

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0085 OF 1998S
(High Court Civil Action No.HBCO412 of 1995s)

BETWEEN:

KAMOE R. VAREA

Appellant

AND:

FIJI TIMES LIMITED

Respondent

Coram:

The Rt. Hon. Sir Thomas Eichelbaum, Presiding Judge
The Rt. Hon. John Steele Henry, Justice of Appeal
The Hon. Sir Rodney Gallen, Justice of Appeal

Hearing:

Wednesday, 17 October 2001, Suva

Counsel:

Mr. M. B. Patel for the Appellant
Ratu J. Madraiwiwi for the Respondent

Date of Judgment: Thursday, 18 October 2001

JUDGMENT OF THE COURT

The appellant was in January 1995 employed by the respondent a company for which he had worked for some 18 years and in which he had held various positions including some of responsibility. At the time he held the appointment of Acting Manager Stores and had held this position from October 1994. The respondent company produces a daily newspaper and accordingly it was very important to it that it should have available at all times an appropriate stock of newsprint to ensure that the production of the newspaper could proceed.

The defendant company kept newsprint in a store at Walu Bay leased from a company named Carpenters. On the 2nd of December 1994, that is only a comparatively short time after the appellant had been appointed to his position as Acting Manager of stores, there was a downpour of rain in Suva which resulted in some flooding occurring in the store. Staff

advised the appellant of the flooding which had occurred but the appellant claimed to have been engaged in other work which he saw as being more important because of the necessity to ensure that staff members were able to work at the weekend. Accordingly he did not himself inspect the damaged paper or take any action other than advising a member of the accounts branch of the respondent, a Mr. Naushad Ali, the purchasing and insurance clerk of the respondent. He asked Mr. Ali to speak to a Mr. Yubendra Rao who was in charge of accounts.

The evidence is not wholly clear but it appears that the damage to the newsprint increased over the weekend and might have been restricted had it been inspected on the Friday night.

On the Monday morning Mr. Rao who had been informed of what had occurred by Mr. Ali inspected the store himself. Five rolls of newsprint were set aside as being seriously damaged and another twenty are said to have been set aside as having been damaged. Mr. Rao was annoyed that he had not been told earlier and that no action had been taken on the Friday night but he did not take the matter any further. He did not approach the appellant or express his concern directly to him at that stage nor was any question of the appellant's employment raised with him.

It seems that twenty damaged rolls were sent to the newspaper printing department and used for printing but their unsuitability resulted in loss to the respondent.

Wastage is a significant factor in the operations of a newspaper and it became apparent to management that the normal wastage of some 5% had increased for some reason to 8%.

Inquiries revealed that this increase was a result of the damage occasioned by the flooding. The manager with Mr. Rao called a meeting with those concerned including the appellant. As a result of the inquiries and discussions which took place at that meeting the appellant was asked to resign and when he chose not to do so he was dismissed by letter

dated 31 March 1995. His dismissal was effective from that date, but he was given one month's salary "in lieu of notice".

The appellant initiated proceeding against the respondent claiming to have been wrongfully dismissed. The respondent defended those proceedings and sought to counterclaim from the appellant certain monies which he admittedly owed the respondent.

The claim came before Byrne J on the 4th of June 1998. Byrne J delivered his judgment on the 4th of November 1998. For the reasons which he gave he dismissed the appellant's claim and allowed the respondent's counterclaim.

The appellant appeals against the decision dismissing his claim. The notice of appeal asks that the decision of Byrne J be set aside. There is no separate reference to the counterclaim and if the appeal was intended to include the decision on the counterclaim then it must in the circumstances be dismissed with respect to that aspect of it.

The judge found on the evidence that the appellant had been inefficient in carrying out the obligation of his employment. He went on to note that summary dismissal was a strong measure justified only in exceptional circumstances and that the test to be applied in determining whether dismissal was justified must vary with the nature of the business and the position held by the employee. The judge then referred to a number of authorities where dismissal had been considered.

In coming to his conclusion he started from the position that the appellant held a very responsible position and expressed the view that as a result of his experience the appellant ought to have realised the absolute importance of informing either Mr. Rao or a Mr. Simpson immediately he had been informed of the damage so that remedial measures could be taken to minimise the loss. He considered that the plaintiff had committed a serious error of judgment in giving priority to a different aspect of his obligations and considered that the first priority ought to have been directed to a situation which might have affected the

production of the company's newspaper. For those reasons he dismissed the appellant's claim.

An analysis of the evidence indicates that Mr. Simpson accepted that there was no obligation on the appellant to report to him. In so far therefore as a failure to report was concerned the failure related only to the appellant having reported indirectly to Mr. Rao rather than directly.

We note that although Mr. Rao was aware of the situation on Monday the 5th of December he did not consider it appropriate to take the matter up at that stage with the appellant nor did he see fit to report what had happened to Mr. Simpson. It was in fact nearly a month before Mr. Simpson became aware of the situation and then only because information available to him indicated that the wastage was greater than could normally have been expected.

Although we are reluctant to differ from the learned judge we think it inescapable that Mr. Rao did not see the failure to report directly to him on the Friday as sufficiently serious to justify either taking action with regard to it or reporting it to his superiors.

Before misconduct can be sufficient to justify summary dismissal the conduct must be of such a grave and serious character that it is incompatible with the due and faithful discharge of the duty of the employee to his employer.

It is apparent that Mr. Rao to whom any report should have been made did not see the failure as coming into that category.

We note that the respondent in seeking to justify dismissal also relied on allegations that the failure of the appellant to notify the damage that had been caused resulted in a consequential loss to the respondent. That was said to be because damaged newsprint was used when it ought not to have been and that the respondent was for various reasons unable to recover the full insurance that it might otherwise have been able to expect from its

insurers or from the insurers of the warehouse.

The judge did not base his conclusion on this material and indeed it would have been difficult to do so because there is no clear nexus in the evidence which would justify such a conclusion. Nevertheless it is appropriate to comment that the fact that the respondent thought it necessary to rely upon this unproven aspect reinforces the view that it had at the very least doubts about whether the failure to give direct notice of the damage to Mr. Rao of itself justified summary dismissal.

We have come to the conclusion that the evidence did not justify the conclusion to which the judge came and that the appeal must be allowed.

It is our understanding that in cases of this kind the claim of a successful plaintiff is limited to recovering his or her remuneration for a period equated with reasonable notice which is generally speaking a matter of months rather than the years contemplated by the appellant's claim.

We gave consideration to making an assessment on the material before us of what we would have considered an appropriate amount to avoid prolonging this unfortunate case unnecessarily.

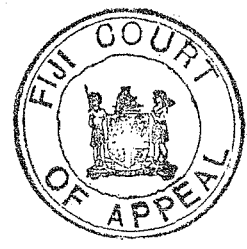
We have however come to the conclusion that it would not be open to us to determine the matter in this way. Counsel had no opportunity to address us upon it and it may be that there are local considerations which would need to be taken into account.

One member of this Court is of the opinion that the appellant's failure to take any action on the Friday evening to safeguard the newsprint stock amounted to a gross dereliction of his duties as stores manager meriting summary dismissal when this came to the

notice of senior management.

In accordance with the view of the majority the appeal will be allowed and the matter remitted to the judge in the High Court to assess quantum.

The appellant is entitled to costs which we fix at \$750 together with disbursements to be fixed by the Registrar including the cost of preparing the record.



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Sir Thomas Eichelbaum
Presiding Judge

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Rt. Hon. John S. Henry
Justice of Appeal

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Sir Rodney Gallen
Justice of Appeal

Solicitors:

Messrs. M. B. Patel and Associates Suva, for the Appellant
Howards Suva, for the Respondent