

whether dismissal of Employee was wrongful
Termination

whether employee of Consumer Council of Fiji was
a Public Servant subject to the Public Service Act 1974,
provisions of the

Master and Servant 18
Employment - Termination
Consumer Council (Fiji) Act 1970
Public Service Act 1974

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 51 of 1980

Employee of Consumer Council was summarily dismissed
by chairman upon formal resolution by the Council after they
were dissatisfied with the quality of employee's work. In lieu of
one month's notice employee was given one month's salary, with amount owed for leave.

Between:

CATHERINE VERMA
d/o Benjamin Joseph

Appellant

and

THE CONSUMER COUNCIL OF FIJI

Respondent

A. Ali for the Appellant
B.W. Sweetman for the Respondent

Date of Hearing: 20th July, 1981

Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

Chilwell, J.A.

This appeal follows the dismissal of the
appellant's claim against the respondent arising out
of the alleged wrongful termination of her employment
by the respondent. The action was heard by Kermodé J.
who dismissed it in a reserved judgment delivered on
21st August, 1980.

The relief sought in the statement of claim
was a declaration that the appellant's dismissal was
wrongful, an order requiring the respondent to reinstate
her, an order for payment of arrears of salary and other
benefits and, in the alternative, damages for wrongful

dismissal.

The amended grounds of appeal are :

- "(a) THAT the Learned Judge failed to fully consider the argument presented to the Court under Section 4 of the Consumer Council of Fiji Act 1976 by the Plaintiff and therefore he erred both in law and in fact.
- (b) THAT the Learned Judge erred in law and in fact when he said - 'she was not summarily dismissed', and hence there was a substantial miscarriage of justice.
- (c) THAT the Learned Judge erred in law and in fact when he said 'I am satisfied however on the evidence that the Plaintiff's employment with the defendant was lawfully terminated and no question of any breach of natural justice arises for consideration', and hence there was a substantial miscarriage of justice.
- (d) THAT the Learned Judge erred in law and in fact in finding that the Plaintiff was not a public servant and therefore not employed subject to the provisions of the Public Service Act 1974."

The last ground of appeal is not precisely as expressed in the notice of appeal but conveys in summary form what we apprehend to be the original ground of appeal.

The appellant was employed by the Consumer Council in January 1975 as a stenographer typist. At that time the Consumer Council was a Departmental section within the Ministry of Commerce and Industries. It is defined under the expression "former Council" in the Consumer Council of Fiji Act, 1976 as "the unincorporated association known as the Consumer Council of Fiji at the date of the coming into force of this Act". The Act came into force on 16th February 1977. Under it the Consumer Council of Fiji was established. The appellant's employment continued

after the Act came into force. From the commencement of her employment in January 1975 the appellant's duties changed as she acquired greater responsibilities. Early in 1977 she became personal assistant to the Chairman, in June 1978 she was appointed acting Chairman, a post which she held until December 1978 when a new permanent Chairman was appointed. She was a consumer affairs officer throughout 1979 and at the time of dismissal. Notice of dismissal was given to the appellant in a letter dated 31st December 1979 under the hand of the Chairman of the Council in the following terms :

"The Consumer Council of Fiji has directed me to dismiss you from the services of the Consumer Council of Fiji with effect from 1st of January 1980.

You are given one month's salary in lieu of one month's notice together with the amount owed to you for leave."

"P.S. Please hand over your I.D. Cards (C.C.F. & P.I.B.) together with the office key and collect your due from the office."

The notice was not received by the appellant until 3rd January 1980 because, as was accepted by the respondent, she had suffered an injury and was taking sick leave. In the result she was treated as being on sick leave until and including 6th January 1980 so that, as far as the respondent is concerned, her dismissal took effect from and including 7th January. Salary vouchers for one month's salary in lieu of notice, fifty one days' vacation and annual leave and five days' sick leave were made out and authorised by the Executive Secretary.

There had been a degree of dissatisfaction concerning the appellant's attitude towards her work and her frequent late coming to work. This was conveyed to the Council at a meeting held on 19th November 1979 and discussed at that meeting. The

matter appears in the minutes of the meeting as does the formal resolution of the Council which states :

"The Council resolved unanimously and directed the Chairman to inform her in writing about the unsatisfactory performance of her work and in the event of no improvement coming forward the Chairman in consultation with the Executive Committee Members was empowered to take action and terminate her employment with one month's pay in lieu of one month's notice."

A letter drawing attention to the matters of concern under the hand of the Chairman was sent to the appellant on 26th November 1979. The letter opens with the following warning -

"The Consumer Council has directed me to write to you and warn you that unless the following weaknesses in your performance of duty improves your services with the Council will have to be reconsidered."

and the matters of complaint are then listed.

In December 1979 the appellant refused to comply with requests from the Executive Secretary and the Chairman to carry on two English women's radio broadcast sessions. This matter was considered by the Chairman in consultation with the Executive Committee on 19th December 1979. The Executive Committee decided that -

"In view of Mrs. Verma's refusal to comply with instruction given by the Chairman and Executive Secretary we agree that she be given 1 month salary in lieu of notice."

and in accordance with that decision the letter of dismissal was signed and delivered. The date, 31st December 1979, appears to have been selected having regard to the provisions of sections 22 and 23 of the Employment Ordinance 1965.

Kermode J. found that the appellant's contract of service included a term for termination by one month's written notice by one party to the other. That finding was attacked on this appeal. It was a finding fully justified on the evidence particularly that adduced on behalf of the appellant. The Judge also found, without specifying what they were, that some of the public service conditions of employment were incorporated in the contract. He was unable to be more specific because the evidence was vague. The appellant did not prove the specific public service conditions incorporated in the contract. She said in her evidence in chief that the Council used civil service disciplinary procedure but that was not satisfactorily explained and it could not have included the provisions of sections 12 to 14 inclusive of the Public Service Act 1974 unless she was a public servant. There were references in the evidence to warnings of disciplinary action and in particular in a minute in relation to staff prepared by the appellant when she was acting Chairman. This minute contains a heading "Disciplinary Action" and the minute states :

"Disciplinary Action will be in the form of three written warnings. After the final warning the officer may be suspended by the Chairman and the matter referred to the Executive Committee for a decision."

The evidence is not clear as to whether this was a term of the contract of service but even if it was it relates to summary suspension. It cannot affect the contractual right to terminate upon notice. The Judge also found that the contract of service was an oral contract. That finding was attacked on this appeal because the appointment of the appellant was made by letter which included the provision for notice of termination. The submission was that the contract of service was therefore a written contract. We are satisfied on the evidence and having regard to the provisions of the Employment Ordinance

that the contract was an oral contract. There was no requirement that it be made in writing. We agree with the following summary of the nature of the contract of service, its material terms and the effect of the Employment Ordinance made by Kermode J. :

" The contract of employment of the plaintiff by the defendant was an oral one and her salary was paid monthly. Under section 24 of the Employment Ordinance the employment could lawfully be terminated by one month's notice. Under section 25(2)(a)(i), where the employment is terminated on or prior to the last date by which that notice may be given, the employee must be paid all wages he or she would have been entitled to had he or she continued to work until the end of the contract period. In other words a contract of employment can be terminated without one month's prior notice if one month's wages in lieu of notice is paid to the employee."

The topic raised in ground (a) of appeal was not pleaded with particularity in the statement of claim. Paragraph 10 alleged :

"Even if the dismissal was otherwise valid it was contrary to section 4 of the Consumer Council of Fiji Act, 1976 and was therefore unlawful and invalid."

Counsel for the appellant in the lower Court, who was not counsel on this appeal, submitted with reference to paragraph 10 that the Act gave no power to delegate to the Chairman with the result that the Chairman had no authority to dismiss the plaintiff. In his judgment Kermode J. dealt with that very argument. He said :

"It was also pleaded by the plaintiff that the dismissal was contrary to section 4 of the Consumer Council of Fiji Act 1976. That section of the Act deals with the Constitution of the Council and it was only during the hearing that it became apparent that the pleading was intended to cover an allegation that the Chairman of the Council had no authority to dismiss the plaintiff."

He found that the Chairman had authority from the respondent after consultation with the Executive Committee to terminate the appellant's employment. Ground (a) fails in limine.

At this appeal the further submission was made that Kermode J. had failed to analyse section 4, had failed to consider the facts in relation to section 4 and that, because he had failed to deal with all the issues raised by paragraph 10 of the statement of claim, the judgment is a nullity. That submission lacks nothing in its boldness having regard to the limited submission made to Kermode J. and his specific determination upon it.

So far as we could ascertain from counsel for the appellant, what Kermode J. should have considered was whether the Council had power to delegate the question of the appellant's dismissal to the Chairman in consultation with the Executive Committee. The Council considered the matter at its meeting on 19th November 1979. Its resolution is set forth earlier in this judgment. In our judgment the Council had ample power under sections 4(9) and 9(c) of the Act to delegate the power to act and terminate the employment. The Chairman and Executive Committee in fact met and acted pursuant to the Council's resolution. The contract of service was not terminated by the Chairman acting alone. It was the Chairman who signed the letter. He was required to sign it in order to comply with section 4(7). We have dealt with the broader submissions of counsel for the appellant in order to allay any concern on her part that her case has not been fully considered. We have arrived at the conclusion that section 4 of the Act was fully complied with. Ground (a) is dismissed.

Under ground (b) the principal submission is that the appellant was summarily dismissed. That, it is

submitted, is the effect of the letter she received on 31st December 1979 with effect from the following day. Dismissal on notice or with pay in lieu of notice is not summary dismissal. See 25 Halsbury's Laws of England 3 Ed. page 485 et seq, 16 Halsbury's Laws of England 4 Ed. paragraph 640 and the following passage in Szakats Introduction to the Law of Employment (1975) paragraph 128 :

"The employer's right of summary dismissal arises not from a 'divine' managerial 'right to fire' but from the terms of the contract, express, incorporated and implied. When an employee commits a sufficiently fundamental breach of the contract by failing or wilfully refusing to carry out his duties, the employer has the right to dismiss him 'on the spot' without giving the requisite notice."

The instant contract of service provided for one month's notice. The provisions of the Employment Ordinance referred to by Kermode J. empower the employer to give one month's wages in lieu of notice. In our judgment Kermode J. was entirely correct in finding that the appellant was not summarily dismissed. Ground (b) is accordingly dismissed.

The original ground of appeal (ground (d) above) raises the status of the appellant. The submission is that she was an employee in the Public Service to whom the provisions of the Public Service Act 1974 applied and in particular the provisions of sections 12 to 14 inclusive which relate to disciplinary matters and to rights of appeal to the Public Service Appeal Board. The appellant was not in the service of the Crown but she was in the service of a "statutory body". The Consumer Council is a statutory body within that definition. But there is nothing in the Public Service Act which elevates such employees to the Public Service. They are merely potentially liable to have their remuneration fixed by the advisory committee appointed

by the Minister in that behalf. See section 11 and the Schedule to the Act. Kermode J. was not in error in finding that the appellant was not an employee in the Public Service. This ground of appeal is dismissed.

Ground (c) raises the issue of natural justice and the right to be heard. There is no provision of any written law or any collective agreement or in the particular contract of service which provides for a hearing nor was the appellant the holder of an office of a type which required a hearing before dismissal. Her dismissal was governed solely by the contract of service which provided for one month's notice and by the provisions of the Employment Ordinance which authorise wages in lieu of notice. We agree with Kermode J. that no question of breach of natural justice arises for consideration and that the appellant was dismissed in accordance with the terms of her contract of service and the relevant provisions of the Employment Ordinance.

The case of Malloch v. Aberdeen Corporation [1971] 1 W.L.R. 1578 is of no assistance to the appellant because the decision was based upon specific statutory provisions. Indeed, it is the common law position which pertains in this case and that is described by Lord Reid at page 1581 -

"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

The dismissal in the instant case was not in breach of contract. There was no right to be heard before a notice of dismissal in terms of that contract was given. Ground (c) is dismissed.

For the foregoing reasons the appeal is dismissed with costs to the respondent.

Chad Kersaud
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Judge of Appeal

R. Spring
.....
Judge of Appeal

Mr. L. L. ...
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Judge of Appeal