KEIL (HANS JOACHIM) v POLYNESIAN AIRLINES LIMITED
AND POLYNESIAN AIRLINES OPERATIONS LIMITED

Supreme Court Apia
Bathgate J
28 May 1987

EMPLOYMENT LAW - Breach of contract - contract of service - termination provisions followed - separate provisions for grievance and right of appeal - claim of implied term that grievance and right of appeal clause should apply to termination clause dismissed - termination clause clear and unambiguous.

HELD: An implied term, preserving the right to make a claim by way of grievance and the further right of appeal could not be read in as it would be contrary to express provisions in the contract as to termination.

William Lory & Son Ltd v London Corporation [1951] 2 KB 476
Lazarus v Cairn Line of Steamships Ltd (1912) 106 LT 378

CASES CITED:

- Clark v Independent Broadcasting Co [1974] 2NZLR 587
- Barber v Manchester Hospital Board [1978] 1 ALL ER 322
- Vine v National Dock Labour Board [1957] AC 488
- Chappell v The Times Newspapers Ltd [1975] 2 ALL ER 233
- Whitwood Chemical Co v Hardman [1891] 2 Ch 416
- Bainbridge v Smith [1889] 41 Ch D 462

C J Nelson for Plaintiff
T K Enari for 1st Defendant
L S Kamu for 2nd Defendant

This is an action commenced on 16 November 1983 in which the Plaintiff, an airline pilot, says he was employed by the Defendants; he claims:

(a) specific performance of his contract of employment with one or both defendants,

(b) damages, which I take to be an alternative claim, to 15 November 1983, and

(c) to the date of judgment,

(d) an Order as to his status on reinstatement, and

(e) costs.

Certain facts are agreed between the plaintiff and the Second Defendant. These two are the real parties in the action. The First Defendant was the Plaintiff's employer but by the relevant time had ceased to be an employer, as I mention hereunder.

The claim for specific performance and damages arises from an alleged breach of contract by the Second Defendant, although the Plaintiff may categorise the claim as one for wrongful dismissal. It seems to me the claim is one of breach of contract, albeit a contract of service, which does not correctly involve consideration of any industrial law, because the contract of service or the relevant steps taken by the Second Defendant comply with the minimum requirements as contained in ss. 20 and 21 of the Labour and Employment Act 1972. There is no other industrial legislation to be considered as, for instance, in other countries where a termination, in accordance with an employment contract, by the employer, amounts to a dismissal of the employee.

There have been a number of attendances by Counsel before my predecessors, Bremner, Lowe and Pain JJ concerning this action. I should mention here that there is a somewhat related action, between the same parties, S.193/83, for alleged breach of contract by the Defendants, concerning the Plaintiff's rights to concession travel benefits under his contract of service. I am not now concerned with that action, although I understand some of my findings in this judgment may relate to that other action.

On 6 March 1986 Lowe J, issued a Minute relating to the matters in issue in the present action. In that he referred to earlier discussions by Counsel with Bremner J. On 15 July 1986 Lowe J, issued a further Minute to Counsel. Subsequently Pain J saw Counsel for the Plaintiff and the Second Defendant, when he recorded certain matters that appeared to be in agreement, but no Minute was issued.

I think it is now important to try and have this action resolved without further delay. From my reading of the file, the notes taken by my predecessors, and after consideration of the written submissions of Counsel and the documents I set out the agreed facts and matters in issue between the parties:

(1) The Plaintiff commenced employment as a pilot for the First Defendant on 25 April 1972;

(2) Plaintiff continued in such employment for the airline;

(3) The written terms of his employment - the relevant contract of service between the Plaintiff as employee and the First Defendant as employer, are contained in the written agreement referred to in the statement of claim and annexed thereto as "B". That is Polynesian Airlines Limited Pilots Agreement 1980/1982 of 6 October 1980 between the Company and the Western Samoa Airline Pilots Association. I refer to the agreement hereafter as "the contract";

(4) On or about 2 April 1982 the First Defendant ceased to be a party to the contract. All its rights and duties thereunder were taken over by the Second Defendant for all purposes. This was accepted by the Plaintiff, so that from April 1982, or thereabouts, the relevant contract of service, the contract, was by and between the Plaintiff as employee and the Second Defendant as employer;

(5) Some employment differences existed between the Plaintiff and the Second Defendant by at least 20 August 1983. No formal steps had been taken by the Plaintiff and no procedure had been commenced by either the Plaintiff or the Second Defendant under the contract, or otherwise, in relation to the employment differences prior to the receipt of the notice by the Plaintiff on 22 August 1983 as mentioned hereunder.

(6) On 22 August 1983 a written notice, referred to in the statement of claim and annexed thereto as "A", was received by the Plaintiff from the Second Defendant. I hereafter refer to this as "the notice". The notice purported to terminate the Plaintiff's employment with the Second Defendant on 22 August 1983;

(7) The notice was given by the Second Defendant pursuant to clause 4.2(c) of the contract; the Plaintiff was paid his salary for a period of 2 months in lieu of 2 months notice in writing, as would be required under clause 4.2(b) of the contract;

(8) The contract also provides for termination of employment by the employer under clause 13, as well as providing for termination by either party under clause 4. Clause 13, "Investigation and Discipline", provides a right of appeal for an employee against disciplinary action by the employer, or in the case of "grievance". The term "grievance" is defined in clause 3 of the contract, where reference is also made to the appeal procedure;

(9) On 23 August 1983 the Plaintiff gave notice to the Second Defendant purporting to exercise his right of appeal under clause 13.6 of the contract. On 29 August 1983 a meeting was held between officers of the Second Defendant and members of the Western Samoa Airline Pilots Association concerning the Plaintiff's employment situation.

The issue between the Plaintiff and the Second Defendant is whether or not, according to the proper interpretation of the contract, the Second Defendant could properly and effectively terminate the contract between it and the Plaintiff by the exercise of its power under clause 4.2(c) of the contract, as it purported so to do, or whether, when there were employment differences between the Plaintiff and the Second Defendant, although no formal action, procedure or steps under the contract had been taken by either party in respect of such differences, the Second Defendant could not exercise its powers under clause 4, but could only take action or dismiss the Plaintiff under clause 13 of the contract, so as to give the plaintiff a right of appeal under clause 13.6.

The plaintiff contends that according to the contract, in the particular circumstances as existed, the Second Defendant could not exercise its rights or powers under clause 4 to terminate his employment and so frustrated his right of appeal under clause 13, while he had the right to take steps to have his differences resolved under clause 13 of the contract, although no such steps had been taken prior to receipt of the notice. The plaintiff says it was an implied term of the contract that in the circumstances as they existed, the second defendant could not terminate the contract under clause 4 but could not dismiss him or act under clause 13.

On the other hand the Second Defendant alleges it acted in accordance with the terms of the contract, clause 4.2(c), and there was no such implied term, or other restriction on the exercise of its powers thereunder at the time it gave notice terminating the Plaintiff's employment. (The foregoing part of this judgment was sent as a draft to all Counsel for perusal and comment as to whether the facts and issues outlined to this stage are accepted as correct. I did that in case I had not properly set out such matters, or in case there had been a wrong interpretation by me on the papers I considered. Counsel agreed at a meeting in chambers on 24 February 1987 that the first defendant was not involved in the action, except now only on the question of costs. Counsel for the Plaintiff and the Second Defendant agreed that the facts and issues I have outlined are correct. The only matters now to be resolved are the issues, by the application of the law to the agreed facts, the conclusions I am to draw therefrom and the question of costs).

It is necessary to better understand the issues to set out the relevant terms of the contract. It is a substantial document. Only parts are mentioned. However it is important to bear in mind that to discover the true intent and meaning of the contract it must be considered as a whole, and each part only interpreted in the context of the whole contract.

Before referring to the specific terms of the contract I make some general observations.

In the absence of special legislation the relationship between an employer and an employee is one of contract alone. Apart from statute law, legal safeguards are not given to employees for so-called unreasonable or arbitrary dismissal; so long as the employer complies with the terms of the employment contract that is sufficient, and, in the present case, so long as the employer also complies with the provisions of the Labour and Employment Act. Generally, an employer is free to dismiss an employee for whatever reason he likes. He has no obligation to reveal or justify his reason for termination. The only remedy the employee might have is that for breach of contract and this is confined generally only to a claim for damages for wages the employee would have received, had there been no breach of contract by the employer. Whether or not the employment contract expressly provides for termination, such contracts are terminable either according to the expressed terms or by the implication of a term to the effect that the contract may be determined on reasonable notice, in the absence of an expressed provision - Clark v Independent Broadcasting Co [1974] 2 NZLR 587.

On the claim for wrongful dismissal the employee is entitled to no more than the actual salary or wages he would have received during the period of express or implied notice for termination. The employer can terminate the employment of his employee at anytime, in accordance with the contract, and even though not in accordance with the terms of the contract, that will usually be an effective termination. The employee cannot treat the contract as if still subsisting; his only remedy as a general rule is to claim damages for wrongful dismissal, Barber v Manchester Hospital Board [1958] 1 All ER 322. An employee cannot successfully claim that because the contract terms have not been complied with there has been no effective dismissal. There cannot be a nullity in terminating an ordinary contract of employment; such contracts are almost [always] terminated by an unilateral act of the employer, even if breach of the employment contract and even if such termination is therefore unlawful. The remedy of the employee as a general rule is only in damages, Vine v National Dock Labour Board [1957] AC 488 to 507. Only in exceptional circumstances would a Court grant an injunction to restrain a breach of an employment contract rather than leave the employee with his monetary claim, Chappell v The Times Newspaper Ltd [1975] 2 All ER 233. The Court will not decree specific

performance of contracts of personal services even though there may be a wrongful termination by the employer. Whitwood Chemical Co v Hardman [1891] 2 Ch 416 at 427 and Bainbridge v Smith [1889] 41 Ch D 462 at 474. The reason for this is that the Court cannot practically supervise the terms of a personal contract or require, effectively, the personal relationship of an employer and an employee to continue when one of the parties is clear that it does not wish to continue with the personal relationship.

The question of whether or not the contract in the present case has been wrongfully terminated depends on the proper construction and meaning of the relevant terms of the contract. In the absence of an expressed provision in the contract, and subject to such provisions as there may be, no form of notice to terminate is necessary so long as the intention to terminate is clear. If the notice to terminate is to be in writing, then all such notices should be in writing, as required by the contract. A contract of employment as any other executory contract is terminable in accordance with the intention of the parties. Where, as in the present case, the contract is in writing the parties intention is to be ascertained from its written terms and the plain, ordinary meaning of the words used, in the context of the whole contract. The object is to ascertain the intention of the parties from the contents of the contract. The cardinal rule of interpretation is that the parties intended what they actually said in their written terms. In interpreting such terms and to give effect to the whole contract each part as far as possible should be interpreted in harmony with the other parts so as to make the entire contract meaningful and effective.

The relevant contract terms to be interpreted in the context of the whole contract include those mentioned hereunder, in which the Plaintiff is described as "the pilot" and the Second Defendant as "the employer", or "the Company". It is necessary to refer only to the first part of the contract where the particular provisions mentioned appear under the heading of "General Conditions". Clause 3 of this part contains interpretations of some of the words and phrases used, as follows:

> "Grievance: - Shall be any claim by a pilot, in respect of his employer, that the employer intends to , or has, wrongfully dismissed the pilot or has taken, or intends to take, any action which could adversely affect his advancement, promotion or employment. Pilots shall have recourse to the Appeals procedure in resolving grievances."
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> "Termination: - Shall be the conclusion of employment for any reason whatsoever."

"Terms of Employment: - Shall be the continuous period from appointment to the Company until on termination of service, the expiry of the required notice period, plus the expiry of any accumulated leave. Termination date shall be the last day of notice. Severance Date shall be the last day of the term of employment."

Clause 4 contains 10 subclauses under the general heading "Contract of Employment"

Clause 4.2 provides:

"The services of a pilot shall be terminable by either the Company or the Pilot:

(a) During the period of probation by 28 days notice in writing;

(b) Thereafter by 2 months notice in writing;

(c) By the payment to the pilot of 28 days salary or 1 months salary in lieu of the notice required in sub paragraphs (a) and (b) hereof;

(d) By the forfeiture by the pilot of 28 days salary or 2 months salary in lieu of the notice required in sub paragraphs (a) and (b) hereof;

(e) On the completion of a specifically agreed term of service."

Clause 4.4 states:

"Nothing in this Agreement shall detract from the Company's right at Common Law to dismiss a pilot without notice for misconduct or breach of contract in which case he shall be paid up to the time of his dismissal only, such payment to include accrued leave. However should a dismissal be given under this paragraph the Company would discuss the position with the Commissioner of Labour and Association, but it would be prepared to defend its decision in a Court action."

Clause 4.9 says that:

"On termination of service, a pilot shall be deemed to be employed, and shall receive all benefits as such of employment granted by the Company, and other carriers subject to conditions of interline agreement until the expiry of the required notice period plus the expiry of accumulated leave."

There are 6 subclauses of clause 13 of the contract under the general heading "Investigation and Discipline". Clauses 13.1, 13.3 and 13.6 provide:

> "Disciplinary Action
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> The only disciplinary actions available to the Company in respect of pilots subject to the Agreement are:
>
> (a) Reprimand, whether verbal or in writing.
>
> (b) Delayed advancement or promotion, the period to be specified.
>
> (c) Loss of seniority, subject to agreement with the Association.
>
> (d) Demotion, the period to be specified.
>
> (e) Suspension without pay will be in accordance with Labour and Employment Act.
>
> (f) Dismissal with, or without a period of notice as specified with the Labour and Employment Act. Implementation of disciplinary action as above will be deferred for 7 days to enable the pilot to appeal to the General Manager under Clause 13.6.
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> Representation
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> A pilot has the right to be represented by himself, the Association, another pilot or other persons of his choice at all stages of an investigation or disciplinary enquiry conducted by the Company and subsequent appeals, and at all stages of procedure in cases of grievance. Subject to the witnesses' concurrence, a pilot shall be entitled to call such witnesses as may assist his case.
>
> Appeals
>
> A pilot has the right to appeal to the General Manager against disciplinary action, or in the case of grievance. Any subsequent appeals may be to the Commissioner of Labour."

Some notable features of the terms mentioned are:

(a) Grievance is a claim by the pilot. In the context of the contract and using the ordinary meaning of the word "claim", is what it says it is, or a demand. It is a claim or demand by the pilot for something he says is due under the contract. It can only be made against the employer, or the

Company. To be meaningful the pilot would have to manifest his intention to claim by some patent or overt act, such as a claim or demand in writing or a clearly manifest, oral statement, given to the employer in the form of an appeal to the General Manager of the employer to resolve a specified grievance. There is then a right to a subsequent appeal, in the event of an unsatisfactory result, to the Commissioner of Labour. These appeals being pursuant to clause 13.6 to which the pilot is to have recourse in resolving a grievance. There was no such "claim" by the Plaintiff in this case prior to service on him of the notice.

(b) A right of appeal exists under 13.6 only where there has been disciplinary action against the pilot under clause 13.1 or where there is a grievance. In the event of disciplinary action, that is not to be implemented by the employer for seven days so that the pilot may exercise his rights of appeal under clause 13.6. No such expressed reservation is made in the case of a grievance, it is initiated by the action of the pilot in making the claim.

(c) Termination is the conclusion of employment; that is the end of the executory contract of service. The contract is a contract of service, a true contract of employment, and not a contract for services, in the nature of work done by an independent contractor such as a plumber or tailor. The contract fails to recognise the defined distinctions between a contract of service and a contract for services. The words service and services appear to be used interchangeably.

(d) The termination date under the contract is the last day of notice; that is also the end of the service. This recognises the common law position, as expressed in the contract, namely in the event of termination by notice under clause 4.2 the contract is not terminated until the expiry of the notice. Under clause 4.9 the contract continues after service of a notice until the expiry of the period of the notice, In that case I think the pilot can undoubtedly exercise his rights of appeal, either for grievance or disciplinary action under clause 13.6, after notice of termination and prior to the expiry of that notice; during which period he is deemed to be still employed, and so the contract remains in force.

(e) The contract does not expressly provide for any continuation of employment, under any deeming provision or otherwise on payment to the pilot in lieu of notice under clause 4.2, although there should still be advice of termination at or about the time of payment in lieu of notice to effectively terminate the contract under clause 4.2. Otherwise the employer's intention may not be clear. I think the absence

of any express continuation of employment after such payment and the expression of termination by the employer therewith is intentional, because on payment in lieu of notice the pilot's employment has ceased for all purposes. On advice of termination and payment in lieu of notice the contract is effectively at an end. It could not be possible for an employer or employee I think to blow hot and cold and terminate the contract but at the same time not terminate it for all purposes, such as for an appeal under clause 13.6. I think that would be an unworkable situation and would be contrary to the plain meaning and effect of clause 4.2, that the contract could be terminated on payment in lieu of notice. It cannot be both terminated and not terminated. In this context "notice" means a notice specifying termination at the end of a stated period of one or two months after service of the notice on the recipient. Either party can terminate the contract on giving "notice" to the other or on payment, or the taking of payment, in lieu of notice. "Notice" is that referred to in clauses 4.2(a) and 4.2(b) of the contract. It is not the notice given by the Second Defendant to the Plaintiff in the present case. That was a form of a notice or advice of termination of the contract between the parties and an explanation of the payment made in lieu of the one months or two months notice under either clause 4.2(a) or clause 4.2(b). In the present case it was in lieu of notice under the last mentioned clause. It is important to clearly bear in mind the two distinct types of notices.

(f) Clause 4.9 and the definition of "termination date" expressly provide for and preserve the rights of the pilot in the event of termination by notice under clause 4.2(a) and (b) to reflect the true position of the pilot under the contract, when his employment is to be terminated on the expiry of the notice and to preserve his rights in the meantime. No such express provisions exist in the case of termination by payment in lieu of notice. I think the contract is purposely silent on that point because it has for all purposes then been terminated. To imply a term to the contrary would seem to me to in effect rewrite the contract, which has purposely and expressly not provided for such a situation, because there is no need to do so. "In lieu of notice" means instead of notice. The payment made instead of a notice brings the contract to an end so long as the intention of the employer as to the purposes of the payment is clearly given. On payment in lieu the situation is the same as at the expiry of the notice. The notice in the present case I think was a clear and an unequivocal expression of the Second Defendant's intention to terminate the contract on the payment on the same day of salary for a period of 2 months, in lieu of notice for that period. The notice given by the employer is not the notice, to terminate

at the end of a period. There was no claim that the payment of salary and leave entitlement, in lieu of or instead of notice were not in fact made. The notice clearly stated the Plaintiff's services were no longer required; although it should have been service, the intention was clear and effective. The notice expressly referred to clauses 4.2(c) and 4,9. I do not know why reference was made to clause 4.9 unless it was to bring to the attention of the plaintiff that the notice was effective on payment of 2 months salary, as at the 22nd August 1983.

The Plaintiff was in no doubt as to the effect of the notice and payment to him of 22 August 1983. He wrote to the General Manager of the Second Defendant on 23 August 1983 in which he said, inter alia:

> "Enclosed is a copy of a letter from the MFO terminating my services with PAOL. I wish to appeal under Pilots Agreement Part A para 13.6 and 13.3 as grievance defined under Interpretations."

When the Plaintiff wrote the letter of 23 August 1983 I consider his contract of employment was then at an end as it had been effectively terminated by payment in lieu of notice with advice of termination on 22 August 1983. He had not prior to termination made a claim by way of grievance and instituted an appeal under clause 13.6. The Second Defendant did not purport to take disciplinary action against the Plaintiff. He did claim that there was a wrongful dismissal. That could only be made after the event (more correctly the intended event) within the definition of "grievance" so long as the contract was still in existence or the Plaintiff's rights to make the claim were expressly preserved. I cannot imply a term into the contract that would preserve such rights as it would be clearly contrary to the expressed provisions of clause 4.2(c). That would be contrary to the express provisions of the contract. Under those circumstances there is no room for an implied condition or provision.

Terms may be implied to carry out the obvious and unexpressed intention of the parties, by necessary implication, or to give business efficacy to a contract. Such terms however cannot be implied to rewrite a contract or to vary the meaning of the expressed terms. To imply the term that the contract was not wholly terminated for all purposes I think would be contrary to the terms of the contract, to the general contract law on implied terms and the common law relating to termination of employment contracts. The situation may be otherwise had the Plaintiff made his claim as a grievance and appealed prior to termination of the Plaintiff. He would have then it would seem, have a vested right to pursue his appeal under clause 13.6. In that event it would

be unlikely the Second Defendant could have then prohibited the Plaintiff from pursuing his right of appeal, except in breach of the contract. That however applies only when a right of appeal is vested by the claim being made prior to termination.

A term may be implied, for obvious necessity, if other terms of the contract do not negative the implication, that neither party will prevent the other from performing the contract, and if one does so it may be in breach of the contract, William Lorry & Son Ltd v London Corporation [1951] 2 KB 476 at 484. In the present case if the Plaintiff was performing his contractual right to appeal the Company may not then lawfully terminate the contract to prevent such performance by the Plaintiff. The point is however there was no performance of the right to appeal or a claim as a grievance prior to termination of the contract. The contract expressly provided for termination of the principal subject matter of the contract, whether or not there were any differences between the parties, and perhaps impliedly, that had not been subject to the grievance procedure at the time of termination.

In Lazarus v Cairn Line of Steamships Ltd (1912) 106 L.T. 378 Scrutton J in referring to the cases on implied terms of contract said:

> "I read them ... as deciding first, that the first thing to consider is the express words the parties used; secondly, that a term they have not expressed is not to be implied because the Court thinks it is a reasonable term, but only if the Court thinks it is necessarily implied in the nature of the contract the parties have made; thirdly, that where there is a principal subject matter in the power of one of the parties, and an accessory or subordinate benefit arising by contract out of its existence to the other party, the Court will not, in the absence of express words, imply a term that the subject-matter will be kept in existence merely in order to provide the subordinate or accessory benefit to the other party; ....."

I may have been more readily prepared to imply a term as claimed by Mr Nelson for the Plaintiff, if the Plaintiff had taken steps, before termination of the contract, by way of grievance under the contract, in order to give efficacy to right of appeal. I cannot however imply such a term merely to allow the Plaintiff to make a claim after the contract has been effectively terminated. In the circumstances the Plaintiff fails in his action. There was no breach of contract by the Second Defendant in the exercise of its right to termination, which it effectively did on 22 August 1983. There must therefore be judgment for the Second Defendant against the Plaintiff. There is also judgment for the First Defendant against the Plaintiff. The Defendants are each entitled to their

costs as against the Plaintiff; such costs in the first instance to be fixed by the Registrar, but if agreement cannot be achieved between the parties and the Registrar as to amount, then the question of costs is reserved and may be referred to me for consideration.