DINERS CLUB (NZ) LTD

v.

PREM NARAYAN

[COURT OF APPEAL, 1997 (Casey, Dillon, Sheppard JJA) 28 November]

Civil Jurisdiction

Contract- employment- summary dismissal with pay in lieu of notice- whether employer's mistaken belief relevant to legality of the dismissal. Employment Act (Cap. 92).

A company invoked a dismissal clause in the employee's contract summarily to dismiss him with one month's pay in lieu of notice. It was argued that the employer was in fact mistaken in its belief that it had adequate grounds for the dismissal and that accordingly the dismissal was unjustified. On appeal the Court of Appeal allowing the appeal and upholding the dismissal HELD: that in the absence of unfair dismissal legislation in Fiji the only questions are (a) whether the employer has, under the contract, a right to determine the contract and (b) whether it acted in accordance with the termination clause.

Cases cited:

Delaney v. Staples [1992] 1 AC 687
In the matter of an Arbitration between African Association Ltd and Allen [1910] 1 KB 396

Appeal from the High Court to the Court of Appeal.

B.N. Sweetman for the Appellant
S.P. Sharma & S.J. Stanton for the Respondent

Judgment of the Court:

On 22 November 1995 the High Court at Suva (Pathik J.) gave judgment in favour of the respondent (Prem Narayan) in his claim for wrongful dismissal against his former employer Diners Club (N.Z.) Ltd. (the company) and awarded him $22,275.61 damages. The company appeals against the whole of that judgment.

Mr Narayan was appointed Fiji Manager of the company from 6 August 1990, the conditions of his employment being set out in a letter dated 30 July 1990 containing a provision for termination reading:

> "Should you decide to resign from your position you will do so in writing to the Manager – Service Establishments Division giving

> one calendar months notice. Should the Company wish to terminate your employment at any stage, likewise once (sic) calendar month or the equivalent salary will be paid. Diners Club does however, reserve a right to amend or revoke these conditions should such a change be warranted by them."

(There was no change to these conditions)

Following an interview with him on 24 October 1991 the company gave Mr. Narayan a letter of the same date complaining about his non-disclosure of the reasons for leaving his former employment and other matters, leading it to believe there had been a break-down in trust between them. The letter concluded

> "Therefore effective immediately you are dismissed from employment with Diners Club under the termination clause of your letter of appointment."

And a cheque was enclosed, comprising his current salary and allowance and 1 month's salary ($1579.85) in lieu of notice.

His Lordship rightly found that Mr. Narayan was employed on the terms and conditions set out in the letter of appointment, but came to the conclusion that he had been summarily dismissed, and that there was no justification for it in the reasons given by the Company. He relied on In the matter of an Arbitration between African Association Ltd and Allen [1910] 1 KB 396-400 where a provision in an employment contract gave the employers the right at their discretion to terminate the engagement at any time. Lord Alverstone C.J. considered that the proper construction to place on its language, bearing in mind that the agreement related to service abroad, was that the discretionary power could only be exercised after reasonable notice of intention had been given. Another member of the Court (Bray J) said at p 400 that an employment agreement of this nature confers no right on the employer, in the absence of misconduct, to terminate the employment without reasonable notice "unless the agreement contains clear words indicating a contrary intention."

Fiji does not have legislative provisions protecting employees from arbitrary or unjustified dismissal, as is the case in England, Australia and New Zealand. Accordingly the rights and liabilities of the parties in the present case fall to be determined in accordance with the proper construction to be placed on the termination clause. It differs from that in African Association and Allen in clearly giving the employer the power to dismiss on notice, or on payment in lieu thereof. In Delaney v. Staples [1992] 1 AC 687 at p. 692 Lord Browne – Wilkinson analysed the concept of payment in lieu of notice, identifying four categories. His second describes what happened in this case. It reads:

> "The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a

> sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu."

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We respectfully agree with this comment. An employer making the payment in the circumstances postulated is not in breach of contract. Indeed, we cannot see how the position could be otherwise in this case, since both parties agreed that the company could lawfully act in this way. We see nothing in the letter of appointment or in the circumstances of Mr. Narayan's employment which could give rise to an implied term that the company should have adequate reasons for exercising its express power to terminate, and in any event this was not pleaded. Whether its reasons for doing so were adequate - or indeed, whether there were any reasons at all – could make no difference to the legality of its action.

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As best one can understand the argument put on behalf of the respondent, it was that Diners Club invoked the clause on a basis which was not established at the hearing. So far as the evidence established, it was thus wrong in taking the view which it did of the respondent's conduct.

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Counsel submitted, in effect, that the trigger for the exercise of the clause was this mistaken belief on the part of Diners club. The trouble about this submission is that it ignores the fact that the termination clause, which is mutual, is available to be invoked by either party at any time. Neither is obliged to assign a reason for its invocation. Here a reason was assigned, but a proper analysis of the letter shows that the reason was given, not as a ground of the termination of the employment, but as an explanation for the invocation of the clause. The second part of the letter which refers to the clause plainly shows that the termination was not for misconduct but pursuant to the clause which it was Diners Club's right to invoke.

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The only relevant issues in the case were whether the company had the right to determine Mr. Narayan's employment in the way it did, and whether it acted in accordance with the termination clause. The answers to both these questions must be "yes" and this is sufficient to dispose of the appeal.

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Mr. Sweetman did not challenge his Lordship's finding that the reasons given by the Company could not justify summary dismissal, if reasons had been necessary; but he submitted that even if the dismissal had been wrongful, the damages were excessive. They were based on his Lordship's view that Mr. Narayan was entitled to 9 months' notice of termination. With respect, we think this was an unduly generous period even though he had held a managerial position, bearing in mind that his service with the company lasted only about 15 months. If the matter had been at large, something in the order of 2-3 months would have been more appropriate. However, in view of the fact that the parties accepted 1 month's notice as adequate in the letter of appointment, we cannot see how damages based on a longer period could be justified. The respondent received one month's

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salary and could not have expected more by way of damages for wrongful dismissal, if that had been established.

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The appeal is accordingly allowed with costs to the appellant in this court, together with disbursements and expenses to be fixed by the Registrar. The judgment of the High Court of Fiji is set aside. In lieu thereof there will be an order that there be judgment for the appellant (the defendant in the High Court). The respondent is to pay the appellant's costs of the proceedings in the High Court, together with its disbursements and expenses as fixed by the Registrar.

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(Appeal allowed; Judgment for the Appellant).

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