IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 120 of 1977

Between

PREM SINGH s/o Ram Singh — Plaintiff

and

LAUTOKA CITY COUNCIL — Defendant

Dr. M.S. Sahu Khan, Counsel for the Plaintiff
Mr. B.C. Patel and Mr. V. Kalyan, Counsel for the Defendant

JUDGMENT

The plaintiff in this case was a storeman employed by the Lautoka Town Council while Lautoka was still a town and on 1st June 1977 was summarily dismissed by the City Council. He now claims damages from the Council alleging that he was wrongfully dismissed and asks for loss of salary and consequential relief. The Council demurs to his claim.

It appears that in February 1976 it was reported to the Council that the plaintiff had stolen kerosene from the store. He was asked about the theft and denied it. However the Council decided that he should be prosecuted, and reported the matter to the police in March 1976, as a result of which the plaintiff was charged with larceny. He first appeared before the Court in June 1976, but the matter dragged on until on 2nd May 1977 plaintiff pleaded guilty. Apparently the trial had begun, and the Magistrate then remarked that the matter seemed somewhat trivial, and plaintiff was then advised to plead guilty apparently on the understanding that he was unlikely to be sent to gaol. The charge was read out to him again and he did plead guilty. He was then ordered to be discharged conditionally upon his committing no further offence within a period of 12 months from his conviction. Of course what appeared to the Magistrate as trivial would not necessarily be so regarded by the Council, and the plaintiff having been convicted on his own admission of stealing, the council then decided to dismiss him and on 1st June 1977 he was paid his salary to that date and summarily dismissed. Plaintiff says that the City Engineer told him that his conviction would not interfere with his employment and

he was therefore surprised when he received notice of its termination. His employment had not been interfered with between the time when he was charged and the time when he was convicted, and he had continued to be employed on full pay. His contention now is that the Council by so continuing his employment have condoned his theft.

Although plaintiff told this Court that he was not guilty, and that he only pleaded guilty because the affair had been going on so long, I think that the position then is that if he wishes to prove his innocence, the burden of proof rests upon him, for the fact of conviction is conclusive and evidence must be adduced which will be sufficient to rebut its conclusive nature. see Stupples v Royal Insurance (1970) 3 AER 230. No evidence was in fact brought and, indeed, Dr. Sahu Khan told the Court that plaintiff was not concerned with what really happened, but with the way it was done. His client's allegation that the City Engineer promised that he would not be dismissed is however material. It is an allegation whose proof rests upon him. It was not pleaded. It is not supported by correspondence. There was plenty of time after plaintiff was dismissed for the allegation to have been made in correspondence. There was indeed plenty of time for the plaintiff to have had evidence taken from the City Engineer, because it was stated in evidence that he did not leave the Council's employ until December 1977. Moreover even the reason given by the plaintiff in evidence as to what he was told by Mr. Gupta, the City Engineer was equivocal. I do not believe the plaintiff. I do not believe that the City Engineer made any promise about plaintiff's employment or that plaintiff believed that he had made any promise that he would not be dismissed.

The plaintiff put in evidence a copy of an agreement relating to council employees, and it is not disputed that the terms of the agreement relate to the plaintiff. That agreement permits the summary dismissal of the employee if, among other things he is guilty of misconduct inconsistent with the fulfilment of the express or implied conditions of his conduct of service. I do not doubt that if the employee is guilty of stealing the Council's property he is guilty of misconduct inconsistent with his service. Of course he was guilty of that misconduct as far back as March 1976. The Council might have then summarily dismissed him. They decided to report the matter to the police and they awaited the result of the police prosecution.

Dr. Sahu Khan submits that when the Council proceeded to consider the position of this employee who had betrayed his trust by stealing from his employer they should have given him a hearing. I cannot accept that, and Dr. Sahu Khan did not furnish any authority to support him. Indeed the judgments of Cotton L.J. and Bowen L.J. in Boston Deep Sea Fishing and Ice Company v Ansell (1888) 39 Ch D 339 seem to indicate that no matter how old the offence is, the legal right remains.

Dr. Sahu Khan placed some reliance on Phillips v Foxall (1872) 7 LRQB 666, and on the dictum of Blackburn J at page 680 "Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of what he has waived or condoned." I accept that statement, with respect, as a correct statement of law. The evidence shews that after the plaintiff was convicted his case was considered by a committee of the Council who recommended his dismissal - a recommendation accepted by the full Council. This took just under a month. I am not prepared to say that the Council has lost its right of summary dismissal. Perhaps they could have suspended him when they decided to prosecute, but by their omission to do so, the plaintiff is $2,500 better off. I do not see that he can complain. Dr. Sahu Khan submitted that the Council's evidence was that plaintiff was dismissed because he had admitted to stealing kerosene from the Council while employed by the Council. Dr. Sahu Khan relied on Horton v McMurtrie (1860) 5 H & N 667, 675, 157 E.R. 1347, 1350, in which the ground of the servant's discharge is stated thus: "Bladders were bought by the servant from one person and he represented to his master that another person was the seller." That was held sufficient to justify summary dismissal, the servant's intention to make a commission and his untruth to his master both being relevant. Likewise in Jupiter General Assurance v Shroff (1937) 3 AER 67, 73-74, Dr. Sahu Khan refers to the comment of the Privy Council that the immediate dismissal of an employee is a strong measure, and that it would be only in exceptional circumstances that an employer would be justified in dismissing an employee for a single act of negligence. I accept all that, but I emphasise that this was not 'a single act of negligence'. This was theft of the council's property by the Council's servant which plaintiff had admitted and dishonesty has always been a ground for summary dismissal see the comment ascribed

to Park J in Cunningham v Fonblanque (1833) 172 E.R. 1139, 1141 "If a servant robs his master he may though a month's notice is required, dismiss him without notice and need not pay him a month's wages". R v Smith (1844) 5 Q.B. 614 was also cited by Dr. Sahu Khan. That is a different type of case altogether. There a priest dismissed his parish clerk for interrupting him in the services and the Court of Queen's Bench held that the clerk could not be summarily dismissed. But that is not this case. In my view the plaintiff's action fails and must be dismissed, with the usual result that he will pay the defendant Council's costs to be agreed or taxed.

LAUTOKA
8th May, 1978.

(sgd.) K.A. Stuart
JUDGE