IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0012 OF 2009
(High Court Civil Action No. HBC 0196 of 2002L)

BETWEEN : **SHELL FIJI LIMITED** and **FERETI FILIPE**

Appellants

A N D: **BENJAMIN JOHNSON**

Respondent

Coram: Byrne, AP
Calanchini, JA

Date of Hearing : 18 March 2010

Counsel : Ms A Neelta for Appellants
Dr M S D Sahu Khan for Respondent

Date of Judgment: 23 September 2010

JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Datt J) handed down on 13 February 2009. The Court awarded judgment to the Respondent in respect of his claim for wrongful dismissal and ordered the Appellants to pay to the Respondent special damages and interest in the sum of $484.22,

general damages and interest in the sum of $14,200.00 and costs in the sum of $2,000.00. The Court dismissed the Respondent's claim for damages for defamation.

[2] The background may be stated briefly. The Respondent had been employed by the First Appellant (Shell) as a driver for over 20 years. He delivered fuel to customers in the western side of Viti Levu between Vuda and Rakiraki. Allegations of misconduct were made against the Respondent in that he under supplied and wrongfully supplied fuel to customers. In other words, the allegations related to fraudulent deliveries. Similar allegations were also made against other drivers employed by Shell. Shell commenced an investigation into the delivery procedures and documentation.

[3] By letter dated 4 February 2002 the Respondent was informed by Shell's Operations Manager, the Second Appellant (Filipe) that:

> ***"Following our discussions this morning in respect of our investigations into fraudulent deliveries to various customers of Shell Fiji Ltd in the west, you are hereby suspended from tanker driving duties to allow investigations to continue unimpeded. I also confirm that alternative duties will be assigned to you in the meantime.***
>
> ***In recognition of your willingness to cooperate, I also confirm that your suspension from driving shall be for a duration of two (2) weeks. This is ample time for you to demonstrate your cooperation to enable the allegations against yourself to be tabled to clear your involvement. However, should more evidence be discovered in conjunction with other external investigations that implicate your involvement then Shell shall have no option but to first suspend you from employment immediately.***
>
> ***Should you have relevant information to the investigation, please contact myself or the Terminal Manager immediately. As a long serving employee of Shell, I am confident that you together with Shell have your best interests to consider through having this matters resolved."***

[4] Then by an internal memorandum dated 13 February 2002 from Filipe the Respondent was advised that:

> *"Following our meeting on February 4th at Vuda with the Terminal Manager and the Internal Auditor over fuel delivery shortages to Govt, you expressed willingness to cooperate and to assist in further details of widespread non fuel deliveries to specific customers. At that same discussion I also advised you that SFL was working closely with Govt auditors in establishing the specific days of non delivery of fuels and the storemen implicated in this.*
>
> *The information that have been established so far is enough to warrant your suspension from duties immediately to enable investigations to be completed and without interference. Effective immediately you are suspended without pay for an indefinite period and you will be advised as soon as investigations are completed with Govt auditors as well as with other Customers affected."*

[5] By letter dated 26 February 2002 the Respondent was informed that the investigation had confirmed his involvement. The letter stated:

> *"As advised to you following our meeting on Monday, February 4th which resulted in your indefinite suspension without pay, Shell was going to continue with its investigations into your involvement with fraudulent deliveries of fuel orders to unauthorised customers and without authorised documentations.*
> *In our joint investigations with PWD/Govt auditors, a list of fuel delivery shortages have been confirmed to the day on which you had been the nominated driver to make the deliveries. It should also be pointed out that some of the deliveries were to customers other than PWD which were not delivered in full. There is overwhelming evidence to confirm your involvement and it is in this context that I will highlight some of the examples to demonstrate the fraudulent delivery process.*
>
> *The evidence were compiled from trip records, RED 1 process and JDE system.*

1) *March 16 2001 : On a delivery trip to PWD Rakiraki, you made a short delivery of 10000 litres diesel, and this was subsequently delivered unauthorised on same day to Ba Bridge SS.*

2) *August 10 2001 : On a delivery trip to PWD Rakiraki, you made a short delivery of 10000 litres diesel, and this was subsequently delivered unauthorised on same day to Ba Bridge SS.*

3) *December 24 2001 : On a delivery trip to Ba and Rakiraki, you had surplus diesel in the truck after making the deliveries (which was advised to Vuda by PWD Rakiraki). You also claimed that you spoke to Mereseini Waqa about the surplus fuel, however, she was on annual leave that day. You have not accounted for the surplus fuel in your last interview.*

The above are just some of the specifics that we have on file from the joint investigations. It is very disappointing and sad that a senior employee such as yourself with over 20 years service could involve yourself in this delivery fraud with our customers. It also puts your daughter's employment with Shell at risk, and depending on your response, Shell reserves the right to exercise termination.

You have 2 weeks to refute these charges and to demonstrate to Shell why your employment contract should not be terminated.

After this grace period, Shell will proceed with Civil and Criminal court action against you.

Should you wish to discuss the case in confidence, please contact the Terminal Manager."

This letter was signed by Filipe. It was cc copied to Rupeni Inoke, Shell's Manager at Vuda Point (Inoke).

[6] In a letter dated 28 February 2002 the Solicitors instructed by the Respondent (and other drivers) indicated that the Respondent denied the allegations without going into any details.

[7] By letter dated 18 March 2002 the Respondent was advised that his employment with Shell had been terminated. The letter stated:

> ***"In our letter dated February 26th of Shell's intention to terminate your employment contract on fraudulent deliveries to customers, you were given a grace period of 2 weeks as an opportunity to refute the charges outlined therein.***
>
> ***In view of your non response to the charges, I therefore have no alternative but to advise of the termination of your employment contract effective March 18th. Shell will proceed to pursue other legal avenues to recover costs in lost fuel emanating from the fraudulent deliveries."***

This letter was also signed by Filipe and cc copied to Inoke.

[8] On 13 February 2002, in addition to sending the internal memorandum to the Respondent, Filipe also addressed a notice to all staff in the following terms:

> ***"Following the suspension of 2 drivers on February 4th, I now advise that a third driver has been suspended indefinitely without pay effective today. The drivers have been suspended for non-delivery of fuel orders to specific customers. Investigations are on-going and we hope to have these concluded soon.***
>
> ***The suspended drivers are Ben Johnson, Vijay Verma and Ram Murti.***
>
> ***A fourth driver (Supreme) is currently assisting in the investigations and has provided written and signed statements."***

It would appear that this notice was circulated to employees by e-mail.

[9] It was this notice and the letter dated 26 February 2002 that formed the basis of the claim for damages for defamation.

[10] In the statement of claim the Respondent pleaded that his employment had been unlawfully terminated. He claimed that he had commenced

employment with the First Appellant in May 1982 and that he was earning an annual salary of $18,000 as a driver at the time when his employment was terminated. He also claimed that there were social consequences as a result of the termination and that he had been unable to "secure employment particularly in conformity of his employment with the (First Appellant) at the material time." He claimed special damages of $18,000.00 per annum from 18 March 2002.

[11] In relation to the claim for damages for defamation the Respondent pleaded that he was at the time a well respected member of the community in the Western Division and amongst the workers and employees of Shell and that he had respect, status and standing in the community.

[12] The Respondent claimed that the words used in the two offending documents in their material natural and ordinary meaning meant and were understood to mean:

> ***"(i) That the Plaintiff had been guilty of dishonest and fraudulent conduct.***
>
> ***(ii) That the Plaintiff could not be trusted.***
>
> ***(iii) That the Plaintiff was not worthy to be employed as a servant.***
>
> ***(iv) That the Plaintiff was part of a conspiracy to systematically defraud his employer.***
>
> ***(v) That the Plaintiff had committed criminal acts involving fraud and dishonesty."***

[13] The Respondent claimed that in consequence of the said words he was greatly injured in his credit, character and reputation. He claimed general damages (including aggravated, exemplary and punitive damages).

[14] In the amended Defence the Appellants denied that the termination of employment was unlawful.

[15] In relation to the claim for damages for defamation the Appellants claimed that the words complained of in the correspondence did not bear and were not understood to bear and were not capable of bearing the meanings claimed by the Respondent and were not defamatory to the Respondent. They also denied that the allegations made against the Respondent were false and malicious. They also relied upon the defence that the two items of correspondence were published on an occasion of qualified privilege.

[16] The Appellants also counterclaimed for damages and loss suffered due to the fraudulent conversion of petroleum and petroleum products by the Respondent.

[17] In the Pre-Trial Conference Minutes dated 7 March 2008, it was agreed between the parties that at the material time the Respondent was employed by the First Appellant at an annual salary of $16,160.00. It was also agreed that the Appellants wrote the letter dated 26 February 2002 and sent a copy to Rupeni Inoke and also that the Appellants published to all staff the correspondence dated 13 February 2002. Both items of correspondence were published of and concerning the Respondent. It was also agreed that Shell had terminated the Respondent's employment in March 2002.

[18] At the hearing of the action the counterclaim was by consent withdrawn. Filipe, who had been at the material time Shell's operations manager, did not participate in the proceedings.

[19] After a detailed consideration of the evidence and careful analysis of the legal principles involved the learned trial judge found that the First Appellant had breached the implied term of employment in that it failed to either make payment in lieu of notice or give the Respondent one week's notice. He considered that the Plaintiff was entitled to one week's wages in lieu of

notice, plus interest. In reaching that conclusion His Lordship had found that the Respondent's misconduct was not of the kind that provided Shell the right to summarily dismiss the Respondent. In addition, the trial judge awarded the sum of $10,000 by way of general damages as a global figure which included an amount for loss of wages for the period when the Respondent was wrongfully suspended.

[20] As a result the Respondent was awarded one week's wages of $341.00 together with interest at 6% being $143.22 for a total of $484.22 as special damages. He was also awarded $10,000.00 general damages with interest at 6% being $4,200.00 for a total of $14,200.00 as general damages. The total award was $14,684.22.22. The Appellants subsequently appealed to this Court.

[21] In relation to the defamation claim the learned judge found that the Respondent had failed to establish any of the imputations against the Appellants. He indicated that the Respondent had failed to establish publication of the email communication dated 13 February 2002 to all staff.

[22] He also concluded that, had the Respondent succeeded in establishing any of the alleged imputations in respect of the letter dated 26 February 2002 copied to the Vuda Point Manager, the defence of qualified privilege would have applied. As a result he dismissed the claim for damages for defamation.

[23] The Respondent subsequently filed a notice pursuant to Rule 19 of the Court of Appeal Rules.

[24] The Appellants seek an order that the judgment be set aside in so far as it relates to the finding of wrongful dismissal and that the claim for damages for wrongful dismissal be dismissed with costs. The grounds of the appeal are as follows:

"1. *The Learned Trial Judge erred in law and in fact in finding that there was no payment made to the Respondent at the time of the dismissal and did not give any consideration to the Appellant's case when the Respondent did not recall whether he was paid or not.*

2. *The Learned Trial Judge erred in law and in fact in not applying the principles of the leading case of Yashni Kant which has set out the criteria of wrongful dismissal in Fiji. The Learned Trial Judge erred in law and in fact in awarding damages against the Appellants when he failed to apply the correct principles whilst assessing damages for wrongful dismissal. The Appellant gave 1 (one) week's notice in lieu of 1 (one) week's wages.*

3. *The Learned Trial Judge correctly held that the Respondent failed to respond to the allegations put to him by the Appellant **BUT** the Trial Judge erred in law and in fact in wrongfully awarding damages which were excessive by any standards.*

4. *The Learned Trial Judge failed to take into account and give any weight to the Appellant properly carrying out its own investigation before dismissing the Respondent. The Trial Judge failed to consider that the Appellant acted reasonably in dismissing the Respondent. The question was not whether the Respondent was guilty but whether the Appellant had reasonable grounds to believe that the Respondent had committed the offence and whether the Respondent had offered any reasonable explanation.*

5. *The Learned Trial Judge erred in law in awarding such damages to the Respondent when the Respondent's claim for relief sought was inadequate and vague.*

6. *The Learned Trial Judge made serious errors of law in not properly dealing with the summary dismissal under the provisions of the Employment Act.*

7. *The Learned Trial Judge failed to give any reasons when awarding damages in the sum of $10,000.00 as there was not any evidence called to substantiate this award and the Learned Judge was wrong in arriving at the said amount."*

[25] In his Notice filed on 20 April 2009 the Respondent contended that the decision of the High Court should be varied so as to increase the quantum of damages awarded. The Respondent also contended that the decision be varied so as to allow the claim for defamation and for damages to be awarded to the Respondent, otherwise the appeal should be dismissed. The grounds of his contentions were that:

> "1. *The Learned Trial Judge erred in law and in fact in not applying and/or properly applying the correct principles applicable in the law of defamation relevant to the Claims by the Respondent.*
>
> 2. *The Learned Trial Judge erred in law and in fact in holding that there was no evidence of publication of the email dated 13th February, 2002 as required in the law of defamation in as much as there were evidence of the same and that was admitted in the pleadings and the Pre-Trial Conference and in evidence in Court.*
>
> 3. *The Learned Trial Judge erred in law and in fact in not properly and/or adequately applying the principles of publication as regards the principles of publication in law as regards the law of defamation .*
>
> 4. *The Learned Trial Judge erred in law and in fact in not holding that the letter dated 26th day of February was defamatory and that there was not sufficient evidence as to publication thereof as required by the law of defamation.*
>
> 5. *The Learned Trial Judge erred in law and in fact in not properly and/or adequately applying the principles of qualified privilege in the law of defamation and/or in applying those principles in the circumstances of the case.*
>
> 6. *The Learned Trial Judge erred in law and in fact in not awarding damages for termination of the employment of the Respondent as to the manner of dismissal and/or the implied breach of terms of employment.*
>
> 7. *That the Learned Trial Judge erred in law and in fact in not properly and/or adequately considering the evidence of the Respondent on the one hand and that*

of the Appellant on the other having regard to the relevant circumstances.

8. ***That the decision of the Learned Trial Judge as regards the Claim for defamation is unreasonable having regard to the evidence as a whole."***

[26] We propose to deal first with the Appellants' appeal against the decision of the High Court that the Respondent had been wrongfully dismissed. If necessary, we shall then consider the quantum of damages. Finally we shall consider the Respondent's contention that the judgment should be varied and that an award of damage for defamation should be made.

[27] The Appellants' grounds are concerned with the trial judge's conclusion that the Respondent had been wrongfully dismissed and with the quantum of damages that were awarded by the Court as a result of that finding.

[28] At the outset we have no hesitation in stating our agreement with the learned judge that the termination of employment was by way of summary dismissal. The termination letter was dated 18 March 2002 and the Respondent's employment was terminated with effect from 18 March 2002.

[29] The next question for this Court is to determine whether the summary dismissal was wrong. It is apparent that the Respondent was not given notice nor did he receive any payment in lieu of notice. The termination letter made no mention of notice or payment in lieu of notice and there was no admission in the agreed facts set out in the pre-trial conference minutes. Under those circumstances the dismissal was wrong unless the Appellants established that there was misconduct on the part of the Respondent that amounted to a breach of a serious term of the contract or a repudiation of the contract which entitled Shell to terminate the contract summarily.

[30] The right of an employer to summarily dismiss an employee at common law has been modified in Fiji by statute. At the relevant time, section 28 of the Employment Act Cap 92 (now repealed) stated:

"28 An employer shall not dismiss an employee summarily except in the following circumstances:

(a) where an employee is guilty of misconduct inconsistent with the fulfillment of the express or implied conditions of his contract of service;

(b) for willful disobedience to lawful orders given by the employer;

(c)-(e) ...."

[31] In the absence of a more generous term in an employee's contract of service, the summary dismissal of an employee will be wrong if it is inconsistent with the provisions of section 28.

[32] In ***Fiji Public Service Association and Satish Kumar -v- The Arbitration Tribunal and Another*** (unreported Civil Appeal No. 13 of 1999 delivered on 19 February 2002) the Fiji Court of Appeal said (approving the comments made by the judge at first instance) at page 10:

> ***"Section 28 provided that an employer should not dismiss an employee summarily except in the circumstances specified therein. .... His Lordship said that the section did not confer an unfettered right to dismiss an employee where any of the matters specified in section 28 was found to exist, rather it removed the common law right to dismiss except where paragraphs (a) to (e) applied. He added that if any of the paragraphs applied, the common law right continued and there was no statutory or other objection to that right being fettered by an agreement between the employer and its employees."***

[33] The termination of employment by summary dismissal in this case will be wrong unless (a) the Respondent's misconduct fell within one of the circumstances listed in section 28 and (b) was of a sufficiently serious nature that it would entitle Shell to regard the contract of service as being at an end.

[34] For the purpose of determining that issue it is only necessary to consider the first matter (a) set out in section 28. That in turn first requires a determination as to the grounds upon which Shell summarily dismissed the Respondent.

[35] Upon a reading of the judgment from paragraph 159 through to paragraph 166, it is apparent that the learned judge had concluded that the basis of the decision to summarily dismiss the Respondent was his failure to provide an explanation when requested to do so. In paragraph 166, the judge stated:

> ***"In the present case, the plaintiff was only required to submit explanation, what happened to the 20,000 litres of missing fuel. There was no allegation that he was guilty of fraudulently delivering fuel to Ba Service Station. In my view, the Plaintiff's failure to reply entitled the defendant to terminate the plaintiff's employment provided the defendant gave the plaintiff a proper notice of termination. In my assessment this was not a proper case which required instant summary dismissal as compared to serious cases such as assault .... In the present case the Plaintiff was only required to provide answers to questions, which in my view was not a serious allegation for instant dismissal. I took note of the fact that the defendant was not required to give the Plaintiff any reason to terminate his employment, since the plaintiff was not employed on contract basis even though the letter of termination referred to contract of employment."***

[36] We note that under section 13(1) of the Employment Act it was provided that

> ***"No person shall employ any employee and no employee shall be employed under any contract of service except in accordance with the provisions of this Act."***

[37] It did not appear to be disputed that the Respondent was an employee employed under a contract of service. Under the Employment Act, all contracts of service are either oral or written contracts. It was perhaps, therefore, an oversight on the part of the learned judge when he noted that

the Respondent was not employed on a contract basis. It may be that his comments were intended to indicate that the Respondent was not employed on a fixed term basis.

[38] However the more important issue is the learned judge's conclusion as to the basis of the decision taken by Shell to terminate the Respondent's employment. In that regard we consider that it is necessary to have regard to the contents of the letter dated 26 February 2002 to the Respondent and the contents of the termination letter dated 18 March 2002.

[39] In the letter dated 26 February 2002 (the first letter) it is clearly stated the investigation revealed that a list of fuel delivery shortages were confirmed on the day on which the Respondent was the nominated driver. The letter also stated that there was overwhelming evidence to confirm the Respondent's involvement in the fraudulent delivery process. Three specific instances involving the Respondent were then detailed.

[40] The respondent was then advised that he had two weeks to refute these charges and to demonstrate why his contract should not be terminated.

[41] It was not disputed that the Respondent did not attempt to refute the specific instances of fraudulent delivery and nor did he attempt to demonstrate why his contract should not be terminated because of his confirmed involvement in the three instances of fraudulent delivery. The Solicitor's letter dated 28 February 2002 certainly did not attempt to provide any explanation. It contained a blanket denial. Hence the letter dated 18 March 2002 that informed the Respondent that his employment was terminated with immediate effect.

[42] We cannot agree with the conclusion that the Respondent's employment was terminated because he failed to provide a written explanation. In our opinion the Respondent's employment was terminated on account of his confirmed involvement in fraudulent fuel deliveries. By failing to respond within the

time specified it was presumed, and rightly so, that there was no reasonable explanation for the Respondent's involvement in the three instances of fraudulent fuel delivery that had been specified in the letter dated 26 February 2002.

[43] We therefore also conclude that this misconduct was inconsistent with the fulfillment of both an express and an implied condition of the Respondent's contract of service and was of a sufficiently serious nature for Shell to treat the contract of service as being at an end. We therefore conclude that the summary dismissal was not in contravention of section 28. Under these circumstances the Respondent was not entitled to notice of termination nor was he entitled to payment of wages in lieu of notice.

[44] The Respondent submitted that there was no evidence to substantiate the Respondent's involvement in the instances of fraudulent delivery set out in the letter dated 26 February 2002.

[45] However Shell's conclusion as to the Respondent's involvement was based on the result of its investigation. The agreed bundle of documents in the Court Record included documents that were the subject of the investigation. On the investigation, the learned trial judge stated at paragraph 15:

> ***"The defendant (Shell) claimed that after receiving several complaints from its customers for short supplies of fuel, it appointed its auditors to conduct an investigation in the short supply of fuel by the Plaintiff to PWD Rakiraki. There was evidence that PWD conducted its own inquiries for short supplies of fuel to Rakiraki depot. There were innumerable photocopied computer-generated documents annexed to the bundle of documents tendered as evidence."***

[46] Then at paragraph 18 of his judgment, the learned judge noted:

> *"Counsel for the Plaintiff submitted that the investigation against his client was flawed, the outcome was unacceptable, the evidence was contaminated by improper accounting methods and principles and the report lacked authenticity."*

[47] However, having considered the material and having listened to and having observed the witnesses, the learned judge concluded at paragraph 161:

> *"The Plaintiff failed to provide any explanation in writing concerning the above two claims made against him. I considered that the defendant's request for explanation was reasonable, when it was alleged that the defendant short supplied fuel to PWD Rakiraki. I considered that the Plaintiff should have provided some explanation in writing, which he failed to do."*

[48] To have reached this conclusion the judge must have been satisfied on the evidence before him that the investigation conducted by Shell provided sufficient grounds for the conclusion that the Respondent had been involved in fraudulent short supply of fuel and that he should have been given an opportunity to explain that involvement.

[49] We see no reason why we should reach a different conclusion from that which the trial judge arrived at. This Court did not have the opportunity to hear the evidence of the witnesses and is therefore not in a position to assess what weight should be given to the written material and the documents that were tendered in evidence at the trial. That was a matter entirely for the trial judge. We therefore accept that there was sufficient material from the investigation to enable Shell to conclude that the Respondent had been involved in fraudulent short supply of fuel to its customers and that he should have been given an opportunity to explain that involvement before taking further action against him.

[50] However, that is not necessarily the end of the matter. Under section 29 of the Employment Act, the Respondent having been summarily dismissed for

lawful cause, was entitled to be paid on dismissal the wages due to him up to the time of his dismissal.

[51] The correspondence indicated that the Respondent had been suspended without pay with effect from 13 February 2002. There was no material before the learned judge that would indicate that there was a contractual right to suspend the Respondent without pay.

[52] In the absence of any deduction authorised by section 51 of the Employment Act, the Respondent should have received his wages up until the date of the termination of his employment. If he was not paid wages between 13 February and 18 March 2002 and there does not appear to be any evidence to that effect, then this Court orders accordingly. We accept the calculation submitted by the Respondent's Counsel on page 251 of the Record in the sum of $1730.00 (i.e. 5 weeks x $346.00 per week).

[53] As the learned trial judge noted in paragraph 158 of his judgment the nature of the pleading in the claim for wrongful dismissal was inadequate. The Respondent pleaded in paragraph 10 that he had been unlawfully dismissed. As previously noted the dismissal will be unlawful or wrong if it is inconsistent with either the terms of the contract or with the provisions of the Employment Act. The Court has considered the summary dismissal of the Respondent in relation to the Employment Act.

[54] In ***Central Manufacturing Company Limited -v- Yashni Kant*** (unreported Civil Appeal No. 10 of 2002 delivered on 23 October 2003) the Fiji Supreme Court stated that "there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal" (see page 21 of that decision). The Court described this obligation as a duty that extends to treating an employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Where the dismissal is carried out in a manner that is unnecessarily humiliating and distressing, there is no reason in principle, the

Supreme Court stated, why a breach of this implied term should not be found to have occurred.

[55] The decision does not mean that there is in the contract of employment an implied term that the dismissal must be fair (since wrongful dismissal is not the same as unfair dismissal) but rather that in the process of dismissing the employee, that employee should be treated fairly in the sense that he should not be unnecessarily humiliated or caused unnecessary distress. It does not mean that an employer is required to consider a previous good record of service or any length of service.

[56] In the ***Kant case*** (supra), the Supreme Court considered that the unnecessary use of security and the prevention of access to his office amounted to public humiliation of the employee in the process of his dismissal and constituted a breach of the implied term. Damages were awarded.

[57] In the present case there was evidence before the trial judge that would lead this Court to conclude that Shell had behaved in a manner that would amount to a breach of the implied term. This evidence is to be found in the letter dated 26 February 2002. We refer to the following passage:

> ***"It also puts your daughter's employment with Shell at risk, and depending on your response, Shell reserves the right to exercise termination."***

There was no material before the Court below to suggest that the Respondent's daughter was in any way involved in the issue of fraudulent delivery of fuel.

[58] The reference to the Respondent's daughter was completely inappropriate. We consider that this part of the letter breached the implied term in the sense that any father would have been greatly distressed by such a threat being made to a blameless daughter. Although for entirely different reasons

We consider that the sum of $10,000.00 damages is appropriate for the breach.

[59 On this aspect of the appeal, the decision of the Court below is to be varied and the Respondent is to be awarded $1730.00 together with interest at 6% as special damages and $10,000.00 general damages with interest at 6%.

[60] We now turn to the Respondent's Notice and his contention that the judgment should be varied to allow the claim for damages for defamation. The Respondent's Notice challenged the findings of the trial judge in relation to (a) publication, (b) the principles to be applied in determining whether the Respondent was defamed, (c) the defence of qualified privilege and (d) his assessment of the evidence.

[61] Dealing first with publication. We accept that in the pre-trial conference minutes there was agreement between the parties that the Appellants had published the words in the memorandum dated 13 February 2002 sent to all staff by e-mail. The learned trial judge found that the Respondent had failed to establish publication since the Respondent did not call evidence from any employee of receipt of or having read the e-mail.

[62] However, in view of the admission as to publication, it was not necessary for the Respondent to call such evidence.

[63] We are satisfied that the letter dated 26 February was received by Inoke as a cc addressee. He acknowledged receipt of the letter in his evidence. The Appellants agreed that the letter had been published. We consider that the admission goes no further than an admission that Inoke received and read the letter. Inoke was Shell's manager at Vuda Point. He was another employee of Shell.

[64] There was no evidence before the court below to suggest that any person other than the Respondent as addressee or Inoke as cc addressee had read

the letter. Furthermore, the author of the letter, Filipe, was also an employee of Shell. He was at the time the Operations Manager. The only other witness called by the Respondent at the trial, Reverend S K Singh, stated that he had no knowledge of the existence or the contents of the letter dated 26 February 2002.

[65] Whilst there is no doubt that publication need only be to one person for the Plaintiff to seek damages for defamation, the particular circumstances of this case do raise an issue that is related to publication.

[66] This issue was the subject of some discussion in ***Riddick -v- Thames Board Mills*** [1977] 1 QB 891. The facts were similar. In that case the Plaintiff began employment as a shift engineer with the defendant company. After doubts about his ability he was dismissed some 18 months later for failure to do his job satisfactorily. Following a complaint from the Plaintiff's Solicitors, the Chief Personnel Manager (A) at the defendant's head office asked a colleague (B) to ascertain the facts about the dismissal. In a memorandum B reported to A the results of his investigation. The memorandum referred to the Plaintiff not having been up to the demands of the job, to his known instability and to his being highly strung and unsure of himself. The memorandum had been typed by B's secretary who handed it to A. A read it and filed it.

[67] The Plaintiff issued a writ claiming damages for defamation based on the memorandum. At the trial it was accepted that the memorandum had not been read by anyone other than A, B and B's secretary who had typed it. The jury found the words in the memorandum to be defamatory and malicious. The Plaintiff was awarded damages.

[68] The defendant company appealed. For reasons that are not relevant to this appeal, the appeal was allowed. However the Court of Appeal also discussed the question of publication. Lord Denning MR in particular expressed strong views on the subject. At page 893 he stated:

"A master should not be held liable for reports made to him by one of his servants about the conduct of another servant, even though it is in the course of the employment. But what is the legal basis of it?

....

According to one theory, the master is liable for the acts of his servants because they are regarded as being authorised by him : so that in law the acts of the servant are the acts of the master.

....

If that theory were to be applied to inter-departmental memoranda, then it would follow that the act of the one servant in making the report would be the act of the master : and the act of the other servant in receiving it and reading it would also be the act of the master. So it would be in law the master making a publication to himself. No one can be made liable for a libel published only to himself: any more then a man is liable for writing a defamatory letter and keeping it in his desk, showing it to no-one.

That is an attractive theory. I know that it will not fit in with the cases where a company has been held liable for letters dictated by a director to a typist. But in none of those cases was the point of publication properly argued. So it is still permissible theory, and I would for myself adopt it."

And at page 895 Lord Denning in urging the acceptance of his solution stated that:

"... a master should not be liable for a confidential report made by one of his servants about another, even though that servant was malicious in making it. Let the aggrieved servant bring his action against the malicious servant who reported on him. But do not let him bring it against the master who employs both of them and has done nothing wrong."

[69] In the present appeal, the letter was written by an employee and cc copied to another employee for his information as manager at Vuda Point.

[70] We see no reason why the opinion of Lord Denning should not apply to the facts of this case. In both cases company correspondence concerning one employee was written by another employee and passed to a third employee, all in the course of the employment of the three employees.

[71] Although we have taken a particular view about publication concerning the letter dated 26 February 2002, we shall proceed to consider the issues of imputation and qualified privilege in relation to this letter later in the judgment.

[72] Returning to the contents of the e-mail dated 13 February 2002. The learned trial judge came to the conclusion that an ordinary reader would not consider the contents of the e-mail to be defamatory of the Plaintiff. He stated that the document was nothing more than providing information to employees that the four drivers were under investigation. The judge found that the words used in the e-mail did not give rise to any of the imputations that were alleged by the Respondent.

[73] Upon a close examination of its contents, it is clear that its purpose is to do no more than to inform employees that the Respondent is one of three drivers who have been suspended pending an on-going investigation into the non-delivery of fuel orders to specific customers. The word fraudulent did not appear in the memorandum

[74] The question for the trial judge to determine was what was the likely effect of the words used upon the view taken of the Respondent by right-thinking readers. In the context of the work place the e-mail to the employees was likely to do no more than explain why the three drivers were no longer at work. The passage of such information would put to rest any speculation or rumour that might otherwise adversely affect work performance.

[75] We agree with the learned trial judge that the words used in the e-mail do not give rise to any of the imputations claimed by the Respondent and were therefore not defamatory of him.

[76] Turning now to the letter dated 26 February 2002. Once again, the learned judge concluded that the Respondent failed to establish any of the five imputations against the Appellants.

[77] On a fair reading of the letter, it is reasonable to conclude that a right-minded reader would have concluded that (a) so far as the Respondent was concerned, the investigation had been completed, (b) fuel shortages had been uncovered on days when the Respondent was the nominated driver, (c) some deliveries to customers (other than PWD) had not been delivered in full, (d) there was overwhelming evidence of the Respondent's involvement, (e) the Respondent was responsible for fraudulent delivery in three specified instances, (f) the Respondent was involved in fraudulent delivery of fuel to customers and (g) as a result the Respondent's employment would be terminated unless the charges were satisfactorily refuted.

[78] We cannot agree with the findings of the learned trial judge. In our opinion it is an inescapable conclusion that any right-minded person reading the letter could reasonably be expected to have concluded that the Respondent had committed acts involving the dishonest and fraudulent delivery of fuel (imputation 1). The letter clearly states that Shell has evidence that the Respondent was involved in these activities and listed three instances as examples with the added comment that there were other instances that were not detailed in the letter.

[79] In our opinion a right-minded person reading the letter could reasonably be expected to think of the Respondent as a person who could not be trusted and was a person who was not worthy to be employed as a servant. We therefore conclude that the words are capable of having the meaning set out in imputations 2 and 3.

[80] We do not consider that imputations 4 and 5 have been established. There is no material in the letter that would enable a right-minded person to conclude that the Respondent was part of a conspiracy which is a technical legal word. Similarly, there is insufficient material in the letter to enable a right-minded person to conclude that the Respondent's misconduct necessarily satisfied all the matters that needed to be established for the commission of criminal acts. This imputation is directed to the assertion that the Respondent had committed offences under the criminal law. That is not necessarily an imputation that could reasonably be drawn by a right-minded reader.

[81] We therefore find that the words used in the letter dated 26 February 2002 were defamatory of the Respondent in respect of imputations 1 – 3.

[82] The learned trial judge indicated in his judgment that in the event that the Respondent had established any of the imputations, he would have found that the defence of qualified privilege applied.

[83] In view of our findings in relation to the material in the e-mail dated 13 February 2002, we do not consider it necessary to consider the applicability of the defence to the publication of the words in the e-mail.

[84] In relation to the letter dated 26 February 2002, the following particulars were pleaded in the defence that the letter was sent to Inoke on an occasion of qualified privilege:

> "***(a) The said letter was made in discharge of the duty to put the allegations contained therein to the Plaintiff and to invite the Plaintiff to respond to the said allegation.***
>
> ***(b) In the premises the Defendants had a duty and/or interest in writing and sending the said letter to the said Rupeni Inoke and the Defendants wrote and sent the said letter pursuant to the said duty and/or interest and the said Rupeni Inoke had a***

corresponding duty and/or interest in receiving the said letter and the matters set out therein."

[85] At paragraph 153 of his judgment the trial judge noted that at the hearing Counsel for the Appellants established the defence by corroborative evidence from Inoke. The judge indicated that he accepted Inoke as a credible witness.

[86] His Lordship found that there was evidence that the letter was prepared and sent to the manager Shell Ltd, Vuda in the ordinary course of Shell's business operations. He considered that the contents of the letter made it abundantly clear that the maker (Filipe) had a duty to inform the (cc) recipient (Inoke) of the conduct of the Respondent. The judge found that the recipient (Inoke) equally had the legal entitlement to receive the letter in the ordinary management of Shell's business. The judge also accepted that the information contained in the letter directly related to the operation and management of Shell's business. He stated that if the material had been of a private nature, it would not be protected by the defence of qualified privilege. The letter had not been issued to a private person or an outsider.

[87] The nature of the defence is described by the learned authors of "***Gatley on Libel and Slander***" 11th Edition at page 437 in the following terms:

> ***"There are circumstances in which on grounds of public policy and convenience ... a person may yet, without incurring liability for defamation, make statements of fact about another which are defamatory and in fact untrue. .... Protection was granted if the statement was "fairly warranted by the occasion" and so long as it was not shown by the person defamed that the statement was made with malice, i.e. with some indirect or improper motive, which was typically established by proof that the defendant knew the statement to be untrue or was recklessly indifferent to its truth."***

[88] This category of qualified privilege needs to be distinguished from another category which covers reports to the public at large of certain matters of legitimate concern to them such as the proceedings of Courts or Parliaments. The learned authors of Gatley state at page 439 that the decision in ***Reynolds -v- Times Newspapers Ltd*** [2001] 2 AC 127 provided a much more extensive protection for publications to the public at large where the matter is of sufficient public concern.

[89] In this appeal, the defence arises in the limited category founded on a relationship. Lord Atkinson in ***Adam v. Ward*** [1917] AC 309 at page 334 stated:

> ***"A privileged occasion is an occasion where the person who makes a communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential."***

[90] We agree with the learned judge that this was a case where Filipe as operations manager was under a duty to inform Inoke about the involvement of the Respondent in the fraudulent delivery of fuel to customers. We are also satisfied that Inoke had a corresponding duty or interest to receive it in the performance of his management duties at Vuda Point. We also accept this to be the position even though there was no evidence to the effect that Inoke had requested this information.

[91] We have concluded that there was no error by the trial judge in his conclusion that the defence applied. We also note that he found that the Respondent did not submit any evidence of malice. We see no reason to disturb that finding. In addition to the view we have taken about publication of the letter dated 26 February, we do in any event confirm the trial judge's conclusion that it was written on an occasion of qualified privilege.

[92] As a result we make the following orders:

1. The Appellants' appeal is allowed in part. We set aside the order for special damages in the sum of $482.22.

2. We also allow the Respondent's cross appeal in part. We award the sum of $1730.00 together with interest at 6%.

3. We confirm the award of $10,000.00 as general damages together with interest at 6%.

4. The amounts in paragraphs 2 and 3 are awarded for different reasons from the decision of the court below.

5. Otherwise the appeal and the cross appeal are dismissed.

6. As both parties were partially successful, we make no orders as to costs.

Byrne, AP

Calanchini, JA

Solicitors:

Sherani & Co for the Appellants

Sahu Khan & Sahu Khan for the Respondent