PENIONI BULU v HOUSING AUTHORITY (ABU0057 of 2003S)

COURT OF APPEAL — CIVIL JURISDICTION

GALLEN, PENLINGTON and SCOTT JJA

7, 16 July 2004

Employment — termination of employment — unlawful termination — damages — whether Respondent guilty of breach of contract in terminating Appellant's employment contract — whether Appellant guilty of serious misconduct dealing with transactions of which he was personally and financially involved — Housing Act.

The Appellant who was a director of marketing of the Fiji Housing Authority (the Respondent) was a trustee of a housing trust under the provisions of the Talau housing scheme. However, the housing scheme fell into arrears because of non-payment and as a result, the account was categorised as a "non-performing account".

In February 1996, the board of the Housing Authority approved a new category for loans categorised as "non-performing" for accounts which were not serviced satisfactorily and in arrears for more than 6 months. Still, the Appellant failed to pay.

In September 1996, the Appellant made repayment readjustment himself by accessing the computer using his pin and made payment at the original rate at which he had been paying them.

In December 1996, a report was given to the chief executive that the Talau housing scheme account was re-categorised as "performing", the balance understated and the repayments made by the Appellant were insufficient to pay the balance.

The chief executive requested a written explanation from the Appellant regarding the Talau scheme. The Appellant responded and explained that on 31 January 1997, the sum of $2500 was paid into the account by the Appellant and on 4 February 1997, the sum of $2363.11 which ought to have been shown as a debit in July of the previous year was debited to the account.

In April 1997, the chief executive advised the Appellant immediately terminating him of his employment.

The Appellant filed originating summons and claimed that the Respondent breached his contract of employment. The judge ruled against the Appellant on the ground that the Appellant was guilty of serious misconduct sufficient to justify summary dismissal.

The Appellant's grounds were that the learned trial judge erred in law and in fact: (a) in holding that the adjustment of repayment by the Appellant was not sufficient to pay the balance; (b) in holding that the conduct of the Appellant amounted to gross misconduct which warranted summary dismissal; (c) in holding that the Appellant was given adequate opportunity to explain himself to the chief executive; (d) in holding that the Appellant's explanations to the Respondent was sufficient; (e) in failing to consider that the disciplinary procedure adopted by the Respondent to the Appellant failed to provide any opportunity for the Appellant to be heard; (f) in failing to follow the rules laid down in *Yashni Kant v Central Manufacturing Co Ltd* [2002] FJCA 39 (*Yashni Kant*) on the requirement to act fairly and reasonably.

Held — (1) The adjustment made for repayments by the Appellant was insufficient to pay the balance. The evidence that the chief executive asked the Appellant to explain, both orally and in writing, was sufficient to warrant that this ground failed.

(2) The Appellant contended that the court did not consider the fact that the Talau housing scheme was a village scheme and was subjected to an assessment of 6 monthly intervals and that the Respondent should have waited until July before deciding to terminate his employment due to the alleged misconduct. However, the Appellant's alleged substantial payment was made only after the audit inquiry. Thus, the acts of the

Appellant amounted to serious breach of general office rules, procedures and good management practice by accessing the computer and assessing arrears in which he was personally and financially involved. Therefore, there was a clear conflict of interest and the Appellant's acts amounted to grave and serous misconduct sufficient to cause termination of his employment.

(3) The Appellant argued that he was not given adequate opportunity to explain himself before the chief executive and he could have explained his conduct before an investigative committee. There was evidence that he was given an opportunity by the chief executive to explain his side both orally and in writing. Moreover, although counsel for the Appellant relied upon a memorandum that there was an investigation committee for investigation purposes, the same was presented as evidence before the court. The method of investigation adopted by the Respondent for the Appellant was fair. Accordingly, the third–fifth grounds were not considered as the procedures were not required in this case and the failure to implement the same will not give rise to any ground for the award of damages.

(4) The Appellant's conduct amounted to serious misconduct justifying his dismissal and the procedure adopted by the Respondent before terminating his employment was fair and reasonable.

Appeal dismissed.

Cases referred to

Yashni Kant v Central Manufacturing Co Ltd [2002] FJCA 39; *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66; *R v E Berks Authority* [1985] 1 QB 140; *Permanent Secretary for Public Service Commission v Epeli Lagiloa* Civ App No ABU0038/1996; *The Permanent Secretary for Public Service Commission v Lepani Matea* [1998] FJCA 23, cited.

Central Manufacturing Co Ltd v Yashni Kant [2003] FJSC 5, considered.

I. V. Tuberi for the Appellant

V. Maharaj for the Respondent

Gallen, Penlington and Scott JJA. This is an appeal against a decision in the High Court whereby the Appellant's claim for damages for unlawful dismissal was dismissed.

The Appellant was employed by the Fiji Housing Authority after graduating from the University of the South Pacific. In 1993 he was appointed the Director Marketing and the terms of his employment were contained in a written contract signed by the Appellant on 25 June 1993 which contained a termination clause in the following terms:

> If the employer exercises its right to terminate the employment of the employee for a matter not warranting summary dismissal, it shall give three months notice in writing to the employee of such termination, or at its sole discretion, pay three months remuneration to the employee in lieu of such notice.

At this point it is necessary to refer to the Appellant's quite separate responsibility as a trustee of a housing trust, the purpose of which was the erection of a house under the provisions of a scheme known as the Talau housing scheme. The two older brothers of the Appellant were also trustees of the trust. The funds for the erection of the house were advanced by the Housing Authority and envisaged repayment by regular payments by the Appellant and his two brothers. The advance was subject to interest and the repayments were designed to cover both principal and interest. The particular loan was categorised as a "village scheme". Interest was charged on 6 monthly rests at the end of January and at the end of July in each year. The accounting system adopted by the

Housing Authority involved a computer-generated record of transactions which recorded the interest at each due date and recorded the payments made and the balance.

The evidence establishes that initially the scheme proceeded on a normal basis but unfortunately the two brothers of the Appellant emigrated overseas and failed to continue the payments for which they were responsible. The result was that the obligations of the housing scheme fell into arrears and the account was eventually categorised as a "non performing account". The evidence indicates that in such cases the Housing Authority adopted certain procedures designed either to ensure the payments were brought up to date or that there was some renegotiation of the obligations to reflect the financial ability of the persons responsible. This usually involved a recalculation of payments required sometimes extended over a longer period.

By letter dated 13 August 1996 the Housing Authority offered to the Appellant the position of "General Manager Lending". The appointment proposed was said to be for 2 years on a performance-based contract subject to satisfactory performance after the first 6 months. The offer involved the continuation of the Appellant's current salary together with the benefits which he at that time enjoyed. The letter further indicated that an employment contract was being prepared and would be forwarded once completed.

It is important that the letter also contained the following paragraph:

> you will also be required to adhere strictly to the general office rules and procedures and ensure that professional conduct, good management practice and efficient and courteous customer service is observed at all times. Your attention is drawn specifically to the requirement of confidentiality and the prohibition that no information pertaining to the Housing Authority should be disclosed to the public and/or the media without the Chief Executive's written approval.

The Appellant responded to this letter by letter declining the offer, specifically because he was concerned that the increased responsibilities he would be accepting were not being recognised by increased remuneration. He was advised by letter that the matter would be placed before the board of the authority. On 26 August 1996 the chief executive of the Housing Authority advised the Appellant that for reasons set out no increase in remuneration was contemplated. She drew his attention to the fact that the position of general manager customer services had been abrogated. The letter indicated that unless the offer was accepted in writing no later than 2 September 1996 it would be deemed to be withdrawn.

That letter was replied to by the Appellant reiterating his concerns as to remuneration. By letter dated 29 August 1996 the chief executive advised the Appellant that the offer was not subject to negotiation and he was required to indicate his acceptance or otherwise by Monday 2 September 1996. The Appellant did notify his acceptance of the offer and assumed the position of General Manager Lending on 2 September 1996. Reverting to the Talau housing scheme: Interest assessed under the scheme as at 31 July 1996 ought to have been recorded in the debtors ledger against the trust. The amount assessed would have been $2363.11, but the ledger contains no entry for that date.

In February 1996 the board of the Housing Authority, had approved a new category for loans which were not "being serviced satisfactorily" and had accumulated more than 6 months arrears of payments to be made under the loan. Loans which came into this category were described as "non performing". There was a procedure available for such loans which involved a recalculation of

payments and which was known as Mortgage Repayment Adjustment. The repayments were negotiated and the situation assessed over a 3-month period to make sure it was workable. The loan made to the Talau housing scheme for which the Appellant and his brothers were responsible was categorised as a "non performing account" because of the arrears which had been accumulated as a result of the payments of the brothers having been discontinued. The Appellant had discontinued his own payment and there was a suggestion on the evidence he had done this in order to force the sale of the property as a result of the failure of his brothers to meet the payments for which they had accepted responsibility.

The Appellant in his evidence indicated that he had discussed the matter with his brothers by telephone and expressed the view to them that because of his position as General Manager Lending it was not fitting that the Talau housing account should be classified as non performing. He had received no response from his brothers. The Appellant accepted that for the account to be removed from the non performing category, payments had to be rescheduled. The Appellant stated that he gave a direction that the Talau housing scheme was to be re-categorised from non performing to a normal account. He was aware that the computer was not programmed to automatically transfer a non performing account to a performing account. He stated in evidence that "out of curiosity I tried to carry out mortgage payment on Talau. It confirmed that computer did not automatically transfer non performing account to normal. As a result Talau housing scheme remained a non performing account".

Under cross-examination the Appellant conceded that on 10 September 1996 he made a repayment calculation of arrears of $5852.50 and carried out a mortgage repayment adjustment himself, accessing the computer by the use of his own confidential pin number and readjusting repayment schedules. He maintained it was in his discretion to make such decisions with regard to mortgage repayment adjustments.

At this point it is appropriate to mention the responsibility for managing mortgage repayment adjustments rested on a subordinate of the Appellant, one Jay Singh, who had only just taken up his appointment to this position. The Appellant maintained that he had discussed the process with Mr Singh. This was denied by Mr Singh. The question of credibility assumes some but not overriding importance at this point. The judge in the High Court made a finding of fact that he accepted the account given Mr Singh rather than the account given by the Appellant.

The Appellant sought to contest this finding of the judge and in order to do so relied upon material contained in documents which through his counsel he submitted cast doubt on the reliability of Mr Singh. He contends they suggest that Mr Singh's account of the procedures involved was inaccurate. The documents concerned were three in number. None of these were before the judge in the High Court and counsel sought the leave of this court to adduce these documents as new evidence on the appeal. With the exception of the third document, (a computer-generated document which confirmed the Talau housing scheme was a "village scheme"). Mr Maharaj for the Respondent objected to the court taking these documents into account. It was Mr Maharaj's contention that the remaining two documents were either in the possession of, or available to, the Appellant at the time of the original hearing and accordingly did not meet the criteria for introduction at this stage. In the circumstances in order to progress the hearing we agreed to look at the documents de bene esse. Although we have considerable doubt as to whether the documents were admissible, in the event even if they

were admissible they fall far short of what would be necessary to set aside the judge's determination of fact on credibility, bearing in mind the advantages he had of hearing and seeing the witnesses. We accordingly accept Mr Singh's statement that the Appellant had not discussed with Mr Singh what he had intended to do and did do.

We accept also that the calculation made by the Appellant as to arrears was wrong as it did not take into account the amount which ought to have been debited to the trust in July of 1996 but which had not been. The resulting difference was not proportionately substantial amounting to some $140 but the fact that the difference existed has some significance in the circumstances of this case, although it is the Appellant's contention any difference was corrected by the payment made in February 1997.

The Appellant then recommenced his own payments at the original rate at which he had been making them.

The mortgage repayment adjustment is normally made on a trial basis and, as the judge noted, the purpose of this is to ensure that the persons accepting an obligation are financially able to meet it. There was no such trial period in this case. A loan is not nominally re-categorised as performing before verification of the 3-month trial. In December of 1996 the manager responsible for internal audit of the authority reported to the chief executive that the Talau housing scheme account had been re-categorised as performing and stated his view that the circumstances surrounding the case were suspicious, noting that the person involved in processing the recalculation was one of the trustees of the scheme. The report noted that the account balance had been understated by leaving out the interest charges which ought to have been brought to account in July of 1996. He also noted that the repayments being made by the Appellant which recommenced on 12 September 1996 were insufficient to meet the expected repayment according to the recalculation, leaving a short fall of $1,343. The report contained the following paragraph "General Manager Lending who was responsible for the collection section should have pursued this matter through his subordinate in compliance with standard rules and practices. It is considered serious and suspicious of his involvement on his own account".

The chief executive by memorandum dated 14 January 1997 requested a written explanation from the Appellant in the following terms:

> Memorandum
> To: General Manager Lending
> From: Chief Executive
> Date: 14 January 1997
> RE: TALAU HOUSING SCHEME A/C NO 279935
>
> This matter was discussed with you on Tuesday 07 January 1997.
>
> I am particularly concerned that you have considered it proper to process an MRA (Mortgage Repayment Adjustment) for Talau Housing Scheme an account on which you happen to be a trustee and have been personally involved.
>
> In particular, I have found the following actions highly improper and irregular:
>
> (i) approval and processing of MRA on 10 09 96 by yourself;
> (ii) understatement of account balance by $2363.10 being interest charges for the second half of 1996;
> (iii) absence of any written evidence of communication with the other trustees or written arrangement to substantiate your actions.
>
> Please provide a written explanation on this case by Friday 24 January 1997.

(S Qoro) Mrs
CHIEF EXECUTIVE

The response of the Appellant was in the following terms:

MEMORANDUM
To: Chief Executive
From: General Manager Lending
Re: Talau Housing Scheme
Your memo of 14th January refers.

I believe that you may have been wrongly informed of this case to have formed your opinion as expressed in your said memo. The reasons are:

1. The processing and approval for MRA in this case was done after consultation and discussions with the Acting Business Manager Lending. Be informed that a "non-performing" account cannot automatically revert to being "active" just by an approval on the system. A file maintenance had to be done manually to change its category status. This was done by Act BML, under whose responsibility this work falls.
2. The understatement of the account balance is true but was a consequence of management's decision at the time to implement the freezing of interests on non-performing accounts without finalizing the procedure for the treatment of such cases. Specifically, discussions were still being made, at that time, to determine whether the write-back of uncharged interests was to be systems-generated or be done manually. At that time Act BML was of the view that the computer would calculate and charge foregone interests on those accounts where acceptable arrangements had been made and MRA effected. I have discussed this with Act BML who confirmed that this was the reason the interest charges due at the end of July was not debited then.
3. As discussed with you in our meeting on 07/ 01/97 on this case the other two trustees are both overseas and that we only communicate by phone. However, I had verbally informed Act. BML of the new arrangement which had been accepted by him; this is acceptable practice in our normal arrears recovery work. According to current practice and procedures the review of this arrangement is to be done after the end of this month, January 1997, when the next loan repayment falls due. I wish to inform also that in cases such as this, ie where the loan repayment is due six-monthly, a reasonable thinking client would place his money set aside for such payment in the bank, where it would earn interest, for five months and then make the payment on the sixth.

The above are my explanations as directed.
P Bulu
23/01/97

On 31 January 1997 the sum of $2500 was paid into the account by the Appellant and on 4 February 1997 the sum of $2363.11 which ought to have been shown as a debit in July of the previous year was debited to the account.

In April of 1997 the chief executive sought a further report from the auditor. He reported on 7 April 1997. It is unnecessary to set out this report in detail. It is enough to say that the auditor did not accept the explanations put forward by the Appellant. He considered that the explanation was misleading and contrary to existing rules and practice as it was unethical for the Appellant as the trustee of the scheme to process himself a mortgage repayment adjustment in the way in which he did and he drew attention to the fact that there was no documentary evidence nor formal arrangement made in writing.

On 24 April 1997 the chief executive advised the Appellant that the board was unanimously of the view that it could not confirm his appointment as General Manager Lending and that his employment was terminated with immediate effect. He was advised he would receive terminal pay included fortnightly salary up to Friday 9 May 1997.

The Appellant initiated proceedings by way of originating summons and his statement of claim was before the court. It is in the following terms.

> 1. THE Plaintiff was at all material times employed by the Defendant as General Manager Lending.
> 2. THE Defendant is a statutory body duly constituted under the Housing Act.
> 3. ON or about the 13th day of August, 1996 the Plaintiff and the Defendant entered into a contract whereby the Defendant employed the Plaintiff to the position of General Manager Lending for a period of 2 years. It was an express and/or an implied term of the contract that the Plaintiff would not be terminated during the period of his contract provided that the Plaintiff was not guilty of any matter warranting summarily dismissal.
> 4. ON or about the 24th day of April, 1997 the Defendant wrongly and in breach of its contract with the Plaintiff purported to terminate the Plaintiff's employment with the Defendant without giving the Plaintiff a reasonable opportunity to explain any fault on his part.
>
> WHEREFORE the Plaintiff prays for:
>
> (i) A Declaration that the Defendant is in breach of contract in purporting to terminate the Plaintiff from his employment with the Defendant.
> (ii) An Order quashing the Defendant's decision to terminate the Plaintiff's employment with the Defendant.
> (iii) An Order that the Plaintiff be re-instated to his employment with the Defendant forthwith.
> (iv) An Order that the Defendant do pay to the Plaintiff damages for breach of contract.
> (v) Such further or other orders as to this Honourable may seem just.
> (vi) Costs of this action on indemnity basis.
>
> DATED this 11th day of August, 1997.
> SHERANI & CO.
> Per
> …
> Solicitors for the Plaintiff

At the hearing counsel for the Appellant informed the judge that the Appellant was not proceeding with prayers ii and iii thus, the matters which remained before the judge were a prayer for a declaration that the defendant was in breach of contract in purporting to terminate the plaintiff's employment and a prayer seeking an order for damages for breach of contract.

The judge having reviewed the evidence and arrived at the finding already referred to as to credibility came to the conclusion that the plaintiff's action in dealing with the Talau housing scheme account was a serious breach of general office rules, procedures, and good management practice. He came to the specific conclusion that the conduct of the Appellant amounted to grave and serious misconduct sufficient to justify summary dismissal.

He then considered the contention of the Appellant that he had been dismissed without having been given an adequate opportunity to explain his conduct. The judge came to the view that the Appellant had had an adequate opportunity to explain his actions and noted that the chief executive had both spoken to him and sought an explanation in writing. It was the judge's conclusion that the Appellant had been the subject of a fair investigation process. The judge concluded his

decision by noting that the statement of claim did not plead mental anguish or humiliation nor was there any evidence of either, accordingly it was not necessary to consider any liability in respect of such a claim.

As a result of the conclusions expressed by him the judge dismissed the claim and awarded costs to the Respondent.

In this court the grounds of appeal were as follows:

1.2.1 That the learned trial Judge erred in law and in fact in holding that there was no hope of repaying $2903.00 every six months on repayment of $120.00 a fortnight. The learned trial Judge failed to take into considerations that the Appellant paid a total of $3220.00 from the period the 1st day of August, 1996 to the 31st day of January, 1997. The said amount comprised six (6) deduction of $120.00 per fortnight and $2500.00 cash payment on the 31st day of January, 1997.

1.2.2 That in failing to consider the correct status of the Talau Housing Scheme at the beginning of February, 1997 regarding the period from the 1st August, 1996 to 31st January, 1997 the learned trial Judge erred in law and in fact in holding that the conduct of the Appellant amounted to gross misconduct which warranted summary dismissal.

1.2.3 That the learned trial Judge erect in law and in fact in holding that the Appellant was given adequate opportunity to explain himself to the Chief Executive. The learned trial Judge relied on the evidence of Semi Tokalau and failed to consider the admission of M Razak (DW2) under cross-examination that there is procedure to be followed by the Respondent for management staff where the Appellant could appear before an investigation committee. No such committee was set up and the Appellant was not given an opportunity before it. The Appellant will rely on the following case: *Yashni Kant v Central Manufacturing Co Ltd* [2002] FJCA 39.

1.2 That the learned trial Judge erred in law and in fact in holding that the Appellant's explanations to the Respondent was sufficient when the same did not fulfil the obligations that the Appellant was not given an opportunity to be heard by an investigation committee as is the practice with the Respondent and the learned trial Judged failed to consider the procedure he was accepting was a breach of the rule of natural justice in allowing the Respondent to be the prosecutor and Judge in its own cause.

1.2.5 That the learned trial Judge erred in law and in fact in failing to consider that disciplinary procedural adopted by the Respondent to the Appellant failed to provide any opportunity for the Appellant to be heard on the question of guilt and also failed to provide an opportunity to mitigate on question penalty which was dismissal. The Appellant will rely on the following cases: (i) *The Permanent Secretary for Public Service Commission v Epeli Lagiloa* Civ App No ABU0038 of 1996; (ii) *The Permanent Secretary for Public Service Commission v Lepani Matea* [1998] FJCA 23.

1.2.6 That the learned trial Judge erred in law and in fact in failing to follow the rules laid down in *Yashni Kant* (above) on the requirement to act fairly and reasonably and of mutual trust and confidence would be implied in contracts of employment requiring procedural fairness. The learned trial Judge erred in law in distinguishing the present case from that of *Yashni Kant* (above) on facts. The Appellant will rely on *Yashni Kant* (above).

The first ground of appeal depends upon an assertion that the judge was factually wrong when he expressed the view that the proposal initiated by the Appellant by way of adjustment of the repayments would have been insufficient to meet the obligations falling due. Considerable reliance was placed on the fact that the Appellant had made a substantial payment in January of 1997 as well as the fortnightly payments which indicated his financial ability to meet all

necessary outgoings and which would have resulted in no loss to the Respondent particularly if it was taken into account that the next assessment would not be due until July. The second ground of appeal contended that the court had not approached the matter taking into account the status of the Talau Housing Scheme as a village housing scheme and its requirement for assessment at 6 monthly intervals. The Appellant contended that since the accounts were assessed in January and July the Respondent ought to have waited until July before arriving at any conclusion as to the situation.

We note that the substantial payment upon which the Appellant relied was made at the end of January after the audit inquiry had commenced and he had been requested to give an explanation. Even if however the evidence fell short of establishing financial inability we do not read the judge's decision as having proceeded on that basis. The judge considered that the actions of the Appellant amounted to a serious breach of general office rules procedures and good management practice. We agree with that conclusion and simply add that the actions of the Appellant in himself accessing the computer and assessing arrears in dealing with a transaction in which he was personally financially involved rather than through the officer whose function it was to carry out adjustments, was, as the auditor found, quite unacceptable. There was a clear conflict of interest.

Even if ultimately there was no loss to the authority we agree with the judge that the Appellant's conduct amounted to grave and serious misconduct justifying summary dismissal in accordance with the cases.

The third ground of appeal is procedural in nature and depends upon two contentions, the first that the Appellant was not given an adequate opportunity to make an explanation to the chief executive and the second that there ought to have been an investigative committee before which he could have appeared to explain what had occurred. It was contended also that he should have been given an opportunity to make a plea in mitigation.

As far as the first is concerned we agree with the judge that the opportunity for explanation given by the chief executive to the Appellant both orally and in writing was in the circumstances adequate.

As far as the second is concerned the question of whether or not the requirements of public law remedies apply to the dismissal of an employee is disputed. We note the comment of the Supreme Court in *Central Manufacturing Co Ltd v Yashni Kant* [2003] FJSC 5 (*Yashni Kant*) where that court stated "In our view the Court of Appeal correctly held that there is an implied term in the modem 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 extent 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*".

This case is plainly not one of those which comes within the categories explored by Lord Reid in *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66 or *R v E Berks Authority* [1985] 1 QB 140. Nor can it be said on the evidence that the Appellant had any contractual right to an inquiry other than that which occurred in this case. The judge noted that a witness called for the Appellant, one Semi Tokalau, had said there was a disciplinary procedure for unionised employees. He said however the Appellant was at managerial level and not subject to the collective agreement. Counsel for the Appellant in this court sought to rely upon a memorandum, which he wished to produce, dated 1995 which seems to suggest there was an investigative procedure involving an investigation

committee for some purpose in which the Appellant was involved. This memorandum was not before the judge and is very doubtfully admissible before us. We consider the judge was entitled to conclude that the method of investigation adopted in this case was fair as was the procedure followed.

In the absence of some special consideration we do not consider those requirements referred to in public law cases apply.

We note that the dismissal occurred after the expiry of the 6-month probationary period but the procedures which led to that dismissal clearly commenced within the probationary period.

We therefore do not consider that the procedures referred in the third–fourth of the grounds of appeal were required in the circumstances of this case nor that the failure to implement them gave rise to any ground for the award of damages. The final ground of appeal related to comments contained in *Yashni Kant*. Those comments related in context to allegations that the person dismissed was entitled to recover damages arising out of the manner of dismissal. As the judge pointed out the statement of claim in this case did not raise any such contentions and they do not therefore fall to be considered.

In conclusion therefore it is our view that the judge was correct in the conclusion to which he came that in the circumstances of this case the plaintiff's conduct as found by the judge to have occurred amounted to serious misconduct justifying summary dismissal, that in the circumstances the procedures adopted were fair and reasonable, and that the plaintiff is not entitled to damages in respect of what occurred.

The appeal is dismissed. The Respondent is entitled to costs which we fix at $750 together with disbursements to be fixed by the registrar.

Appeal dismissed.