judge properly applied the law in the circumstances of the present case and exercised his discretion accordingly He submitted that under s 12(11) of the Annual Leave with Emoluments Law, 1967 (Law 8/67) the power is vested in the Court to decide the procedure to be followed in a particular case Furthermore, counsel submitted, that once the allegation of the applicants was that they did not terminate the employment of the respondent but it was he who submitted his resignation the burden shifts on them to start their case first in order to prove such allegation by virtue of which they seek to take this case outside the provisions of the law which otherwise would have been applicable. They should have the burden to start first to prove such allegation.

S.3 of Law 92/79, which repealed s.3 of Law 24/67, reads as follows:

«3.-(1) Όταν, κατά ή μετά την έναρξιν της ισχύος του παρόντος άρθρου, ο εργοδότης τερματίζη δι'

οιονδηποτε λόγον άλλον ή των εν τω αρθρω 5 εκτιθεμένων λόγων, την απασχόλησιν εργοδοτουμένου, ο οποίος έχει απασχοληθή συνεχώς υπ' αυτού επί είκοσι εξ τουλάχιστον εβδομάδας, ο εργοδοτούμενος κέκτηται δικαίωμα εις αποζημίωσιν υπολογιζομένην συμφώνως προς τον Πρώτον Πίνακα.»

The translation in English reads as follows

(Where, on or after the commencement of the present section the employer terminates for any reason other than those set out in section 5, the employment of an employee who has been continuously employed by him for at least twenty-six weeks, the employee has a right to compensation calculated in accordance with the First Schedule)

S 5 of Law 24/67 enumerates the cases in which termination of employment does not give right to a claim for compensation

S 6(1) of the Law deals with the burden of proof and provides as follows

«6.- (1) Καθ' οιανδήποτε ενώπιον του Διαιτητικού Δικαστηρίου διαδικασίαν ο υπό του εργοδότου τερματισμός απασχολήσεως του εργοδοτουμένου τεκμαίρεται, μέχρις αποδείξεως του εναντίου, ως μη γενόμενος διά τινα των εν τω άρθρω 5 εκτιθεμένων λόγων.»

The translation in English reads as follows

(In any proceedings before the Industrial Disputes Court there shall be a rebuttable presumption that *the termination of the employment of the employee by the employer* has not been for one of the reasons set out in section 5 (The underlining is mine).

S 7(1) of Law 24/67 provides as follows

«7.-(1) Όταν εργοδοτούμενος νομίμως τερματίζη την απασχόλησίν του παρ' εργοδότη λόγω της διαγωγής του εργοδότου, τότε ο τερματισμός ούτος θεωρειται ως τερματισμός υπό του εργοδότου υπό την έννοιαν του άρθρου 3.»

The translation in English reads as follows

(Where an employee lawfully terminates his employment

with an employer because of the employer's conduct, such termination is deemed to be termination by the employer within the meaning of section 3.)

In the present case it is the allegation of the respondent-employee that the applicants-employers terminated his employment. Therefore, the termination of the employment of the applicant is a matter in issue in the present proceedings.

By their defence the applicants deny that they terminated the employment of the applicant and advance the allegation that the respondent employee submitted his resignation. This is also a matter in issue before the Court.

Under s.6(1) the termination of such employment is presumed. To rebut such presumption applicants allege that the respondent himself terminated his employment and that he was not dismissed. This is an allegation which takes the case outside the ambit of s.6(1). Once the presumption operates in favour of the respondent and the applicants advance an allegation in rebuttal of such presumption the burden of proof lies upon them to establish that the claimant voluntarily retired from their employment by *submiting his resignation.*

Bearing in mind all the relevant provisions of Law 24/67 and my finding as above the learned trial Judge rightly came to the conclusion that the burden lied upon the employers to start their case first.

In the result the application is hereby dismissed with costs.

Application dismissed with costs against applicants.