PETER PLOWMAN v. HIS MAJESTY THE KING

HIGH COURT. Apia. 1952. 14, 27 March. MARSACK C.J.

Crown Proceedings - wrongful dismissal - damages - claimed on basis of injury to reputation and difficulty of obtaining new employment - position of the Crown - status of petitioner in Public Service.

The petitioner was engaged as store manager for the New Zealand Reparation Estates as from 24 March 1949. On 3 December 1951 he was summarily dismissed. In an action claiming, inter alia, damages for wrongful dismissal -

Held: 1. That the petitioner was summarily dismissed without proper cause.

2. That damages for wrongful dismissal cannot include compensation for injured feelings or for loss sustained from the fact that the dismissal itself makes it more difficult to obtain fresh employment.

Addis v. Gramophone Company 78 L.J.K.B. 1122 followed.

3. As the petitioner was from 24 March 1951 an officer of the Public Service, he was entitled to three months' notice of dismissal, or, where no notice is given (as in this case) to a sum representing what he would have earned during that period.

Judgment for petitioner.

CLAIM for damages for wrongful dismissal.

Petitioner, in person.
Metcalfe, for respondent.

Cur. adv. vult.

MARSACK C.J. This is a claim for the sum of £5,000, of which sum £4,740 represents damages for alleged wrongful dismissal, set out under headings (a), (b) and (d) in the Statement of Claim and £260 for overtime unpaid.

The evidence is extremely conflicting and it is difficult to reach a clear understanding of the relevant facts. I find however that petitioner was engaged as store manager for the New Zealand Reparation Estates as from the 24th March 1949. The precise terms of that appointment and the status of petitioner in the Government Service, will call for consideration later in this judgment. Petitioner was called upon by the General Manager, Mr Eden, to undertake other duties in addition to those of store manager; in particular, advantage was taken of the qualifications acquired by petitioner in the course of his war-time service in the Navy to send him on a number of trading voyages to the Tokelau Islands. He was required also to exercise supervision on occasions at the Faleata Plantation and at the sawmill at Asau. I find as a fact that petitioner complained to the General Manager that these long absences made it impossible for him to exercise complete control over the store in Apia and that he could not assume full responsibility for what happened there during the periods when he was away. His protests were however overruled and he was required to continue these outside activities. Petitioner's work in Apia was apparently satisfactory and in the Tokelau Islands venture rather better than that. The entire Tokelau undertaking was under the control of petitioner and when in one year's trading there was a profit of £4,400 from that source. Mr Eden addressed a report to the Department of Island Territories ascribing that success largely to petitioner's industry and ability.

Then in the latter part of 1951 there was an alarming epidemic

of thefts from the larger stores in Apia, the losses mounting to many thousands of pounds. Several persons, employees of the different stores concerned, were convicted in respect of these thefts and sentenced to terms of imprisonment. Among them was one Ah Fook, an employee of New Zealand Reparation Estates. The books of New Zealand Reparation Estates disclosed, on the stocktaking of 30th September 1951, a shortage of £6,000; this sum was reduced, after the appropriate corrections and adjustments to £3,609.17.3. Mr Eden was disturbed by these large losses and called petitioner into his office. In his own words, he said to the petitioner "The Public Service Commissioner and I take a grave view of this situation". Petitioner swears that Mr Eden went to say "and we may have to ask for the resignations of yourself and one or two others on the staff". Mr Eden does not remember saying that; but his recollection is vague as to many conversations between himself and petitioner and I think it is likely that some such remark was made. Not long afterwards, on the morning of 3rd December 1951, petitioner was in Mr Eden's office discussing the routine to be followed on the Tokelau trip. The ship was sailing at noon on that day and petitioner was going over in command. Less than an hour later petitioner was again called into Mr Eden's office and was handed a letter of dismissal, in the following terms:

3rd December 1951

Mr P. Plowman,
Stores Manager,
N.Z. REPARATION ESTATES.

Dear Sir,

I regret to inform you that it has been found necessary to reorganize our Stores Department and with the Public Service Commissioner's approval it has been decided to dispense with your services as from today, 3rd December, 1951.

According to your contract of service dated 28th February 1949, one month's pay in lieu of notice is hereby given to you and you are entitled to a proportion of furlough amounting to two months and twenty days.

One week's untaken leave is also due to you.

Yours faithfully,

(D.R. Eden)
GENERAL MANAGER

The terms of this letter call for some comment. It is, in fact, notification of summary dismissal. As compensation for that dismissal, a sum equivalent to one month's salary was paid to petitioner. It refers to a "contract of service dated 28th February, 1949"; there was in fact no written contract of service. It was signed, not by the Public Service Commissioner who controls the Public Service in Western Samoa, but by the General Manager; though Mr Malone, the Public Service Commissioner, stated in evidence that he saw the letter before it was delivered, and approved of its contents. It gives as the reason for the summary dismissal of petitioner the necessity of reorganizing the Stores Department. No mention is made in the letter of the large shortages in the accounts, though petitioner could be excused for thinking that if those shortages had never taken place he would not have been dismissed.

As soon as he had read the letter petitioner commented to Mr Eden that this was a serious reflection on his honesty and integrity and that he would have to take action to protect his reputation. Mr Eden replied that the honesty of petitioner was not called into question and to prove that, he would give petitioner a testimonial. A little later the

following reference was handed to petitioner:

3rd December 1951

"TO WHOM IT MAY CONCERN

Mr Peter Plowman has been employed by the New Zealand Reparation Estates as Stores Manager and Relieving Plantation Manager from 24th March 1949 to the 3rd December 1951.

During this period Mr Plowman has operated for us the trading ventures which have been undertaken by the New Zealand Reparation Estates in the Tokelau Islands and these have been conducted successfully. Their success has been due to Mr Plowman's knowledge of the sea, his organizing ability, and his responsible dealings with the native people of those islands.

Mr Plowman has been industrious, but the decision to reorganise and to reduce our stores department as a result of a reduction of the vote under this heading which has been directed by the Department of Island Territories, has caused us to dispense with his services.

We wish him every success in whatever new employment he may decide to undertake.

(D.R. Eden)
GENERAL MANAGER"

It is worthy of comment that, though the testimonial was given expressively to show that there was no allegation of dishonesty against petitioner, the written document is silent on this important point. Apart from some commendation for his work in the Tokelau venture, Mr Eden limits his assessment of petitioner's merits to one statement: "Mr Plowman has been industrious". One of the first things a prospective employer would look for in a testimonial would be a reference to the honesty and reliability of the person seeking employment. This would be of particular importance in Apia, where the recent thefts had excited much general interest.

Notwithstanding the inferences to be drawn from the omissions in the testimonial, it has been made perfectly clear to the Court that there is not, and never has been, the slightest suggestion of dishonesty against Mr Plowman personally. Mr Eden says in his evidence:

> "I have never suspected Plowman of dishonesty. When he raised the point with me, I said I would give him a reference showing that there was no suggestion of dishonesty....I am satisfied that there was no evidence of dishonesty on the part of Plowman."

Mr Lascelles, accountant to New Zealand Reparation Estates, says:

> "I have never had any reason to doubt Mr Plowman's honesty and integrity."

Mr Malone states in evidence -

> "There is no question of black mark against Mr Plowman's character."

Similarly, there are no allegations of negligence, incompetence, failure to carry out his duties, or any other factors which in the ordinary course might give sufficient grounds for the dismissal of an employee. Both Mr Eden and Mr Malone state emphatically that the only reason for the dismissal of petitioner was the necessity of reorganization in the store. Mr Eden's evidence on the point is as follows:

> "I have never discussed Plowman's dismissal with any outsiders. If they had asked me about it, I would have said that there was no reflection on his honesty. He was discharged, not because of the shortages, but because of reorganization."

The evidence on the subject of the proposed reorganization was not very explicit. Such as it was, it fell far short of proving that to be effective it required the instant dismissal of the store manager. As far as I can gather from Mr Eden's explanation, the organization remained the same and the only difference was in personnel. The post of store manager was not abolished and on petitioner's dismissal another person was immediately appointed in that capacity. I find therefore that what witnesses for the defence call the "necessity for reorganization" did not justify the summary dismissal of petitioner; that no other grounds for such dismissal have been shown; and that he was dismissed without proper cause.

The question now arises as to whether the facts I have found can support petitioner's claim for damages. Even if such an action does lie a substantial portion of petitioner's claim must necessarily fail; that is the portion relating to the injury to his reputation and the difficulty of obtaining fresh employment. Petitioner contends, possibly with some justification that his dismissal just after the discovery of the series of thefts from the major stores would lead the general public to believe that he was in some way involved in those criminal activities. Prior to 1909 there was some doubt as to whether such considerations could be taken into account in aggravation of damages; but in that year the House of Lords definitely settled the law on the subject in Addis v. Gramophone Company 78 L.J.K.B. 1122. It was there held that damages for wrongful dismissal cannot include compensation for injured feelings or for loss sustained from the fact that the dismissal itself makes it more difficult to obtain fresh employment. In that case - as in the present petition - plaintiff contended that the manner of his dismissal had cast a slur on his character, and he attempted to recover damages for what he alleged was really defamation. The House of Lords decided that such a claim could not be sustained. That decision is one of the highest authority and is directly in point in the present case. Mr Metcalfe's submission that an action for defamation would not lie against the Crown here as the cause of action, if any, arose before coming into force of the Crown Proceedings Act 1951, would appear to have considerable force, but it is not necessary to decide the matter on that ground.

An action for wrongful dismissal is based on breach of contract. The Crown is in a different position from that of an ordinary employer. McGregor J. sets out the law concisely in The King v. Power /1929/ N.Z.L.R. 267:

> "It is clear law that except where it is otherwise provided by statute all public officers and servants of the Crown in England hold their appointments at the pleasure of the Crown and all in general are subject to dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained."

This was also held to be the law in New Zealand. In Campbell v. Holmes (C.A.) /1949/ N.Z.L.R. 949 O'Leary C.J. reviews the authorities and then says, at p. 980:

> "The result of these authorities is that it is an implied term in the engagement of every person in the Public Service that he holds office during pleasure, unless the contrary appears by statute."

The statute which applies to the engagement of petitioner in the present case is the New Zealand Public Service Act 1912 with its amendments and with the regulations made thereunder. As from 1st April 1950, upon which date the Samoa Amendment Act 1949 came into force, the conditions of employment of petitioner in the Western Samoa Public Service would be determined by the provisions of the Amendment Act in so far as that Act

applies. I shall refer to the Public Service Act 1912 as "the principal Act". Any rights the petitioner has must be strictly limited to those conferred on him by statute.

Section 60(3) of the principal Act provides that every appointment to the Public Service must be made in accordance with the provisions of the Act, and not otherwise. An appointment may belong to one of three classes: "Probationer", under section 39, "temporary employee" under section 45, and "officer" who under section 3 is a person employed in the Public Service not being either a probationer or a temporary employee. Mr Malone states that in his opinion petitioner was at all times a temporary employee. Petitioner contends that he was an officer. The legal status of petitioner is important. The services of a probationer or a temporary employee may be dispensed with at any time. An officer, except in the case of misconduct, is entitled to 3 months' notice.

It therefore becomes necessary to look at the circumstances surrounding the original engagement of petitioner by New Zealand Reparation Estates. After preliminary discussions between petitioner and Mr Eden, the letter wrote to the Secretary, Department of Island Territories, asking for authority to engage petitioner as store manager at a salary, including allowances of £700 per annum. The terms of the proposed engagement are set out in detail, but I need to refer only to three:

"1. Temporary officer.
5. Hours of duty 7 a.m. - 12 noon, 2 p.m. - 4 p.m.
7. Term - unspecified and subject to termination with one month's notice on either side."

Petitioner was not made aware of the contents of this letter. In one respect at least they differed from the verbal arrangement made between petitioner and Mr Eden; petitioner had agreed to work, and was in fact required to work, from 7 a.m. till 12 noon and from 1 p.m. till 4 p.m.

The Secretary of Island Territories replied by telegram, the text of which is as follows:

"Your despatch 20th (?28th) February. Stores manager. Please advise Plowman's age and educational qualifications. We could not support recommendation regarding salary which is higher than that of any plantation manager or senior work storekeeper in New Zealand also conditions of employment would have to follow those usually laid down plus 12 months probationary service please comment urgently."

Further conversations took place between petitioner and Mr Eden, and at a discussion with Mr Eden and Mr Rodda, of the Public Service Commission office in New Zealand, who was visiting Samoa, petitioner agreed to accept a lower salary than that originally mentioned. Mr Eden then wrote to the Island Territories Department on the 24th March as follows:

24th March 1949

Memorandum for:-

The Secretary,
Department of Island Territories,
WELLINGTON, N.Z.

STAFF - APPOINTMENT OF MR P. PLOWMAN AS STORES MANAGER AND RELIEVING PLANTATION MANAGER

I acknowledge receipt of your Radio No. 27 with regard to the above. The matter was discussed with Mr Rodda of the Public Service Commission's Office and Mr Rodda agreed to recommend the following salary for Mr Plowman, commencing from the 24th March, 1949:-

Stores Manager and Relieving Plantation Manager Temporary Appointment -

Basic Salary	£535
Special Allowance	50
Cost of Living Allowance	60
Tropical Allowance	5
	£650

Appointment is subject to one month's notice on either side, but if three years of service completed, Mr Plowman will be entitled to the usual furlough privileges.

In the event of our dispensing with Mr Plowman's services, or his resignation, he will not be entitled to have his fare paid out of the Territory except it be upon completion of three years' service.

I understand that Mr Rodda will make the necessary recommendation to the Public Service Commission, but no doubt you will advise me of their approval in due course.

Mr Plowman's application for appointment is enclosed.

(D.R. Eden)
GENERAL MANAGER

Accompanying this letter was petitioner's application to join the Public Service, the only document signed by him at any stage. This was a cyclostyled form handed to him for completion and signature. It is addressed to the Secretary, Public Service Commissioner, Wellington and commences -

"Sir, I desire to apply for appointment to the Public Service, and furnish the following particulars required of applicants."

There is a note to the form which states that the applicant will be advised of the result of his application.

That appears to be the end of the matter, except that petitioner commenced work on the 24th March 1949 and remained in his position until his dismissal on 3rd December 1951. He was not advised of the result of his application. Mr Malone stated in evidence that he sent to New Zealand for petitioner's personal file, and was informed that there was no such file. The detailed record concerning "all persons in the Public Service" which by section 28 of the principal Act the Commissioner was required to keep, was not kept in respect of petitioner, though he was admittedly a "person in the Public Service". The status of petitioner at the time of his joining the Public Service is thus not a matter of official record.

In view of the provisions of section 60(3) of the principal Act it is clear that negotiations between petitioner and Mr Eden, though they might assist the Commissioner in deciding upon the terms of his engagement, could not of themselves form the basis of his employment. It is necessary to look to the official pronouncement of the Public Service Commissioner on the subject; and evidence as to this pronouncement is regrettably vague and scanty. Petitioner says his engagement was for three years, subject to a month's notice. Mr Eden in his letter of 28th February 1949 also speaks of a month's notice, but refers to the term as "unspecified". But the Commissioner can appoint to the Public Service only in accordance with the provisions of the Act, and I can find in the Act no power to appoint for three years, or for an unspecified term (except under section 45) or for an indefinite period terminable on one month's notice. Even if he has such power, there is no evidence that

he did appoint petitioner on any such special terms. If I am correct in this conclusion, then petitioner was either a temporary employee, or a person admitted to the Public Service under section 39, in which latter case he was, at the time of his dismissal, either a probationer or an officer.

Primarily, temporary employees are appointed from the register referred to in section 34 of the principal Act, for a term of three months, and following that not more than two successive terms of three months with the sanction of the Commissioner. Section 45(5) however gives the Commissioner much wider powers; and in New Zealand in Public Service Association v. Campbell 1951 G.L.R. 484 Gresson J. held - or so it may be inferred from his judgment - that that subsection authorised the Commissioner to engage any person, in employment of a temporary nature, for a period exceeding the limits earlier laid down. This judgment is I think open to the comment that it renders nugatory the elaborate provisions of subsections (1) (2) and (3). The point at issue in that case was the right of the Commissioner to extend for a further period the employment of a person who was admittedly "temporarily employed" and who had already served more than the specified periods totalling nine months. The judgment does not, in my view, assist me in determining whether petitioner was or was not a temporary employee. In any event the Commissioner is required, by subsection (6) to make a return showing the names of all persons temporarily employed under the authority of section 45; and there is no evidence that petitioner's name appears on any such return. In fact, as the Public Service Commissioner has apparently no personal file for petitioner, it would seem to be a logical inference that his name does not so appear.

I should have thought that if a person had been appointed under section 45 of the principal Act he would have been informed that his appointment was temporary; especially when his application specifies an appointment, not a temporary appointment. Mr Malone stated in evidence that it is his practice so to inform persons engaged by him. No such notice was given to the petitioner. The only allusion to the duration of petitioner's engagement to be found in any document having, as far as can be gathered, the authority of the Commissioner behind it, is contained in the telegram from the Secretary of Island Territories already quoted. This states "conditions of employment would have to follow those usually laid down plus 12 months probationary service". This I take to mean that the terms of employment suggested in Mr Eden's letter of 28th February were not acceptable and must be replaced by the terms usually laid down plus twelve months' probationary service; that is to say, terms which are consistent with the provisions of the principal Act. In the telegram from Island Territories there is no mention of a temporary appointment. The reference to a period of probation negatives the suggestion that the appointment should be temporary, as persons engaged under section 45 do not serve a term of probation. It is most regrettable that no official intimation was given to petitioner of the terms of his appointment, and I am compelled to come to a decision on the subject on most inadequate evidence. It must be assumed that the letter of the 28th February/1949 was referred to the Public Service Commissioner in New Zealand and that the telegram from the Department of Island Territories was sent with his approval. From the wording of that telegram, for the reasons I have set out, I conclude that petitioner was admitted to the Public Service under section 39 subject to his serving as a probationer for 12 months.

As from the 1st April 1950 the Western Samoan Public Service became subject to the provisions of the Samoa Amendment Act 1949. By section 40(3) of that Act all appointments made under (inter alia) section 19 of the Finance Act 1931, which placed the Samoan Public Service under the control of the New Zealand Public Service Commission, shall enure as if they had originated under the provisions of the 1949 Act. This last mentioned statute must therefore be examined to ascertain the rights and obligations pertaining to the dismissal of petitioner. It is to be noted that the provisions of this Act differ considerably from those of the principal Act. Section 17, for example, which authorises the Public Service Commissioner to appoint in a temporary capacity such persons as he thinks fit on such conditions as he from time to time determines, bears little resemblance to the corresponding section 45 in the principal Act. There are also substantial

differences in the provisions affecting persons on probation. In particular, the Samoa Amendment Act 1949 omits the words added to section 39 of the principal Act by section 7 of the Public Service Amendment Act 1927:

> "(The Commissioner) may from time to time extend the period of probation, but confirmation of the appointment shall not be presumed by reason only of the fact that the person concerned has been continued in the Public Service after the expiration of the period of probation."

The omission of these words, which received such lengthy consideration from the judges of the Court of Appeal in Holme's case (supra), seems to me peculiarly relevant in the present action

Section 13(3) of the 1949 Act defines the classes into which the Western Samoan Public Service is divided. These are three in number:

(a) Persons employed in a permanent capacity.
(b) Persons on probation for a specified period.
(c) Persons employed in a temporary capacity.

In making an appointment on probation, the Public Service Commissioner has an unfettered discretion as to the length of the period of probation to be specified; he is not subject to the limitation imposed by section 39 of the principal Act, which provides that such period shall not be less than six months. He may impose either a longer or a shorter period.

To determine the status of petitioner at the time of his dismissal, it is necessary to consider the provisions of section 16 of the 1949 Act. This section reads:

> "16. (1) The Public Service Commissioner may from time to time extend the period of probation of any probationer by notice in writing to that probationer.
>
> (2) Where any person is appointed to the Western Samoan Public Service on probation, he shall, while he remains in that service, be deemed to be employed on probation, notwithstanding that his term of probation may have expired, until he is notified by the Public Service Commissioner in writing that he is appointed to the Western Samoan Public Service in a permanent capacity or in a temporary capacity:
>
> Provided that if, at the end of one year after the termination of the period for which he was appointed and every extension thereof under the last preceding subsection, he is still deemed under the foregoing provisions of this subsection to be employed on probation he shall thereupon be deemed to be appointed to the Western Samoan Public Service in a permanent capacity.
>
> (3) While any persons is employed on probation in the Western Samoan Public Service, his services may be terminated by the Public Service Commissioner at any time."

Subsection (2) is perhaps a little difficult to construe, but its meaning appears to me to be this. When the period specified for his probationary service, including any extensions of that period made by notice in writing given by the Public Service Commissioner has expired, an employee still remains on probation until the Public Service Commissioner notifies him in writing that he is appointed in a permanent or in a temporary capacity. If however the Public Service Commissioner gives no such notification for twelve months after the period of probation has expired, then the employee at the end of that

twelve months is automatically, and without any notice, deemed to be appointed in a permanent capacity. Applying that construction to the facts in this case, the position of petitioner would appear to be this. His specified period of probation was twelve months, which expired on the 24th March 1950. No extension of that term was notified by the Public Service Commissioner, and no other notification in writing under the Act given to petitioner. Twelve months later, that is to say on the 24th March 1951, he was deemed to be appointed to the Western Samoan Public Service in a permanent capacity. If the phrase "appointment in a permanent capacity" in that connection means anything, it must mean that his period of probation was at an end, and that he could no longer be classed as a probationer. This meaning seems consistent with the provisions of section 13(3) quoted above.

Turning now to the definitions in section 2 of the 1949 Act, we find that an "officer" means a person, other than a probationer or a temporary employee, who is employed in the Western Samoan Public Service. As petitioner was from the 24th March 1951, neither a temporary employee nor a probationer, it follows that he was an officer. By section 13 of the 1949 Act an officer who is dismissed (otherwise than for cause shown in accordance with the procedure laid down in the Act) is entitled to three months' notice. Where no notice is given, as in this case, the officer can claim a sum representing what he would have earned during that period.

Petitioner was in receipt of a salary of £725 per annum. He was paid, by way of compensation, one month's salary; so that there is still due to him the equivalent of two months' salary, that is to say £120.16.8. His salary was not, however, the only benefit he received from his employment. He, as store manager for New Zealand Reparation Estates, was given the privilege of purchasing his household requirements at less than current retail prices. If he had received the three months' notice to which he was entitled, he would have continued receiving the benefit of the special discounts on his purchases from the New Zealand Reparation Estates store. Mr Eden in evidence said that if petitioner had asked him, he would have allowed him this privilege for a further period of one month; but, in all the circumstances of the case, an employee summarily dismissed could hardly be expected to approach the General Manager to ask for a concession which he knew was extended only to the staff of the New Zealand Reparation Estates. I think that petitioner is entitled to a further sum representing the monetary value of that privilege for a period of three months. No figures were given to me upon which I could base an accurate computation of the sum involved, and I make an arbitrary assessment. I fix the amount at £7 per month, making £21 for the whole period. Under these heads therefore the plaintiff will have judgment for £141.16.8.

There remains for consideration the claim for overtime. In New Zealand this subject is dealt with in Regulations 8B - 8E made under the authority of the principal Act. The Public Service Commissioner in Western Samoa has not yet made Regulations for the general control of the service, as he has the power to do under section 33 of the 1949 Act; so that, under section 40(3) the New Zealand Regulations would apply. Generally speaking overtime is not payable except with the approval of the Public Service Commissioner on the recommendation of the Permanent Head, of the Department concerned, in this case Mr Eden. Mr Eden made no such recommendation, and the approval of the Public Service Commissioner was not obtained; so that no legal claim for overtime pay can be sustained. Petitioner admittedly worked, under instructions from Mr Eden, longer hours than were laid down in the conditions of his employment. Mr Malone stated in evidence that he would have considered authorising overtime payments if a recommendation from the General Manager had come to him. But in the absence of such a recommendation no authority could be given. Petitioner has no legal remedy in respect of the non-payment of overtime. As Mr Malone pointed out, all a public servant can do, if he considers he is not receiving sufficient remuneration for the work he is called upon to perform, is to resign

and seek employment elsewhere. Petitioner's claim for overtime payment consequently fails.

In the result there will be judgment for petitioner for the sum of £141.16.8, with costs and witnesses' expenses to be fixed by the Registrar.