8/78

INDUSTRIAL APPEALS COURT at MELBOURNE

TUCKER v NYLEX CORPORATION LTD

Deputy President O'Shea J

31 October 1977

LABOUR AND INDUSTRY – ENTITLEMENT TO PAYMENT FOR LONG SERVICE LEAVE – TERMINATION OF EMPLOYMENT ON ACCOUNT OF PRESSING NECESSITY: *LABOUR AND INDUSTRY ACT*, S.1-54-155A.

One Gerreyn was employed by Nylex for over 10 yrs. He worked considerable overtime in order to pay his financial commitments arising from his marriage, purchase of home, and birth of 2 children. In October 1974, all overtime stopped with no prospect of re-introduction. G. was no longer able to pay his way without the extra $50 overtime per week. He arranged employment in the same type of work with another company at an increased wage with an offer of some overtime. His reason for leaving was that once he lost the overtime he was unable to meet his commitments. Nylex were charged with failure to pay his entitlement for 10-15 years' continuous employment and in defence claimed that G. was not under a "pressing necessity" to justify his termination of employment.

HELD: Charge found proved.
Gerreyn was a worker who had completed at least 10 years but less than 15 years continuous employment with Nylex Corporation Limited and that his employment was terminated by him on account of a pressing necessity which was of such a nature as to justify such termination and that he was therefore entitled to an amount of long service leave equal to 1/60th of the period of his continuous employment.

O'SHEA J: We were urged to say that his real reason for terminating his employment was that in September 1974, Christopher Dempsey was appointed as his supervisor. It was said that on hearing of Dempsey's appointment to that position that Mr Gerreyn said: 'That's it. There is no future in the company for me.' We are not persuaded that he uttered those words or words to that effect. We should say that having seen and heard Mr Gerreyn and Mr Dempsey and the other witnesses give their evidence that where there is conflict between Mr Dempsey and Mr Gerreyn we prefer to accept the evidence of Mr Gerreyn. Moreover, on this issue we are quite satisfied that Mr Gerreyn was not disappointed at his failure to be appointed as supervisor. After all, Mr Dempsey had been acting as supervisor for many months beforehand and it must have been apparent to all that he was likely to be appointed supervisor.

Moreover, we accept Mr Gerreyn's evidence that he was not keen to take on the responsibility of supervisor. Indeed he said that if he had been offered the job he would not have taken it, because it involved too much for him. He considered that the supervisors had too much to do. This we feel is consistent with his general approach to work in that whereas he was a competent and conscientious worker and did work overtime, nonetheless, it was not his custom to work the maximum number of hours overtime which were available, but only so much as he needed to work in order to cover his commitments. In those circumstances, we see no reason to doubt his testimony when he said that he was not jealous of the appointment of Mr Dempsey as supervisor and indeed he had no ambition to take that position.

Moreover, we accept the evidence of Mr Price that no prospects of promotion were held out to him when he obtained the position with Matherson-Selig. In the light of that evidence, we do not accede to the suggestion that the use of the expression 'better prospects' when filling in the reason for leaving, indicates that Mr Gerreyn's reason for leaving was that he considered that he had prospects of advancement at Matherson-Selig which he did not have with Nylex in the sense that he might thereafter become a supervisor. Mr Gerreyn testified that that was not his reason and Mr Price's evidence bears out that no such prospects were held out to him. We consider that the words 'better prospects' are adequately accounted for by the notion that by moving to Matherson-Selig his financial prospects were better. Again, it was suggested that Mr Gerreyn was generally a discontented employee with Nylex but we see no reason whatsoever to justify that view.

It is apparent that the employer was considerate and met him with his personal requests and guaranteed his personal loan with the Bank and we see no reason to conclude that Mr Gerreyn was discontented in any general way. Although some 18 months earlier an advertisement by Matherson-Selig for a color matcher had been brought to his attention and he had followed that up to see what salary and conditions were offering, we attach no sinister significance to that. Such enquiries are quite common amongst employees who frequently compare conditions offering in comparable positions without thereby indicating that they are discontented with their own employment or ready to leave their employer whenever some slight improvement in conditions is indicated by another employer.

On the other hand, there are a number of considerations which in our view lend weight to Mr Gerreyn's claim that he did leave because of the loss of overtime. In our view, apart from the increase in weekly wage and the promise of overtime, he had everything to lose by a change of employment. As was pointed out to him before he left by Mr Buis, he had already been with Nylex for over 10 years and conditions in the industry generally were uncertain and if there were to be further retrenchments then the usual rule of the last on first off would be followed and by changing employment at that stage, he was placing himself in a more vulnerable position. Moreover, there had been considerable retrenchments at Nylex, yet his services had been retained. In addition, he lost the benefit of being on the staff at Nylex and he lost considerably on his superannuation. Having regard to all those matters, we see no reason to doubt Mr Gerreyn's evidence that his reason for leaving was that once he lost the overtime he was unable to meet his commitments.

In that factual situation, the question remains as to whether or not Mr Gerreyn terminated his employment on account of pressing necessity of such a nature as to justify such termination. We have no doubt that Mr Gerreyn took the view that the situation in which he found himself constituted such a necessity which that, viewed objectively, the facts and circumstances which operated in November 1974 did constitute a pressing necessity of such a nature as to justify such termination. We consider that most reasonable and responsible members of our community would regard a man's duty to pay his way as high amongst the obligations which fall upon him, at least where he is an able-bodied, healthy citizen.

Where a worker, through no fault of his own, finds himself in a position where he is unable to meet his current financial commitments because of some change in the circumstances of his employment, then in our view he is faced with a 'necessity' in the sense that he is confronted with a situation which needs to be corrected. In other words, Mr Gerreyn was faced with a situation which if he allowed it to continue would produce insolvency in that he would not be able to meet his debts as they fell due and that situation would become progressively worse. Something needed to be done to correct that situation. Moreover, in our view, it was a 'pressing' necessity in the sense that it could be foreseen that if things were allowed to continue his financial situation and that of his family for whom he was responsible would deteriorate progressively. Surely no-one would suggest that he should have to wait until he had judgments entered against him before he took remedial action. Once he could foresee that unless something were done and done soon, that he would be unable to pay his way and would inevitably be reduced to insolvency he was faced with a situation which was pressing for correction. He was in our view in a financial situation which needed to have something done about it as a matter of urgency. In November or December 1974 had he laid out his situation before a prudent and competent financial adviser, we have no doubt that the advice he would have been given was that he must immediately take steps to increase his income in order that he could cover those commitments which it was essential for him to meet. The availability of a position with Matherson-Selig at $137 per week with an offer of overtime presented an opportunity for him to arrest the deterioration in his financial situation and to pay his way.

In the economic situation facing the industry in which he was employed, and the financial plight in which he found himself, Mr Gerreyn could not reasonably or responsibly afford to disregard that opportunity. In order to accept it it was necessary for him to terminate his employment.

In all those circumstances we have no doubt that in November 1974 he was faced with a pressing necessity of such a nature as to justify his termination of his employment and we are satisfied that it was that pressing necessity which accounted for his termination of his employment.

We were urged to say that even if there were a pressing necessity to take steps to boost his income, that this did not require that he should have terminated his employment with Nylex, because there were shift workers who received a loading of 15 per cent for shift work and although they too no longer received overtime, he could have taken on shift work and thereby solved his financial problems. However, we do not regard that suggestion as providing a realistic solution to his problems. Perhaps the best answer to it was made by Mr Buis who was called on behalf of Nylex. It it clear from his evidence that the loss of overtime had been discussed between himself and Mr Gerreyn after Mr Gerreyn had given notice, but before his employment terminated.

In the light of that evidence we do not consider that it would have been practicable or plausible to suggest that Mr Gerreyn might have been able to solve his problems by changing to the position of a shift worker. Plainly there would have been difficulties at that time in changing him to the position of a shift worker and even if that could have been done we do not consider that that would have been adequate to have solved the financial difficulties in which he found himself.

In the result we are satisfied on the criminal onus that on the 11th day of December 1974, Mr Gerreyn was a worker who had completed at least 10 years but less than 15 years continuous employment with Nylex Corporation Limited and that his employment was terminated by him on account of a pressing necessity which was of such a nature as to justify such termination and that he was therefore entitled to an amount of long service leave equal to 1/60th of the period of his continuous employment. We are satisfied that he was continuously employed by Nylex Corporation Limited from the 14th February 1964 until the 11th December 1974, and therefore in accordance with Sections 154 and 155A of the Act he was entitled to pay in lieu thereof for that period at his ordinary pay which was at that time $127.50 per week. Thus he was entitled to an amount of $1172.49 in lieu of long service leave on the termination of his employment. We are also satisfied that the employer, Nylex Corporation Ltd failed to pay Mr Gerreyn any part of that amount. We are therefore satisfied that all the elements of this charge have been proved.

That is the point we have reached. Although those findings would justify a conviction, we do not regard this as a case in which it is necessary to record a conviction if the pay which is due to Mr Gerreyns is paid by the employer — unless you wish to urge anything to the contrary?

Mr BASSETT:
I am instructed by the Department that it is concerned that the number of bonds which have been given in cases of this nature as well as in other cases. I would, therefore, urge the Court to record a conviction in this matter — that is, of course, at the Court's discretion.

THE DEPUTY PRESIDENT:
We have plenty of bonds but we would not do it precisely in that way. I would suggest perhaps that we could adjourn the matter until 1st December and if the amount of long service leave of $1172 is paid, we would simply strike out the matter. That do you say to that?

Mr ROSEN:
Very well. Would Your Honour adjourn the matter to that date and, obviously, one or other course would be adopted in that time.

THE DEPUTY PRESIDENT:
It will be known before that date what has happened and what will happen; it may not be possible for all the parties to have further argument on it. If it is not paid by then it will probably be further adjourned.
