IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

No. 7 of 1956.

Appeal from the Court of Petty Sessions, Territory of Papua.

AUSTRALASIAN PETROLEUM COMPANY PROPRIETARY LIMITED

Appellant

and

DIRK PEIT THEUNISSEN

Respondent.

J U D G M E N T

DELIVERED BY BIGNOLD J. ON FRIDAY, 13th JULY, 1956 at 2.30 p.m.

This case comes on appeal from the Court of Petty Sessions at Port Moresby, and the facts seem little in dispute. The case for the Appellant Company was argued by Mr. Peter Clay of Counsel, and Mr. Des Sturgess of Counsel appeared for the Respondent; both Counsel put their cases with ability in an interesting and helpful way.

The facts, briefly, are as follows:- The Respondent, Dirk Peit Theunissen, a diesel fitter, was engaged as such in Melbourne, and the parties to the contracted service executed a document which took the form of a letter to the Respondent which he executed at its foot. That letter set out the period of engagement and the various terms of the engagement in numbered paragraphs with a preliminary unnumbered paragraph which read:-

"This will serve to confirm your appointment as Diesel Fitter with Australasian Petroleum Company Pty. Ltd. in the Territory of Papua and New Guinea."

The Respondent took up duties in pursuance of the agreement at Port Moresby on the 11th August, 1955 and continued working until Friday, the 11th May, 1956, when the Foreman at Badili gave him two jobs at about knock-off time in the afternoon, the first a plumbing job and the second a job installing hydraulic pipes connected with an electric gantry.

The Respondent did not consider the work within

56

the work of his trade as a diesel fitter, and on that afternoon he saw Mr. Lister and made this submission, saying that he was not prepared to do the job.

On the next morning (Saturday) Mr. Lister took him to see Mr. Houston, but the Respondent got no satisfaction, and Mr. Houston then said - "I'll wait until Mr. McKillop comes back from the country so I'll leave the case open." Mr. McKillop was the Chief Engineer.

The Respondent thereupon started on Saturday on the plumbing work he had been detailed to do, and on the following Monday he did, in fact, start work on the gantry. That he did so does not seem to be disputed.

The Respondent was summoned to the Staff Office between 12 and 1 o'clock on the Monday when he was dismissed, as appears from the letter dated the 14th May, 1956, the dismissal purporting to be pursuant to Clause 11(a) of his letter of appointment.

The Respondent has testified that he did not tell the Foreman Sully that he would not work on the gantry, but whatever the exact words used by him were, the learned trial Magistrate has held that they were tantamount to a refusal, and I agree with him.

The Respondent's contention was and is that the work on the electric gantry was beyond the scope of his employment. Mr. Triggs, an Engineer, who was called for the Respondent in the Court of Petty Sessions, agrees that it is not part of a diesel fitter's trade to work on a gantry which had no diesel engine, and as I understand it, the gantry in question had no diesel engine but the motor power was an electric motor, but Mr. Triggs said that notwithstanding this, he did not think it unreasonable to ask a diesel fitter in this country to do so, but if he refused, it would not, in his opinion, be insubordination.

The Foreman, Mr. Sully, who was a witness at the trial, agrees that work on an electric gantry is not that of a diesel fitter.

Mr. Peter Clay argued that whilst the learned trial Magistrate found that the Respondent had not disobeyed a lawful order, he omitted to give consideration to the question of whether the Respondent refused, pointing out that a refusal could be effective to afford the Company the option of treating the contract of service at an end, even before the time for fulfilment had arrived. Adami v. Maison de Luxe Limited 35 C.L.R. P. 143.

The learned Magistrate held, asI understand it, that as no specific time to commence work was specified by the Foreman, it could not be construed as a lawful order, for the reason that it could not be determined when breach occurred. Inter alia, the learned presiding Magistrate held that:-

(1) (a) The Plaintiff had not been given an order;
(b) The Plaintiff had not been guilty of a disobedience of an order; and,
(c) The work detailed for him to do on the gantry was suitable work for a diesel fitter to do.

Mr. Clay contended in this Court that the evidence of the detailing of the work to the Respondent was, in fact, a plain order to the Plaintiff to perform the work on the electric gantry, and that it did not matter that no specific time was mentioned by him in his conversation with the Respondent, but that the Respondent must have understood that it was work to be done by him in the regular course of events, and it seems to me to be amply clear that he had so considered it, because when he finished the plumbing work, he went on to work on the electric gantry, though unwillingly.

Mr. Clay further contended that the presiding Magistrate quite omitted to consider whether there had been a refusal to do the work as contrasted with a disobedience, pointing out that a refusal might constitute a ground for dismissal eventhough the time for performance had not yet arrived.

Counsel for the defence hinged his objections to the appeal on two grounds:-

(1) That work on an electric gantry was beyond the scope of the Respondent's employment; and,
(2) That be that as it may, that as he had commenced work on the Monday on the electric gantry before he had received intimation of his dismissal, he was entitled to reconsider his position, and that wiped out his refusal as a cause for dismissal.
Bird v. British Celonese Limited.
(1945) 1 K.B. P. 336.

It is not necessary for me to deal with the findings of the Magistrate with which I have designated the above (1)(a) and (1)(b) because I am satisfied that the contention that the description as diesel fitter governs the whole appointment.

Mr. Clay, with considerable audacity, went so far as to argue that the servant Respondent was obtained under his engagement to do any work of any class whatsoever required of him by the Appellant Company, and submitted that the terms and conditions in the letter of appointment are the

5

ones in the numbered paragraphs, and the capacity in which he was employed appearing at the commencement of the letter in the unnumbered paragraph should be disregarded. I reject that contention. The evidence satisfies me that the work required of the Respondent on the electric gantry was not work properly to be required of a diesel fitter in the terms of his appointment; in fact, the expert witness for the Plaintiff, Mr. Triggs, agreed with that, and the evidence of the Foreman is to like effect.

Taking the view that I do, it is not necessary for me to deal with the second ground urged by Counsel for the Respondent, in view of the fact that this Court comes to the conclusion that it was not a lawful order; For the reason that he was being required to do something outside the scope of his employment; I dismiss the appeal and order the Appellant to pay the costs of and incidental to the appeal. which I fix at 60 guineas

[signature]

J.