

IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 580 OF 1979

BETWEEN:

R. E. CHINGWALU PLAINTIFF

and

RUO ESTATES LIMITED DEFENDANT

Coram: Skinner, Chief Justice

For the Plaintiff: Kapeta of Counsel

For the Defendant: Makhalira of Counsel

Official Interpreter: Sonani/Kadyakale

Court Reporter: Kelly/Brown

JUDGMENT

The plaintiff in this case was employed by the defendant and at the time of the termination of his contract by it he was a section manager, and it is pleaded in the statement of claim that he was employed as such by virtue of an agreement in writing dated 26th November 1970 at a salary of K1,760 per annum payable by equal monthly payments. It is pleaded that pursuant to the agreement the plaintiff served the defendant until 19th October 1978, when the defendant wrongfully and in breach of the agreement, and without giving the plaintiff any notice in writing, by letter dated 19th October 1978 terminated his employment with immediate effect and refused to allow him to remain in its employ. It is claimed that by reason of this the plaintiff has lost the benefit of participating in the staff pension scheme operated for the benefit of the defendant's employees and has been deprived of the salary he would otherwise have earned, and that he has thereby suffered loss and damage. He claims loss of salary from 19th October 1978 to 25th November 1996, which is calculated at K31,826.66, and further, the benefit which he would have enjoyed under the pension scheme which he claims to be K13,216, and further, he claims damages for wrongful termination of the employment. The defendant in its defence denies having breached the agreement by dismissing the plaintiff on 19th October as alleged in the statement of claim and puts forward a defence justifying such dismissal on the grounds of misconduct. The particulars of the misconduct are pleaded. There are four such particulars.

Tomlinson v. L.M.S. (1944) 1 All ER 537 is authority for the proposition that where a defence justifies dismissal on the grounds of misconduct such ground or grounds must be specifically pleaded.

In the instant case they are so pleaded, and in my judgment the defendant is only entitled to rely on the particulars as pleaded. The plaintiff has objected to its going outside its pleadings. The reason for pleading the grounds of dismissal is that the plaintiff will know the case he has to answer. It would be unfair to allow an employer to rely on grounds which he has not pleaded, and in my judgment it would be entirely wrong to allow him to plead one set of particulars and to rely on others.

The defendant denies that the dismissal was in breach of the agreement and avers that it paid the plaintiff a sum of K492.39 being three months' pay in lieu of notice.

The first issue which I have to determine is whether the defendant was entitled to dismiss the plaintiff for the grounds set out in paragraph 7 of the defence. Closely allied to this is the issue whether or not the plaintiff's service was determined by payment in lieu of notice and in accordance with his contract of employment.

The particulars of misconduct pleaded in the defence are as follows:-

- "a) Some time between 9th to 14th October 1978 the Plaintiff took 43 unclaimed pay and wage packets to his house without the authority of the Defendant which is in contravention of the Defendant's Company procedure.
- b) The Plaintiff made various irregularities in the labour register whereby some of the pages in the Daily Report Book were found torn and or missing.
- c) The Plaintiff re-employed a clerk without the authority of Defendant after the said clerk was previously dismissed by the Defendant's management.
- d) The Plaintiff took his personal car to Nunes Panel Beating at the Defendant's expense without first obtaining authority from the Defendant."

The burden of proof to show justification is on the defendant and the standard of proof is that of the balance of probabilities.

I now turn to the evidence in so far as it relates to these issues.

The plaintiff stated that he was employed by Mini Mini Estate from 1952 until 1968. Mini Mini Estate was bought by the defendant company and he worked for it from 1968 until 18th October 1978. He was a field section manager working under a Mr. Sansom. He referred to his letter of appointment (Exhibit P7) dated 25th November 1970. His evidence as to what happened on 11th October was that after he had paid out the wages there were 43 pay packets over, and that these were taken by D.W.3 Mr. Sansom. This part of his evidence is

clearly corroborated by D.W.3, who admitted that it was he who took the pay packets and not the plaintiff. The allegation of misconduct which is pleaded in paragraph (a) of the particulars is that the plaintiff took these packets to his house without the authority of the defendant and that this is in contravention of the company procedure. I am fully satisfied that he did not do so.

The plaintiff in his evidence said that part of his duties was to keep a labour journal. P.W.2 kept a labour register and P.W.1 a Daily Report Book, and he transferred information from these books to his labour journal. It was part of his duty to check the books to ascertain whether there were errors, and he would know if the information in the books was wrong.

Now the allegation made against the plaintiff in paragraph (b) of the particulars is that he made various irregularities in the labour register whereby some of the pages in the Daily Report Book were found torn and/or missing. The evidence for the defence on this particular was given by D.W.3. On the evening of 11th October after the check as to the payment of labourers this witness wished to check the Daily Report Book and he went and asked the plaintiff for it. The plaintiff said that it was locked in the office and that the checker clerk, P.W.1, had the key. The next day the witness obtained the book and he found that the pages relating to the previous ten days had been torn out. There were ten other pages which had been filled up, and these in the witness's opinion must have been written in on the evening of 11th October, and they were in the clerk's handwriting and not initialled by the plaintiff. I am not satisfied from this evidence that the plaintiff either tore out the pages or was a party to their extraction.

The next particular of misconduct relied upon by the defendant is that the plaintiff re-employed a clerk without the authority of the defendant after the clerk was previously dismissed from its employment. The evidence of D.W.3 was that P.W.1, who was the clerk in question, was employed by Ruo Estates in April 1977. The employment of clerks had become necessary because all the previous clerks supervised by the plaintiff had been convicted of offences of dishonesty and sent to prison. The witness asked the plaintiff to find new clerks, and his evidence is that he told the plaintiff to employ competent and trustworthy people. The plaintiff employed three new clerks and he did not tell the witness about their background. Just prior to the plaintiff's employment being terminated the witness discovered that P.W.1 had previously been in the employment of the company and had been dismissed for irregularities in connection with books. If he had known this he would not have sanctioned the employment of P.W.1. If a clerk had been previously dismissed the plaintiff would have had to get specific authority to re-employ him. The witness knew about a written examination which was conducted by the plaintiff but he did not interview the clerks though he may have spoken to them.

D.W.5 Peter Snell, a tea planter in the employment of the defendant, said that he had worked with the plaintiff at Mini Mini Estate from 1969 to 1977 and that he knew P.W.1 who was a clerk working under the plaintiff at Mini Mini Estate in the years 1970 and

1971. He was dismissed for irregularities in connection with the books. The witness had forgotten the details but he said it was untrue that he had a quarrel over the sale of chickens. At the time P.W.1 was dismissed the plaintiff was his immediate superior.

The plaintiff's evidence in connection with this aspect of the case was that in April 1977 he was called by D.W.3 to attend an interview at which D.W.3 interviewed sixteen men for the posts of clerks. After that D.W.3 told him to prepare a written test and to take the two candidates with the highest marks. P.W.1 and P.W.2 had the highest marks, and D.W.3 approved their names and they were employed. The plaintiff did not agree that P.W.1 was employed without the authority of the company. He agreed that he worked with P.W.1 at Mini Mini Estate and that witness had quarrels with the witness Snell, and this was the reason for his dismissal. The witness had worked under him at Mini Mini but he was not dismissed because of the insertion of fictitious names in the books. He had told D.W.3 that P.W.1 worked at Mini Mini but that he had quarrelled with D.W.5.

P.W.1's evidence was that he had worked as a checker clerk for Ruo Estates from 1977 until his dismissal. He was interviewed for the job. It was a written interview, and there was an examination, which he passed. Previously he had worked for Mini Mini Estate, and he had resigned because of a dispute with D.W.5 Mr. Snell. Later in his evidence he said he was dismissed by D.W.5. When he came to be employed by the plaintiff he was interviewed by D.W.3 and he did an examination paper which was given to him by that witness, but he had no interview with him before the examination paper. The plaintiff supervised his examination and announced the results. He had spoken to D.W.3 before taking the examination, and D.W.3 had told the plaintiff that he was seeking to be employed again and that he had better go for an interview. In cross-examination he said that he worked for Mini Mini Estate from 1953 until 1971 and for part of that time the plaintiff was his immediate superior. He was dismissed by D.W.5 because he, D.W.5, went to the home of his relative who had chickens for sale and he failed to buy them and there was a quarrel with his relative.

I accept that the witness D.W.3 did instruct the plaintiff to employ trustworthy people. This would be natural in the circumstances when one considers that all the previous clerks had been dismissed for dishonesty. I find that P.W.1 had previously worked for Mini Mini Estate and had been dismissed by the defendant company because of irregularities in the books. I was impressed by the evidence of D.W.6, who corroborated D.W.5 as to the previous dismissal of P.W.1.

I am further satisfied that the plaintiff must have known that P.W.1 was dismissed and the reason for it. After all, he was his immediate superior. I am satisfied that he did not tell D.W.3 of this, and I am further satisfied that he was under a duty to disclose that P.W.1 had previously been dismissed by the defendant and that he was not authorized to employ him unless he got the specific authority of the company to do so.

I now turn to the allegation in paragraph (d) of the particulars of misconduct. It is that the plaintiff took his personal car to Nunes Panel Beating Services at the defendant's expense without first obtaining authority from the defendant. The evidence for the defence did not prove this allegation. D.W.3's evidence was that the plaintiff was authorized to get a quote for repairs to his motor car which had been damaged by one of the company's cars and came back with a quote of K150 from Nunes Panel Beating Services, and he was then authorized to have his car repaired at the company's expense. The evidence of D.W.3 is that the quote of K150 was in respect of repairs in addition to the repairs necessitated by the accident. K80's worth of the work was attributable to repairs necessitated by the accident, K70 was attributable to repairs which were not necessitated by the accident. In my judgment the defence have not proved that the plaintiff had not got authority to take his motor vehicle to the panel beaters for repair. He did have, and in any event he paid for the repairs himself and thereafter sought, on the defence case, to obtain money which he was not entitled to. That is a different matter from what is alleged in the particulars.

In my view the defendant has proved only one of the allegations of misconduct which it relied upon to justify the summary dismissal of the plaintiff, namely, that contained in paragraph 7 (c) of the defence. There is no general rule as to what causes would justify the discharge of a servant, but it is trite law that a person may be dismissed for wilful disobedience of a lawful order of his employer. Now it appears to me in the instant case that the plaintiff disobeyed the instructions of the company given through D.W.3 that he was to employ trust-worthy people. In fact he employed a man who he must have known was not trustworthy. But his conduct goes further than that. I remind myself of the words of James L.J. in Clouston & Co., Limited v. Corry (1906) A.C. 122 at 129:-

"Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

I again remind myself of the words of Sachs L.J. in Sinclair v. Neighbour (1967) 2 Q.B. 279 at 289:-

"It is well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to 'a wrongful act inconsistent with his duty towards his master' but is also inconsistent with 'the continuance of confidence between them.' That was said by Bowen, L.J. in his classical judgment in Boston Deep Sea Fishing & Ice Co. v. Ansell."

The words of Bowen L.J. which the learned Lord Justice referred to are reported in 39 Ch.D. at 363 and refer to a servant "doing a wrongful act inconsistent with his duty towards his master and the continuance of confidence between them".

I am satisfied that in the instant case not only did the plaintiff disobey a lawful order but that by employing an untrustworthy person who had already been dismissed he did a wrongful act inconsistent with his duty towards his employer and inconsistent with the continuance of confidence between them. Again I am satisfied that this misconduct would be likely to interfere with the safe and proper conduct of the master's business, because to put a person who had been dismissed for irregularities in the keeping of the books again in charge of them would do so. In my judgment the defendant was entitled to summarily dismiss the plaintiff on the ground set out in paragraph 7 (c) of the defence.

But did the defendant dismiss the plaintiff or did he terminate his employment by payment in lieu of notice? The plaintiff put in evidence a letter (Exhibit P7) written to him by the defendant company in November 1970 which he relied upon as containing the terms of his appointment with it. There is a termination clause and it reads as follows:-

TERMINATION

This appointment may be terminated by either party without assigning any reason, by the giving of three (3) months' notice in writing or by either party paying to the other three (3) months' salary in lieu of notice.

In the event of any leave being due to you at the date of the notice of termination of employment being given, the Company shall at its option either pay to you salary in lieu of the leave so earned, or permit you to take such leave during the notice period.

The Company may summarily terminate your appointment without previous notice if you should be guilty of unauthorised absence or misconduct, or any act or omission, or course of conduct inconsistent with the proper performance of your duties."

It is clear that under that clause the employer could terminate the employment by giving three months' notice in writing or paying to the employee three months' salary in lieu of notice. It was also provided that it could summarily terminate the employment without notice in the event of the employee being guilty of unauthorized absence or misconduct or any of the other acts set out in the clause. Now I have to ask myself, did the defendant summarily dismiss the plaintiff, in which event it has to justify such dismissal, or did it terminate his employment in accordance with the notice provision by giving him three months' salary in lieu of notice?

The plaintiff and his legal adviser seem to assume that he was dismissed. The employment was ended by a letter (Exhibit P8) written by the defendant on 19th October 1978. The second paragraph of the letter refers back to the misconduct. The fourth and fifth paragraphs read as follows:-

"I therefore regret to inform you that it has been decided to terminate your employment with the Company with immediate effect.

In view of your relatively long service on the staff of The Ruo Estates Limited and your earlier connections with Mini Mini Tea Syndicate Ltd., you will be paid up to the end of October, and you will also receive three months' salary in lieu of notice."

The remaining paragraphs of the letter deal with the moneys to be paid to him. In my view paragraphs four and five did not summarily terminate the plaintiff's employment. The effect of the paragraphs is to terminate the appointment by giving him three months' salary in lieu of notice. In other words it was a termination by notice and not a dismissal and it was in accordance with the terms of the contract between the plaintiff and the defendant. This is not a case of implying into the contract a power to terminate on notice in respect of pensionable employment. It is a case where there is an express term agreed between the parties that the contract can be terminated on notice or by payment in lieu thereof. In my judgment the employment was not terminated by the plaintiff being summarily dismissed. It was terminated on payment in lieu of notice in accordance with the contract.

I dismiss the action with the costs thereof to the defendant.

Strictly that is the end of the matter, but it may be of use if I deal with the question of damages in so far in any event as the pension fund is concerned. The plaintiff claimed K13,216 in respect of his loss of pension. This would appear to be based on the cash which he would have been entitled to on retirement at the age of sixty for pensionable purposes. However, both the evidence and the submissions related to the payment of the employer's contribution under clause 5.4(2)(a)(i) of the policy of insurance governing the pension fund which deals with the premature retirement of an employee. It was submitted by counsel for the plaintiff that the plaintiff was unaware of the provisions of the rules governing the pension fund, in particular the provisions of clause 5.4(2)(a)(i), and that as his knowledge of the rules was based on Exhibit P5 he would not be bound by the provisions of that clause. However, it is abundantly clear that it is only that clause as amended and endorsed on the policy on 11th August 1976 that would give an employee any right whatsoever to receive the employer's contributions in the fund on premature withdrawal from the pension scheme. Prior to the endorsement an employee with ten years' service, as the plaintiff had, would have been entitled to either a deferred pension or the return of his own contributions. I am satisfied however that the plaintiff is entitled to the benefit of the endorsement dated 11th August 1976, but the question is, what is he entitled to under that

endorsement? Under clause 5.4(2)(a)(i) the employer may at his absolute discretion grant any employee who withdraws from the service his equitable share determined at the time of the withdrawal, though in terms of the next sub-paragraph the member is entitled to take a deferred pension instead. The member's equitable share would include the employer's contributions. In the instant case the plaintiff was paid his own contributions together with interest thereon, but the employer's contributions were not paid to him. The employer's contributions were retained in the pension fund for the benefit of all the employees.


The relevant part of the clause upon which the dispute centres reads as follows:-

"It is furthermore specifically provided that the EMPLOYER may, at his absolute discretion, grant any MEMBER who withdraws from service the MEMBER'S EQUITABLE SHARE determined as at the date of withdrawal."

Counsel for the defendant has submitted that the defendant can withhold its own contributions at pleasure and as it wishes. In my view the defendant in exercising its power under this clause must act in a fiduciary manner for all the members of the pension fund. The discretion must be exercised honestly and in the spirit of the scheme. I think that such happened. The evidence of the witnesses was that the record of service of the plaintiff was taken into account. I would not have awarded damages under this head unless I had found that there was something in the nature of misconduct in the exercise of the discretion. I do not think there was.

There was one matter which slightly worried me, namely, the plaintiff had an option to take either his own contributions or a deferred pension at the age of fifty five. There was no evidence that anybody asked him what he wanted to do, but his own evidence suggests that he wished to have the money, and the evidence is that he accepted the money which was sent to him.

Pronounced in open court this 15th day of October, 1980, at Blantyre.


J. J. SKINNER
CHIEF JUSTICE