CENTRAL MANUFACTURING CO LTD v YASHNI KANT

SUPREME COURT — CIVIL JURISDICTION

D FATIAKI CJ, BLANCHARD and WEINBERG JJ

20, 24 October 2003

[2003] FJSC 5

Employment — termination of employment — damages — breach of contract — oral contract of employment — payment in lieu of notice — implied term of employer's obligation of fair dealing — Constitution of Fiji ss 33(3), 122(2)(b) — Employment Act 1965 (Cap 92) ss 2, 13(1), 15(1), 15(2), 22, 23, 24, 25 — Supreme Court Act 1998 s 7(3)

Petitioner sought for special leave to appeal from a Court of Appeal judgment reversing a decision of the primary judge who had dismissed a claim brought by the Respondent against the Petitioner, his former employer, for damages for breach of contract. The Court of Appeal found that it was a written contract of employment, payment in lieu of notice was not accepted, an implied term of fair dealing was present and damages was proper.

Held — (1) It was an oral contract of employment since it was not required by the Employment Act to be in writing.

(2) Payment in lieu of notice was accepted as a statutory right in relation to oral contracts, and an employer does not commit a breach of contract by exercising that statutory right.

(3) There was an implied term in the modern contract of employment that required employers to deal fairly with employees, even in the context of dismissal. Here, the dismissal was carried out in a manner that is unnecessarily humiliating and distressing.

(4) Respondent was entitled to damages since he was publicly humiliated, involving as it did the unnecessary use of security and the prevention of access to his office.

Damages awarded.

Cases referred to

Addis v Gramophone Co Ltd [1909] AC 488, not followed.

Baltic Shipping Co v Dillon (1993) 176 CLR 344; [1993] HCA 4; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144; [1996] IRCA 371; *Delaney v Staples* [1992] 1 AC 687; *Fink v Fink* (1946) 74 CLR 127; [1946] HCA 54; *Hadley v Baxendale* (1854) 156 ER 145; [1854] EWHC J70; *Johnson v Unisys Ltd* [2003] 1 AC 518; *Martin v Tasmania Development & Resources* (1999) 163 ALR 79; [1999] FCA 593; *Stuart v Armourguard Security Ltd* [1996] 1 NZLR 484; *Wallace v United Grain Growers* [1997] 3 SCR 701, considered.

Brown v Waterloo Regional Board of Commissioners of Police (1982) 136 DLR (3d) 49; *Gothard v Mirror Group Newspapers Ltd* [1988] ICR 729; *Hetherington v Faudet* [1989] 2 NZLR 224; *Horsburgh v New Zealand Meat Processors Industrial Workers Union* [1988] 1 NZLR 698; *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578; *McAulay v Sonoco New Zealand Ltd* [1998] 2 ERNZ 225; *Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3d) 378; *Reda v Flag Ltd* [2002] UKPC 38; *Ribeiro v Canadian Imperial Bank of Commerce* (1989) 67 OR (2d) 385 (on appeal); (1992) 13 OR (3d) 278; *Sanders v Snell* (1998) 196 CLR 329; [1998] HCA 64; *Southern Express Co v Byers* (1916) 240 US 612; [1916] USSC 106; *Trask v Terra Nova Motors Ltd* (1995) 127 Nfld & PEIR 310; *Vorvis v*

Insurance Corporation of British Columbia [1989] 1 SCR 1085; *Whelan v Waitaki Meats Ltd* [1991] 2 NZLR 74; *William Hill Organisation Ltd v Tucker* [1998] IRLR 313, cited.

J. Apted for the Petitioner.

B. C. Patel for the Respondent.

D Fatiaki CJ, Blanchard and Weinberg JJ. This is a petition for special leave to appeal from a judgment of the Court of Appeal delivered on 30 August 2002. By that judgment, the Court of Appeal reversed a decision of the primary judge who had dismissed a claim brought by the Respondent against the Petitioner, his former employer, for damages for breach of contract.

Factual background

The factual background to this proceeding is essentially quite simple. In January 1988, the Respondent, a qualified accountant, commenced employment with the Petitioner. Initially, there was no written contract of employment. In March 1989, he was promoted to the position of group accountant. In 1991, the Petitioner circulated to its staff a document headed "Basic Terms and Conditions of Employment for Senior Management". That document included the following paragraph:

> "Termination of Employment". Employment may be terminated by giving three months' notice to the other party of his intention so to do. In the event of misconduct, dishonesty or other Act in breach of contract, the employer reserves the right for instant dismissal.

There was no evidence that the Respondent accepted this document as affecting the terms of his employment, other than that he continued to work in a position which was plainly part of "Senior Management".

On 28 November 1991, a letter was sent by the Petitioner's general manager to the Respondent indicating that he would be evaluated for suitability for increased responsibility. The letter was in the following terms:

> *CENTRAL MANUFACTURING COMPANY LIMITED*
> 28 November 1991
> [CONFIDENTIAL]
> Mr Yashni Kant
> CMC Limited
> NABUA
> Dear Yashni
>
> Following our discussion yesterday we agreed that due to Steven's imminent departure, you will continue in your present position using the existing office, reporting directly to me on all accounting functions.
>
> At the end of March, 1992 you will be evaluated for suitability or increased responsibility taking into consideration, leadership quality, example setting, work interest, extra efforts, eager to learn and job knowledge etc.
>
> After March 1992, if there is still shortfall in your standard level then you will be given a further training over a reasonable period.
>
> Elevation to Finance Manager/Company Secretary position will require approval of the General Manager, Finance, RHL and the CMC Board after thorough investigation of your suitability for the position.
>
> You will have a temporary use of the current Finance Manager's car when it becomes available subject to you refunding in full the car allowance you collected in advance for December 1991 to March 1992. A cheque must be handed to me.
>
> Yours faithfully

TV RAJU
GENERAL MANAGER

On 12 June 1992, a further letter was sent by the general manager to the Respondent:

CENTRAL MANUFACTURING COMPANY LIMITED
12 June 1992
[Personal and Confidential]
Mr Yashni Kant
CMC Limited
NABUA
Dear Yashni

Following our talks this morning and subsequent announcement from NZ that recommended, salaries have now been approved effective 1st July, 1992. In your case because of the added responsibilities imposed on you prior to April, your salary increase will be effective from 1st April, 1992.

I am pleased to advise that your 92/93 annual basic salary is reviewed to F $32,000. In addition, you will receive $3000 per annum housing allowance including all fringe benefits as per your Terms and Conditions.

The use of a company car is valued at $7500 per annum based on Hays Consultancy.

I take this opportunity to wish you well in our future progress and thank you for the assistance given to me since you assuming the position of Finance Manager.

Yours faithfully
TV RAJU
GENERAL MANAGER

Both the primary judge and the Court of Appeal noted the reference to "fringe benefits as per your Terms and Conditions" in the letter. The Court of Appeal accepted that this referred to the 1991 circular regarding terms and conditions of employment for Senior Management.

In 1994, the Respondent was nominated by his employer for the Fujitsu CBA Young Accountant of the Year award. The letter written in support of that nomination set out a number of his achievements, and specifically stated that he had made a major contribution to the petitioner and the community, and that he had bright career prospects.

In 1995, a difficulty arose. The Respondent held an Australian permanent resident visa that was about to expire. He wrote to Rothmans Holdings Ltd, the Petitioner's holding company, indicating that he intended to continue his employment with the Petitioner for a further 3 years, but pointed out that if his permanent resident visa were not extended, he would have no alternative but to resign and migrate to Australia. By letter dated 13 March 1995 Rothmans Holdings Ltd wrote to Mr Raju, the Petitioner's general manager, agreeing to support the Respondent as an employee "for an additional two to three years". The Petitioner paid the consultancy fees incurred by the Respondent in obtaining the resident visa.

In April 1995, the Respondent received a special bonus. This reflected what was seen to have been an excellent result for the previous year.

In June 1995, the general manager circulated a memorandum relating to attendance by staff at conventions, conferences or courses. The substance of the memorandum was that no individual had the right automatically to attend such events. The Respondent, who shortly before had approved the attendance at a conference of one of the employees under his supervision, considered the

memorandum reflected badly on him. He sent the general manager a memorandum explaining his actions. It was couched in what the Court of Appeal described as "relatively strong terms".

On 6 June 1995, the Respondent arrived at work to find the general manager already there. On speaking to other staff, he was told that the general manager was upset with him, and that he was to be dismissed. He arranged to see the general manager and, following his interview with him, claimed to have made a diary note of the interview that evening. This was subsequently set out by the Respondent's solicitors in a letter dated 19 December 1995 in the following terms:

> YK: Morning Mr Raju. I am here to sincerely apologise to you for the memo I have written to you as at the time of writing I was not happy that despite several discussions you wrote to me with a copy to all the other executives.
>
> TVR In a very angry voice:
>
> Yashni I have come to a stage where I just can't work with you. I have worked in this company for the last 33 years and I have pride in myself and you are showing disrespect for me. I can't trust you anymore and the staff in your division are also showing disrespect for me. Therefore it is better you leave the company.
>
> YK: Mr Raju I have worked in this company for almost 8 years and we have together built this company to this stage and I have always respected you as my elder who has guided me to become the finance manager of the company. I may have said something which could have offended you and I sincerely apologise for it. Could you please let me know what is the real issue, are you not satisfied with my work or is it the memo I wrote to you.
>
> TVR: The memo is not a problem but it is very disrespectful and as far as the department is concerned I left to you to run and I have no complaints.
>
> YK: In view of my good service to the company I want you to give me one more chance and I will improve on my attitude and work according to your guidelines.
>
> TVR: Yashni I think I have made up my mind and its better that you leave the Company.
>
> Handing a sealed envelope he further said:
>
> Here is your termination letter and a taxi is waiting to take you home and you are not to go to your office as the security guard will not allow you to your office.
>
> YK: Mr Raju in view of my good service record with the company I will appreciate if you could reconsider your decision as my future will be totally jeopardised. I sincerely apologise for any embarrassment I have caused you and being a young executive I want you to pardon my action.
>
> TVR: In view of your pledge I am willing to rethink, however, in the meantime I want you to go home and rest. I may ask you to come to work tomorrow.
>
> YK: Thank you, could you please ask the Sales Manager to drop me home.

The Petitioner challenged the Respondent's account of what had occurred during the interview. There was no dispute, however, regarding the fact that the Respondent was handed a notice of termination in the following terms:

> CENTRAL MANUFACTURING COMPANY LIMITED
>
> *PRIVATE*
>
> 6th June 1995
>
> Mr Yashni KANT
>
> MANAGER FINANCE/COMPANY SECRETARY
>
> CMC
>
> *SUVA*
>
> Dear Mr Kant
>
> *TERMINATION*
>
> I write to advise you that your employment as Manager Finance/Company Secretary is hereby terminated with immediate effect.

Your three months' salary in lieu of notice (as per terms and conditions of employment) less money owed to the Company will be credited to your Bank account in the usual manner by KPMG.

Yours faithfully

TV RAJU

GENERAL MANAGER

The Respondent did not take any action as a result of being dismissed in this manner until some months later when, as previously indicated, his solicitors wrote to the Petitioner complaining about what had occurred. In response to that letter, the solicitors for the Petitioner wrote to the Respondent on 2 January 1996 denying that his dismissal had been wrongful or unjustifiable, and maintaining that it had been carried out in accordance with the law prevailing in Fiji, and with the terms and conditions of his employment. In that letter, the solicitors claimed that the termination had not arisen out of the correspondence relating to the subject of attendance at conferences. The letter included the following comments:

3. No reasons are necessary for the termination of Senior Management staff provided that the termination is in accordance with terms and conditions of their employment. In fact it is usual practice and in the interest of senior staff if no reasons for the termination are given. This makes it easier for the staff member to find alternative employment. In this case there is no breach of the terms and conditions by our client. However, to clarify the position some of the reasons why your client was terminated are as follows:
   (i) Your client was holding a very senior position and was also the Company Secretary. However, his behaviour left much to be desired. He was undermining the authority of the general manager and ridiculing him in the presence of most senior managers of the Company.
   (ii) Your client was using Company resources ie staff and computer to maintain accounts of his family business "Bluebird Printery".
   (iii) Your client had kept $80,000.00 in undeclared cash for his family business "Bluebird Printery" in the Company Safe and thereby exposing the Company to substantial risk.
   (iv) At a public place (Fiji Club) your client told the son of a senior executive with 34 years' service with the Company that he would terminate his father's employment with the Company.
   (v) Your client was also found to be divulging confidential Company information.
   (vi) Your client called a member of the staff of Rothmans Fiji and falsely advised that he was funding the Rothmans operation and he was fully responsible for that company.
   (vii) Without the General Manager's prior approval your client joined a fitness club at Company expense and also gave the use of the Company Car to friends and relatives.
4. Most of the facts contained in paragraph 5 of your letter are not true and contain a distorted picture of what happened. At no stage did the General Manager say that he may call your client back to work the next day.
5. As to paragraph 7 of your letter we wish to advise that the Company has always tried to assist staff members and in this case it did everything possible to assist your client to get an extension of his Australian Residency Visa. This assistance was given to your client on his request. Also the bonus was paid to all managers of the company and all received the same sort of letter ie "for your splendid performance".

6. Our client denies that it or its General Manager has made any libelous statements about your client.
7. Please note that any action taken by your client will be vigorously defended.

Yours truly
Sherani and Co
Per:
…(sgd)…
c.c. The General Manager, Central Manufacturing Co. Ltd.

In his evidence at trial, Mr Raju explained that he had dismissed the Respondent because another employee told him, on 3 June 1995, that the Respondent had been making derogatory comments about him. These included comments to the effect that Mr Raju had gained his position by "sucking up to the white man", that he had falsified his expenses, that he had used company funds to refurbish his home, and that he was too old, could not do his job, and should retire. Mr Raju said that he had discussed the matter with other managers, and they had confirmed that the Respondent had been making comments of this type for some time. Two other managers gave evidence that supported Mr Raju's account.

There was also evidence at the trial that the Respondent had become "unbearable" as a supervisor of other staff.

The Respondent denied these allegations.

Decision of the primary judge

The primary judge identified four issues for determination. They were:

- Whether the plaintiff's contract of employment was oral or written;
- Under what provision of that contract, if any, he had been dismissed;
- Whether the defendant had been entitled to dismiss the plaintiff; and
- If not, what was the measure of damages.

His Lordship concluded that the termination clause contained in the "Terms and Conditions of Senior Management", to which reference had been made in Mr Raju's letter of 12 June 1992, was part of the Respondent's contract of employment. He accepted that the Respondent had engaged in the practice of habitually denigrating Mr Raju, and in so doing, had destroyed the basic trust upon which the relationship of employer and employee depended. He concluded that the Petitioner had been entitled to terminate the Respondent's employment, and accordingly, dismissed his claim for damages for breach of contract.

Decision of the Court of Appeal

In summary, the Court of Appeal found that the Petitioner had breached the termination clause in dismissing the Respondent by making a payment of salary in lieu of notice. The court also held that the contract contained two additional terms implied by law. These were:

- "an implied term that the procedure leading to termination must be consistent with fairness" and
- "an implied term that the parties will act fairly and reasonably with mutual trust and confidence".

The Respondent was said by the Court of Appeal to have suffered from these various breaches in several ways. He lost the opportunity to seek an alternative job from a position of secure, albeit temporary, employment. He lost certain fringe benefits. He was denied fair treatment. Finally, he suffered serious harm to his reputation because his employment was terminated suddenly, and without notice, giving rise to suspicion as to why that had occurred.

The Court of Appeal noted that all three breaches arose out of the manner of dismissal. This raised for consideration the question whether *Addis v Gramophone Company Ltd* [1909] AC 488, a case long seen as authority for the proposition that damages arising out of the manner of dismissal cannot be recovered, was still good law. The court observed that the authority of *Addis* had been eroded in a number of jurisdictions, including New Zealand, but that it was unnecessary to discuss those authorities since the whole question had recently been analysed in depth in *Johnson v Unisys Ltd* [2003] 1 AC 518. After analysing that judgment in some detail, the court concluded that *Addis* no longer stood in the way of the recovery of damages arising from the breach of an implied term of a contract of employment, even though the breach arose from the manner of dismissal.

The Court of Appeal then proceeded to assess the damages that should be awarded to the Respondent arising out of the various breaches that had been established. It concluded that an amount of $30,000, in addition to the 3 months' salary already received, together with costs and disbursements, was an appropriate sum.

It is necessary to set out in some detail several aspects of the court's reasoning. It commenced its analysis by noting that the rights, if any, of the Respondent depended upon the terms of his contract of employment. When the Respondent was first employed, those terms were not reduced to writing. Accordingly, any notice of termination would have to be reasonable, having regard to all the circumstances. That was subject, of course, to the provisions of the Employment Act 1965 (Cap 92).

The Court of Appeal next noted that the subsequent unilateral circulation of the "Terms and Conditions of Senior Management" could not have affected the Respondent's terms of employment. Those terms became part of the contract only if expressly accepted by the parties.

The Respondent's promotion in June 1992, and the letter advising him of salary changes contained the words, "including all fringe benefits as per your Terms and Conditions". It was submitted on behalf of the Petitioner that the "Terms and Conditions" to which reference was made differed from the "Terms and Conditions of Senior Management" which had been introduced at an earlier stage. The Court of Appeal rejected that submission. It accepted that the Respondent had taken fringe benefits other than those set out in the letter, including, for example, club subscriptions. That being so, he could not "pick and choose" between terms. He must be held to have accepted the "Terms and Conditions of Senior Management", as varied by the letter sent to him. These were the terms referred to in the letter as "your Terms and Conditions".

The Court of Appeal then returned to the question whether the contract of employment was oral. That raised an important issue because "oral contracts", as defined in s 2 of the Employment Act, would fall within the terms of ss 24 and 25. Section 24 required a notice period of only 1 month, although it seemed that the parties could agree to a longer period, if they wished to do so.

The court concluded that the contract of employment was written, and not oral. However, even if the contract were oral, it would at least be arguable that the words of s 24(1), "subject to any specific agreement to the contrary that may be made between the parties", would be sufficient to import the terms of the circular applying to Senior Management. The consideration for the inclusion of those terms, including the period of 3 months' notice, was the increased remuneration. The Respondent's taking up the position indicated his acceptance of those terms.

Accordingly, the Court of Appeal proceeded upon the basis that the Respondent's contract allowed for his termination on 3 months' notice. It rejected the Respondent's submission that there was a subsequent variation of the contract whereby there was substituted an agreement for a fixed term of 3 years.

The Petitioner's position before the Court of Appeal was that the Respondent, having received 3 months' wages in lieu of notice, had no further claim. That submission was rejected. The court characterised the provision as to notice in the "Terms and Conditions" as falling into the fourth category in the analysis of Lord Browne-Wilkinson in *Delaney v Staples* [1992] 1 AC 687 at 692. His Lordship there said that the phrase "payment in lieu of notice" was not a term of art. It was commonly used to describe many types of payment, the legal analysis of which differed. The fourth of those categories was in the following terms:

> Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice … The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment.

Lord Browne-Wilkinson went on to say, at 693, that the nature of a payment in lieu falling within the fourth category had been analysed as a payment by the employer on account of the employee's claim for damages. His Lordship referred to the observations of Lord Donaldson MR in *Gothard v Mirror Group Newspapers Ltd* [1988] ICR 729 at 733 as support for that proposition.

The Court of Appeal drew from this analysis the proposition that notice, and payment in lieu of notice, were not the same thing. It referred to *Martin v Tasmania Development and Resources* (1999) 163 ALR 79 at 93; [1999] FCA 593; where Heerey J observed that an employee who is given actual notice will often be in a much better position than an employee who is "shown the door", albeit with money in his pocket. The former had the opportunity to seek other employment from a position of current employment and to do so without the opprobrium of immediate dismissal. If an employer wished to have the right to terminate on payment of salary for the period of notice, as well as actual notice, it could so stipulate. In Martin, it had not done so.

The Court of Appeal next said that before considering the question of damages it had to be determined whether the Respondent had established any other breaches upon which he could rely. It referred to *Stuart v Armourguard Security Ltd & Farmer* [1996] 1 NZLR 484 as authority for the proposition that employment contracts contain an implied term that procedure leading to termination must be consistent with fairness. It then considered whether any such breach had occurred in the present case. It concluded that there had indeed been such a breach. The Respondent had not been confronted with the allegations upon which the Petitioner subsequently relied. Nor had he been given any opportunity to controvert or refute them. If an action lay for breach of an implied term to act with fairness in terminating a contract of employment, the Respondent had plainly established a right to recover.

The Court of Appeal noted that there was clear authority for the proposition that a contract of employment contained an implied term that the parties would act "fairly and reasonably" with "mutual trust and confidence". Failure to so act would amount to a breach of contract: *Whelan v Waitaki Meats Ltd*

[1991] 2 NZLR 74 and *Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20. To dismiss the Respondent without notice, bearing in mind the very senior position he occupied within the company, and his position in the community was, in the view of the Court of Appeal, a breach of that implied term.

As indicated earlier, all of the harm that the Respondent sustained was said to have arisen out of the manner of his dismissal. That raised the question whether *Addis* — which was said to have determined that damages arising out of the manner of dismissal cannot be recovered – should continue to be followed in this country. The Court of Appeal concluded that *Addis* should no longer be followed.

The petition for special leave to appeal

The Petitioner applied to this court for special leave to appeal under s 122(2)(b) of the Constitution of Fiji, and s 7(3) of the Supreme Court Act 1998. The principal grounds in support of the grant of special leave are set out in terms which are extremely detailed. They run for many pages. They are said to raise far-reaching questions of law, matters of great general or public importance, and matters that are otherwise of substantial general interest to the administration of civil justice.

It is unnecessary to set out those grounds in full. In substance, the Petitioner contends that the Court of Appeal erred:

- in holding that the Respondent's contract of employment was not an "oral contract" as defined in s 2 of the Employment Act;
- in rejecting the contention that the Petitioner had an implied right to make a payment in lieu of providing notice of termination;
- in accepting that the Respondent was entitled to damages for breach of contract arising out of the termination of his contract in an amount exceeding the wages that would have been paid to him during his notice period, which he had already received;
- in holding that all contracts of employment in Fiji contain an implied term that the procedure leading to their termination must be consistent with fairness;
- in holding that all contracts of employment in Fiji contain a further implied term that "the parties will act fairly and reasonably with mutual trust and confidence";
- in holding that damages are recoverable in Fiji for the breach of an implied term of a contract of employment even though the breach arises from the manner of the termination of employment, and in holding that *Addis* no longer stands in the way of recovery of such damages; and
- in holding that the Respondent had, by his evidence, met the tests of causation and remoteness in respect of his claim that he had suffered as a result of these breaches.

Discussion

The first issue to be considered is whether the Court of Appeal erred in finding that the contract of employment between the Petitioner and the Respondent was not an "oral contract" as defined in s 2 of the Employment Act. That issue is said to be important because oral contracts fall within the scope of other provisions of the Act governing matters such as termination, notice, and payment in lieu.

The relevant provisions of the Act are set out in an appendix to this judgment. The question whether the contract was oral or written depends upon the construction accorded to the expressions "contract of service", "oral contract",

and "written contract" in s 2. An oral contract is defined as a contract of service which, under the provisions of Pt V, is not required to be made in writing, but which may nevertheless be subsequently evidenced in writing. A written contract is defined as a contract of service which, under the provisions of Pt VI, is required to be made in writing. It was common ground that the Respondent's contract, as it was found to be by the Court of Appeal, was not required by the act to be in writing.

There was considerable debate regarding this issue before us. The Petitioner contended the Act contemplated only two types of contract, oral or written: see ss 13(1) and 15(1) and (2). If a contract did not meet the definition of a "written contract", it had to be an "oral contract". This was so notwithstanding the fact that the contract was reduced entirely to writing. The Respondent contended that the Act must be construed in a manner which recognised the possibility that a contract could fall outside the definition of an "oral contract" even though it did not meet the requirements of a "written contract" as defined.

In our view the Employment Act does not contemplate the existence of any hybrid form of contract. A contract under the Act is either oral, or it is written. The fact that the contract may have been reduced entirely to writing does not preclude it from being an "oral contract" within the extended meaning of that expression in s 2. The conclusion by the Court of Appeal that the contract of employment in this case was relevantly a "written contract", in circumstances where it did not meet the definition of such a contract contained in that section, cannot be sustained.

The next issue to be addressed is whether the fact that the contract was oral, and therefore fell within the scope of ss 22 to 25 of the Employment Act, leads to the conclusion that the Petitioner was entitled to terminate the Respondent's employment forthwith by paying him 3 months' salary in lieu of notice. This issue also was debated at great length before us. On behalf of the Petitioner it was submitted that s 25 of the Act, which deals with the termination of contracts, and the notice of termination required to be given by the parties, had the effect of creating an "implied term" giving the Petitioner the right to terminate by making a payment in lieu of notice. On behalf of the Respondent it was submitted that s 25 should not be so construed.

The Petitioner also advanced an alternative argument. It was contended that even if s 25 did not imply a right to terminate by making a payment in lieu, the common law itself implied such a term. The Petitioner relied, by analogy, upon decisions of the High Court of Australia in *Sanders v Snell* (1998) 196 CLR 329; [1998] HCA 64 and the Supreme Court of Canada *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701 as authority for that proposition. The respondent submitted that the Court of Appeal had correctly resolved this issue in his favour, relying primarily upon the observations of Lord Brown-Wilkinson in Delaney as support for that conclusion.

In our view, the Petitioner's argument should be accepted. This was a situation falling within ss 22 and 23 but with a notice requirement of longer than 1 month. Section 25(3) of the Act provides that where an agreement is made between the parties to a contract providing for a period of notice greater than the minimum period specified in s 24(1), the provisions of s 25(2) shall be construed as if the minimum period of notice provided for in that agreement was substituted for the statutory minimum period. Here the minimum period of notice agreed between the parties was 3 months. Section 25(2) allows either party to an oral contract to terminate at any time, under conditions that permit payment in lieu of notice.

Accordingly, payment in lieu of notice is accepted as a statutory right in relation to oral contracts, and an employer does not commit a breach of contract by exercising that statutory right.

If that interpretation of s 25 be incorrect, we would none the less hold that there is now an implied term at common law that an employer can make payment in lieu of notice. The reasoning of the Supreme Court of Canada on this issue in *Wallace* seems to us to be persuasive. There Iacobucci J said at paras 65–6:

> In the absence of just cause, an employer remains free to dismiss an employee at any time provided that reasonable notice of the termination is given. In providing the employee with reasonable notice, the employer has two options:
>
> "Either to require the employee to continue working for the duration of that period or to give the employee pay in lieu of notice …
>
> In the event that an employee is wrongfully dismissed, the measure of damages for wrongful dismissal is the salary that the employee would have earned had the employee worked during the period of notice to which he or she was entitled…"
>
> The fact that this sum is awarded as damages at trial in no way alters the fundamental character of the money.

It follows that, in our opinion, the Court of Appeal erred in concluding that the petitioner acted unlawfully in terminating the respondent's contract of employment forthwith, paying him 3 months' salary in lieu of notice.

As indicated earlier, the analysis of the phrase "payment in lieu of notice" adopted by the House of Lords in *Delaney* identifies several senses in which that expression may be used. Lord Browne-Wilkinson identified four principal categories, the first of which related to what is commonly called "garden leave". His Lordship described that category in the following terms:

> (1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.

We have set out his Lordship's fourth category earlier in these reasons for judgment. A logical distinction can be drawn between the first and fourth categories. The Court of Appeal in *William Hill Organisation Ltd v Tucker* [1998] IRLR 313 appeared to draw just such a distinction, as did the Employment Court of New Zealand: *McAulay v Sonoco New Zealand Ltd* [1998] 2 ERNZ 225. However, we regard the distinction as somewhat artificial, at least at a practical level. It can scarcely make any difference whether a person is told that he is dismissed forthwith, and given payment of salary in lieu of notice, or told that he is still employed but is not to perform any further duties. Accordingly, we prefer the Canadian approach to this issue to that apparently now taken in the United Kingdom.

The next issue to be determined is whether the Court of Appeal correctly held that a contract of employment in Fiji contains implied terms requiring employees to be treated fairly, in a procedural sense, and also ensuring that an employer will not, without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of the latter term is now well established on the authorities: see *Reda v Flag Ltd* [2002] UKPC 38 at [45]. More importantly, assuming that one or other of these terms are implied, do they apply in the context of dismissal?

That question is by no means easy to resolve. Appellate courts have come to very different conclusions on this issue. The Court of Appeal focussed largely upon the decision of the House of Lords in *Johnson*, and that is a useful starting point.

Johnson involved a claim brought by an employee against his former employer for whom he had worked for approximately 20 years. The employer had terminated his employment summarily and had paid him a month's salary, in lieu of notice. He brought a claim for unfair dismissal in an industrial tribunal. The tribunal upheld the claim, and ordered the employer to pay the employee £11,691.88.

The employee then commenced an action against his employer for common law damages. He claimed that the employer had, without reasonable cause, conducted itself in a manner calculated to destroy or seriously damage the relationship of mutual trust and confidence that existed between employer and employee. He alleged that, as a result of the manner of his dismissal, he suffered from a mental breakdown, depression, suicidal tendencies, and alcoholism. The evidence was that he was hospitalised on more than one occasion. Despite numerous attempts, he was unable to find work.

Upon the employer's application, the primary judge struck out Mr Johnson's statement of claim on the ground that it disclosed no cause of action. He appealed to the Court of Appeal, which upheld the primary judge's decision. He then appealed to the house of lords.

Their Lordships dismissed the appeal but not before providing some important comments regarding the implied terms in a contract of employment. The main term upon which the appellant relied was that the employer would not without reasonable cause conduct itself in a manner calculated and likely to destroy or seriously damage the existence of trust and confidence between itself and the employee. Lord Hoffmann observed that the existence of this implied term in a contract of employment had recently been affirmed in *Mahmud*. It was commonly called the implied term of trust and confidence. The first question was whether this implied term applied to a dismissal. There were two reasons why dismissal presented special problems. The first was that any terms that the courts imply into a contract must be consistent with the express terms. The second was that judges, in developing the law, had to have regard to the policies expressed by parliament in legislation. Ultimately, it was the fact that the legislature had dealt extensively with the process by which dismissal could take place that led his Lordship to decline to imply a term of this nature in the context of dismissal.

Lord Millett provided additional guidance. He agreed with Lord Hoffmann that it would not have been appropriate to found the employee's rights in relation to wrongful dismissal upon the implied term of trust and confidence now generally imported into the contract of employment. His Lordship said of that implied term that it was usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them. He continued at 549–50:

> But this is an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship. The implied obligation cannot sensibly be used to extend the relationship beyond its agreed duration. Moreover, manipulating it for such a purpose would be unrealistic. An employer who summarily dismisses an employee usually does so because, rightly or wrongly, he no longer has any trust or

> confidence in him, and the real issue is whose fault is that? That is why reinstatement or re-engagement is effected in only a tiny proportion of the cases that come before the industrial tribunals.

Lord Steyn took a different approach. He considered that there was no impediment to the implication of an obligation of mutual trust and confidence in the context of dismissal. He noted that the implied obligation had developed in a series of constructive dismissal cases and could not therefore be confined to breaches during the subsistence of the contract.

In our opinion, the Court of Appeal erred in preferring the approach taken by Lord Steyn on this issue to that of the majority of the House of Lords. To characterise the relationship between employer and employee as involving obligations of mutual trust and confidence at the stage of dismissal, when that relationship has effectively broken down, seems to us to involve a somewhat strained use of language. It may well be that the very reason the employee is being dismissed is because there is no longer any trust or confidence in him.

The alternative implied term found to exist by the Court of Appeal was that of procedural fairness. That formulation also gives rise to difficulty. An employee who may be dismissed without cause is not entitled to demand reasons from his employer. Nor, in the ordinary course, is he entitled to a hearing or any of the normal incidents of natural justice: *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 at 1581 per Lord Reid.

It does not follow that there is no implied term requiring an employer to deal fairly with an employee when dismissing that employee. In *Johnson*, Lord Millett observed at 550:

> But the courts might well have developed the law in a different way by imposing a more general obligation upon an employer to treat his employee fairly even in the manner of his dismissal. They could not, of course, have overridden any express terms of the contract or have held the dismissal itself to be invalid. As in the case of the statutory right, employers would probably have responded by introducing their own procedures of complaint and warning before eventual dismissal. But there would have been this difference: they would surely have taken care to incorporate such procedures into the contract of employment so that an employee who was dismissed in accordance with the procedure laid down in his contract could not claim damages for breach of an implied term.

Lord Hoffmann expressed similar views when he said, at 542, that if there had been no relevant legislation in the area of employment and dismissal, he would have regarded the question of whether judges should develop the law by implying a suitable term into the contract as "finely balanced". His Lordship also observed at 540 that there was much to be said for the approach taken by McLachlin J in *Wallace* that the courts could imply an obligation to exercise the power of dismissal in good faith. That did not mean that the employer could not dismiss without cause. The contract entitled him to do so. But in so doing, he should be honest with the employee and refrain from untruthful, unfair, or insensitive conduct. He should recognise that an employee losing his or her job was exceptionally vulnerable, and behave accordingly.

Lord Steyn considered that it was no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms was as a "relational contract". He considered that the implied obligation of trust and confidence could also be described as "an employer's obligation of fair dealing". He concluded at 536 that:

> …the employer may become liable in damages if he acts in breach of the independent implied obligation by dismissing the employee in a harsh and humiliating manner.

In our view, the Court of Appeal correctly held that there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make a payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Each case must, of course, depend upon its own particular facts. However, where, as in the present case, the dismissal is carried out in a manner that is unnecessarily humiliating and distressing, there is no reason in principle why a breach of this implied term should not be found to have occurred.

This takes us to the next issue. Does *Addis* mean that where an employee is wrongfully dismissed, the damages for the dismissal cannot include compensation for the manner in which it occurred, or injured feelings, or for the loss the employee may sustain from the fact that the dismissal itself makes it more difficult for him to obtain further employment?

In *Johnson* Lord Hoffmann commenced his analysis of *Addis* by reviewing the development of the law relating to employment contracts. Initially, they were regarded as any other contracts. Parties were free to negotiate their terms, and nothing additional could be implied thereto. His Lordship said at 539:

> But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament …
>
> The contribution of the common law to the employment revolution has been by the evolution of implied terms in the contract of employment. The most far reaching is the implied term of trust and confidence. But there have been others.

His Lordship continued by noting that employment law required a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck was a matter for democratic decision. The development of the common law by the judges played a subsidiary role. Their traditional function was to adapt and modernise the common law. However, such developments had to be consistent with legislative policy, as expressed in statutes.

His Lordship recognised that Unisys was expressly entitled to terminate Mr Johnson's employment on 4 weeks' notice without any reason, and "to make payment in lieu of notice". It had exercised that right. In the face of that express provision, it was difficult to imply a term that the company should not do so except for some good cause, and after giving Mr Johnson a reasonable opportunity to demonstrate that no such cause existed.

Lord Hoffmann then referred to *Mahmud* where Lord Steyn had said that the true ratio of *Addis* was that damages were recoverable only for loss caused by breach of contract, not for loss caused by the manner of its breach. Lord Hoffmann went on to say that where the only cause of action is wrongful dismissal, *Addis* would hold that nothing could be recovered for mental distress

or damage to reputation. On the other hand, if such damage were loss flowing from a breach of another implied term of the contract, *Addis* would not prevent recovery of appropriate damages.

His Lordship then considered the manifest evidentiary problems that confronted an employee in such a case. Not only would there likely be difficulty in proving causation generally, Mr Johnson would struggle to prove the distinction between psychological injury arising from the dismissal itself (for which damages were not recoverable), and psychological injury arising from the manner of the dismissal (for which damages might now be recoverable). Another problem was the prospect of open-ended liability, which might inhibit the future of psychologically fragile personnel.

His Lordship noted that Parliament had conferred upon the relevant industrial tribunals' broad jurisdiction to deal justly and equitably with the matters about which Mr Johnson complained. He could see no reason why in an appropriate case compensation awarded by a tribunal should not include compensation for distress, humiliation, damage to reputation in the community, or to family life. But the question to be asked in this case was whether the courts should develop the common law to give a parallel remedy that was not subject to the kind of limitations imposed by statute. He concluded at 544:

> My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step …
>
> For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be contrary to the evident intention of Parliament …

Once again, Lord Steyn approached the matter somewhat differently. His Lordship commenced his speech by querying whether the headnote in *Addis* correctly reflected the ratio decidendi of the case. He doubted whether *Addis* had held that special damages could never be recovered for loss resulting from the manner of dismissal. Only Lord Loreburn LC had stated the law in those terms. The other members of the House of Lords in the majority had, by and large, confined themselves to the non-pecuniary aspects of the case. In Lord Steyn's estimation, only one of the Law Lords who sat in the case could realistically be regarded as having evinced a clear endorsement of Lord Loreburn's observation so far as it ruled out special damages for loss of employment prospects flowing from the manner of a wrongful dismissal. In Lord Steyn's view, it was "tolerably clear" that the ratio of *Addis* did not preclude the recovery of special damages flowing from the manner of a wrongful dismissal.

Nevertheless, his Lordship said that if, either he was wrong, or Lord Loreburn's approach was correct, the question remained: should *Addis* be overruled? In answer, Lord Steyn said at 531:

> Addis's case was decided in the heyday of a judicial philosophy of market individualism in respect of what was then called the law of master and servant. The idea that in the eyes of the law the position of a servant was a subordinate one seemed natural and inevitable. And in Addis's case it may have been the background to the adoption of a special restrictive rule denying in all cases to employees the right to recover financial loss which naturally flowed from the manner of their wrongful dismissal.

His Lordship reflected upon the "fundamental change in legal culture" that had taken place since *Addis* was decided in 1909. Like Lord Hoffmann, he said that one of the law's most significant contributions to the evolution of employment contracts was the development of the obligation of mutual trust and confidence and its unanimous and unequivocal endorsement in *Mahmud*. As indicated

earlier, he said that an employment contract was no longer to be regarded simply as a commercial contract but rather, as a "relational contract". If, contrary to his view, the headnote in *Addis* correctly stated the ratio of that case, he would now be willing to depart from it. This would not be a "particularly bold" step. Indeed, he expressed the view that the House had already taken that step in *Mahmud*.

Lord Steyn then turned to the existence of the legislative scheme that operated in the United Kingdom. In contrast to Lord Hoffmann, he considered that the scheme did not of itself indicate that the common law could not confer any kind of protection. The scheme in question was "always only capable of meeting the requirements of cases at the lower end of seriousness". A person's serious loss of employment prospects owing to the manner in which he or she was dismissed had never really been catered for by the relevant legislation. As for Parliament's intention, his Lordship said at 535 that it could not "have assumed the common law as reflected in *Addis's* case to be set in stone and incapable of principled development".

Turning to the implied obligation of mutual trust and confidence, Lord Steyn said that it did not conflict with any express term in Mr Johnson's contract. The implied obligation was one imposed by law. He said:

> It is not a term implied in fact. It is an overarching obligation implied by law as an incident of the contract of employment. It can also be described as a legal obligation imposed by law: Treitel, The Law of Contract, p 190. It requires at least express words or a necessary implication to displace it or to cut down its scope.

As noted earlier, departing from the other members of the House of Lords, Lord Steyn said that the implied obligation was not confined to the subsistence of an employment relationship and that it could apply in the context of a dismissal. The argument in support of the contrary view was a described as a "legalistic point". It ignored the purpose of the obligation, which was to ensure fair dealing between employer and employee, a requirement that was as important in relation to dismissal as at any other stage of the employment relationship.

His Lordship rejected what he described as the "floodgates" argument that if Mr Johnson's appeal were to succeed, virtually every dismissal case could include a claim based on the manner of dismissal. He said that this prediction was to too alarmist. In *Mahmud*, it was held that the mere fact of dismissal could not of itself handicap an employee in the labour market. On the other hand, a dismissal carried out in a harsh and oppressive manner that inflicted unnecessary and substantial financial damage on the employee ought, in principle, to be compensable.

For these reasons, Lord Steyn held that Mr Johnson had a reasonable cause of action based upon the implied obligation of mutual trust and confidence. However, he held that there were formidable evidentiary difficulties in the way of Mr Johnson succeeding. These related to causation and remoteness. Upon that basis alone, the claim would inevitably fail at trial. His Lordship therefore agreed that the appeal should be dismissed.

The position regarding the current status of *Addis* in Australia was discussed by the High Court in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344; [1993] HCA 4. A passenger on a cruise ship suffered injury when the vessel sank ten days into a 14-day cruise. In her action against the ship owner for damages for breach of contract, she was awarded damages which included a refund of the entire fare, and compensation for disappointment and distress. A majority of the court held that damages for disappointment and distress were not recoverable

unless they proceeded from physical inconvenience caused by the breach, or unless the contract was one the object of which was to provide enjoyment, relaxation or freedom from molestation.

Mason CJ discussed the effect of *Addis* at 361. His Honour noted that the same approach had been adopted in the United States (*Southern Express Co v Byers* [1916] USSC 106; (1915) 240 US 612) and in Canada (*Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085 with strong dissenting judgments of Wilson and L'Heureux-Dubé JJ). However, *Addis* had not been followed in New Zealand (*Whelan*), and earlier cases to the same effect including *Horsburgh v New Zealand Meat Processors Industrial Union of Workers* [1988] 1 NZLR 698 at 701–702 per Cooke P and *Hetherington v Faudet* (1989) 2 NZLR 224 at 227 per Cooke P. It should be noted that the position in Canada has changed since *Vorvis*: see *Wallace* discussed below.

McHugh J noted that the general rule derived from *Addis* was so firmly established in England and Australia that in *Fink v Fink* [1946] HCA 54(1946) 74 CLR 127 at 144 Dixon and McTiernan JJ could say that in an action for breach of contract, "[r]esentment, disappointment and the loss of esteem of friends are not proper elements". However, his Honour went on the say that although not all principles relating to an award of damages in tort ought to be applicable in an action for breach of contract, it was difficult to see why no damages should be awarded for distress or disappointment arising directly from the breach of contract itself. Moreover, there were significant exceptions to the general rule, a number of which were analysed. His Honour noted the demise of the *Addis* rule in New Zealand, and concluded that if the matter were free from authority, damages for disappointment or distress resulting from breach of contract would be compensable if within the reasonable contemplation of the parties when the contract was made. Plainly, his Honour had grave doubts about the correctness of *Addis*, in modern times.

It should be noted that *Addis* was followed by the Industrial Relations Court of Australia in *Burazin v Blacktown City Guardian Pty Ltd* [1996] IRCA 371; (1996) 142 ALR 144 at 151. That court, after considering Baltic Shipping, held that if damages were to be awarded for distress resulting from wrongful dismissal, it could only be after rejection, at High Court level, of the Addis conclusion that employment contracts were to be treated like other commercial contracts for the purposes of the rule in *Hadley v Baxendale* [1854] EWHC J70; (1854) 156 ER 145.

In Canada, Addis is no longer regarded as good law. See generally *Pilon v Peugeot Canada Ltd* (1980) 114 DLR (3d) 378, *Brown v Waterloo Regional Board of Commissioners of Police* (1982) 136 DLR (3d) 49, *Ribeiro v Canadian Imperial Bank of Commerce* (1989) 67 OR (2d) 385 (on appeal) (1992) 13 OR (3d) 278, and *Trask v Terra Nova Motors Ltd* (1995) 127 Nfld & PEIR 310.

In *Wallace*, the Supreme Court of Canada held that the contract of employment has many characteristics that set it apart from an ordinary commercial contract. The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence most in need of protection. Employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal. While a dismissed employee was not entitled to compensation flowing from the fact of dismissal itself, where it could be shown that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment, and damage to self-esteem might all be

worthy of compensation. Often the intangible injuries caused by unfair dealing on dismissal will lead to difficulties in finding alternative employment. However, the intangible injuries are sufficient to merit compensation in and of themselves. In an appropriate case, damages may be awarded for mental distress.

In New Zealand, Gallen J, in *Whelan*, held that damages may be awarded for mental distress suffered by a long-term employee who was peremptorily dismissed from his employment. In *Stuart*, McGechan J followed that decision. It appears therefore, that in New Zealand, *Addis* has been entirely rejected as a statement of correct legal principle.

In our view, the Court of Appeal correctly determined that *Addis* no longer represents good law. The modern trend of authority, apart from the decision of the House of Lords in *Johnson* (which is explicable on other grounds) is entirely against the somewhat artificial approach taken by Lord Loreburn. Even among the majority Law Lords in *Johnson* there was little enthusiasm for the principle. *Addis* only survived because, in practice, it did not preclude recovery of damages for distress and humiliation arising from the manner of dismissal through the industrial tribunals. Although *Addis* continues to be applied in Australia, the portents for its survival in that country are not good.

This court is required to declare the common law as it applies in Fiji. In our view, *Addis* has no place in a modern system of employment law. It should now be consigned to history.

We reject the Petitioner's contention that this task should be left to the legislature. *Addis* is a product of the common law. It may have been correct in 1909, when conditions of employment were very different from what they are today. It is no longer, however, an appropriate standard by which to regulate employer/employee relations.

We also reject the argument that social and economic conditions in Fiji are so different from those in Canada or New Zealand as to make it inappropriate to follow the most recent statements regarding employment law in those countries. We have regard to s 33(3) of the Constitution 1997 which provides that "every person has the right to fair labour practices, including humane treatment and proper working conditions". The continued existence of *Addis* seems to us to be difficult to reconcile with that right.

The final matter to be considered is the Petitioner's argument that the Court of Appeal acted upon speculation and conjecture, and not evidence, when it assessed damages in the amount of $30,000. It was submitted that there was no evidence to support the conclusion that the Respondent had suffered anything like the harm found to have been caused by the manner of his dismissal. In particular, there was no evidence that his inability to find alternative employment for 2 years was brought about by the insensitive treatment accorded to him by the petitioner.

We accept the Petitioner's argument on this point. The Respondent called no evidence to suggest that he had suffered any physical or psychological damage resulting from the manner in which he was dismissed. His evidence regarding the damage done to his reputation was tenuous, at best, and did not provide the basis for a link between the manner in which he was treated on the day of his dismissal, and his inability to find alternative employment.

In our view, the Respondent was entitled to some compensation for the distress and humiliation that was needlessly inflicted upon him by his employer in the manner in which he was dismissed. However, two of the three bases upon which the Court of Appeal assessed damages have been found to be in error, and the third basis, namely harm to reputation, significantly modified. The Respondent

was publicly humiliated by the manner of his dismissal, involving as it did the unnecessary use of security, and the prevention of access to his office. However, the amount awarded as compensation should be significantly less than that assessed by the Court of Appeal.

We would set aside the sum of $30,000 fixed by the Court of Appeal. We would instead award the Respondent the sum of $5000 as compensation for the treatment meted out to him by his employer, in breach of the implied term that he be dealt with fairly, and in good faith, in the context of his dismissal. We see no reason to disturb the orders made below regarding costs. Each party has had a measure of success in this appeal. Accordingly we consider that there should be no order as to the costs of the appeal.

APPENDIX

EMPLOYMENT ACT 1965

Interpretation

2. In this Act, unless the context otherwise requires—

…

"contract of service" means any contract, whether oral or in writing, whether express or implied to employ or to serve as an employee for any period of time or number of days to be worked, or to execute any task or piece work or to perform for wages any journey and includes a foreign contract of service;

…

"oral contract" means a contract of service which, under the provisions of Part V, is not required to be made in writing, but which may nevertheless be subsequently evidenced in writing;

…

"written contract" means a contract of service which, under the provisions of Part VI, is required to be made in writing;

…

Employment to be in accordance with Act

13.(1) No person shall employ any employee and no employee shall be employed under any contract of service except in accordance with the provisions of this act…

Contracts of service, oral and written

15. (1) Contracts of service may be oral or written contracts.

(2) The provisions of this Part shall, unless the contrary intention appears, apply to both oral and written contracts.

…

Contract not required to be in writing

21. All contracts of service, other than contracts which are required by this Act or any other law to be made in writing, may be made orally.

Presumption as to period of oral contracts and termination of oral contracts

22. (1) In the absence of any proof to the contrary, an oral contract shall, subject to the provisions of subsection (3), be deemed to be a contract for the period by reference to which wages are payable under the contract but in any case shall not extend for a period longer than one month from the making thereof:

Provided that where wages are payable at intervals of less than a day, then in the absence of any proof to the contrary, any such oral contract as aforesaid shall be deemed to be a daily contract.

(2) Subject to the provisions of subsection (3) and any proof to the contrary, an oral contract shall terminate on the last day of the contract period, or in the case of a daily contract at the end of the day.

(3) Where an oral contract which would, under the provisions of subsection (1), be deemed to be a monthly contract, is entered into after the first day of any calendar month, the following provisions shall, subject to any proof to the contrary, have effect—

(a) the contract shall, until the expiry of the calendar month during which it was entered into, be deemed to be a contract for the period commencing on the day on which it was entered into and terminating on the last day of the calendar month during which it was entered into;

(b) notwithstanding the provisions of paragraph (a), if, after the termination of such contract under the provisions of that paragraph, a new contract is deemed or presumed to have been entered into under the provisions of section 23 the period of the new contract shall be presumed or deemed, as the case may be, to be the full calendar month next ensuing after such termination.

Presumption as to new contract

23. (1) Subject to the provisions of subsection (3) of section 22 and subsection (2) of section 25, each party to an oral contract shall, on the termination of the contract under subsection (2) or (3) of section 22 be conclusively presumed to have entered into a new oral contract for the same period and upon the same term and conditions as those of the contract then terminated, unless notice to terminate the employment has been previously given by either party in accordance with the provisions of section 24:

Provided that nothing in this subsection shall apply to—

(a) a contract specifically expressed to be terminable without notice; or

(b) a contract specifically expressed to be for one period of fixed duration and not renewable; or

(c) a daily contract where the wages are paid daily.

(2) Where notice has been given to terminate any employment, but after the termination of the current contract period the employer suffers the employee to remain or the employee, without the express dissent of the employer, continues in employment then, unless the contrary is shown, such notice shall be deemed to be withdrawn with the consent of both parties and the parties shall, subject to the provisions of subsection (3) of section 22, be deemed to have entered into a new contract for the same period and upon the same terms and conditions as those of the contract previously concluded.

Provisions as to notice

24. (1) For the purposes of subsection (1) of section 23, an oral contract shall, subject to any specific agreement to the contrary that may be made between the parties, be terminable by either party-

(a) where the contract period is less than one week and wages are paid at intervals of less than one week, at the close of any day without notice;

(b) where the contract period is one week or more but less than a fortnight or where wages are paid weekly or at intervals of more than a week but less than a fortnight, by not less than seven days' notice before the expiration of such period;

(c) where the contract period is a fortnight or more but less than a month or where wages are paid fortnightly or at intervals of more than a fortnight but less than a month by not less than fourteen days' notice before the expiration of such period;

(d) where the contract period is one month, by not less than one month's notice before the expiration of such period.

(2) Notice may be given orally or in writing.

Further provisions as to termination of contracts

25. (1) Where an oral contract is terminated and no new contract is entered into or is presumed or deemed to have been entered into under the provisions of section 23, there shall be paid to the employee all wages and benefits then due to him.

(2) Notwithstanding the provisions of section 22 or 23 either party to an oral contract may terminate the same at any time under the following conditions:—

(a) in the case of a contract to which subsection (1) of section 22 applies-

(i) if such contract is terminated on or prior to the last date by which the minimum notice may be given under section 24, upon, payment to the other party of a sum equal to all wages which would have been due to the employee had he continued to work until the end of the contract period;

(ii) if such contract is terminated after the last date by which the minimum notice may be given under section 24, upon payment to the other party of such sum as is required in sub-paragraph (i), together with a sum equal to the wages due to the employee in respect of the period between the last day of the current contract period and the end of the minimum period of notice required to be given under section 24;

(b) in the case of a contract which may be terminated without notice, upon the payment of a sum equal to all wages which would have been due to the employee had he continued to work until the end of the contract period.

(3) Where any agreement is made between the parties to a contract providing for a period of notice greater than the minimum period specified in subsection (1) of section 24, the provisions of subsection (2) shall be construed as if the minimum period of notice provided for in such agreement were substituted for the minimum period of notice specified in subsection (1) of section 24.

(4) Nothing in section 22 or 23 or in subsection (2) shall preclude either party from summarily terminating any oral contract for lawful cause.

(5) The termination of any contract under the provisions of section 22 or 23 of subsection (2), shall be without prejudice to any accrued rights or liabilities either party under the contract.