IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO 27/2002

BETWEEN : ALEX NAMADUK PLAINTIFF

AND : NAURU AIR CORPORATION DEFENDANT

BEFORE HIS HONOUR, MR. JUSTICE BARRY CONNELL, CHIEF JUSTICE.

HEARING DATES: 7th & 8th MAY 2003

P. Aingimea for Plaintiff
Leo Keke for Defendant

DECISION OF CONNELL C.J.

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1. The Plaintiff was an employee of the defendant corporation. The defendant is a statutory corporation established under the Nauru Air Corporation Act 1995 hereinafter referred to as 'the Act.' The plaintiff had worked with the Corporation since its inception and before his dismissal he had been supervisor of the cargo office of the corporation situated at the airport terminal in Nauru.

2. The main object of the corporation was to maintain and operate air services to and from Nauru and other services in a safe, efficient and profitable manner through the national airline known as 'Air Nauru' (section 20 of the Act).

3. On Friday 16 August 2002, the Plaintiff was dismissed, along with three of the cargo office staff, for breaching clause 30.1.5 of the Corporation's General Terms and Conditions of Employment (hereinafter termed 'General Terms') which states that an employee commits a disciplinary offence when be steals or misappropriates the funds or property of the Corporation.

4. This action had been part heard earlier by the Court. However, the pleader previously appearing for the Plaintiff had died and, in consequence, the Court by Order, dated 2 April 2002, ordered the trial to be recommenced. Earlier there had been a Chamber summons, 3 October 2002, by the defendant to strike out the statement of claim but this had been refused. The Plaintiff, however, was given leave to amend the statement of claim to conform with Order 15 rule 7 of the

Civil Procedure Rules and the defendant was to file a defence to the amended statement of claim. In addition, parties were to agree on the documentary evidence which were to include a listed number of documents contained in the order and which were to be made available to both parties after the filing of the defence. Subsequently, the amended statement of claim and the Defence were both filed.

5. The action was brought in contract by the plaintiff against the defendant claiming that the contract had been breached through wrongful dismissal. The plaintiff pleaded that he had been employed on a master and servant contract subject to the General Terms which were effective from 1 August 1999. The defence stated that the Plaintiff was first employed by the defendant from 1 July 1996, but admitted that the present employment was governed by the defendant's General Terms.

6. The Court was somewhat bemused by the final submissions made by the Plaintiff that the General Terms were ultra vires of the Board's powers. No attempt was made to amend the pleadings on this point as the Plaintiff had earlier asserted the basis of present employment was on a master and servant contract but subject to the General Terms . Such a position had already been admitted by the Defence. To assert otherwise by the Plaintiff flew straight in the face of his own pleadings. If the submission was correct, in law, then it would have exposed him to a situation that did not give him the benefit of the General Terms to the extent that they may have had ameliorative and beneficial effects on his contract.

7. It is sufficient to state at this point that the General Terms have been made by the Board within Section 26 of the Act.

Section 26 reads as follows:-

26 (1) For the conduct of its business, the Corporation shall establish and maintain an appropriate management structure.

(2) The Corporation may,

(a) appoint, engage or employ;

(b) apply such terms and conditions of service in respect of; and

(c) dismiss or suspend

such officers, staff or labour as the Board considers necessary or appropriate.

8. In relation to the above section,

(i) 'Corporation' is a general term embracing the totality of the Nauru Air Corporation, in other words, the body corporate.

(ii) The business of the Corporation is controlled by the Board of Directors.

(iii) Under Section 26, the body corporate appoints, engages or employs, applies terms and conditions of service, and dismisses or suspends in a manner that the Board considers necessary or appropriate.

(iv) The Board generated and authorized a comprehensive document entitled the 'General Terms and Conditions of Employment' which represents what the Board considered necessary or appropriate, and applied that document to the Corporation from 1 August 1999. It was clearly within the power of the Board within the terms of section 26 to authorize the document and ensure its application.

9. The Plaintiff, upon being offered employment by the Corporation at its inception, was, it is common ground, employed on a master/servant contract. No evidence was placed before the Court in relation to any express oral or written contract and the Court accepts, for the want of other material, the assertion of a master/servant contract in paragraph 1 of the Plaintiff's amended writ.

10. The Court notes that in Clause 7.1 of the General Terms, the intentions of the Corporation in its appointing procedure is that there should be a written offer and acceptance of employment, and that every offer shall be in a standard contract format containing a statement of duties and conditions of employment. The clause adds that any other appointment which is not the subject of a written contract or memorandum may be terminated at the will of the Corporation. This latter point is consistent with a master/servant contract. It is apparent, however, that there was, so far as the Plaintiff was concerned, no written contract, either before or after the coming into force of the General Terms. As the General Terms came into effect on 1 August 1999, such General Terms would have, from that date, been applied to the Plaintiff as an employee.

11. The actual dismissal procedure, followed in this case, so far as the Plaintiff was concerned, may be compressed into two letters, dated 26 July 2002, and 15 August 2002. It is a fact that the revenue situation at the airport and, in particular, the cargo section had been the subject of both criticism, audit investigation and review, mainly from the revenue head office in Melbourne, for some months. This was not unknown to the Plaintiff and, more particularly, the situation at hand had been drawn to his attention by the then airport manager, Mr. Morde Amandus. It was, however, the letter of 26 July 2002 from the Manager, Nauru & Micronesia, addressed to the Plaintiff that brought a spark, if not a conflagration, to the situation. That letter read –

> Dear Alex Namaduk,
>
> This is to inform you that following an internal audit of the cargo section it has been established that a certain amount of money received for payment of cargo charges received by you have not been accounted for. The amount is $4,813.69.
>
> You are required to pay Air Nauru the amount of $4,813.69 within two (2) weeks of receipt of this letter. If full payment is not received from you, the Corporation will take steps

necessary to recover this amount.

I would appreciate your acknowledgement of receipt of this letter and take the appropriate action required.

12. Upon receiving this letter, the Plaintiff made a time, along with three others from the Cargo Office who had received similar letters, to meet with the Manager, Mr. Aroi. The appointment was not kept on the explanation given to the Court that the Plaintiff took some three days to prepare urgent documentation and make arrangements for the transportation of a coffin to Brisbane. This evidence was to the effect that he had spoken to Mr. Aroi for another appointment but had been asked to contact Mrs. Joan Duburiya, a Human Resources Officer with the Corporation in Nauru. He rang her in the second week but did not manage to see her. When questioned, Mr. Aroi said he did not recall the second phone call and, in any case, on such a matter he would not have referred or passed on the plaintiff to a comparatively junior officer.

13. Mr. Aroi as Manager, Nauru & Micronesia, handled the matter. He met with the Airport Manager and Accounts (Nauru), and an investigation was carried out which revealed that funds were missing and also verified the officers involved. He then discussed the question with the Chief Executive Officer and forwarded to him a written memorandum on 31 July, 2002, on the matter with a recommendation that the four officers involved have their employment terminated and that action be taken to have the amounts misappropriated to be repaid by the respective officers. The Chief Executive Officer wrote on the letter to 'proceed as discussed,' and dated his instructions 13 August 2002. In evidence, Mr. Aroi said that this meant to terminate the employment of all four officers by Friday 16 August 2002 which was the outcome of the discussion. In cross-examination, Mr. Aroi answered that, because the decision was to terminate their services, this was a 'hard enough' penalty and that the Corporation would not proceed to recover the money. Mr. Aroi, however, quickly had second thoughts about this answer and said the 'matter was still pending'. To this point, none of the shortfall moneys have been recovered from the Plaintiff or from the other cargo officers.

14. A letter was then written, dated 15 August 2002, by Mr. Aroi to the Plaintiff. It is here quoted in full –

Dear Mr. Namaduk,

You will recall that on 26th July 2002, you were advised that following an internal audit of the cargo section it was established that a certain amount of money received by you, on behalf of the Nauru Air Corporation for payment of cargo charges, had not been accounted for. You were also advised of the amount involved.

You were also asked to take steps to repay money received by you on behalf of the Corporation for payment of cargo charges. You have not accounted for the money nor paid it to Air Nauru as directed in the time required. You have also failed to explain your action and your failure to account for the money nor to repay it.

The matter was referred to the Chairman/Chief Executive Officer (CEO) of the Corporation for his consideration. Having considered the matter, the CEO has concluded that the circumstances regarding your failure to account for and to repay the money, tantamount to a misappropriation of the Corporation's funds.

You have breached clause 30.1.5 of the Corporation's General Terms and Conditions of employment applicable to your position with the Corporation.

Therefore, according to clause 31 of the General Terms and Conditions of Employment, you have been found guilty of misappropriation of the Corporation's funds. The CEO, on behalf of the Corporation, has decided that your services are no longer required and you are hereby summarily dismissed in accordance with the Corporation's General Terms and Conditions of Employment.

Your dismissal is effective from the close of business on Friday 16 August 2002.

You are to hand over all the Corporation's property under your care including keys and documents to the Airport Manager, Remus Capelle, on Friday 16 August 2002.

Yours sincerely,

Mike Aroi
Manager/Nauru & Micronesia
For and on behalf of the Chief Executive Officer

15. Following the authorization by the Board of Directors of the Corporation of the discipline provisions of the General Terms, an employee may commit five different types of offences which will merit some discipline. Where an employee is found guilty of an offence then the Chief Executive Officer may issue a warning, summarily dismiss, or dismiss following a hearing. Under clause 32.1 a staff member will always be given the opportunity to be heard orally or in writing or both to any charge of a disciplinary offence. The Chief Executive Officer has the power to delegate his authority in the matter of a disciplinary offence except the power to impose a penalty. Further under Clause 33, an employee may be suspended without pay if suspected of theft or misappropriation of the Corporation's property.

16. I suspect that one could describe the process followed in these two letters as untidy given the principles enunciated in these General Terms with respect to discipline. In particular, the 26 July letter did not as such charge the Plaintiff with misappropriation but simply sought repayment of moneys unaccounted for. A recipient of the letter would no doubt have appreciated, however, the seriousness of the matter and its implications. After all, the Plaintiff had become well aware of the problems through investigations, threatened relocation and a precise letter from the Airport Manager of 24 May 2002 seeking explanations in writing. I do not accept that he was unaware of that memorandum sent to each member of the cargo staff.

17. The other untidy feature of the dismissal process was the absence of a clear written decision on penalty from the Chief Executive Officer, or for that matter a delegation by him to Mr. Aroi to investigate and report. It has to be said in all such cases as the present, compliance with proper procedures will eliminate not only error but produce a much better morale and operational efficiency within an organisation as large as the corporation.

18. If indeed there had not been considerable investigatory activity into the cargo office prior to the two letters of Mr. Aroi, then the corporation might well have been criticised by its employees and others for the manner in which it conducts its staff relations. However, the evidence before the Court makes one wonder why action was not taken sooner. The fact that there were other areas in the airport terminal in much the same condition does not help to excuse the cargo office but it certainly raises questions about the quality of management in allowing the situation to be as prolonged as it apparently was.

19. In this case there are no administrative law remedies available to the Plaintiff nor has he sought them specifically. The action of dismissal by the defendant was not a nullity or void. No reinstatement is available. The contractual relationship has been terminated. The only remedy available for any breach of the master and servant contract is damages.

20. Lord Reid declared the existing law in Ridge v Baldwin [1964] AC 40 at 65 in dealing with master and servant cases in the following terms:-

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it

can make with its servants, or the grounds on which it can dismiss them."

21. I accept the explanations of the defendant. The facts as disclosed in the evidence have proved conclusively that the final decision to dismiss was not reached capriciously or in haste but after considerable investigation. The material placed before the Court would on a clear balance of probability, the burden required in such a civil action, indicate that the plaintiff as supervisor of the cargo office was engaged in behaviour within his control of the office that materially effected not only its efficiency but a reduction of revenue. Given this situation, he was a clear candidate for summary dismissal. I concur, with respect, with the views expressed by Sellers L.J. in the bookmaker's case, Sinclair v Neighbour [1967]2 QB 279 (C.A.) at 287 ' In my view, whether such taking of the money would have resulted in a conviction for larceny or for dishonest misappropriation of the money does not arise. On these facts, a jury might have taken the view that they would not convict. But whether it is to be described as dishonest misconduct or not, I do not think matters. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the manager did as being something which was seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged.' Indeed, in the Plaintiff's case there was ample evidence of unaccounted moneys which over a period of months he was unable to account for and merited a charge under Clause 30.1.5 of the General Terms. In fact, the office, on the evidence, was in such a state that it was highly unlikely that he was ever going satisfactorily to explain what had taken place in any form which would have led to his exoneration.

22. But was the dismissal a summary dismissal? And could it be said that the Plaintiff had an opportunity to be heard orally or in writing to any charge of a disciplinary offence? The master and servant contract, and this is common to the parties, had engrafted to it the General Terms from 1 August 1999. All staff members of the Corporation have the benefit of such terms but not so it appears the promised standard form contracts envisaged under clause 7.1 of the General Terms.

23. I accept that the letter dated 15 August 2002 from Mr. Aroi amounted to a summary dismissal and is stated to be so in the letter. However, a lot had taken place before that letter. Series of investigations, memoranda to the supervisor and the letter of 26 July 2002, which tends to diminish the nature of what amounts to 'summary'. Why had it not occurred earlier? Why had Mr. Aroi simply given 14 days to the Plaintiff to account for moneys on 26 July 2002? After all, the investigations had arrived at conclusions before that date, and if considered to be proper for a summary dismissal why was it not done there and then on 26 July 2002?

24. In the course of the investigations, there were opportunities for the Plaintiff to explain questions of shortfall in moneys to various investigators, but he had not as such been charged with anything. The General Terms give him a right to be heard once he knows what breach of discipline he has been charged with. This right applies whether the penalty is to be summary dismissal, dismissal or a warning. It is not a

lengthy hearing procedure that is required but only as it is stated in the General Terms a procedure that will ensure the employee is treated fairly.

25. I find, therefore, that there was a breach of contract by the defendant in not according to the plaintiff an opportunity to be heard following a charge that the plaintiff had committed a disciplinary offence under Clause 30.1. Such a breach only renders the defendant Corporation liable in damages. The contract of the plaintiff with the defendant was terminated on August 16, 2002. As a master and servant contract it is terminable at the will of the corporation. Damages were not pleaded by the Plaintiff nor was any evidence given by the plaintiff as to quantum of damage. In any event, given my decision in Clay Solomon's case, it is unlikely that there was any entitlement to damages beyond August 16, the termination date of the contract. (Also see Automatic Fire Sprinklers Pty. Ltd. v Watson 72 CLR. 435 at 465 Dixon J.) However, if there were any outstanding entitlements for the plaintiff upon the date of termination of the contract, they should be paid by the Corporation.

26. This case has its unfortunate features. But the one that stands out is the administrative inefficiency of management in undertaking the proper procedures that would clearly have avoided this matter being litigated.

27. I shall hear the parties on the question of costs.

BARRY CONNELL
CHIEF JUSTICE

15TH MAY 2003

THE SEAL OF THE SUPREME COURT REPUBLIC OF NAURU