LEPANI DELAI

A **v.**

THE MINISTER OF COMMUNICATIONS TRANSPORT & WORKS & THE ATTORNEY GENERAL

[HIGH COURT, 1990 (Palmer J) 28 June]

B Civil Jurisdiction

Employment- action for wrongful dismissal- availability of reinstatment- measure of damages.

Damages- wrongful dismissal- measure of.

C The Plaintiff who was an unestablished public servant was summarily dismissed for a "serious act of indiscipline" after causing a road accident. The High Court HELD: (i) that previous conduct was not an element of such an act (ii) that the dismissal was wrongful (iii) that reinstatement was not an available remedy and (iv) that the measure of damages was the amount the employee could have earned during the lawful contractual termination period.

D Cases cited:

Catherine Verma v. The Consumer Council of Fiji (FCA Civ. App. 51/80)
Malloch v. Aberdeen Corporation [1971] 2 All ER 1278

Ram Chand for the Plaintiff
E *Ratu Joni Madraiwiwi & Ms. G. Philips* for the Defendants

Action in the High Court for damages for wrongful dismissal.

Palmer J:

This is an action instituted on 31 August 1988 for wrongful dismissal of the
F Plaintiff by the Defendants on 13th May 1986. The Plaintiff was a driver employed by the Public Works Department. On the 27th April 1986 the truck he was driving was involved in a collision with another truck also owned by the Public Works Department. It is common ground that his dismissal on the 13th May 1986 was a direct result of that accident and the departmental view that he was to blame for the same.

G I first of all consider how to approach this matter. The whole hearing of this action was conducted along the lines of a hearing of a motor collision case. By that procedure the Court was invited to determine who was to blame for the collision, the Plaintiff or the other PWD driver. However, as I pointed out to Counsel during the hearing, it seems to me that that is not really the point or certainly not the whole point. This is not an appeal from the departmental apportionment of blame whereby this Court can substitute its own findings for

those of the department. So if I were to find that the Plaintiff was not to blame then, in the way that the case has been conducted by the Defendants, clearly the Plaintiff's dismissal would be wrongful. However, conversely, if I were to find that he was to blame that does not necessarily determine whether or not he was rightfully dismissed. The same applies with even greater force if I were to come to the view that both parties were partly to blame for the collision, So in my view it is not a review of the circumstances of the accident which the Court should be undertaking but rather a review of the circumstances of the Plaintiff's dismissal.

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It is common ground that the Plaintiff was an unestablished employee at the material time. By consent there was tendered a document entitled "Conditions and Rules of Employment for Government Unestablished Employees issued by the joint Industrial Council for Government Unestablished Employees." (Hereafter referred to "the JIC Agreement".) It is also common ground that this agreement constitutes the contract of service between the Plaintiff and the Defendants and I so find. Among other things it provides that wages will be paid weekly. The following Clauses are relevant to the present action:

C

SECTION C – DISCIPLINE

"34. General

D

Employment is conditional on the employee continuing to render satisfactory service. An employee failing in this respect or committing a breach of discipline may have his employment terminated or be liable for such lesser penalty as may be decided. Disciplinary measures are indicated in the following clauses.

E

35. Warnings

After due investigation under the authority of an Officer-in-Charge, a formal warning in writing may be administered to an employee in varying degrees of severity setting out the nature of the offence. Such warnings are to be recorded o the employee's service record card.

F

37. Discharge

(a) For a serious act of indiscipline an employee may be summarily discharged without notice on the authority of an Officer-in-Charge.

G

(b) An employee may be discharged with one week's notice or equivalent pay in lieu of such period of notice."

44. Length of Notice on Termination of Service

(a) An employee who is discharged, for reasons other than serious

indiscipline as provided for in Clause 37(a), will be given one week's notice pay in lieu of notice.

A The procedure adopted here was that a report was obtained from the Plaintiff and there was then an inquiry by the Accident Committee of Central Eastern Division which recommended that the Plaintiff's services be terminated forthwith. Curiously enough the accident was also investigated by an Accident Committee of Western Division which obtained a report from the other driver and made a finding that he was not at fault Apparently this procedure was followed on the B grounds that the two vehicles involved belong to different divisions of the department.

The act of terminating the Plaintiff's employment is contained in the following letter:

C 13/5/86

"TERMINATION OF EMPLOYMENT"

The Accident committee at its meeting held on 29/4/86 considered the accident report on vehicle No. GJ 512 on two separate occasions. It also took into D consideration your previous driving record and is of the opinion that your services should be terminated forthwith.

With all the information submitted, I concur with accident committee's decision and advise that your services are terminated as from 5pm today, the 13th of May. Arrangement shall be made to pay any wages that is due to you.

E (Sgd) C. Simpson

Divisional Engineer Central/Eastern"

It is clear that the Plaintiff was summarily dismissed. There is nothing in the evidence to suggest that the Plaintiff was given one week's pay in lieu of notice as provided in Clause 37(b) and 44(a) and the letter is to the contrary. The case F then turns upon the question of whether or not the circumstances of the Plaintiff's dismissal are within the provisions of Clause 37 (a) which alone provides for summary dismissal. The first thing to note in this context is that the letter of termination of 13th May 1986, which is unsigned, bears at the foot the words "C. Simpson Divisional Engineer Central/Eastern." There is no evidence that the person there named was himself or was authorised by an officer-in-charge or G "the holder of any senior post designated as such by the head of the department" as prescribed by Clause 3 (I). That being so it is not shown that the purported summary discharge of the Plaintiff was carried out in accordance with the terms of the contract.

Further there is the question of whether the Plaintiff's discharge was "for a

serious act of indiscipline". For the purpose of considering that question, and for that purpose only and without making any finding as to it, I assume that the Plaintiff was to blame for the accident. Does this constitute a serious act of indiscipline? The provisions of Clause 34 can play no part in that consideration because of the provisions of Clause 44(a). Had the fact of the accident and the Plaintiff's supposed guilt in respect of the same been regarded as a failure to render satisfactory service this would not, in the light of those two clauses, give rise to any right to summary dismissal but only to the ordinary dismissal on one week's notice or pay in lieu which is open to the employer in any case. There is no fixed rule for determining the degree of misconduct which will justify summary dismissal. It must obviously depend upon the whole of the circumstances in each case. But the words of Clause 37 (a) must be borne in mind. I am not persuaded that causing this traffic accident can be characterised as a serious act of indiscipline.

I now turn to consideration of whether the supposed blameworthiness for the accident was in fact the cause of the department's decision to discharge the Plaintiff. Clause 35 of the JIC Agreement has already been noted.

There is no provision that any particular number of warnings may lead to a dismissal. It is common ground that the Plaintiff had received three previous warnings, although one of them referred to an incident11½ years previously and which in my view had been condoned by the department twice re-employing him after it.

The dismissal resulted from the acceptance by the Divisional Engineer of the Accident Committee's recommendation. This, at the end of a very brief report, reads as follows:

> "Previous record is shocking and as such he should be terminated forthwith to avoid any further liability to government."

The proceedings of the Accident Committee were most unsatisfactory, but I can save myself any further comments on them because it is well established that considerations of natural justice do not arise in a case such as this, see Malloch v. Aberdeen Corporation, [1971] 2 All ER 1278 and Catherine Verma v. The Consumer Council of Fiji, (F.C.A. Civil Appeal 51/1980 - 31.7.81.)

In Malloch Lord Reid said in the well passage on page 1282 ibid:

> "At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses, but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

The present matter can be determined on the short point of whether the dismissal

was within the terms of the contract. Looking at the evidence as a whole I find that in reality the Plaintiff's previous record was the real reason for his dismissal or at least a major factor in it. In my view consideration of the employee's previous service record can play no part in determining whether there has been "a serious act of indiscipline". It may be relevant for consideration in the context of other clauses.

For the reason stated I find that the Plaintiff's summary dismissal was not in accordance with Clause 37 (a) – the only provision in the contract which permitted it – and was therefore wrongful.

The Plaintiff is seeking reinstatement. It is settled law that reinstatement is not available as a remedy - see e.g. Malloch supra - in the absence of statutory provision. The only remedy is damages. The learned authors of Chitty on Contracts, 24th ed. para 3636 put it succinctly thus: "The remedy of an employee who has been wrongfully dismissed is an action for damages. The normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment".

McGregor on Damages, 14th ed. Para. 933 is to the same effect, as is 25 Halsbury, 3rd ed. Para 995: "Where it is an express term of the contract that a servant who is dismissed without notice is to be paid his wages for a certain period in lieu of notice, or where there is a usage to that effect, the measure of damages for the breach is the amount of such wages, which is to be regarded as liquidated damages."

It is clear from the evidence here that one week's pay is the contractual amount in lieu of notice. The evidence is that the Plaintiff was earning $73 per week.

Accordingly there will be judgment for the Plaintiff for $73. The Defendants must pay the Plaintiff's costs to be taxed if not agreed. It must be observed that this whole action could have been avoided by giving the Plaintiff a week's notice or pay in lieu in accordance with the terms of the contract.

(Judgment for the Plaintiff)