THE STATE

A **v.**

1. PERMANENT ARBITRATOR,
2. ESEKAIA NAWELE &
3. NATIONAL UNION OF HOTEL & CATERING EMPLOYEES

B **ex parte:**
WARWICK FIJI LIMITED

[HIGH COURT, 1999 (Byrne J), 31 August]

Revisional Jurisdiction

C *Employment- misconduct by employee- whether dismissal harsh and unreasonable.*

A grievor who had been dismissed by his employer succeeded before the Permanent Arbitrator who ordered his reinstatement. On a motion for judicial review of the Arbitrator's decision the High Court examined the proper approach to be taken
D to an allegation that a decision is harsh and unreasonable. It concluded that the Permanent Arbitrator had erred in his evaluation of the grievor's conduct and quashed his Award.

Cases cited:

E *Farley v. Lums* (1917) 19 WALR 117.
Grundy Teddington v. Willis (1976) ICR 323.
Laws v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 WLR 698.
Monsanto Chemicals (Australia) Ltd. v. The Amalgamated Engineering Union (1958) 90 CAR 26.
Pearce v. Foster 17 QBD 536.
F *Wilson v. Racher* (1974) 1CR 428.

Motion for Judicial Review in the High Court.

G.P. Lala for the Applicant
J.N. Madubuike-Ekwe for First Respondent
T. Naivaluwaqa for Second and Third Respondents
G

Byrne J:

This is an application for Judicial Review of an Award of the Permanent Arbitrator of the Arbitration Tribunal given on the 30th of July 1998 in which the Arbitrator held that the dismissal by the Applicant of the Second Respondent Esekaia Nawele on the 10th of April 1997 was harsh and unreasonable and the order of the

Permanent Arbitrator that Mr. Nawele be re-instated from the date of his termination without loss of privileges. The Arbitrator also directed that the re-instatement was to be subject to a warning being placed on Mr. Nawele's file for the incident in which he was involved on the 13th of March 1997 and that the warning be valid for a period of 12 months from the date upon which Mr. Nawele resumed duty.

Prior to the termination of his employment, the Second Respondent had been employed by the Applicant (hereinafter referred to as "the Warwick") for some thirteen years originally by the Hyatt Regency Fiji and he continued at the hotel as an employee when the Warwick took over management of the hotel. At the time of his dismissal Mr. Nawele was employed as an Assistant Bar Manager. He was also the Union representative of the Third Respondent.

It has never been disputed that on 13th March 1997 Mr. Nawele and approximately 100 other staff of the Warwick attended its Monthly Staff General Meeting. Evidence was given that the purpose of these meetings was to allow management to inform staff of recent developments and forthcoming events, but they were also open for general discussion initiated by staff.

Just before the end of the meeting during discussion time, Mr. Nawele addressed those present. The evidence which the Arbitrator accepted was that Mr. Nawele belittled the management of the hotel and particularly its General Manager, Mr. G. Meyer. Among other things he made a generally unfavourable comparison between the Warwick's management of the hotel and that of the Hyatt and stated that since the arrival of the General Manager Mr. Meyer, in particular, there had been a decline in the hotel's operations. Among other things, he accused the management of stealing from the government by not paying taxes of certain employees and described guests as prostitutes, drug addicts and alcoholics.

It was common ground that a week after the meeting, on 20th March 1997, the General Manager wrote a letter to Mr. Nawele disputing the allegations made by him and giving him 7 days from the date of receipt "to reply in writing supported by evidence".

It warned that "failing this management will instigate disciplinary action against you for insubordination, dishonesty and for blatantly making allegations at this management in total contravention of the legally binding collective agreement between your Union and this Company".

On 29th March 1997, not having received a written response the Warwick's General Manager wrote to Mr. Nawele stating among other things that because he had received three written warnings under the collective agreement together with the fourth referring to the incident of 13th of March 1997, "termination clause is to be applied effective Tuesday 01 April 1997". The letter then continued rather curiously, "Again I have no other alternative but to discipline you with a more serious disciplinary action, that is to suspend your services effective Tuesday 1st

April until further notice".

A In his Award the Arbitrator correctly noted that the parts of this letter I have just quoted appear to have been contradictory in as much as the General Manager purported both to terminate Mr. Nawele and to suspend his services from 1st of April pending further discussions with the General Manager and the Union's then General Secretary.

B In his Award the Arbitrator found for reasons which I consider immaterial in view of the clear conclusion I have reached in this case that all three warnings which the Applicant had given Mr. Nawele were invalid. More to the point in my judgment is what the Arbitrator said at page 7 of his Award and I quote:

> C "Having considered the Warwick's version of the events against Mr. Nawele, the Tribunal is of the view that, despite what might have been good reasons for the concerns, Mr. Nawele displayed gross insubordination by making those concerns known in the way that he did at the meeting. Evidence was given that as Union representative, Mr. Nawele had direct access to the General Manager, and it was the practice for the two to discuss Union concerns on a one-to-one basis in the General Manager's office. By choosing to
> D bring his concerns up in the presence of approximately 100 staff members, and to personalise them against members of management, the Tribunal finds that Mr. Nawele was deliberately seeking to embarrass them. The tribunal can draw no other conclusion.
>
> Accordingly, he was deserving of some disciplinary sanction for this behaviour, but whether termination was the appropriate remedy
> E in the circumstances will, for the reasons given earlier, depend on the processes followed and the validity of the 3 previous warnings on which the Warwick purported to reply."

F This raises the question which is the subject of this application whether Mr. Nawele's remarks at the staff meeting were such as to justify the Applicant dismissing him. The Applicant contends that they were and seeks orders of certiorari quashing the Award and various declarations.

When the parties appeared before me on the 1st of October 1998 I gave the Second and Third Respondents leave to file and serve an Affidavit in Reply by the 22nd of October. No such affidavit was ever filed nor have I received any
G submissions from the Second and Third Respondents. I can only presume them therefore to rely on the submissions they made before the Permanent Arbitrator.

There is much law on the question of when an employer is entitled to dismiss an employee for misconduct. The question of when a dismissal can be termed "harsh and unreasonable" was considered by a very experienced Arbitration Commissioner in Australia, Senior Commissioner Chambers in Monsanto

Chemicals (Australia) Ltd v. The Amalgamated Engineering Union (Australian Section) (1958) 90 CAR 26 at 31 who said:

> "The dismissal to be `harsh and unreasonable' must be of a nature very different from the normal case. For the employee dismissed to be concerned, embarrassed financially, disturbed in the normal pattern of his life is not sufficient, unless it can be shown that the employer created all these or like difficulties by effecting dismissal without regard for all the reasonable and fair considerations one is entitled to expect in the employer/employee relationship. A clear breach of discipline in the form of a refusal to comply with a lawful order to perform work within his trade would ordinarily not be considered as providing support for a claim that the employer had been harsh if dismissal of the employee concerned resulted. A summary dismissal may be harsh, for example, if flowing from an employee's failure to perform a function which would have placed him in serious danger, and it may be unreasonable to dismiss an employee without seeking an explanation in certain conditions. It would be unreasonable to expect an employee called back to stand down without pay for such period as was necessary for management to produce the labouring assistance required."

In deciding whether the dismissal was fair it was held in Grundy Teddington v. Willis (1976) ICR 323, that:

> "The tribunal's decision must take into account whether in the circumstances the employer acted reasonably in treating their reason as a sufficient reason for dismissing the employee. This question must be determined in accordance with equity and the substantial merits of the case."

In England the Employment Appeal Tribunal said of the approach which a Tribunal should take in deciding a dismissal was unfair:

> "The function of the tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band it is fair, if it falls outside it is unfair." - Iceland Frozen Foods Ltd v. Jones (1982) IRLR 439 at 442.

In Farley v. Lums (1917) 19 WALR 117, Farley had been asked to perform a task, which, if done would require that he work 15 minutes overtime. It seems that the request was objectively justified and Farley would have been paid overtime. But Farley responded by saying "It's a bit bloody hot keeping a man waiting so damn long." He was summarily dismissed and he sued for wrongful dismissal. McMillan C.J. (with whom Rooth J. agreed), at 118, held that the dismissal was

justified. It was held that:

> "Everything depends on the circumstances under which the language was used. I am not going to say that a man should be dismissed because he uses the word "bloody or ...damn,...." but under the circumstances of this case I can see nothing which justified the servant using language as that to a master who was speaking to him quietly, and who had done nothing to bring about remarks of that kind."

With respect to this case I venture to suggest that nowadays at least in Australia the words used by Mr. Farley would not result in his dismissal because it seems to me attitudes to the use of coarse language generally have become more liberal, some people might aver unfortunately. It seems to me that in the present industrial climate in Australia such language would result in at worst a serious reprimand being delivered to the employee.

It may well be however that in Fiji that would not be so.

In a more recent case, Wilson v. Racher (1974) ICR 428 Edmund Davies L.J. (as he then was) said this about such cases at 430:

> "The test is whether the plaintiff's conduct was insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master and servant. The application of such a test will, of course, lead to varying results according to the nature of the employment and all the circumstances of the case. Reported decisions provide useful but only general guides each case turning upon its own facts ..... (A) contract of service imposes upon the parties a duty of mutual respect."

The last case I mention on this question is Laws v. London Chronicle (Indicator Newspapers) Ltd [959] 1 WLR 698 where Lord Evershed M.R. said at p. 700:

> "..... the question must be - if summary dismissal is claimed to be justifiable - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

In my judgment the Permanent Arbitrator was correct in describing the remarks of Mr. Nawele at the staff meeting as he did but I consider he fell into error in not holding that these remarks constituted a very serious breach of the employer-employee relationship which in my view justified Mr. Nawele's dismissal. Principal among the obligations imposed by the common law on employees is the duty of fidelity and good faith. These terms embrace every aspect of an employee's duty towards his employer, varying according to the nature of the obligations.

In Mr. Nawele's case, considering his position as an Assistant Bar Manager and a Union representative, in my judgment he had a duty not to say or do anything which could be construed as contrary to the hotel's interests. He must have realised when he made the remarks that it was very likely that the hotel's reputation would be tarnished. In my view his remarks were calculated to engender distrust and lack of confidence by hotel staff in their employer which, as the Arbitrator also found, could not be justified.

Last century in Pearce v. Foster 17 QBD 536 at 539 it was said that:

> "The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due and faithful discharge of his duty to his master, the latter has a right to dismiss him."

I am therefore satisfied on the evidence before the Permanent Arbitrator that he erred in finding the conduct of the Warwick in dismissing Mr. Nawele harsh and unreasonable. If that term could be applied to anybody in my judgment it should have been applied to Mr. Nawele. Further I consider that the penalty imposed by the Permanent Arbitrator in respect of the remarks was totally inadequate and amounted in my view to a mere tap on the wrist when a far more stringent penalty was required.

I therefore uphold the motion for Judicial Review and order that certiorari go to bring before this Court the Award of the Permanent Arbitrator and then quash the same. In my judgment the penalty imposed by the Arbitrator constitutes Wednesbury unreasonableness for the reasons I have given.

(Judicial Review granted: award of Permanent Arbitrator quashed.)